95th Congress
2d Session

COMMITTEE PRINT

WMCP: 95-99

SUBCOMMITTEE ON TRADE

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

UNFAIR TRADE PRACTICES

RECOMMENDATIONS SUBMITTED BY INTERESTED INDIVIDUALS AND ORGANIZATIONS

ON

AMENDMENTS IN U.S. LAWS TO PROVIDE RELIEF FROM UNFAIR TRADE PRACTICES

SEPTEMBER 5, 1978

Printed for the use of the Committee on Ways and Means

U.S. GOVERNMENT PRINTING OFFICE
32-760 WASHINGTON : 1978

H782-69

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LETTER OF SUBMITTAL

SUBCOMMITTEE ON TRADE,
COMMITTEE ON WAYS AND MEANS,
U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., August 4, 1978.

Hon. AL ULLMAN,
Chairman, Committee on Ways and Means, Longworth House Office Building.

DEAR MR. CHAIRMAN: The Subcommittee on Trade is reviewing U.S. unfair import practice laws with a view toward considering legislative and administrative changes in these statutes. As part of this review, the Subcommittee issued, on February 6, 1978, a press release inviting all interested parties to submit recommendations for changes both to the unfair import practice laws and to the regulations promulgated pursuant to these laws.

Since the Subcommittee intends to schedule oversight hearings on this subject in the near future, I request that these responses be printed for the use of the Subcommittee on Trade and the Committee on Ways and Means and that the information be made available to all Members of Congress.

Sincerely yours,

CHARLES A. VANIK,
Chairman.

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RECOMMENDATIONS SUBMITTED BY INTERESTED INDIVIDUALS AND ORGANIZATIONS ON AMENDMENTS IN U.S. LAWS TO PROVIDE RELIEF FROM UNFAIR TRADE PRACTICES

[Subcommittee on Trade Press release of Feb. 6, 1978]

SUBCOMMITTEE ON TRADE, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES INVITES RECOMMENDATIONS FOR AMENDMENTS IN U.S. LAWS TO PROVIDE RELIEF FROM UNFAIR TRADE PRACTICES

Congressman Charles A. Vanik (D., Ohio), Chairman of the Subcommittee on Trade, Committee on Ways and Means, today announced that the Subcommittee on Trade invites all interested parties to submit recommendations to the Subcommittee on Trade on how U.S. laws and regulations pursuant to such laws should be amended to provide more expeditious, effective, and equitable relief for domestic industries from unfair practices affecting import competition. Specifically, the Subcommittee is interested in recommendations for amending the Antidumping Act of 1921, as amended by section 321 of the Trade Act of 1974, the countervailing duty statute (sections 303 and 516 of the Tariff Act of 1930, as amended by section 331 of the Trade Act of 1974), provisions to deal with unfair methods of import competition (section 337 of the Tariff Act of 1930, as amended by section 341 of the Trade Act of 1974), and responses to foreign export subsidies under section 301 of the Trade Act of 1974.

In issuing this invitation, Chairman Vanik stated that a Subcommittee oversight hearing on the adequacy and administration of the Antidumping Act held on November 8, 1977, a hearing on the operation and administration of the reference price system developed by the Department of the Treasury for steel dumping cases held on January 25–26, 1978, and Subcommittee general oversight of the operation of the unfair trade statutes have demonstrated the need for the Subcommittee to consider legislative and administrative changes in these laws.

More specifically, the Subcommittee invites recommendations and comments on the following issues which have come to its attention, as examples of areas in which the Subcommittee seeks guidance in preparation for drafting legislation to restructure and simplify the U.S. law and its administration in the area of unfair trade practices.

GENERAL ISSUES

Possible replacement of existing laws by a single statute and/or administrative procedure for petitions dealing with all unfair trade practices whatever their cause;

Resolution of overlapping or conflicting jurisdictions between the Department of the Treasury and the International Trade Commission, particularly in antidumping and section 337 cases;

Coordination of unfair import practices provisions with other statutes dealing with prevention of unfair methods of competition, such as antitrust laws;

More expeditious time periods for reaching determinations, including possible concurrent rather than consecutive 3 month final Treasury dumping and ITC injury determinations and the inclusion of time limits for making determinations in section 301 cases;

Initiation of dumping and countervailing duty investigations by the Secretary of the Treasury;

Judicial review procedures, including review of negative ITC injury determinations in dumping and countervailing duty cases.

ANTIDUMPING ACT

Amount and type of evidence of dumping and injury required by Treasury from petitioners in relation to capability of petitioner to provide such information;

Cost of production concept and calculation, including the definition of a "reasonable period of time" for recovery of all costs;

Price comparisons and verification of data, particularly in cases involving state-controlled-economy countries;

Retroactive withholding of appraisement and possible deposit of estimated duties in lieu of bond posting following a preliminary affirmative dumping determination;

Discontinuance of investigations on the basis of price assurances or special circumstances;

Assessment of dumping duties, including a possible statutory time limit for liquidating entries following a final dumping finding, and assessment of dumping duties across-the-board based upon price comparisons made during the fair value investigation rather than entry-by-entry based upon revised post-investigation data.

COUNTERVAILING DUTY LAW

Criteria or guidelines for determining what constitutes a direct or indirect "bounty or grant";

Application to government-owned or subsidized facilities;

Possible injury criteria in connection with agreement on an international subsidy/countervailing duty code in the Multilateral Trade Negotiations.

The above list is meant to be illustrative and the Subcommittee welcomes comments and recommendations on any aspect of this subject area, which should be submitted to John M. Martin, Jr., Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, Room 1102 Longworth House Office Building, Washington, D.C. 20515; telephone: 202—225-3625 by April 15.

[Subcommittee on Trade press release of Apr. 18, 1978]

SUBCOMMITTEE ON TRADE, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES ANNOUNCES EXTENSION OF DEADLINE FOR SUBMITTING RECOMMENDATIONS FOR AMENDMENTS IN THE U.S. LAWS TO PROVIDE RELIEF FROM UNFAIR TRADE PRACTICES

Congressman Charles A. Vanik (D-Ohio), Chairman of the Subcommittee on Trade, Committee on Ways and Means, today announced that the Subcommittee on Trade is extending to May 15, 1978, the deadline, as previously announced in the press release of February 6, 1978,[1] for all interested parties to submit recommendations on how U.S. laws and regulations pursuant to such laws should be amended to provide more expeditious, effective, and equitable relief for domestic industries from unfair practices affecting import competition.

In announcing the extension of the submission deadline Chairman Vanik stated: I hope that the additional period will permit all interested parties with sufficient time to complete statements and recommendations. It is my intention to schedule hearings late this Spring based on the recommendations submitted to the Subcommittee, and in particular to invite testimony from expert practitioners in this important area of trade law and regulations.

All comments and recommendations should be submitted to Mr. John M. Martin, Jr., Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, Room 1102 Longworth House Office Building, Washington, D.C. 20515; telephone: (202) 225-3625 by May 15, 1978.

SECRETARY OF THE TREASURY,
Washington, D.C., March 24, 1978.

Hon. CHARLES A. VANIK,
Chairman, Subcommittee on Trade, Committee on Ways and Means, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge with thanks your letter of February 8 enclosing a copy of your press release concerning the study the Subcommittee on Trade intends to undertake with respect to U.S. laws providing relief from unfair international trade practices. As the Treasury Department administers the antidumping and countervailing duty laws, we do, of course, have a keen interest in the work of your subcommittee and its staff on this subject. I can certainly repeat Mr. Mundheim's pledge that we will work constructively and in cooperation with your staff in making the study you propose.

Work has, indeed, already commenced within our Department to review some of the problems that we have ourselves noted in connection

[1] The Subcommittee is interested in recommendations for amending the Antidumping Act of 1921, as amended by section 321 of the Trade Act of 1974, the countervailing duty statute (sections 303 and 516 of the Tariff Act of 1930, as amended by section 331 of the Trade Act of 1974), provisions to deal with unfair methods of import competition (section 337 of the Tariff Act of 1930, as amended by section 341 of the Trade Act of 1974), and responses to foreign export subsidies under section 301 of the Trade Act of 1974.

with these two statutes. Nevertheless, it is our present view that the statutes, as amended by the Trade Act of 1974, have been working fairly well in most cases and that it would be a mistake to move precipitously toward change. In addition, as you know, the subject of unfair barriers to international trade and responsive practices is being discussed in the multilateral trade negotiations. It is possible that agreements will be reached in Geneva requiring amendments to our antidumping and countervailing duty laws. Of course, any such discussions will, in accordance with the Trade Act, follow consultation with the relevant Congressional committees. We think that it would be a mistake to consider amending the existing laws just at a time while our discussions with foreign countries have begun. Therefore, while we certainly intend to work with your staff in considering possible improvements in the law, we believe that the Congress will be in a far better position to judge what if any, changes are needed and appropriate after the MTN has completed its deliberations—presumably this summer—and the agreements emerging from those meetings are presented for approval.

In the meanwhile, I can tell you that we are considering with the State Department a study of questions of trade with state-controlled-economy countries and imports from state-owned enterprises. This, and similar academic and governmental conferences to study issues relevant to our responsibilities, will continue to receive our support and participation in the hope they may generate creative responses to the important problems we and your committee will be studying.

Sincerely,

W. MICHAEL BLUMENTHAL.

U.S. INTERNATIONAL TRADE COMMISSION,
Washington, D.C., June 22, 1978.

JOHN M. MARTIN, Jr., Esq.,
Chief Counsel, Committee on Ways and Means,
U.S. House of Representatives, Washington, D.C.

DEAR MR. MARTIN: The U.S. International Trade Commission is pleased to submit the attached memorandum in response to the request made by Chairman Vanik in Subcommittee on Trade releases of Jan. 6, 1978, and April 18, 1978, for comments on possible amendments to U.S. laws to provide relief from unfair import trade. The memorandum also addresses issues raised by two bills, H.R. 11562 and H.R. 10590, which are before the Committee.

The comments in the memorandum are largely technical in nature and address a variety of issues within the context of the Antidumping Act, 1921, section 337 of the Tariff Act of 1930, and section 303 of the Tariff Act of 1930. We hope you find these comments useful. This Commission and its staff stand ready to assist the Committee further in whatever manner may be deemed useful.

Sincerely yours,

JOSEPH O. PARKER, *Chairman.*

Enclosure.

MEMORANDUM OF THE U.S. INTERNATIONAL TRADE COMMISSION ON POSSIBLE AMENDMENTS TO THE ANTIDUMPING ACT, 1921, AS AMENDED, SECTION 337 OF THE TARIFF ACT OF 1930, AS AMENDED, AND SECTION 303 OF THE TARIFF ACT, AS AMENDED

On February 6, 1978, Congressman Vanik, Chairman of the Subcommittee on Trade, requested recommendations from interested persons on possible amendments to laws of the United States concerning unfair practices in import commerce, and their implementing regulations, as follows:

The Subcommittee is interested in recommendations for amending the Antidumping Act of 1921, as amended by section 321 of the Trade Act of 1974, the countervailing duty statute (sections 303 and 516 of the Tariff Act of 1930, as amended by section 331 of the Trade Act of 1974), provisions to deal with unfair methods of import competition (section 337 of the Tariff Act of 1930, as amended by section 341 of the Trade Act of 1974), and responses to foreign export subsidies under section 301 of the Trade Act of 1974.

Chairman Vanik further invited recommendations on several general and specific issues concerning these statutes and their administration. On April 18, 1978, Chairman Vanik announced his intention to schedule hearings based upon the recommendations submitted.

This memorandum provides general comment by this Commission on variousissues which have been raised before the Subcommittee, including those raised by two bills—H.R. 11562, the proposed "Antidumping Enforcement Act of 1978," and H.R. 10590—as introduced in the House of Representatives and referred to the Committee on Ways and Means. The Commission's comments address these various issues within the context of the legislation to which they pertain. i.e., the Antidumping Act, 1921, as amended, section 337 of the Tariff Act of 1930, as amended, and section 303 of the Tariff Act of 1930, as amended. Finaly, those issues which are not susceptible to analysis within the context of these statutes are addressed separately.

THE ANTIDUMPING ACT, 1921

Concurrent investigations

Present section 201(a) of the Act requires an injury determination by the Commission within 3 months after the receipt of advice from the Secretary of the Treasury that a class or kind of merchandise is being, or is likely to be, sold at less than fair value (LTFV). Under this schedule, the Commission is advised of the final LTFV margins prior to the initiation of its 3-month investigation. Chairman Vanik has raised the issue of possible concurrent, rather than consecutive, Treasury and Commission investigations in an effort to expedite antidumping proceedings, which can take up to 16 months to complete after receipt of a properly filed petition. As raised by Chairman Vanik, such a proposal would require that the Commission's 3-month injury investigation under section 201(a) of the Act be concurrent with the 3-month period for the Secretary's final LTFV determination under section 201(b)(3) of the Act. Under this schedule, which appar-

ently is also proposed in section 2(f) of H.R. 10590, the Commission's investigation would presumably commence with the Secretary's tentative determination of LTFV sales pursuant to section 201(b)(1)(B) of the Act, and the Commission would not have the benefit of the Secretary's final determination of LTFV sales in making its determination of injury. In many cases, the degree to which sales are below fair value influences the Commission's injury determination. Thus, in cases where the Secretary makes a final determination of LTFV sales with margins which are less than those tentatively determined by the Secretary to exist, such as in the recent case involving carbon steel plate from Japan (the Gilmore case), importers might petition the Commission for review of an affirmative injury determination on the basis of the Secretary's final determination of LTFV sales.

While the Commission has the authority to review its injury determinations upon application of an interested party, advice from the Secretary, or its own motion (see 19 C.F.R. 207.5 and S. Rep. No. 93-1298, at 181), the frequent review of injury findings may promote the appearance of uncertainty in the Commission's injury determinations under the Act. Under the circumstances, it may be appropriate to consider a schedule such as that proposed in sections 2 and 3 of H.R. 11562, the proposed Antidumping Enforcement Act of 1978, which would require a final determination of LTFV sales by the Secretary within 2 months of his tentative determination, a month prior to the required deadline for the Commission's injury determination. This schedule would allow the Commission to consider the findings of the Secretary in his final determination of LTFV sales. However, it is apparently technically possible to have a final determination of LTFV sales preceded by a negative tentative determination under section 201(b)(1)(C), and any amendment to section 201 which would provide for concurrent investigations by the Treasury and the Commission should anticipate this possibility by providing for commencement of the Comission's injury investigation when such a final LTFV determination is made.

Requirements for complaints

Present section 201(c)(1) requires the Secretary to determine whether to initiate an investigation within 30 days of the receipt of information alleging dumping (a complaint). This section was added by the amendments to the Antidumping Act, 1921 in section 321(a) of the Trade Act of 1974. Legislative history S. Rep. No. 93-1298, at 170) indicates that section 201(c)(1) was intended to incorporate into law the requirement of existing regulation (19 C.F.R. 153.29) that Treasury determine whether to initiate an investigation within thirty days after receipt of a complaint. The Senate Report further states that:

> (I)t is the Committee's intent that the Secretary of the Treasury administer the Act, as amended, and promulgate regulations if necessary, so that he will initiate an investigation within 30 days after a written complaint is made by the complaining party under the Act. (S. Rep. No. 93-1298, at 170)

Thus, there are somewhat inconsistent pronouncements in the legislative history of the amended section 201(c)(1). The wording of the regulation, and the statutory provision which was intended to incorporate the substance of the regulation, merely require the Secretary to determine whether to initiate an investigation within 30 days, presum-

ably allowing for some discretionary authority not to initiate an investigation. However, the legislative history expresses an intent to require initiation of an investigation within 30 days of the receipt of a proper complaint. Legislative history further states:

> The (Finance) Committee recognizes that the Secretary may have to require, through regulations, that the information submitted be in such proper form as to provide a sufficient basis upon which to make a determination as to whether or not an investigation is warranted in each case. (S. Rep. No. 93-1298, at 170)

The Department of the Treasury, on June 25, 1976, published a revision to its dumping regulations (19 C.F.R. Part 153) in which it added requirements for antidumping complaints, including detailed new requirements for furnishing injury information (19 C.F.R. 153.27 (a)(4)), although section 201(c)(2) of the Act had been amended by the Trade Act of 1974 to "refer the initial complaint to the Commission for its consideration" of the injury information (S. Rep. No. 93-1298, at 32). Nevertheless, the Secretary may return a complaint which does not substantially conform to the requirements established by the regulation, pursuant to 19 C.F.R. 153.28. Accordingly, Chairman Vanik has raised the issue of the amount and type of information concerning alleged LTFV sales and injury which should be required by Treasury in antidumping petitions.

The Department of the Treasury has recently published a notice of proposed rulemaking in the Federal Register, (43 F.R. 1358, Jan. 9, 1978) which proposed amendments to the customs regulations pertaining to requirements for antidumping petitions (19 C.F.R. 153.27). The amendments would establish that antidumping petitions should include evidence of injury (i.e., lost sales, price depression, and price suppression) which is the "direct result" of alleged LTFV sales. This Commission, in comments dated February 10, 1978, to the Department of the Treasury, concluded that it appeared that the standard proposed for the nature of the information necessary to show a "causal link" between alleged LTFV sales and injury bore little relation to the Commission's interpretation of the causal requirement in the Antidumping Act as approved by the Congress (S. Rep. No. 93-1298, at 180)—that injury is "by reason of" LTFV sales if the LTFV sales contribute to injury in the U.S. industry (See Carbon Steel Plate from Japan Determination of Injury in Investigation No. AA 1921-179, at 13 (April 1978)). In its comments, this Commission further concluded that the promulgation of the regulation proposed by the Department of the Treasury could have the "unfortunate consequence of discouraging the filing of meritorious antidumping petitions or the initiation of antidumping proceedings on the basis of such petitions." To date, the Commission is aware of no revision of the proposed regulations which would warrant a change in its position.

Initiation of dumping investigations

From the time of its enactment in 1921 until 1954, investigations under the Antidumping Act were initiated within the Customs Service by customs appraising officers. The Customs Simplification Act of 1954 amended section 201 of the Act to place the responsibility of initiating investigations with the Secretary of the Treasury. Thereafter, the customs regulations were amended to provide for the filing of complaints on behalf of an U.S. industry (19 C.F.R. 153.26, et seq.). While the Department of the Treasury retains the authority to initiate

antidumping investigations on the basis of information from Customs officers (19 C.F.R. 153.25), this authority has been invoked infrequently since 1954. In the November 8, 1977, oversight hearings on the Antidumping Act, 1921, before the Subcommittee on Trade, representatives of the Department of the Treasury indicated that investigations initiated on the basis of information supplied by customs officers often were not completed because of a "lack of interest". (Oversight of the Antidumping Act of 1921, Hearing before the Subcommittee on Trade, House Ways and Means Committee, 95th Cong. 1st sess., 19 (1977)). As discussed by Chairman Vanik, the successful prosecution of antidumping investigations on the initiative of the Treasury Department may well depend on the implementation of an early warning program to detect those sectors of the economy where such relief is needed.

The record of antidumping proceedings

Present section 201(d)(3) of the Act exempts the Commission's hearings from the requirements of sections 554, 555, 556, and 557 of title 5, which establish procedures for every case of adjudication required by statute to be held on the record after opportunity for an agency hearing. While the section does provide that the transcript of the Commission hearing, together with all information developed in connection with the investigation (other than confidential items) shall be made available as provided in the Freedom of Information Act (section 552(b) of itle 5), this reference to otherwise applicable law does not require or contemplate the creation of an evidentiary record as the basis for the Commission's injury determinations under the Act.

The absence of such a record has led to controversy involving the amount and kind of information which is discoverable against the Commission in judicial proceedings to review the Commission's injury determinations under the Act. In *Sprague Electric Co.* v. *United States*, Customs Court No. 77-9-03056 and *Armstrong Bros. Tools Co.* v. *United States*, Customs Court No. 77-8-02005, plaintiffs are seeking discovery of all documents and things relating to the Commission's injury investigation contained in either the Commission's files or the files of individual commissioners. The Commission's position is that the only documents relevant to the court's review are the official notices published in connection with the investigation and its actual determination and statement of reasons in support thereof. It is further the position of the Commission that, in judicial review of its injury determinations, which are informal nonadjudicatory administrative decisions where there is no evidentiary record, the Court should limit its review to an examination of the reasons given by the administrative agency to explain its action. See *Dunlop* v. *Bachowski*, 421 U.S. 560, at 572-573 (1975). Accordingly, the court's review should be confined to the reasons stated to ascertain whether the statement, without more, evinces that the Commission's decision is so irrational as to constitute the decision arbitrary and capricious. The Trade Act of 1914 amended the Antidumping Act to require the publication of a complete statement of reasons with each determination under the Act, and present practice of the Commission is to include an approved sanitized version of the staff report in its determination and statement of reasons in connection with each investigation under the Act. Since the report reflects the information obtained in the Commission's investigation, meaning-

ful judicial review of the Commission's determination is thereby facilitated.

Because the information on which the Commission makes its determination is acquired from many sources other than the parties (the main source being staff questionnaires propounded to the domestic industry and to importers), and the parties do not have an opportunity at the Commission level to have access to confidential submissions on which the Commission bases its decision, we believe that it would be anomalous if judicial review proceedings could be used by parties to gain access to this information, and then to make arguments to the court on the basis of this information which could not have been made to the Commission. Such a result would transform judicial review into a complete relitigation. It would have the further unfortunate effect of allowing greater access to confidential information, inhibiting prompt compliance with Commission questionnaires, and preventing the Commission thereby from making informed decisions in antidumping cases.

Accordingly, the Commission has moved for a protective order to limit discovery in these proceedings. The matter is at present under advisement. A ruling against the Commission could require the Commission to base its injury determinations upon an exclusive record, which was originally proposed by the Nixon Administration in section 301(b) of the proposed Trade Reform Act of 1973 (H.R. 6767, introduced on Apr. 10, 1973) and rejected by the Congress in its enactment in the form of the Trade Act of 1974. Further, as explained above, the disclosure of confidential data in judicial review proceedings under appropriate protective order may require comparable disclosure of such data during the Commission's hearing to provide for the exhaustion of administrative remedies prior to judicial review.

The proper forum and procedure for review of Commission injury determination under the act

A related issue concerns the proper forum for review of Commission injury determinations under the Act. At present, these determinations are reviewable in the United States Customs Court. Affirmative injury determinations are reviewable by way of an action to contest the denial by the Secretary of the Treasury of an importer's protest under section 514 of the Tariff Act of 1930 (19 U.S.C. 1514). *Imbert Imports, Inc.* v. *United States*, 475 F. 2d 1189 (CCPA 1973). Similarly, negative injury determinations are reviewable by way of an action to contest the failure of the Secretary of the Treasury to assess antidumping duties on a class or kind of imported merchandise under 516(c) of the Tariff Act of 1930 (19 U.S.C. 1516(c)), *SCM Corporation* v. *United States* C.R.D. 78-02, (Customs Court, May 1978). However, these procedures are designed to permit an adversely affected party (an importer under section 514 or a producer under section 516) to intervene in what is otherwise an *ex parte proceeding* (the liquidation of entries and the assessment of duties), and, failing satisfaction, take the controversy to a trial court (the Customs Court) for the presentation of fact and argument. On the other hand, the Commission's injury proceedings allow for the presentation of fact and argument by affected parties in a hearing held in each investigation, and Customs Court review of the Commission's injury determinations is consequently limited in the fashion of appelate review. *City Lumber*

Co. v. *United States*, 457 F. 2d 991 (CCPA 1972). However, in at least one case, *Kleberg & Co.* v. *United States*, 71 F. 2d 352 (CCPA 1933) the Customs Court allowed three witnesses to be called.

In addition, the different procedures for review of negative LTFV determinations (section 516(d) of the Tariff Act) and negative injury determinations (section 516(c) of the Tariff Act) may lead to complex procedural problems where domestic manufacturers seek review of Treasury and Commission action under the Antidumping Act. See *Armstrong Bros. Tool Co.* v. *United States*, *supra*, C.D. 4751, June 15, 1978.

Judicial review of the Commission's injury determinations under the Act should not be based on a new record after a trial *de novo*. If an evidentiary record is to be required, such record can be made before the Commission. Thus, it would be appropriate to provide for direct review of Commission injury determinations without recourse to the protest procedure of section 514 or the petition procedure of section 516. At present such direct review is available only with respect to negative LTFV determinations of the Secretary under section 516(d). In light of the properly appellate nature of such review, direct review in the Court of Customs and Patent Appeals would further simplify and expedite review of Commission injury determination under the Act.

The liquidation of entries of merchandise subject to a finding of dumping

Section 202 of the Act provides for the collection of a special dumping duty on merchandise sold at LTFV which is subject to a published finding of dumping. Present law imposes no limitation on the amount of time the Department of the Treasury may take in the liquidation of entries of merchandise subject to a finding of dumping and in the collection of any such duty which is payable upon such merchandise. Section 4 of the proposed Antidumping Enforcement Act of 1978 (H.R. 11562) would require the liquidation of entries of merchandise subject to a finding of dumping within 6 months after entry or after publication of a notice of withholding of appraisement under section 201(b)(1)(B) of the Act, whichever date is later. While liquidation of such merchandise cannot occur until after publication of a finding of dumping (it appears that the proposed amendment should more properly read after publication of a finding of dumping under section 201(a) of the Act), the enactment of such legislation would prevent unreasonable delay in the liquidation of dumped merchandise such as the approximate 5-year delay in the liquidation of entries subject to T.D. 71-76, Television Receiving Sets from Japan. Further, on April 14, 1978, the General Accounting Office released its report on several questions posed by a number of Senators concerning the administration of the Antidumping Act, concluding that the average delay for the liquidation of entries subject to a finding of dumping was from 3 to 3½ years.

In addition, consideration of the procedures and timeliness of the actual collection of duties on liquidated entries of merchandise subject to a finding of dumping may be appropriate.

The basis for calculation of special dumping duties

Present section 201 of the Act provides for the levy of special dumping duties on an entry-by-entry comparison of the purchase price or

exporter's sales price with the foreign market value (or, in the absence of such value, the constructed value) of such merchandise. Chairman Vanik has raised the issue, reflected in section 2(b) of H.R. 10590, of the possible assessment of special dumping duties on an across-the-board basis calculated at the time of the initial LTFV determination.

While it is presumed that the initial pricing data, which would form the basis of the calculation of special dumping duties, could be periodically revised, the implementation of this approach could tend to detract from the principal purpose of the Act, which is to discourage dumping on an entry-by-entry basis. Faced with the certainty of a special dumping duty regardless of the actual pricing of the merchandise, foreign exporters might be encouraged to offset the impact of the special dumping duty by lowering their transaction prices even further. While it may be advantageous to allow the Secretary to base his foreign market value (or, as the case may be, constructed value) calculations under section 202 on data obtained during the course of his initial LTFV determination and periodically revised, it appears advisable to continue to calculate the purchase price or exporter's sales price of dumped merchandise on an entry-by-entry basis.

The calculation of the cost of production of imported merchandise

Prior to the enactment of the Trade Act of 1974 (Public Law 93-618, Jan. 3, 1975) the Antidumping Act contained no provision authorizing the Secretary of the Treasury to disregard home market or, as appropriate, foreign market sales made at prices below the cost of production in the determination of the "foreign market value" of imported merchandise under section 205 of the Antidumping Act. When the Trade Act of 1975 was originally proposed by President Nixon and introduced in the House of Representatives in the form of the Trade Reform Act of 1973, no proposed amendments to section 205 were incorporated in the bill, and the issue of amending the Act to treat with below cost home market or foreign market sales apparently was first raised during the course of the hearings on the bill before the Committee on Ways and Means (Trade Reform act of 1973, Hearings on H.R. 6761 Before the House Ways and Means Committee, 93d Cong., 1st Sess., 3082-3100 (1973)). Section 321(e) of the bill, as reported by the Committee, contained a proposed amendment to section 205 of the Antidumping Act to provide for the disregarding, in certain situations, of home market or, as appropriate, foreign market sales at prices below the cost of production in determining the foreign market value. The committee amendment passed the House, was reported upon favorably by the Senate Committee on Finance, passed the Senate in section 321(d) of the Trade Act of 1974 without further amendments, and is now section 205(b) of the Antidumping Act.

During the course of hearings before the Subcommittee on Trade on the Trigger Price Mechanism, Chairman Vanik questioned the authority of the Department of the Treasury to average costs over a period of time in determining the cost of production of imported merchandise. While the term "cost of production" is nowhere defined in the Act, the Secretary of the Treasury apparently relied upon the following statement of congressional explanation:

> If . . . prices will permit recovery of all costs based upon anticipated sales volume over a reasonable period of time, such sales will not be disregarded . . . (H.R. Rept. No. 93-571, 93d Cong., 1st Sess. 71 (1973)).

However, it would appear from the above language that the phrase "over a reasonable period of time" was intended to allow the Secretary to consider a sufficient volume of sales to indicate whether the cost of producing the merchandise was being recovered, rather than to allow the averaging of all costs incurred over a reasonable period of time.

It is uncertain why the term "cost of production" was ever reintroduced into section 205 of the Act. The Antidumping Act, prior to its amendment in 1958, made no reference to "constructed value", now defined in section 206 of the Act. Instead the term "cost of production" was used and defined in section 206. The Antidumping Act was amended by the Antidumping Act—Amendment of 1958 (Public Law 85-630, Aug. 14, 1958) to substitute the term "constructed value" for the term "cost of production" wherever it appeared in the Antidumping Act, including amending section 206 to provide for the present definition of "constructed value," which follows, with minor changes, the definition of that term as added to the Tariff Act of 1930 by the Customs Simplification Act of 1956 (Public Law 927, 84th Cong., 2d Sess., Aug. 2, 1956). This latter statute had introduced the term "constructed value" as the generally applicable subsidiary basis for valuing imported merchandise for the assessment of duties by adding new section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a). As indicated by the Ways and Means Committee Report on the Customs Simplification Act of 1956 (H.R. Rep. No. 858, 84th Cong., 1st Sess., 3 (1955)), the change from "cost of production" to "constructed value" was intended to be largely a change in terminology only.

From the above, it appears uncertain as to what implications may be drawn from the introduction of the term "cost of production" in the Antidumping Act by the Trade Act of 1974. The minor definitional changes that have distinguished historically the term "cost of production" from "constructed value" in the customs laws do not appear to warrant the reintroduction of the term. Nevertheless, the definition of both terms have generally required the calculation of costs "at a time preceding the date of exportation of the merchandise (undergoing appraisement) which would ordinarily permit the manufacture or production of (the) (that) particular merchandise (under consideration) in the (usual) (ordinary) course of business." See Section 206(a) of the Antidumping Act, 1921, (19 U.S.C. 165(a), Section 402(a) of the Tariff Act of 1930 (19 U.S.C. 1402); and section 402 of the Tariff Act of 1930 (19 U.S.C. 1401(a). The averaging of costs of material and fabrication over time appears to find little precedent within this language. *Charles Stockheimer, et al* v. *United States* 44 CCPA 92, at 94 (1957); *Andy Mohan, Inc.* v. *United States* 396 F. Supp. 1280, at 1286 (Cust. Ct. 1975).

The entry of merchandise subject to a finding of dumping under bond

It is the present practice of the Department of the Treasury that, at the time of entry of merchandise subject to a finding of dumping, the importer must file an appropriate bond sufficient to insure payment of any special dumping duty, unless the Customs district director is satisfied that other required bonds of the importer are sufficient to cover his liability for such duty (See 19 C.F.R. 153.50 and 51). This practice differs sharply from the general requirement that importers deposit at the time of entry estimated duties which are applied against his ultimate tax liability determined upon liquidation of the entry (See

Section 505 of the Tariff Act of 1930 (19 U.S.C. 1505), 19 C.F.R. 141.101). The authority for requiring the posting of bond in lieu of an estimated dumping duty on entries of merchandise subject to a finding of dumping is found in section 208 of the Antidumping Act, 1921, (19 U.S.C. 167) and section 623 of the Tariff Act of 1930 (19 U.S.C. 1623). However, section 208 of the Antidumping Act by its terms applies only to entries made by an "exporter" as that term is defined in section 207 of the Act, and this does not preclude requiring the payment of estimated dumping duties by an importer who is not such an "exporter." Further, section 623 of the Tariff Act of 1930 in no way precludes the payment of estimated dumping duties, and in fact subsection (e) thereof appears to provide authority for requiring the payment of estimated duties in lieu of bonds required by law, such as in the case of entries made by an "exporter" within the meaning of section 207 of the Antidumping Act.

Thus, it appears that present law would allow the Department of the Treasury to require the payment of estimated dumping duties on entries of merchandise subject to a finding of dumping. The estimated duties could be computed on the basis of the dumping margins calculated at the time of Treasury's LTFV determination under section 201 of the Antidumping Act, and, to the extent that the estimated duties exceeded the importers liability for dumping duties, such excess would be recoverable upon liquidation of the merchandise. In this fashion, a measure of protection could be afforded the domestic industry while at the same time providing an incentive to foreign producers to supply the information necessary for liquidation of the merchandise. Finally, unrelated U.S. importers of the merchandise would have a better idea of the extent of their ultimate liability for the payment of dumping duties and the hardship inherent in cases where substantial dumping duties are ultimately assessed after a period of significant delay (such as with T.D. 71-76, Television Receivers from Japan) might be mitigated.

Chairman Vanik has raised the issue of requiring the deposit of estimated special dumping duties, which also appears to be contemplated in section 2(a) of H.R. 10590. In this regard, the report of the General Accounting Office of April 14, 1978, on certain aspects of the administration of the Antidumping Act concluded that the present bonding requirements on entries of merchandise subject to a finding of dumping have little effect on prices of such merchandise. Thus, it appears that requiring the deposit of estimated duties would improve the administration of the Act and the ability of domestic manufacturers to obtain prompt relief thereby, especially in light of the substantial delays experienced in the actual assessment of special dumping duties. Nevertheless, it may be appropriate to allow the Secretary of the Treasury to require bond in addition to the payment of estimated dumping duties where necessary to assure compliance with law.

Technical amendment

In light of the amendment to section 212(3) of the Act by section 321(e) of the Trade Act of 1974, subsections (b)(3) and (c)(3) of section 202 of the Antidumping Act, 1921, should be amended to read as follows:

(3) the fact that merchandise described in section 212(3)(c) is used in determining foreign market value.

Jurisdiction of the Commission under section 337 and possible overlap with other statutes

Chairman Vanik has raised the issue of a possible legislative resolution of overlapping or conflicting jurisdiction between the Commission and the Department of the Treasury, particularly with regard to the Antidumping Act and section 337.

The issue of whether section 337 should be interpreted to cover areas already covered by other statutes is an issue specifically addressed in present section 337(a), which provides that violations of section 337 "shall be dealt with, in addition to any other provision of law, as provided in this section." The bulk of Commission activity under section 337 historically has involved alleged violations of U.S. Letters Patent, a matter clearly covered by other statutes. Since much of the statutory language in section 337(a) is similar to that of section 5 of the Federal Trade Commission Act (19 USC 45), section 337 cannot be reasonably interpreted to exclude areas already covered by other statutes. In fact, in determining the scope of its jurisdiction under section 337, the Commission is frequently guided by precedent established under other statutes which regulate competition in U.S. commerce, even though the Court of Customs and Patent Appeals has specifically held that the broad language of section 337 should not be limited to acts coming within judicial precedent. *In re Von Clemm* 229 F. 2d 441, at 443–44 (C.C.P.A. 1955).

However, even under these precedents, the Commission has been faced with two complaints filed by industries which allege violations of section 337 which it was argued were also within the purview of the Antidumping Act, 1921. Interestingly, these cases involved two commodities, color television receivers from Japan and welded stainless steel pipe and tube from Japan, which already had been the subject of proceedings under the Antidumping Act. In the case of Certain Color Television Receiving Sets, investigation No. 337–TA–23, the commodity under investigation was subject to an outstanding finding of dumping (T.D. 71–76), and in the case of Certain Welded Stainless Steel Pipe and Tube, investigation No. 337–TA–29, the commodity under investigation had been the subject of antidumping proceedings in 1972 which were discontinued on the basis of price assurances and initiated once more, this time without a formal petition, when the Commission responded to a complaint received under oath by initiating a section 337 investigation. In both instances the complaints alleged, in addition to a restraint in trade and commerce in the United States, injury to a U.S. industry as the result of predatory pricing, in spite of action by the Department of the Treasury under the Antidumping Act.

The Commission had little choice in these investigations. Section 337(b) and pertinent legislative history require the Commission to institute an investigation on receipt of a properly filed petition alleging matters within its jurisdiction under section 337 (S. Rep. No. 93–1298, at 194; see also *Talbot* v. *Atlantic Steel Company*, 275 F. 2d 4 (D.C. Cir. 1960)). The legislative history of section 337 and its predecessor, section 316 of the Tariff Act of 1922, indicate that the Commission's jurisdiction under section 337 was intended to prohibit all forms of unfair competition in importation, including "dumping in the ordi-

nary accepted meaning of the word." Remarks of Senator Smoot on Section 316 of the Tariff Act of 1922, 62 Cong. Rec. 5879 (1922); see also the Report of the Committee on Finance on that tariff bill, S. Rep. No. 67-595, 67th Cong., 2d Sess. 3 (1922). Further, Congress did not limit the broad scope of the Commission's jurisdiction under section 337 in the amendments contained in section 341 of the Trade Act of 1974. Legislative history clearly indicates that "No change has been made in the substance of the jurisdiction conferred under section 337(a) with respect to unfair methods of competition or unfair acts in the import trade" (S. Rep. No. 93-1298, at 1941). While section 337(b)(3), added by the Trade Act, does require notification of the Secretary of the Treasury where the matter under investigation may come within the purview of the Antidumping Act, it is not a substantive limitation on the Commission's jurisdiction.

The Committee on Finance used as a model for subsection (b)(3) the langauge in section 201(b)(6) of the House version of H.R. 10710, which was enacted without change in section 201(b)(6) of the Trade Act of 1974, and just as the Commission does not view section 201(b)(6) as a limitation on the Commission's jurisdiction under section 201, it does not view section 337(b)(3) as a limitation on the broad jurisdiction of the Commission under section 337. The legislative intent of section 337(b)(3) suggests that the Commission should, in a manner consistent with law, avoid imposing the burden of simultaneous and possibly duplicative investigations of matters "clearly" within the purview of the Antidumping Act by continuing its past practice of referring correspondence and other informal communications alleging dumping to the Department of the Treasury (S. Rep. 93-1298, 93rd Cong., 2d Sess. 195 (1974)). Nevertheless, when the Commission receives a properly filed complaint under oath alleging predatory pricing of imported articles, it is required by law to investigate such an allegation, which includes an element of intent to restrain trade and commerce in the United States and constitutes a violation of other antitrust laws. See section 2 of the Sherman Act, 15 U.S.C. 1, *Standard Oil Co.* v. *United States*, 221 U.S. 1, 43 (1911) (conspiracy to monopolize); section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. 13(a), *International Air Ind., Inc.* v. *American Excelsior Co.*. 517 F. 2d 714 (5th Cir., 1975) (price discrimination); section 3 of the Robinson-Patman Act, 15 U.S.C. 13a, *United States* v. *National Dairy Corp.*, 372 U.S. 29 (1963) (criminal statute directed at unreasonably low prices with a predatory intent); section 5 of the F.T.C. Act, 15 U.S.C. 45, *In the Matter of Quaker Oats Co.*, 66 F.T.C. 1131 (1964) (unfair methods of competition).

In this regard, the scope of the Commission's jurisdiction under section 337 has been well established. On October 18, 1976, an action was filed in the U.S. District Court for the District of Columbia seeking to enjoin the Commission's investigation No. 337-TA-23, *Certain Color Television Receiving Sets*, of an alleged predatory pricing scheme resulting in below-cost and unreasonably low-cost pricing of television receivers from Japan in the United States. (*Melco Sales, Inc.* v. *U.S. International Trade Commission, et al.*, Civ. Action No. 76-1932.) Plaintiffs argued that the Commission lacked jurisdiction over this allegation since predatory pricing, which allegedly was within the "exclusive jurisdiction" of the Department of the Treasury

in its administration of the Antidumping Act, 1921. Appended to plaintiff's memorandum of points and authorities was a letter from the Secretary of the Treasury, dated September 24, 1976, advising the Commission that there was an outstanding finding of dumping concerning television receivers from Japan (T.D. 71-76), and that the Commission should refrain from investigating matters within the purview of the Antidumping Act, 1921. Nevertheless, the District Court, on November 12, 1976, granted the Commission's motion to dismiss the action, holding *inter alia* that.

> Nothing in the papers or argument before this Court shows that the Commismission proceeding . . . (Commission investigation No. 337-TA-23, "Certain Color Television Receivers") is in excess of the Commission's jurisdiction under 19 U.S.C. 1337(a).

Further, Congress had clearly established its policy that alleged duplication of administrative proceedings is not an appropriate basis for withholding agency action. The Commission has a jurisdiction that is intentionally duplicative; it is as provided in secton 337(a) "in addition to any other provisions of the law." Such provisions are a valid exercise of Congressional power, *Trade Comm'n* v. *Cement Institute*, 333 U.S. 683 (1948), and particularly so in the regulation of the import trade of the United States, since importation is a privilege granted by Congress. *Buttfield* v. *Stranahan*, 192 U.S. 470 (1904). The Trade Act of 1974 confirms Congressional commitment to this policy. It is not irreparable harm to the defendants that to defend themselves before the Commission they may need to hire additional lawyers. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41 (1938). There is no apparent basis for applying a different standard to foreign respondents.

Certain Color Television Receiving Sets, Investigation No. 337-TA-23, was successfully concluded on July 29, 1977, with the issuance of consent orders in the investigation. Welded Stainless Steel Pipe and Tube, investigation No. 337-TA-29, was concluded on February 22, 1978, on the basis of a Commission determination of a violation of section 337, supported in part by adverse inferences made against the respondents for failure to cooperate wtih the Commission investigation. On April 22, 1978, the President disapproved the Commission's action in Welded Stainless Steel Pipe and Tube, in part on the basis of: "The need to avoid duplication and conflicts in the adminstration of the unfair trade practice laws of the United States."

The Commission has interpreted the present statutory scheme for a possible overlap of jurisdiction between the two agencies as follows:

> Section 337(b)(3) requires the Commission to notify the Secretary of the Treasury when it has reason to believe that the matter of a secion 337 investigation may come within the purview of the Antidumping Act or section 303. The Commission may, pursuant to section 337(b)(1), suspend its section 337 investigations pending the outcome of any such proceedings, the Commission may consider the evidence obtained and, when appropriate, take official notice of the findings, in continuing with its section 337 investigation as the facts warrant. If the only matters alleged in section 337 investigation fall "clearly with the purview" of the Antidumping Act on section 303, then action taken under either of those statutes may dispose of the alleged unfair trade practices and the resultant injury. (*Certain Color Television Receiving Sets;* U.S. International Trade Commission, investigation No. 337-TA-23; Commission memorandum opinion, at 12; Nov. 22, 1976).

It may be appropriate to grant the Commission the authority to terminate its investigation where action under the Antidumping Act

or section 303 of the Tariff Act of 1930 effectively determines the controversy before it, without regard to section 337(c), which requires the Commission to determine whether there is a violation of section 337 in each investigation it conducts under the section. Together with the Commission's present authority to suspend its investigations pending action under other laws, this authority would allow the Commission to avoid unnecessary duplication of proceedings without detracting from the ability of domestic industries to obtain prompt relief from unfair trade practices.

The Commission did not suspend its investigation concerning welded stainless steel pipe and tube in spite of the pendency of antidumping proceedings before the Department of the Treasury, a fact specifically noted by the President in his determination disapproving the Commission's action. The fact that the investigation was not suspended was due in part to circumstances peculiar to the investigation, including the fact that the motion to suspend was made on the basis of asserted hardship to counsel and not on the basis of the policy expressed by the Commission in its investigation No. 337-TA-23 Certain Color Television Receiving Sets, described above. The Commission will more carefully scrutinize the subject matter of its investigations in the future to determine whether suspension is warranted in view of investigations pending before the Secretary of the Treasury. However, the Commission will not ordinarily suspend a section 337 investigation because of simultaneous judicial proceedings or administrative proceedings other than pursuant to the Antidumping Act, 1921, or section 303 of the Tariff act of 1930.

Enforcement of cease and desist orders

Present section 337(f) empowers the Commission to issue cease and desist orders to be served on any person violating section 337, in lieu of an exclusion order or a temporary exclusion order. Since the exclusion of merchandise may often amount to a remedy more anticompetitive than the practice condemned under section 337, it is apparent that the Commission's ability to successfully prosecute and remedy unfair trade practices, other than those based upon the unauthorized importation and sale of articles covered by U.S. Letters Patent, depends on the Commission's ability to issue and enforce its cease-and-desist orders. However, present section 337 provides for no possible penalty for the violation of a cease and desist order other than the issuance of an exclusion order. Thus, it would be appropriate to consider providing for a monetary penalty for the violation of a Commission cease and desist order which is recoverable by civil action. See, for example, section 5(1) of the F.T.C. Act, as amended, 15 U.S.C. 45(e), which provides for a civil penalty of not more than $10,000 for each violation of a cease and desist order of the F.T.C.

SECTION 303 OF THE TARIFF ACT OF 1930

Possible injury criteria

Prior to the passage of the Trade Act of 1974 the countervailing duty statute reached dutiable imports only. The statute did not contain any injury requirement, and the United States is exempted from the provisions of GATT Article VI prohibiting the levying of counter-

vailing duties in the absence of a determination of injury to a domestic industry by reason of the Protocol of Provisional Application of the GATT, a "grandfather" clause applicable to legislation to existence at the time the GATT was entered into.

Section 331 of the Trade Act of 1974 amended the countervailing duty statute to reach duty-free merchandise. The section also requires the Commission to conduct the same kind of injury investigation with respect to duty-free articles in countervailing duty investigations as it does with respect to articles sold at "less than fair value" under the Antidumping Act, 1921. The operative language of the amendment is identical to the language of the antidumping act. In its first determination under this provision, *Certain Zoris from the Republic of China (Taiwan)*, Investigation No. 303-TA-1 (USITC Pub. 787 (1976)) the Commission made the following statement:

> In making its determination set out above, the Commission has interpreted the relevant operative words of section 303(b)—whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such . . . merchandise into the United States . . . in the same way it has interpreted identical language under section 201(a) of the Antidumping Act, 1921, as amended. This was clearly the intent of Congress in using identical language. Thus, Commission determinations under the Antidumping Act provide guidance for the Commission's determination in this investigation.

At the time the Committee on Ways and Means considered the amendments proposed in the bill which became the Trade Act or 1974, the Committee states that ". . . it may be necessary to further amend section 303 (the countervailing duty statute) depending upon the outcome of these negotiations (i.e., the Multilateral Trade Negotiations (MTN)), assuming that they terminate in an agreement acceptable to the United States" (H.R. Rep. No. 571, 93d Cong., 1st Sess., 76 (1973)). Any agreement negotiated as a part of the MTN will most likely implement the injury requirement in Article VI of the GATT. Implementing amendments of the countervailing duty statute to provide for an injury test could follow the examples of the provision in the statute for duty-free imports and the provision in the Antidumping Act, 1921, which place the responsibility for such injury determinations with the Commission.

Chairman Vanik has raised the issue of possible injury criteria in connection with an international subsidy code. Should the countervailing duty law be amended to implement such a code in a manner which provides for Commission investigations and injury determinations in the case of dutiable imports, the injury criteria should be used by the agency for duty-free goods under the act and for goods subject to its investigations under the antidumping act. Chairman Minchew transmitted a description of the Commission's criteria under the Antidumping Act, 1921, in an attachment to a letter sent to the Honorable Charles A. Vanik, chairman, Subcommittee on Trade, dated November 16, 1977. That statement accurately describes the criteria used by the USITC to determine injury, the likelihood of injury or the prevention of the establishment of a domestic industry. The statement is reproduced below for your convenience:

> The Commission determines whether an industry in the United States "is being * * * injured" within the meaning of the Antidumping Act, 1921, by utilizing, among others, the following indicators of injury occurring "by reason of" the LTFV imports:

1. Price depression of the impacted competitive products;
2. Price suppression—e.g., although domestic production costs have increased, competition from less-than-fair-value imports precludes price increases;
3. Market penetration by less-than-fair-value imports;
4. Documented lost sales of domestic manufacturers to the less-than-fair value imports;
5. Operation of domestic production facilities at less than normal capacity;
6. Plant closures and unemployment;
7. Foreign capacity to produce for export;
8. Lost profits.

Indicia used by the Commission to determine whether, in the absence of actual injury, an industry "is likely to be injured" within the meaning of the Antidumping Act, 1921, include increasing LTFV imports and the capacity of the foreign exporters to continue to export the same or larger volumes so that injury is imminent and not conjectural.

As an example of a determination of likelihood of injury is illustrated in *Printed Vinyl Film from Brazil and Argentina*, investigation No. AA1921-117/118 (USITC Publication No. 595, July 1973, 38 F.R. 19873 (July 18, 1973)). In its statement of reasons for the determination, the Commission indicated that the market penetration of less-than-fair-value imports had increased from none in 1970 to 1.1% of domestic consumption in 1971—not enough to justify a finding of present injury. Yet the rapid increases is less-than-fair-value imports combined with the ability of the foreign producers to increase their production and to alter production patterns to increase exports to the United States justified the finding of likelihood of injury.

To date, the issue of whether an industry has been prevented from being established has been addressed only once. In a case involving *Regenerative Blower/Pumps from West Germany* (investigation No. AA1921-140, U.S.I.T.C. Publication No. 676, May 1974, 39 F.R. 18814 (May 22, 1974), the Commission majority concluded that lost sales were attributable to product differentiation, not less-than-fair value pricing. A dissenting opinion stressed that the less-than-fair value German imports competed with imports from Japan; the exclusive importer of the Japanese product had made preparations to produce one model of the Japanese pump in the United States; and, the plans were altered because of the competition from less-than-fair-value imports. The dissenting commissioner concluded that forestalling the development of a stable and viable domestic production facility by less-than-fair-value imports satisfied the requirements of the Antidumping Act, 1921. The Commission majority concluded that as the exclusive importer of the Japanese product still intended to produce in the United States, the plans had not been altered significantly.

Judicial review of Commission injury determinations

Because of the similarity between Commission injury determinations under section 303 and the Antidumping Act, 1921, much of our analysis on the proper forum and record for review of Commission determinations under the Antidumping Act is appropriate for consideration within the context of section 303. The provisions of direct appellate review of determinations under section 303 would simplify and expedite judicial review of such determinations. As in the case of the Antidumping Act, the actual appraisement of entries subject to a finding under section 303 would continue to be reviewable in the Customs court.

Further, section 303 contains no express provision exempting hearings under section 303 from the requirements for adjudications under the Administrative Procedure Act 5 U.S.C. 554 et seq. as does section 201(d)(3) of the Antidumping Act, in spite of the fact that it was apparently the intent of the Congress that the injury determinations under the two statutes be made in a comparable manner. It may be appropriate to consider specifying that procedures under the two statutes be similar.

GENERAL ISSUES

Import relief

Title II, Chapter I of the Trade Act of 1974 provides for relief from injury caused by import competition. Legislative history clearly indicates that where increased imports results from unfair import competition, then action taken under appropriate remedial provisions of law, such as the Antidumping Act, 1921, section 303 of the Tariff Act, 1921, section 303 of the Tariff Act of 1930, a section 337 of the Tariff Act of 1930, is to be preferred over action taken under that Chapter (S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 123 (1974)). While section 201(b)(6) provides for notification where action under other statutes may be appropriate, there is no provision which would enable the Commission to implement the legislative intent by suspending a section 301 investigation pending action under appropriate provisions of law to remedy possible unfair import competition. Thus, the Commission was placed in the situation of having to suspend its investigation No. 337-TA-23, Certain Color Television Receiving Sets, under section 337 of the Tariff Act of 1930, in favor of its investigation No. TA-201-19, Television Receivers from Japan, under section 201 of the Trade Act of 1974, in spite of the legislative intent that action as the result of the suspended investigation should be preferred.

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C., April 20, 1978.

Hon. CHARLES A. VANIK,
Chairman, Subcommittee on Trade, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: We are enclosing for your information, The Results of the U.S. General Accounting Office Review of Selected Aspects of the Administration of the Antidumping Act of 1921.

We initiated this study to determine whether the Antidumping Act is effective in countering unfair foreign competition involving the sale of imported merchandise in the United States at less than fair value. We are making it available to you because the results of this study bear directly on a number of the trade issues that your Committee will be considering.

Sincerely,

JOHN GLENN,
U.S. Senator.
JENNINGS RANDOLPH,
U.S. Senator.
BIRCH BAYH,
U.S. Senator.
JOHN HEINZ III,
U.S. Senator.
HOWARD M. METZENBAUM,
U.S. Senator.

Enclosure.

Following are comments by Senators Glenn, Bayh, Heinz, Metzenbaum, and Randolph announcing the public release of GAO's review of the Antidumping Act:

On November 4, 1977, we asked the General Accounting Office to review the Treasury Department's administration of the Antidumping Act of 1921. We are publicly releasing that report today.

We initiated this inquiry to determine whether the Antidumping Act is effective in countering unfair foreign competition involving the sale of imported merchandise in the United States at less than fair value. To make such a determination we asked GAO to assess the extent to which the administration of the Antidumping Act responds to the needs of American manufacturers for quick and fair relief from unfair trade practices.

In its report, GAO states that the Treasury Department has consistently met the statutory time guidelines for the multistep process leading to the determination that dumping duties should be assessed. This observation is qualified by the discomforting conclusion that "The actual assessment of duties, however, is not bound by any deadline and it is seldom done in a timely manner. The U.S. Customs Service estimated the average delay to be from 3 to 3½ years." This 3 year period follows the 13 month long "determination" investigation. In other words, importers engaged in unfair trade practices can continue to engage in unfair trade practices for at least 4 years before they are brought to justice. Justice delayed is justice denied. American workers and industries, in the meanwhile, continue to suffer the injuries inflicted by unfair trade practices.

The GAO report notes that much of the delay in the assessment of duties is due to the fact that, until recently, it has not been given high priority by the Customs Service. In addition, the bonding requirements of the Antidumping Act have little effect on the price of goods found to have been sold for less than fair value because the cost of antidumping bonds to importers adds little to importers' costs.

These conclusions document the timeliness of the Trade Procedures Reform Act that we introduced on behalf of the Senate Steel Caucus on November 15, 1977. The purpose of that bill is to render our trade procedures consistent with the vigorous enforcement intended by Congress and expressly endorsed by President Carter. It would streamline the processes whereby antidumping complaints are considered and provide for more effective penalties when violations are found.

Free trade rests on the timely enforcement of rules of fair dealing. This report highlights the urgency of our endeavors to ensure that all valid trade complaints receive a fair hearing and that such hearings are concluded within a reasonable period of time.

Enclosure I

RESULTS OF THE U.S. GENERAL ACCOUNTING OFFICE REVIEW OF SELECTED ASPECTS OF THE ADMINISTRATION OF THE ANTIDUMPING ACT OF 1921

(U.S. Customs Service—Department of the Treasury)

HOW LONG DO DUMPING INVESTIGATIONS TAKE AND HOW OFTEN ARE STATUTORY TIME LIMITS EXCEEDED?

The Antidumping Act of 1921, as amended, is intended to counter unfair foreign competition involving price discrimination. Under the act, the Secretary of the Treasury is responsible for determining whether foreign merchandise

is being, or is likely to be sold in the United States at less than fair value and for assessing dumping duties to equalize the price paid by the U.S. importers and the price in the country of export.

The act provides for a multistep investigation process and establishes a time limit for each step. Thirteen months (16 months in complicated cases) is the maximum time allowed for completion of all steps. The purpose of each step, and the maximum time permitted for its completion are described below.

Preliminary investigation

Dumping investigations are ordinarily initiated as the result of an affected U.S. company filing a petition containing data purporting to show that imported merchandise is being sold at less than fair value and indicating that an industry in the U.S. is being injured.

Upon acceptance of a petition, Customs has 30 days to conduct a preliminary investigation to determine if there is a sufficient basis to conduct a full-scale investigation. If the result of the preliminary investigation is negative, the Commissioner of Customs so advises the petitioner. If, however, the result is affirmative, the Secretary of the Treasury publishes an "Antidumping Proceeding Notice" in the Federal Register and the case proceeds to the next step.

Tentative determination of dumping and withholding of appraisement

The Secretary has 6 months (9 months in complicated cases) from the Antidumping Proceeding Notice to make a tentative determination of sales at less than fair value, with the final determination due 3 months thereafter. Unless both the importer and foreign exporter request an extension, the final determination is issued instead of a tentative one. The extension affords the exporters and importers an opportunity to present further information and argument to Treasury prior to the Secretary's final determination, and if persuasive, may prevent a determination that the merchandise is being sold below fair value.

When a tentative determination of dumping is made, the Secretary will publish a notice of withholding of appraisement for a period of 6 months to cover the extension period and the 3 months allowed the International Trade Commission to determine any injury to U.S. industry. If a final affirmative determination is made, the withholding period is for the 3 months the case is at the Commission. All imports from the date of withholding are subject to the assessment of dumping duties.

When a final determination of sales at less than fair value is made, the case is forwarded to the U.S. International Trade Commission to determine, within 3 months, whether an industry in the U.S. is being or is likely to be injured or is prevented from being established by imports sold at less than fair value. An affirmative determination subjects all imports to a dumping finding. The assessment of dumping duties—generally equal to the difference between the price paid by the U.S. importer and the price in the country of export—offset any dumping margins. The dumping duties are assessed in addition to the ordinary duties applicable to the merchandise.

Treasury's antidumping workload

On January 3, 1975, the effective date of the Trade Act of 1974, which established time frames for dumping investigations, 11 antidumping cases were in some stage of investigation.

Between January 1, 1975, and December 31, 1977, Treasury initiated an additional 60 antidumping proceedings; 23 in calendar year 1975, 17 in calendar year 1976, and 29 in calendar year 1977. The status of all 80 cases as of December 31, 1977, is shown below.

Status	Pre-1975 cases	Subsequent cases
Investigation in progress (includes cases referred to the International Trade Commission)	0	29
Terminated (no reasonable indication of injury)	0	2
Discontinuance of investigation	0	[1] 10
Determination of no sales at less than fair value	3	4
No injury	5	14
Finding of dumping	3	10
Total	11	69

[1] Includes eight automobile cases initiated in August 1975. Investigations were primarily discontinued due to receipt of certain specialized commitments from the automobile exporters.

Minor delays in meeting statutory time frames

Treasury has been late in meeting statutory time frames set forth in the Antidumping Act, but delays have been insignificant. With minor exceptions, most cases initiated since January 1975 have been processed in about 10 months, the time allowed for a final determination of whether sales at less than fair value have occurred. About 4 more months are usually required before a dumping finding is published.

TIME FRAME PERFORMANCE CASES INITIATED BETWEEN JAN. 1, 1975, AND DEC. 31, 1977

	Preliminary investigation	Tentative determination	Final determination
Number of cases time frame was applicable	69	37	42
Number of cases where time frame was exceeded	53	9	12
Percentage	76.8	24.3	28.6
Number of cases where excess was more than 3 days	19	2	1
Most days by which time frame was exceeded	10	4	4
Average days time frame was exceeded	5.6	2.3	1.8

The time expended for the major steps of some typical cases is shown in enclosure II.

ARE THE BONDING REQUIREMENTS OF THE ACT ENFORCED, ARE THE BONDING REQUIREMENTS APPLIED CONSISTENTLY, AND ARE BONDS SET HIGH ENOUGH TO AFFECT THE PRICE OF IMPORTED MERCHANDISE?

The act provides for the posting of bonds by importers subject to a tentative or final determination by the Secretary that sales at less than fair value have occurred. Treasury views the imposition of bonding strictly as a means of protecting revenue and Customs' implementing regulations allow each district director to determine the extent of additional bonding, if any, needed to insure payment of potential dumping duties. We believe Customs' regulations are in accord with the requirements of the act.

When a Withholding of Appraisement Notice is published, each Customs district is notified of its effective date as well as the tentative dumping margins. In processing a subsequent entry, a district can either consider the bond under which the entry is made to be sufficient or consider the bond insufficient and require the posting of a single entry bond in such amount that would assure payment of the potential dumping duties.

In only one circumstance is an additional bond mandated by Customs regulations. An antidumping bond equal to the estimated value of the merchandise covered by the finding is required when the exporters' sales price is unknown.

Bonding requirements are inconsistent

Each district determines bonding requirements independently and inconsistencies between districts exist. Customs has no system for monitoring its districts bonding practices. The following example illustrates the different bonding requirements placed on one importer who purchased merchandise from one source, but imported it through eight districts. The dumping margin on this commodity was estimated at 22 percent.

Port	Value of merchandise	District's determination
Boston	$316,303	Single entry bonds equal to 22 percent of value for estimated dumping duties.
Houston	114,042	One case single entry bond equal to 22 percent of value.
		One case single entry bond equal to 122 percent of value.
		Two cases—antidumping bond because sales price unknown.
Los Angeles	274,600	No additional bonding required.
New York	4,595,888	Single entry bonds equal to 22 percent of value.
Norfolk	73,614	No additional bonding required.
Philadelphia	2,433,000	No additional bonding required.
Portland, Maine	120,297	Single entry bonds equal to 22 percent of value.
Savannah	562,551	No additional bonding required.

It should be noted that $3,343,656 of merchandise entering through Los Angeles, Norfolk, Philadelphia, and Savannah was covered solely by the importer's regular

entry bond which had a face value of only $500,000. The estimated liability for dumping duties on this merchandise was about $736,000.

Bonding has minimal effect on prices

The bonding requirements of the Antidumping Act have little effect on the price of goods found to have been sold for less than fair value because the cost of antidumping bonds to importers adds little to importers' costs.

Although Customs does not always require additional bonding to cover dumping duties, even where it does the bonding requirement is not likely to have an impact on the price of the product. For example, a large surety company that underwrites Customs bonds charges only $1 per thousand dollars of bond value for a single entry bond. Such a charge, if a bond is required by Customs, increases the importers costs by only a minute percentage. However, as discussed later on, there are other considerations which appear to generally cause either price adjustments or import curtailments.

PROBLEMS ASSOCIATED WITH ASSESSING DUMPING DUTIES

Customs has fallen far behind in the assessment of dumping duties. The average delay has been about 3 to 3½ years. Faced with mandated time requirements for other segments of the antidumping process, Customs has simply not concentrated on the assessment phase. Recognizing the problem, Customs has taken steps which should speed up the assessment process. There is, however, a minimum time frame of 12–18 months that will be difficult to shorten because of the complexity of the assessment process.

Appraisement process steps

Once a finding of dumping is published, special dumping duties are assessed on an entry-by-entry basis on shipments from the date of withholding of appraisement. The assessment process involves the gathering and analyzing of information from the exporters, the issuance of master lists—special appraisement instructions—to Customs field offices, and the assessment of dumping duties by the field offices. Customs is under no time constraints during the assessment process.

Information gathering.—To obtain the information required to appraise shipments under the Antidumping Act, a Customs representative presents questionnaires to all exporters of the subject merchandise in the country covered by the finding. The questionnaire relates to home market (or third country) sales, U.S. export sales, and circumstances relative to all sales, such as discounts, advertising, warranties, and distribution costs. This information is initially requested for the period from the withholding of appraisement to the date of the questionnaire, which usually covers a period of 6 to 12 months.

Customs usually allows exporters 30 days to respond to requests for price information with possible extensions of 30 days. Provided the information from the questionnaire is in good order, approximately 2 months are then required to determine the special dumping duties. This time frame is dependent upon the number of manufacturers and complexity of each individual transaction.

Preparation of master lists.—To properly process entries subject to dumping duties, it is necessary for Customs headquarters to provide specific appraisement instructions to the field offices. These instructions, called master lists, outline for the field offices the various calculations and price adjustments that must be made to determine the appropriate amount of dumping duty. A master list covers each shipment of merchandise by a particular manufacturer which was purchased or exported during a specified time period.

In preparing the master lists, Customs makes numerous calculations to arrive at the foreign market values or constructed values for each manufacturer covered by the dumping finding. Price adjustments may be made for such items as differences in merchandise, differences in quantities, and circumstances of sale.

The calculations during the appraisement process are more detailed than those made during the dumping investigation. The purchase price or the exporters' sales price for each transaction is compared to the home market price or constructed value on the date of purchase or export to calculate the dumping duty. For appraisement purposes, Customs cannot use any weighted average to arrive at home market price as it does in making the tentative or final determination of sales at less than fair value.

To comply with the requirement that dumping duties be assessed on price comparisons at the time of export or purchase, the master lists must be revised periodically. Updated information is requested from the exporters at periodic-

intervals, usually every 6 months or every year. Upon receipt of the information, revised master lists are prepared and issued to field offices.

Assessment of dumping duties.—When a master list is issued, the field offices appraise the entries covered by it and determine the amount of the special dumping duty. In each case the importer of record is notified of the dumping duties. However, as shown below, the extent of the appraisement delay is disclosed by the backlogs in the issuance of the master lists.

MASTER LIST BACKLOG

Year	Number of manufacturers	Number of master lists published	Backlog
1970	52	0	52
1971	96	13	83
1972	146	24	122
1973	264	85	179
1974	298	47	251
1975	370	161	209
1976	392	158	234

Customs officials advised us that the backlog figures for 1977 have not been determined.

Customs officials gave the following explanations for the backlog of master lists.

Passage of the Trade Act of 1974. The act placed statutory deadlines on all new antidumping and countervailing duty cases. Customs operations officers who handled those cases were also responsible for preparing master lists. Case work with statutory deadlines was given priority over master list work.

The act placed special emphasis on previously neglected countervailing duty cases. During 1975, Customs personnel were required to work on 40 active countervailing duty cases and were diverted from master list work.

From July 1975 through May 1976, Customs had to handle eight complex automobile cases in addition to all other antidumping and countervailing duty work. Customs officials stated that work on master lists during this time virtually ceased.

Efforts to reduce appraisement delays

Customs has taken the following actions to reduce the delays in issuing master lists.

In May 1977, Customs assigned 16 additional operations officers to work on a temporary basis to update master lists.

Customs at the same time reorganized and established a new group that works exclusively on master lists and augmented its permanent staff by seven positions to keep master lists current.

Customs is utilizing a computer to automate a portion of the functions currently being manually performed by case analysts, such as data transcription and simple arithmetic functions. Automation will also eliminate time consuming manual typing of the master lists.

Customs now requires exporters to adhere to the established cut-off dates for the submission of information. In the past, this has been a significant cause of delay in the assessment process.

DO FOREIGN PARTIES COOPERATE IN DUMPING INVESTIGATIONS?

According to Customs officials, cooperation from foreign governments and firms in the conduct of dumping investigations is usually good.

With only three exceptions, Customs is able to contact businesses in foreign countries during dumping investigations without formally coordinating its efforts with the foreign government. The three exceptions are—

Japan—contacts with industry have to be coordinated through the Ministry of International Trade and Industry;

Austria—permission from the government must be obtained before contacting industry; and

Switzerland—permission from the government must be obtained before contacting industry. Verification has to be performed at a neutral site.

These requirements have not posed any problems to Customs.

Customs officials advised us that there have been only three cases since 1975 where cooperation has been a major problem. These were as follows:

Commodity/Country	Problem
Animal glue/West Germany	Most manufacturers refused to complete questionnaire.
Carbon plate steel/Japan	Manufacturers refused to supply cost of production data.
Polyvinyl chloride sheet and film/Taiwan.	Manufacturers' responses to questionnaires were deemed inadequate for verification.

While Customs officials stated that cooperation is generally good, incomplete or late submission of data often delays the dumping investigation. Foreign firms will frequently request extensions to Customs' deadline or Customs frequently has to follow-up the responses to obtain clarification or additional data. In some cases, firms are reluctant to release certain details of costs or allowances such as cash discounts to preferred customers, quantity discounts, and sales commissions.

As discussed previously, Customs is taking a harder line with exporters to insure that response to its questionnaires are received timely. Only time will tell whether this will improve the process.

HOW FREQUENTLY ARE DUMPING FINDINGS REVOKED?

Dumping findings are revoked by Treasury when it is satisfied that further sales at less than fair value will not occur or when the International Trade Commission changes its injury determination. Treasury revoked seven findings of dumping from January 1970 to March 1978 (see enclosure III), and had issued a notice of intent to revoke five additional dumping findings. Revocation of a finding of dumping is not mentioned in the Antidumping Act of 1921, as amended; however, Customs regulations allow revocation under either of the following sets of conditions:

Interested parties request revocation. No sales at less than fair value have been made for at least 2 years and assurances are given that there will be no future sales at less than fair value.

Treasury initiates action. Dumping finding has been in effect for at least 4 years and Treasury is satisfied that there is no likelihood of resumption of sales at less than fair value.

The International Trade Commission determination of no further injury was the reason for Treasury's revocation of three dumping findings. The Commission found that changed circumstances indicated that if the findings of dumping were revoked, industry in the United States would not be injured or prevented from being established. Unless good cause is shown, 2 years must have elapsed since the publication of the finding of dumping in order for the Commission to reconsider its injury determinations.

Enclosure III presents additional details of the seven revocations.

WHAT EFFECT DO DUMPING DUTIES HAVE ON RETAIL OR WHOLESALE PRICES?

We were unable to identify any studies which addressed the effect of dumping duties on import prices. However, based upon our discussions with Government officials, trade associations, importers, a domestic manufacturer, and a law firm involved with dumping cases, it appears that the Antidumping Act generally has some restraint on unfair competition.

The consensus was that antidumping proceedings create uncertainty in the market place and this prompts some types of adjustments to prices of imports and/or quantity imported until it is known whether or not there will be a dumping finding and what the potential dumping duties will be. Our discussions with various parties involved in antidumping proceedings disclosed the following:

Representatives of a U.S manufacturer in discussing the degree of protection provided by the Antidumping Act said the process provided some protection initially because of the uncertainty which the investigation creates. However, they do not believe this protection last long because of the lengthy delays in assessing dumping duties.

A representative from a law firm which handles dumping cases told us that the act had a definite but unmeasurable effect on prices. The uncertainty created by the investigation caused a strong effect over the short run, but over the long run this effect would be weakened.

Representatives of a major trade association advised us that it is the market place where the true measurement of the effect of the Antidumping Act takes place. However, they were not aware of any attempts to measure the act's effect on prices.

Representatives of a large importers association believe that the antidumping investigations provided good protection to the U.S. industries. They stated the act created so much uncertainty in the market place that price adjustments would be made and/or the volume of imports would decline. For example, they believe the typical reaction to a dumping investigation would be either the exporter raised the export price or lowered the home market price thus eliminating dumping margins; or the importer would change to another supplier or switch to a similar product not subject to dumping.

Several importers whose products were the subject of dumping investigations advised us that the act did cause a rise in import prices. However, the extent of price increases was uncertain because of factors such as inflation and fluctations in currency exchange rates.

Two importers said their general practice, during the antidumping investigation, was to continue ordering if delivery could be made before the withholding of appraisement. Then they would discontinue ordering until they knew the potential dumping liability. Another importer continued ordering because he believed there would not be a finding of dumping.

The degree to which the Antidumping Act is a restraining influence on competition would probably vary from product to product. There are numerous factors which could have a bearing on how effective antidumping proceedings will be. Some the factors are the supply and demand situation for the product; the state of the world economy; quality differences in the domestic and foreign product; importers' profit margins; the availability of substitute products; importers' and exporters' perceptions of the probable outcome of the dumping investigation; the stability of exchange rates; as well as the specific reasons why the exporter is dumping.

Because of these complexities, all those we talked to believed that a study to determine the effect of the act on import prices would be extremely difficult. A scientific approach would require a detailed time-consuming market analysis of a single product for a specific period of time. The result of such an analysis, however, would have limited value because it could not be used to infer that the same effect would be found in another industry or that the effect would be the same at another period of time.

Enclosure II

SUMMARY OF TREASURY'S PROCEDURES UNDER THE ANTIDUMPING ACT

Investigation procedures	Hypothetical case based on average days required	Days required to complete segment [1]	
		Average	Range
A. Preliminary investigation (maximum duration 30 days):			
1. A preliminary investigation is initiated when the Department accepts a petition in its proper form.	Jan. 1	.....	
2. Upon acceptance of the petition, Customs performs a preliminary investigation to determine whether a full investigation is warranted. During this period they attempt to verify from readily available information, the adequacy and accuracy of the petition; gather background information on the product and the effected industry; and prepare its recommendation to Treasury on whether further investigation is warranted.	Jan. 24	[2] 24	20-30
3. Treasury reviews the petition and Customs recommendations, prepares the necessary notices, and has the Antidumping Proceeding Notice signed by the Secretary.	Jan. 31	[2] 7	4-12
B. Full investigation (6 months) [3]			
1. Publication of the antidumping proceeding notice in the Federal Register. The publication date starts the full investigatory period. [4]	Feb. 5	5	4-7

See footnotes at end of table.

SUMMARY OF TREASURY'S PROCEDURES UNDER THE ANTIDUMPING ACT—Continued

Investigation procedures	Hypothetical case based on average days required	Days required to complete segment [1] Average	Range
2. Customs' foreign attachés arrange meetings with foreign manufacturers to provide them with information concerning the act and questionnaires which they are requested to complete.	Mar. 2	25	15–33
3. During the period, the foreign manufacturers are assembling the information requested in the questionnaires. They are given 30 days in which to assemble the information, but are granted extensions when requested. This date represents the day the manufacturers response is received by the attaché.	Apr. 23	52	28–70
4. The attaché arranges meetings with the manufacturers for the purpose of verifying their responses. The actual verification generally requires 1 day per manufacturer.	Apr. 30	7	4–10
5. The attaché prepares his verification reports and forwards them along with supporting documentation to Customs headquarters. This date represents the day the reports are received by the Duty Assessment Division.	May 17	17	10–24
6. Customs' analytical work primarily concerns reviewing verification reports; analyzing sales data representing, as a minimum, 60 percent of sales of the commodity during a 6-month period; determining the propriety of adjustments to sales data; and calculating weighed average margins for each manufacturer covered in the investigation. When the analysis is completed, Customs holds disclosure conferences with interested parties and prepares letters to Treasury detailing their conclusions and recommendations	July 15	59	48–71
7. Treasury's review of Customs recommendation which primarily addresses the the adequacy of support for adjustments, allowances and conclusions as well as their legal standpoint. Based on this analysis it makes its decision, prepares the necessary notices, and signs the withholding of appraisement notice which includes a tentative determination. The signing date represents the end of the full investigatory period. [3]	July 31	16	4–33
C. 6 Month withholding (Treasury, 3 months): [5]			
1. The withholding of appraisement notice is published in the Federal Register. This date starts Treasury's part of this period which lasts 3 months	Aug. 5	5	3–6
2. Treasury receives written legal briefs from interested parties. The briefs are required to be received in Treasury within 30 days from the date of publication of the withholding of appraisement notice	Aug. 28	23	12–33
3. After receipt of the briefs, Treasury arranges a confrontation meeting at which the interested parties may discuss those points mentioned in the briefs. This date represents the date of the meeting	Sept. 17	[6] 20	6–31
4. Rebuttal briefs are received from the interested parties. The briefs are based on the issues discussed at the confrontation meeting. 2 weeks are allowed for receipt of the briefs	Oct. 2	[6] 15	14–17
5. Customs analyzes any new information it may have received and prepares its final recommendation to Treasury	Oct. 24	[6] 22	18–25
6. Treasury's analysis of Customs recommendation and signing of the final determination. The signing date ends Treasury's time period under the 6-month withholding	Nov. 9	16	3–21
7. Publication of the final determination in the Federal Register [7]	Nov. 15	6	5–6

[1] Based on 5 cases.
[2] Based on 4 cases.
[3] Treasury may extend the full investigatory period by 3 months if additional time is needed to analyze complex cases. Since January 1975, 16 cases have been extended.
[4] If Treasury believes that there may be questionable injury to U.S. industry, it may request a preliminary determination by ITC. Since January 1975, 14 cases have been referred for preliminary review with 2 of the cases being terminated because of insufficient injury.
[5] Unless both a foreign manufacturer and American importer request a 6-month withholding period, a final determinltion will be issued rather than a tentative determination. The case would then be referred to ITC.
[6] Based on three cases.
[7] A comparison of the weighted average margin (potential special dumping duty) at the time of the final and tentative determinations is shown on the next two pages.

Note: If the determination is that sales at less than fair value have occurred the case is referred to ITC for its injury investigation. If no sales at less than fair value are found, the case is terminated. ITC's investigatory timeframe is 3 months with Treasury generally requiring about one additional month in which to have the antidumping notice published in the Federal Register if ITC's determination is postitive.

COMPARISON OF MARGINS

Commodity	Country	Foreign manufacturer	Weighted average margin (percent)	
			Tentative determination	Final determination
Butadiene acrylonitrile rubber	Japan	Nippon Zeon Co	10–19	5.2
Water circulating pumps	United Kingdom	Sundstrand, Ltd	25–35	30.2
Polymethyl methacrylate polymers	Japan	Mitsubishi Rayon Co., Asahi Chemical Industry.	17–25	24.0
Acrylic sheet	do	Kyowa Gas Chemical Industry	51.6	48.9
		Mitsubishi Rayon Co	.3	1.0
Ceramic brick and tile	Canada	Clayburn Industries	29.4	29.0
		I-XL Industries	15.6	18.0
Melamine in crystal form	Japan	Nissan Chemical Industries	61.0	60.0
Above-ground, metal-walled swimming pools.	do	Asahi Chemical Industry Co	1.2	3.5
Pressure sensitive plastic tape	Italy	Boston S.p.A	9.0	6.2
		Manuli Autoadesivi S.p.A	9.9	9.2
		Plasturopa-SIPA S.a.S	0	0
		Comet S.A.R.A	11.0	6.3
Do	West Germany	Braas and Co. GmbH	11.0	9.0
		Nopi GmbH	2.0	.8
		Beiersdorf A.G	15.0	.4
Round head steel drum plugs	Japan	Enomoto Industries Co	90-100	94.2
Railway track maintenance equipment.	Austria	Plasser & Theuer	62.0	19.5
Saccharin	Japan	Aisan Chemical Industrial Co	0	0
		Daito Chemical Industrial Co	0	9.4
Do	Korea	Kumbuk Chemical Industries Co.	30.5	24.4
		Choheung Chemical Industrial Co.	30.5	24.4
		Jeil Moolsam Co	31.8	25.7
Ice hockey sticks	Finland	Koho-Tuote Oy	14.0	10.5
Polyvinyl chloride sheet [1]	Taiwan	Nay Ya Plastics	26.2	4.4
		China Gulf Plastics Corp	28.6	.2
		Cathay Plastic Industry	31.5	10.7
		Ocean Plastics Co	37.4	0.04
Carbon steel plate [1]	Japan	Nippon Steel Corp	31.0	9.1
		Nippon Kokan K. K	38.0	7.3
		Sumitomo Metal Industries	32.0	18.5
		Kawasaki Steel Corp	27.0	5.4
		Kobe Steel	32.0	13.9
Viscose rayon staple fiber	Austria	Chemiefaser Lenzing	10.5	0
Birch 3-ply doorskins	Japan	Sattsuru Veneer Co	19.7	14.4
		Teshiogawa Lumber Co	38.3	37.4
		Marutama Lumber Co	23.0	16.8
		Mitsui Lumber Co	66.1	40.7

[1] In these cases, requested information from the foreign manufacturers was not available at the time of the tentative determination.

Enclosure III

FINDINGS OF DUMPING REVOKED BETWEEN JAN. 1, 1970 AND MAR. 31, 1978

Commodity/country	Date of dumping finding	Notice of intent to revoke published	Date dumping finding revoked	Basis for revocation	Opposition to revocation
Chromic acid/Australia	Mar. 21, 1964	Nov. 22, 1972	Feb. 21, 1973	No imports since 1963, price assurances.	None.
Wood pulp/Canada	Jan. 17, 1973	June 28, 1974	Sept. 26, 1974	Injury reconsideration	Do.
Potassium chloride/West Germany	Dec. 19, 1969	Jan. 17, 1975	Mar. 18, 1975	No sales at LTFV since 1969, price assurances.	Do.
Potassium chloride/France	do	Aug. 18, 1975	Jan. 15, 1976	do	Do.
Lead metal/Australia	Apr. 17, 1974	May 28, 1975	May 3, 1976	Injury reconsideration	ITC considered views at hearing.
Lead metal/Canada	do	do	do	do	Do.
C.I. soil pipe/Poland	Nov. 2, 1967	Feb. 10, 1977 [1]	July 21, 1977	No sales at LTFV more than 5 yr price assurances.	None.

[1] Intent to revoke originally published Nov. 13, 1970. However, no further action taken at that time.

AMERICAN IMPORTERS ASSOCIATION, INC.,
New York, N.Y., May 9, 1978.

Mr. JOHN M. MARTIN, Jr.,
Chief Counsel, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. MARTIN: The American Association is pleased to submit the enclosed recommendations and comments on U.S. laws and administrative procedures relating to unfair parctices in international trade. Our submission is made in response to the Trade Subcommittee's February 6. 1978, request for views.

AIA is a nonprofit trade association representing over 1,200 American companies which participate in the import trade either as importers, customs brokers, attorneys in trade and customs laws, banks and other service organizations. Although AIA's focus is primarily on the interests of American importing companies, our membership now includes some of the largest United States exporters. This development is a result of the increasing recognition that there is a direct relationship between the health of our export and our import trades.

AIA exporter members are concerned that revision of U.S. trade laws away from remedial and toward punitive concepts will result in foreign reactions to restrict their markets against U.S. exports. Such a result would be destructive to the U.S. domestic economy. It should be noted that our antidumping and countervailing duty standards are already more stringent than those of our major trading partners.

The nation is also beginning to see that the growth in these trades similarly bears a direct relationship to the growth of our domestic economy. Further, employment in the U.S. due to these trades is substantial.

Chairman Vanik's request for comments raises specific issues which must be thoughtfully addressed. AIA hopes that in considering any changes to these laws, each interested party will weigh the effects of those changes on U.S international economic relations and our economy as a whole.

Publication of the comments received by the Subcommittee will be very useful for study and discussion by the public. If hearings are held, AIA will be very glad to provide expert witnesses to the extent time can be made available.

Sincerely,

GERALD O'BRIEN,
Executive Vice President.

Enclosure.

STATEMENT OF THE AMERICAN IMPORTERS ASSOCIATION, INC.

I. NO LEGISLATION SHOULD BE INITIATED PRIOR TO COMPLETION OF THE MTN

As a preliminary statement, AIA strongly urges the Subcommitee to continue to take cognizance of the ongoing Multilateral Trade Negotiations at GATT and not to initiate legislative action which might undermine progress in reaching an acceptable package of agreements. Statutory changes can be considered in the context of the final MTN results once they are anounced.

II. GENERAL ISSUES

AIA supports, within certain limitations, the concept of a single statutory mechanism for relieving such injury to domestic industry and labor that is directly attributable to increased imports. Such a statute could clarify present jurisdictional conflicts and eliminate duplicative investigations to the benefit of all concerned. It would eliminate the uncertainty under which an importer must operate once his product is charged with being in violation of one or more of the prescribed practices. It would enable the President to provide comprehensively considered relief which is tailored to the specific problems of the petitioner and the welfare of the United States as a whole. Most importantly, such a statute would eliminate unnecessary investigations as to cause which are now conducted prior to an investigation of injury. By first investigating whether injury exists, cases could be terminated prior to any investigation of sales at less than fair value or government subsidization.

This statute must be carefully drafted to be kept strictly trade neutral. Any law which allows a single petition to marshal every complaint that can be made against imported merchandise almost certainly would be used for that purpose in many unwarranted circumstances. It would place additional burdens on American importing companies without preventing unnecessary government investigations. Any new law will be too restrictive if it seeks only to protect domestic industry and fails to recognize, for example, that import competition, too, must be protected as a curb against inflation and as a means of protecting the value and stability of the dollar.

Because of the radical change any such revision of existing law would bring about, AIA recommends the formation of a "commitee of experts" to be charged with the drafting of legislation to solve the problems inherent in the issues raised by the Subcommittee and in the complaints of all members of the international trade community. Such a committee should be jointly appointed by the Congress and the Executive Branch. It should be chaired by a disinterested person knowledgeable in all aspects of the field. (For example, Professor John H. Jackson of the University of Michigan School of Law who performed a similar task prior to the introduction of the legislation which was enacted as the Trade Act of 1974.) AIA believes that the creation of such a committee—after the completion of the MTN—would serve the interests of all parties interested in international trade.

As a springboard for discussion, AIA suggests the following conceptual model for a "single statute" to incorporate the present laws covering dumping, countervailing duties, and also, we believe, the escape clause. A domestic company or industry would petition the ITC to allege that it had been seriously injured by increased imports. The petition would contain a statement of the company's or industry's circumstances but would not necessarily characterize the nature of the cause or the relief sought. The ITC would conduct an injury investigation and transmit its determination and report to the President without necessarily making a final determination of the cause. The President with the advice of the appropriate agencies would investigate the cause and choose the remedy or remedies most suited to the petitioner's circumstances and the welfare of all interests in the United

States consistent with our international agreements. The remedy would come from those now available to him and could be imposed against individual companies, countries, or the world at large. The President would have the discretion to suspend any remedy in the national interest. In view of our growing dependence on international trade, the emphasis should be placed on enhancing the ability of the United States to compete effectively in world markets and on effective adjustment assistance. Finally, the Congress would have an opportunity to override the President's determination. Such a procedure would enable a domestic industry to obtain any or even all of the presently available remedies without having to press multiple cases. It would provide for a speedier, more efficient determination of the appropriate relief. The importer would need to make only one case against injury and one addressing the cause. It would focus initially on what is assumed to be the real reason for relief—serious injury. In the absence of injury there would be no unnecessary investigation of cause. All proceedings, of course, would contain the usual due process safeguards.

III. EXISTING STATUTES AND PROCEDURES

A. Title III of the Trade Act of 1974

AIA is concerned that enforcement of the Antidumping Act and Section 337 be confined to the specific purposes for which these provisions were written. There should be no confusion between an enforcement action to prevent the unfair trade practices against which Section 337 is aimed. The different purposes of these laws seem to be forgotten in the effort to apply Section 337.

The proposal to integrate the enforcement of unfair trade practice provisions with the antitrust laws only moves toward increased fragmentation of U.S. antitrust policy and administration. International antitrust questions should be the province of the Federal Trade Commission and the Department of Justice. Section 337 should be repealed and its authority should be left to these agencies. Its patent authority should be left to these agencies and the District Courts. The Antidumping Act should be administered to encourage competition and not destroy or severely damage competition which is temporarily selling below home market price.

Section 337, despite some procedural improvements made by the 1974 Act, remains a discriminatory anachronism and should be repealed. All of the alleged abuses that Section 337 is designed to reach—such as patent infringement or antitrust violation—are more than adequately covered by existing laws, existing agencies such as the Federal Trade Commission and the Department of Justice, and the Federal District Courts. These are matters for the courts and prosecutors, and not for the International Trade Commission. Moreover, Section 337, by providing an additional forum by which a patent holder can attack an alleged infringer if the product is imported, discriminates against imports.

On the question of whether to adopt more expeditious time periods for reaching determinations in antidumping cases, AIA believes that it would be to the advantage of all parties to strengthen the test the ITC applies in its preliminary determination of injury. The ITC's present interpretation of the statutory test is a de minimis one. Such

an interpretation renders the determination relatively useless. A stricter test would weed out cases for which there is no reason for Treasury to follow through an expensive SLFV investigation. Further, the thirty days now provided for this determination is insufficient for a proper analysis of the factual material available to the ITC. AIA recommends that in every case, the Secretary of the Treasury forward the petitions to the ITC. Within 60 days following the announcement of the initiation of an investigation by the Secretary of the Treasury, the ITC should be required to determine whether sufficient evidence of injury exists to warrant a continuation of the Treasury investigation. The Secretary, of course, would not issue a withholding of appraisement notice until after the preliminary injury determination had been made.

No time limits should be placed on Section 301 cases. The advantage of this section is that it brings parties together to reach solutions. Because the section encourages negotiated settlements, because it involves questions of international economic relations, and because the remedies available are so numerous, time limits would only hinder its effectiveness.

The present law regarding initiation of dumping and countervailing duty investigation by the Secretary of the Treasury should not be changed. The Secretary must have the discretion to decide whether to initiate a case. The present policy of the Secretary not to initiate a case in the absence of an industry petition is a salutary one. Rarely is he in a position to judge whether there has been injury and thus may begin cases which will end all too often at the ITC. The relevant domestic industry is in the best position to judge whether a case may be indicated. If the industry does not complain, there is no need to make large expenditures of tax money.

The question of judicial review of negative ITC injury determination and other judicial review procedures should be left for discussion in the context of the overall review of these issues provided by the proposed Customs Court Act of 1978 (S. 2857).

In the abstract, AIA supports the principle of judicial review of negative ITC injury determinations.

B. Antidumping Act

The present petition requirements regarding the sufficiency of evidence presented to support allegations of dumping and injury should be strengthened to avoid frivolous complaints. The petitioner should be required to present substantial evidence which shows probable cause that by a preponderance of the total evidence collected there is both sales-at-less-than-fair-value and injury. Such petitions would remove the harassing effect on importers of frivolous petitions. Treasury now has thirty days to decide whether to initiate an investigation after receipt of a petition. The Secretary should provide concerned importers with a formal opportunity to comment on the petition during this period. The petitioner should be required to bear the costs to the government of investigating and the fees paid by the importer to defend a petition determined by the Secretary to be frivolous, subject to judicial review.

The Trade Act of 1974 amendment to the Antidumping Act adding Section 205(b) should be repealed. The concept of this section is not

applied in other countries and its application by the United States undermines uniform international practice. If it were adopted by other countries, U.S. exports would then have to meet this stringent barrier. The section confuses the nature of an antidumping proceeding. Dumping is a pricing concept, not a production concept. Furthermore, selling below cost can be an economic necessity in times of cyclical downturn. It is unreasonable to assume that such sales will ever occur for a long period.

A "reasonable time" is virtually undefinable. It might be reasonable to require fixed costs to be recovered over a "business cycle".

Obtaining and verifying this type of data is very difficult and will always be a problem. Many foreign companies will not allow even their own governments to effectively monitor or examine their books.

It is impossible to make the antidumping or countervailing duty laws work in the context of state controlled economies because both laws only make sense in market economies. At best, their application here is arbitrary. There can be no realistic standards here to determine price (or separate the public and private markets in CVD cases). The Secretary of the Treasury should have the discretion to refer all such antidumping cases to the ITC for a Section 406 market-disruption investigation. In any such case the injury standard should be the same as that employed in escape clause determinations. The problems inherent in verifying foreign data argue strongly for a single injury standard applicable to all of these laws. Further, the ITC in considering injury should be required at least to take into account injury to related industries if not all the considerations the President must examine in choosing a remedy.

AIA opposes the concept of depositing estimated duties in lieu of bond posting following a preliminary affirmative dumping determination. In any consideration of this problem, it should be remembered that the Antidumping Act is meant as remedial, not punitive. The Act was written to prevent future sales-at-less-than-fair-value and place imports and domestic products on an equal competitive footing. To impose a financial burden upon a preliminary determination is purely punitive and may effectively stop all importations during the interim period with irremedial damage to our domestic economy, including industrial concentration and the elimination of competition.

Because of the very inexact nature of antidumping investigations, there is likely to be a 5–10 percent margin of error in all cases. Treasury's present price assurance policy should be expanded to cover this margin, again with the idea in mind that the Act is remedial, not punitive. Such price assurances will serve the purpose of stopping the predatory pricing practice.

Regarding investigation discontinuances based on special circumstances, the Secretary should have discretion to end an investigation when he can get proper results through negotiation. The oversight of the Congress would be a sufficient check on his discretion. Without this discretion the Act triggers a mindless machine unable to take into account the exigencies of the case and contemporaneous economic changes. This issue is only one example of the difficulty of administering these laws in isolation from our international policies and agreements.

There should be a statutory time limit for liquidating entries following a final dumping finding. The limit should be long enough for Customs to conduct a thorough investigation but short enough to prevent the absurdities that accompany the present liquidations of television entries from the early 1970's. A statute of limitation of 2 or 3 years would be appropriate. Such a limit will eliminate long periods of uncertinty for the importer. The Act is meant to be remedial in the short term; the problem should be corrected while it exists. Liquidations five years later only punish the importer and do not help the domestic producers to regain lost sales from previous years.

AIA also recommends that the present prohibition on reimbusement of dumping duties from the exporter to the importer should be eliminated. This provision in effect applies only to the independent, unrelated importer and penalizes him vis-a-vis his related—party competition. Such reimbursement is allowed in escape clause and countervailing duty cases.

For a fuller discussion of this and other issues concerning antidumping procedures, reference is made to the written statement of AIA submitted to this Subcommittee for its hearings on Congressional Oversight of the Antidumping Act of 1921, as amended, November 8–9, 1977, page 148.

C. Countervailing duties

AIA believes that any discussion of the guidelines or criteria to be used for determining a direct or indirect "bounty or grant" should be set aside to await the results of the present MTN at the GATT. The United States should adhere to agreed-upon international practices. The U.S. should follow the existing GATT standards as expressed principally in Article VI and Ad Article XVI.

In any application of Section 303 to government-owned facilities, there should be no presumption of subsidy. The usual test should apply and the company should be allowed to prove that it is not benefitting from government ownership or subsidy in its export trade.

In considering possible injury criteria for use in Section 303, our overriding consideration, here as elsewhere, should be to align our practice to international standards. More specifically, the United States should include a serious injury requirement in Section 303 to cover dutiable as well as duty-free imports. The imported goods must be the principal cause of the injury. This provision should be added whether or not a GATT countervailing duty code is produced at the MTN.

Statement of Frank E. Bauchiero of the American Chain Association

As Chairman of the International Trade Committee of the American Chain Association, I am pleased to respond to the Subcommittee's press release of February 6, 1978, inviting comments on the administration of the Antidumping Act of 1921, as amended.

Our Association is composed of thirteen member companies employing approximately 3,000 men and women in the production and sale of power transmission chain and chain used for conveying and elevating. Such chain is used in a wide variety of applications. I once could

have cited bicycle chain as a familiar example of our product, but now virtually all the bicycle chain used in America is imported. American-made power transmission chain, however, is widely used in equipment for agriculture, mining, transportation, construction, materials handling, and other sectors of our economy vital to our national health and security.

U.S. chain manufacturers—particularly producers of roller chain—are familiar with the Antidumping Act and the Customs Service's administration of that law. In 1971 the Association filed a complaint against the dumping of roller chain, other than bicycle chain, imported from Japan. A year later the Treasury Department found sales at substantial dumping margins, and in 1973 the Tariff Commission (now the ITC) found that we had been injured by the Japanese dumping practices. Although we succeeded in proving dumping—at considerable time and expense—our hopes that such unfair trade practices would stop have proven unfounded.

My statement to the Subcommittee is to describe why the Antidumping Act, as currently administered, has failed to halt these unfair trade practices and to offer suggestions for improvement. My comments relate to two important areas of administration of the U.S. dumping law: (1) to the procedures for collecting duties under a dumping finding once dumping is established, and (2) to the statutory provision for investigations of sales at below the cost of producing.

As to the first area of concern, the Association urges three specific reforms to promote the effectiveness of the law and to deter or prevent dumping violators from further abuses:

1. We support a statutory time limit of twelve months on the assessment of dumping duties. This would prevent the long delays which currently hamper the effectiveness of a dumping finding as a remedy for this unfair trade practice.

2. We support a statutory requirement that importers of products subject to a dumping finding be required to post the estimated amount of the dumping duty at the time of entry, instead of merely posting a bond. This would encourage foreign producers subject to a dumping finding to cooperate promptly with the Customs Service in the assessment of duties.

3. We support a requirement that interested parties be supplied with information about the assessment of dumping duties and be allowed an opportunity to comment on submissions by foreign producers. This proposal would help prevent abuse and circumvention of a dumping finding.

Our second area of concern is Section 205(b) of the Act, which Congress enacted in the Trade Act of 1974 to deal with unfair sales below the cost of production. We suggest amendments to effectuate the sound purpose of this provision.

4. The Association urges a statutory requirement that such cost investigations conducted in regard to imports already covered by an outstanding dumping finding be completed within the timetables set forth in the Antidumping Act. This proposal is consistent with the clear congressional purpose of the 1974 Trade Act and may be necessary to prevent misconstructions of the Act.

5. The Association supports an amendment making clear that Treasury need not—and indeed should not—require that an

American industry, as a condition of opening a Section 205(b) investigation, to supply information not reasonably available to it.

I. ASSESSMENT OF DUMPING DUTIES

One primary concern with the current administration of the Antidumping Act is that it simply has not worked as an effective bar to unfair dumping, even after an American industry has proven dumping. Our three proposals do not require any great restructuring of the law, but simply call for enforcement of the Act in the way Congress surely intended.

1. A statutory timetable

A twelve-month timetable on assessment of dumping duties would correct the present state of affairs in which a convicted dumper is allowed several years grace before any duties are payable. This delay in payment—during which an importer merely posts a bond obtained at minimal cost—severely undercuts a dumping finding as a remedy for unfair trade practices. In times of high inflation, as we have seen recently, dumping duties are paid in depreciated dollars several years after merchandise has been imported. Another troublesome aspect of the current delays is that they may provide an incentive to dump during an economic slump—the worst possible time. If a foreign businessman is in immediate need of cash-flow during a recession, he can dump his product in the United States to generate that cash and feel secure that payment of dumping duties can be postponed until after the slump. The knowledge that duties must be paid in Year 5—or Year 10—may not outweigh the attraction of sales and immediate revenues in Year 1.

We think that assessment of duties within twelve months after the end of each quarter would provide ample time to the Customs Service to do its job. With such a timetable, Customs could mail out questionnaires before the end of each quarter with a return deadline of 30 days after the end of the quarter. This would leave up to eleven months for the Service's assessment of duties, which should be ample even in the most complicated cases. Further, if assessment is particularly difficult in a case, there could be provision for the Treasury Department to declare the assessment "complex" by published notice and take up to an additional six months to complete the assessment process.

2. Posting estimate dumping duties

A requirement that importers post the amount of the estimated special dumping duties at the time of entry of merchandise would encourage prompt cooperation by foreign producers with Customs' assessment efforts.

As present, sellers of products subject to a dumping finding and affiliated importers have an incentive to postpone supplying their responses to Customs' inquiries for as long as possible in order to delay the reckoning for dumping duties. Payment of estimated duties would remove this incentive for delay. Moreover, the proposal is workable, as demonstrated by the Customs Service's administration of the countervailing duty law. Currently, importers must pay the amount of an

estimated countervailing duty at the time of entry of merchandise subject to a countervailing duty. Further, coupled with a statutory timetable for duty assessment, this requirement would not impose any severe burden on international trade. An importer not selling or purchasing at dumping prices would be promptly cleared and his duty refunded.

3. Disclosure of assessment information

Another important area for reform of the administration of the dumping laws involves the current Customs practice of denying the U.S. industry information about assessment of dumping duties and an opportunity to comment during this phase of a dumping proceeding. As we understand the Customs procedures, the Customs Service periodically sends questionnaires to foreign producers and importers, requesting information about home market and U.S. prices and adjustments. On the basis of information supplied in the responses, the Service calculates the special dumping duty, which is the difference between the purchase price or exporter's sales price and the foreign market value, as provided in Section 202(a) of the Antidumping Act.

This process is essentially similar to the Treasury determination in a dumping investigation whether sales at less than fair value have been made. Complicated and often sizeable adjustments are made to the selling prices in the U.S and in the foreign market to arrive at a comparable set of prices. These adjustments are not merely mathematical operations, but frequently involve complex judgments on matters such as the commercial comparability of two articles or whether a selling expense was directly related to a sale.

The Customs Service has taken the position that "[a]s to this appraisement process, the petitioner has no more 'oversight authority' than an American manufacturer would have with regard to a Customs appraisement of foreign merchandise under the U.S. valuation law." (Customs Service letter Ruling No. 551422, dated August 2, 1977).

While we are not requesting any "oversight authority" over the Service, we suggest that Customs is mistaken in equating assessment of dumping duties with normal customs valuation. Special dumping duties are imposed to protect American business from unfair foreign trade practices, and a successful dumping petitioner has an interest in ensuring that the law is properly enforced. Further, the determination of dumping duties is a complicated calculation full of opportunities for evasion or abuse and is basically unlike the process of assigning a dutiable value to a product, on the basis of invoices or other documents. A domestic industry is in a position to supply valuable information to Customs, which would help assure the accuracy of duty assessment.

Since some of the information obtained by Customs is confidential business data, we propose that the Service make available meaningful nonconfidential summaries of the foreign producers' and importers' questionnaire responses. Customs does this now during less-than-fair value investigations; and such summaries, even while providing a high degree of confidentiality to foreign producers, often provide to interested domestic parties useful insight into the factual basis for the Customs Service's actions.

We also urge that Customs periodically disclose to the domestic industry its method of calculation. We do not urge that each assess-

ment be made a full adversary proceeding, but there is no reason why Customs should not be required to disclose from time to time any significant changes made in its methods of calculation so that domestic parties would be in a position to comment on them. In the case of roller chain, the Treasury investigation was completed six years ago. During that period there have been changes in Treasury policy relating to the type of adjustments allowed, and there have also been many changes in the manner of sale by the Japanese producers. Thus, we are presently unsure whether any of the calculations disclosed to us during the fair value investigation are still being used.

It is vital to the effective functioning of the system that interested domestic parties be afforded the opportunity to comment on significant changes in Customs' practice in calculation of dumping duties. Domestic parties are familiar with the U.S. marketplace and may be able to supply valuable factual information to Customs. Further, an opportunity to comment would eliminate the present inequitable situation in which Customs is receiving only one side of the story—the foreign producer's.

An important reason for our proposals is that we have reason to believe that roller chain exporters and importers may be circumventing the dumping finding, by the non-reporting or mis-reporting of relevant information. We cannot be absolutely certain of these matters because we do not know what the Service has been told by Japanese roller chain producers. However, the pervasiveness of reports of non-reporting and mis-reporting and the reliability of their sources convinces us that the information cannot be lightly discounted.

II. THE COST-OF-PRODUCTION PROBLEM

The second area that I would like to address is the administration of 205(b) of the Antidumping Act. This provision was added to the Antidumping Act in the 1974 Trade Act and requires that sales below cost be disregarded in the calculation of a foreign market value. This subject is of considerable concern to us, and we propose several reforms to clarify the provision.

4. Clarification of applicable procedures

The Association proposes that Congress clarify the procedures for investigations of sales below cost on products already subject to an outstanding dumping finding. The present time limitations on Treasury dumping investigations should be specifically applied to such investigations.

In the 1974 Trade Act, Congress imposed time limitations on antidumping investigations. After publishing a notice of the initiation of an investigation, Treasury must make its initial determination within six months—unless the case is declared complicated and the initial determination extended by up to three more months. A final determination whether there have been sales at less than fair value must be made within three additional months. Thus, the Treasury Department has a total of between nine and twelve months to complete its investigation.

These time limitations are liberal—many would say far too liberal. However, we understand that Customs does not regard itself as bound by this statutory timetable when investigating below cost sales of a

product subject to an outstanding dumping finding. Further, we have not turned up any *Federal Register* notices regarding the initiation of such an investigation—although we understand that several have been completed or are ongoing.

5. The need for reasonable standards of "proof"

In order to promote the enforcement of Section 205(b), we submit that Congress should clarify the standard for initiating an investigation of the cost of producing under the Antidumping Act. Our Association requested that Customs investigate the cost of producing roller chain in Japan, but were told that "quite detailed information" must be submitted before Customs would initiate an investigation.

The statute itself requires only that the Treasury Department have reason to "suspect" that sales below cost in the home market have occurred. Although the Congress did not impose an insurmountably high standard, the Treasury Department and Customs Service have interpreted the section to require a domestic petitioner to supply information not reasonably available to it. In this regard, we believe that Treasury has not adequately fulfilled its obligation to enforce the law. Indeed, as we read the statute, it requires Treasury to initiate antidumping proceedings on its own motion, but we are aware of no case where it has done so. Instead, Treasury rejects to investigate unless the petitioners supply extension and detailed information.

Our Association is willing to make every reasonable effort to assist Treasury in its duty to enforce the law. However, Treasury demands information that is just not available to us—specifically, the cost of producing in Japan, which is virtually impossible for a domestic industry to obtain. A domestic petitioner, at enormous expense, can hire economic consultants and experts to guess at foreign production costs, but requiring such large expenses is unreasonable, when Treasury has the means to collect the actual data. It should be emphasized that we are only addressing the question whether an investigation should be made. If no below cost sales in the home market have been made, then a foreign producer can readily clear itself by supplying proof of that to Treasury.

* * * * * * *

In summary, the American Chain Association believes that the current administration of the Antidumping Act has proven ineffective. We urge that the Act be amended to promote the effectiveness of a dumping finding as a remedy for unfair trade practices and to promote enforcement of the Act.

AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Washington, D.C., April 26, 1978.

Hon. CHARLES A. VANIK,
Chairman, Subcommittee on Trade, House Committee on Ways and Means, Washington, D.C.

DEAR CHAIRMAN VANIK: The AFL–CIO is submitting a brief description of six unfair trade issues which we believe urgently acquire the attention of your Subcommittee. Even though the Subcommittee has extended the time of submitting such proposals until May 15, we hope that these matters can be considered as soon as possible.

We believe antidumping and countervailing duty statutes are urgently in need of amendment in order to make them fair to American workers and producers. In addition, remedies for services industries should be added to the unfair trade practice section because of the changes in world trade. We believe Title V of the Trade Act of 1974 and Items 806.30 and 807 should be repealed. These two changes can do much to end the unfair advantage given to low-wage countries which are now exporting manufactures to the United States at an accelerating rate. We also believe that a new law must limit the import of products produced under inhuman conditions abroad.

As you know, the AFL–CIO has an extensive program for improving the American trade position. These were detailed in the recent AFL–CIO Convention statements, and at the last meeting of the Executive Council. These statements are attached.

Six of these proposals clearly apply to unfair practices that the Subcommittee has within its jurisdiction, and more detail on each of these six items is attached. A seventh item dealing with a general quantitative approach to heavy import penetration needs to be explored in more detail with the members of this Subcommittee.

Certain items that the Federation is concerned with have already been acted upon by this Subcommittee or other Committees of the House of Representatives this year. These include trade adjustment assistance, the Multifiber Agreement, customs procedural reform, the continuation of the Overseas Private Investment Corporation, and the renewal of Eximbank. The Ways and Means Committee is now considering tax loopholes affecting international trade. Legislation on tariff cutting in the MTN and on domestic preferences also require congressional attention.

The attached proposals respond to your request concerning unfair practices.

Sincerely,

ANDREW J. BIEMILLER,
Director, Department of Legislation.

STATEMENT OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

ANTIDUMPING PROCEDURES

Antidumping procedures must be improved to provide speedy, effective relief. Dumping is a predatory and unfair trade practice that must be stopped, and the need for speed is essential.

Dumping is predatory pricing—the use of market power to drive out a competitor unfairly. By definition, therefore, dumping is unfair. Trade law, however, requires a double test—not only of injustice but also of injury. Since 1921, the United States has had an antidumping statute on the books—a statute whose 57-year life has made it antiquated and clumsy to take care of the types of problems now occurring in the United States.

The administration of the United States antidumping statute is deficient. It results in long delays so that action is either too little or too late. Or there may be no action at all. The current enforcement of the antidumping statute does not protect United States industry

against this unfair trade practice. For example, as this Subcommittee noted in previous hearings on this subject, the United States lost the Zenith Company's TV production units in 1977—six years after a TV dumping finding in 1971. After all the efforts of the subcommittee, duties have been assessed only until 1973.

First, the need for speed is apparent. Treasury and ITC should be required to make a final determination within six months of filing of a dumping charge. We believe this can be accomplished by simultaneous processing of cases by the two agencies and increasing the staffs assigned to dumping.

Second, effective interim deterrents to stop the unfair practice are needed:

(*a*) An importer should pay in escrow the full amount of estimated dumping duties at the time of a finding of sales at less than fair value, pending a final determination. The payment in escrow would be effective as a deterrent. The amount would be returned if no violation were found. That type of action would amend Section 208 of the Antidumping Act, 19 U.S.C. 167.

(*b*) Until final determinations are made, imports should be kept at the level which they reached when the antidumping action started.

Third, the burden of proof should not be on the injured. The complainant is asked to supply detailed information on costs and other facts which he cannot obtain.

Fourth, the government itself should initiate investigations when imports increase rapidly or there is reason to believe dumping is occurring. We suggest a 10 percent increase in imports as a test for action.

Fifth, dumping from non-market economies should be based on real prices of actual market economy production costs in developed countries.

Sixth, the collection of antidumping duties should take place not later than six months after the final determination is made.

COUNTERVAILING DUTY PROVISIONS

Under United States trade law, United States imports which have been subsidized in a foreign country may have a tariff or "countervailing duty" imposed to offset the subsidy. But the effectiveness of this rule has been diluted.

Remedies need to be speeded up and made more automatic.

When foreign governments forgive value added taxes on products exported to the United States, a countervailing duty should be provided to offset this unfair subsidy. Countervailing duties should be applied against government-owned or subsidized facilities that provide an unfair advantage.

Section 331 of the Trade Act of 1974 should be amended to assure that the countervailing duty is applied. The following amendments are needed:

1. No waivers under (d) should be allowed.
2. There should be no requirement for an "injury" test even on a duty-free import.

3. Imports from low-wage countries under the generalized system of preferences (zero tariffs) should not qualify as "duty free" for countervailing duty purposes.

4. Any item subject to a countervailing duty should be exempt from the tariff-cutting of the multilaterial trade negotiations.

5. Periodic reports of subsidy practices on the part of foreign governments should be required.

REPEAL ITEM 807 AND ITEM 806.30

This repeal provided for in a number of bills pending before the Subcommittee would close an unwarranted import loophole. These provisions result in the export of American jobs. Under 806.30 and 807, a company can take certain components (such as television components and garments) made in America, export them to be assembled or processed in a low-wage country, and then re-import the final product. A tariff is paid only on the value added, not on the full value of the product. When the value added consists primarily of wages paid at rates as low as 20 cents an hour, the tariff amounts to practically nothing.

Imports under these items have grown from about $1 billion in 1967 to over $7 billion in 1977—much faster than overall imports.

REPEAL TITLE V OF TRADE ACT OF 1974

Title V of the Trade Act, which provides unfair preferences for imports from low-wage countries, should be repealed.

Preferences or zero tariffs for imports from low-wage countries are obsolete and unrealistic. Total imports from developing countries now account for about half of all United States imports. Manufactured imports are increasing very rapidly from these countries. Worker exploitation, abandonment of human rights and hideous working and living standards prevent potential benefits of rapidly-expanding trade from reaching the people of these countries.

Preferences are used by multinationals or state subsidized firms with new technology to produce exports for the United States. No special tariffs are needed to encourage such trade in the 1970's.

Imports from so-called developing countries have increased more rapidly than other imports. Imports of manufactured goods rose from $3.5 billion in 1970 to $10.9 billion in 1974 when the Trade Act of 1974 was passed. In 1976 manufacturing imports reached $14 billion and have continued upward since then.

The language of Title V—Section 503(c) specifically excludes certain "import-sensitive" products, but the administration of this concept has made such a provision meaningless. It has allowed the continued importation of job destroying imports of over 2,700 items—from electronic parts to dry docks.

Special help for needy people in needy countries may be necessary. Export-led development has not solved the problems of unemployment, poverty or exploitation. Zero tariffs, therefore, merely compound already accelerating injury to workers here and abroad.

REMEDIES FOR SERVICE INDUSTRIES

Adequate remedies for trade related injuries to workers in service industries, such as films, airlines and maritime are needed.

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Service industries need protection from dumping and other unfair trade practices, but they are not included in the Trade Act of 1974's remedies. Thus, Section 321, Section 331 and Section 341 do not provide for remedies against unfair trade practices in services.

Title IV—Trade Relations with Countries Not Currently Receiving Nondiscriminatory Treatment—does not apply to services. The market description provision of Section 406, for example, does not apply to services but the effects of non-market disruption have affected such services as shipping. Services should be included in Title IV.

FAIR LABOR STANDARDS

Fair labor standards must be applied to the acceptance of imports into United States markets to assure fair competition.

Unlike workers in this country, workers in many nations have no worker's compensation, unemployment insurance or social security programs enacted to protect workers and their families. Similarly, most foreign workers do not have the protection offered by various American occupational safety and health statutes. Typically, their wages are substandard, and in many countries child labor and slave labor conditions exist.

The AFL-CIO believes that until international agreements are negotiated to improve labor stanadrds, the United States should prohibit imports from those countries that permit inhuman conditions.

Legislation is needed that (a) regulates against imports made under unfair conditions and (b) puts the burden of proof on the exporting country and the importer to assure that the conditions which are established by United States law are not undermined by unfair trade based on the conditions of exploited workers abroad.

AS ADOPTED BY THE 12th AFL-CIO
CONSTITUTIONAL CONVENTION - DECEMBER 1977

Resolution No. 126
International Trade

U.S. foreign trade and investment policy must be balanced with America's need for jobs. Foreign economic policy should be geared to America's need for a strong, growing economy. The Trade Act and other legislation should be administered to assure American domestic production as well as to encourage world trade. Fair trade and reciprocal relations are basic to policies that will help America and the world.

Negotiations with other nations should be based on the needs of the U.S. economy, not political expediency. The goal must be an expansion of trade based on fairness, reciprocity and mutual benefit.

New legislation is needed to regulate exports and imports. Exports in short supply should be subject to export controls, import relief provisions must be designed to assure adequate safeguards for the U.S. economy. Tax policies need to be reviewed both in terms of equity and in terms of their impact on trade. Imports of products and parts of products should be made identifiable by clear labeling as to country of origin.

Dumping of foreign-made products in the United States must be ended. Both quick enforcement of existing law and new legislation to assure government action should be adopted.

Countervailing duty laws against imports subsidized by foreign governments should be speedily enforced and no injury test should be required for subsidized imports.

In addition to these unfair trade practices, many foreign governments control their industries and manage their economies. U.S. policy and law have not adjusted to these world changes.

Quantitative restraints on imports are, therefore essential to assure that U.S. industry can develop and remain diversified at home. Like quantitative restraints abroad, such regulations will not be designed to stop trade, but will assure imports in keeping with the nation's well-being.

New trade barriers have been added by other countries in recent years — quotas, tariffs and dumping duties. Most countries of the world have unwritten barriers to trade.

The United States has published laws public procedures and stated policies. Against this background, negotiations to reduce tariffs are now going on. The AFL-CIO urges the Administration to insure that current negotiations and agreements protect the vital interests of American workers and industry. This means recognizing that U.S. tariffs are already low when compared to those of many other nations and that the U.S. cannot rely on the types of non-tariff barriers that are common practice abroad.

The Overseas Private Investment Corporation (OPIC), a government agency that insures private investment abroad, should therefore be terminated as soon as possible. OPIC has been insuring huge multinational banks and firms abroad and encouraging the export of American jobs.

Imports of textiles and apparel have been subject to a multifibre agreement which is due to expire at the end of this year. This agreement should be renegotiated, improved and the growth of imports should be reduced.

trade with Communist countries should be regulated more effectively through improved administration of Title IV of the Trade Act and by additional legislation that recognizes the economic and political fact of life that private commercial interests cannot negotiate as effectively with closed and managed economies as governmental negotiators can.

Items 807 and 806.30 of the Tariff Code, which result in the export of American jobs; should be repealed.

Provisions in the Trade Act of 1974 — the escape clause, provisions against unfair competition, etc. — must be improved and enforced to help and build strong American industries and save jobs.

Imports, exports, technology transfers flows and investment must be reported in more detail, monitored and regulated. To this end, Sections 608 and 609 of the Trade Act of 1974, which require reporting of exports, imports and production, should be enforced so that comparisons can be made. The International Investment Survey Act of 1976 should also be enforced, so that foreign technology, investment and other transfers can be monitored and employment effects examined. New laws to regulate the transfer of funds, technology and investment need to be enacted.

Customs laws should be enforced with penalties assessed fairly. More, not less, customs reporting is necessary so that American trade policy can be made on the basis of fact.

Foreign grant, insurance and loan programs should be supervised in terms of U.S. interests at home as well as abroad. This means that Eximbank loans, guarantees and insurance activities should be carefully limited both in amount and in the authority to expand the action.

Title V of the Trade Act, the so-called generalized system of preferences which permits over $3 billion a year in imports without any tariffs at all for many products manufactured by cheap, foreign labor, should be repealed.

Tax loopholes and incentives for multinational companies to move abroad should be ended, the tax deferral halted, the foreign tax credit repealed and DISC abolished.

Adjustment assistance for workers must be completely overhauled to assure that workers injured by imports receive assistance. Adjustment assistance, which is essentially a welfare program, is not a solution for America's trade problems.

The Foreign Trade Zone Act of 1934 should be repealed. Any exemptions from this nation's trade laws must be proven on a case-by-case basis. The U.S. government should seek treaties to end the exploitation of workers in trade zones in foreign countries.

Codes of conduct for the operations of multinational corporations are necessary, but are no substitute for strictly enforced U.S. laws that prohibit bribery of foreign officials and participation in economic blackmail schemes designed to negate American foreign policy. Similarly, international agreements are needed to improve labor standards in those countries that seek to attract industry through the exploitation of workers.

The AFL-CIO supports healthy, fair trade that will build a strong American economy. We oppose the continued export of American jobs and industry, which has undermined the economy. We shall pursue every possible relief for the injury already sustained, as well as new legislation to halt the drain on this nation's economy.

The AFL-CIO with its affiliates will develop a coordinated, effective program for these goals. We will use all departments — legislative, education, research, public relations, publications, organization and field services — to assure protection for American workers' jobs and living standards.

Statement by the AFL-CIO Executive Council

on

International Trade

February 21, 1978
Bal Harbour, Fla.

The AFL-CIO Convention last December called for changes in United States trade policy, administration and law to create "healthy, fair trade that will build a strong American economy."

In the two months since that Convention, evidence of the serious trade crisis has mounted:

In 1977, America suffered the largest trade deficit in history--$27 billion--more than four times the $5.9 billion deficit of the previous year.

Statistics for the first nine months of 1977 indicate that imports rose substantially in every industrial category: oil rose by $9 billion over the same period in 1976, consumer goodsimports by $3 billion, imports of automotive vehicles, parts and engines by $1 billion; imports of capital goods by $1.5 billion; imports of industrial supplies and materials other than oil, $4 billion; and imports of foods, feeds and beverages by $2 billion.

Meanwhile, United States manufacturing jobs failed to recover from the 1974-75 recession. Employment in those goods-producing industries was down almost 500,000 between December 1973 and December 1977. During the last four years, imports of manufactured products rose more than 70%.

These developments have not gone unnoticed. The press here and abroad reports a change in mood:

The Associated Press reported a poll showing that 85% of those asked about imports thought protecting United States jobs is an important policy goal. The Economist notes that protection is needed because manufacturing cannot adjust. The New York Times and the Wall Street Journal describe this as a period of protectionism. The Journal of Commerce carries advice to business on how to adapt to world protectionism.

While every other nation is engaged in protecting itself against imports that would hurt its economy, United States labor and producers lack protection.

The rising flood of imports continues unabated with a projected 1978 deficit as large as 1977's record. The President has recognized "serious injury" only in three industries in the past year and no effective action has been taken in most areas of danger.

International negotiations fail to reflect the urgency of America's crisis. The agreement with Japan would do little to improve the United States-Japan trade imbalance in the near future. The United States continues to offer to cut tariffs even further in the GATT negotiations and to remove so-called non-tariff barriers--ignoring the pleas of workers who have lost or are losing their jobs to imports.

No single negotiation, no single law will alleviate the trade impact on U.S. jobs. Thus the AFL-CIO asks Congress to address a number of the policies that now result in the loss of United States jobs.

Congress is already considering some of this legislation. In other areas, new legislation needs to be introduced.

We call upon the Congress to take the following legislative action:

1. The Customs Procedural Reform bill, already passed by the House and currently before the Senate Finance Committee, should be amended to require more precise, accurate and detailed reporting of imports at the time and place of entry. Such data are essential for import relief, adjustment assistance, and the monitoring of trade flow. The bill should not allow an increase in the value of imports that are granted an informal entry procedure from $250 to $600--a change which could remove hundreds of thousands of items from the trade statistics. The biggest impact would be on low-value imports such as work gloves, shirts, nuts and bolts, electronic parts and handbags. With a lack of reporting, the inrush of imports may be so great that markets are disrupted without any recourse at all. We urge that the current $250 test be maintained and that more detailed entries be required.

Moreover, we object to reducing the penalties on those who make false statements to the government, but we support the moves to assure due process.

2. Anti-dumping procedures must be improved to provide speedy, effective relief. Dumping is a predatory and unfair trade practice that must be stopped, and the need for speed is essential.

Treasury and the International Trade Commission should be required to make a final determination within six months of filing of a dumping charge. We believe this can be accomplished by simultaneous processing of cases by the two agencies and increasing the staffs assigned to dumping.

An effective interim deterrent to stop the unfair practice is needed. An importer should pay in escrow the full amount of estimated dumping duties at the time of a finding of "sales at less than fair value," pending a final determination.

The burden of proof should not be on the injured. Under the present system, complainants are asked to supply detailed information on costs and other facts which are often not available to them.

The government should initiate investigations when imports increase rapidly or there is reason to believe dumping is occurring. We suggest a 10% increase in imports as a trigger for action.

The Trade Subcommittee of the House Ways and Means Committee held oversight hearings on these matters in the past few months. The subcommittee has asked for legislative action along these lines.

3. Trade adjustment assistance is needed for those displaced by imports. Legislation sponsored by Rep. Vanik, chairman of the Trade Subcommittee of the House Ways and Means Committee, is being marked up. The specific AFL-CIO recommendations to improve this legislation have been presented to the subcommittee. Employees hurt by imports need protection against arbitrary time limitations restricting eligibility for assistance. Benefits must be extended to those directly affected as well as those indirectly affected -- such as workers bumped by another worker who has been displaced by trade, or employees of parts and components manufacturers laid-off because of imports. CETA jobs or other jobs should be provided, particularly for those older workers who cannot find another job. Workers close to retirement must be assured that they will not lose proper retirement benefits because of trade-induced layoffs. Other fringe benefit entitlements need to be reviewed to adequately protect displaced workers.

The Administration has not yet formally announced its proposals on trade adjustment assistance.

4. Repeal of Items 806.30 and 807--which is provided for in a number of bills pending before the Trade Subcommittee of the House Ways and Means Committee--would close an unwarranted import loophole. These provisions result in the export of American jobs. Under 806.30 and 807, a company can take certain components (such as television components and garments) made in America, export them to be assembled in a low-wage country, and then re-import the final product. A tariff is paid only on the value added, not on the full value of the product. When the value added consists primarily of wages paid at rates as low as 20 cents an hour, the tariff amounts to practically nothing.

5. Repeal Title V of the Trade Act which provides undue preference for imports from low-wage countries.

Preferences or zero tariffs for imports from low-wage countries are obsolete and unrealistic. Total imports from developing countries now account for more than half of all United States imports. Manufactured imports are increasing very rapidly from these countries. Worker exploitation, abandonment of human rights and hideous working and living standards prevent potential benefits of rapidly-expanding trade from reaching the people of these countries.

6. End tax loopholes that export jobs

End of Deferral on Foreign Profits. United States-based multinational corporations currently pay no taxes on profits earned on overseas operations until those profits are brought back to the U.S, which may be never. Multinational corporations use this loophole to expand and enlarge their overseas operations, at the expense of workers in this country. President Carter has called for repeal in his tax proposals, and the House Ways and Means Committee will hold hearings in March.

Removal of Foreign Tax Credit

Multinational corporations are permitted to subtract from their U.S. corporate income tax -- on a dollar-for-dollar basis -- all taxes paid to foreign countries. We believe this tax credit should be changed to a deduction.

Elimination of Domestic International Sales Corporation

Multinational corporations are permitted to set up dummy subsidiaries -- DISCs -- in the U.S. to handle export sales. Corporations are permitted to defer payment of United States income taxes on a third of export sales profits. There is no evidence this tax subsidy has increased exports. Instead, companies have simply increased their net profits after taxes, shifting more of the tax burden to American wage earners.

The President has supported repeal in his tax proposals and hearings are scheduled before the House Ways and Means Committee in March.

7. The Overseas Private Investment Corporation should not be extended when the House considers the bill now before it.

Legislation to extend OPIC passed the Senate in 1977, but the House failed to complete action before OPIC's authority expired December 31, 1977.

As an agency of the United States government, OPIC encourages the export of American capital and jobs. It insures U.S. corporations against loss of investment in foreign countries resulting from expropriation, revolution, etc. If those claims by corporations overseas exceed OPIC reserves, the difference is paid by the American taxpayer.

8. Countervailing duty provisions should be improved when the House Ways and Means Committee considers legislation in this area this Spring. Remedies need to be speeded up and made more automatic.

When foreign governments forgive value added taxes on products exported to the U.S., a countervailing duty should be provided to offset this unfair subsidy. Countervailing duties should be applied against government-owned or subsidized facilities that provide an unfair advantage.

9. Eximbank funds should not be used for financing foreign production or to aid Russia, Communist China or South Africa.

Continuation of the Eximbank will be the subject of hearings in March before the House and Senate Banking Committees.

The Bank was intended to promote U.S. well-being, but now the Eximbank wants to finance foreign production. The Eximbank should be prohibited from financing loans to Russia, Communist China and South Africa.

10. Fair labor standards criteria must be applied to the the acceptance of imports into U.S. markets to assure fair competition.

Foreign producers should be required to meet minimum labor standards or face import quotas and other trade restrictions.

Unlike workers in this country, workers in many nations have no worker's compensation, unemployment insurance or social security programs enacted to protect workers and their families. Similarly, most foreign workers do not have the protection offered by various American occupational safety and health statutes. Typically, their wages are substandard, and in many countries child labor and slave labor conditions exist.

Until international agreements are negotiated to improve labor standards, the U.S. should prohibit import from those countries that permit inhuman working conditions.

11. Preferences for United States' workers, builders, producers and shippers should be included in all trade and appropriation bills.

For example, H.R. 3350, the Ocean Mining Bill, should include a section preferring U.S.-flag vessels and requiring the location of processing plants in the United States. H.R. 9427, S. 2318 -- extending Buy-American laws to steel purchases for state and local construction projects -- should be passed.

12. Adequate remedies for trade-related injuries to workers in service industries, films, airlines and maritime should be developed.

The virtually unprotected U.S. service industries are experiencing greater difficulty competing against unfair foreign trade practices.

Service industries need protection under the law from dumping and other unfair trade practices, especially those practiced by communist nations. Issues related to service industries should not be included in the Multilateral Trade talks in Geneva.

more...

13. Tariff-cutting agreements arrived at through the GATT negotiations should be subject to specific congressional approval. Results of negotiations on the elimination of non-tariff barriers are currently subject to congressional ratification under the Trade Act of 1974. However, agreements to reduce tariffs may now be made by the President without specific congressional approval. The Administration-supported 40% cut in tariffs and a bigger reduction in high tariff items will, in our estimation, be harmful to workers, add to unemployment and depress American manufacturing. Congress should be provided detailed information on effects of any negotiated changes, and be required to specifically approve or disapprove these changes.

14. The Multifiber Agreement needs to be supplemented with bi-lateral agreements with major textile and garment manufacturing nations. Products subject to the Multifiber Agreement should be excluded from the GATT tariff discussions. Leather apparel should also be included under the MFA.

15. Fair Trade Legislation should be developed to regulate imports and we will press strongly for its enactment.

A new positive approach must be designed to use market penetration as a benchmark for regulating and monitoring trade. No single percentage and no single benchmark period would solve all problems, but fair regulation is needed.

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The U.S. is and must remain a major manufacturing nation, a great agricultural producer, and a major maritime force. We cannot allow any one of these sectors to be destroyed by unfair trade competition.

We believe the U.S. should continue to share its markets. We believe in international trade. We do not believe that U.S. can isolate itself from the rest of the world in trade matters, nor do we think it desirable to do so. But international trade must be fair trade -- fair to all nations, and today it is not fair to American workers.

WASHINGTON, D.C., *June 24, 1978.*

Mr. JOHN MARTIN, Jr.,
Chief Counsel, House Ways and Means Committee,
Washington, D.C.

DEAR JOHN: Attached is our statement in response to Chairman Vanik's invitation to submit recommendations on how U.S. laws and regulations relating to unfair trade and practices.

It is my understanding that Chairman Vanik will hold formal hearings in the fall and if there is additional information desirable I will be happy to supply it.

Attached also is a copy of a memorandum sent to Congressman Steiger in preparation for his forthcoming trip to Geneva. A copy is being issued also to Chairman Ullman. It's intent is to describe in detail the operations likely under EC Regulation 1152/78, the successor to 516/77 which was complained of in the Section 301 complaint and subsequent House and Senate Resolutions.

Best personal regards,

DONALD W. BEDELL.

Enclosures.

STATEMENT OF DIAMOND/SUNSWEET, INC.

Mr. Chairman, it is a great pleasure, on behalf of Diamond/Sunsweet, Inc., to respond to your invitation to submit recommendations on how U.S. laws and regulations can be amended to provide more expeditious relief to U.S. producers from unfair trade practices of foreign countries.

These comments and suggestions are made at this moment against the backdrop of an already unilaterally imposed series of unfair trade practices by the EC against dried prunes and other specialty crops, and with threats of similar action against walnuts.

If we are not to witness the dissolution of a small but prosperous California industry's profitable EC trade, additional modification of Section 301 is an imperative and specific requirement.

It is clear that Section 252 of the Trade Expansion Act of 1962 regarding industry complaints of unfair trade practices of foreign nations was improved by Section 301 of the Trade Act of 1974.

As a practical matter, however, we are unware of any successful resolution of any meaningful allegation about unfair trade practices of foreign nations brought about by the appeal procedures of Section 301.

Certainly, in the case of Docket 301–4 describing the complaint of specialty crop producers in California, the proceedings have been costly to industry, the apparent intent of the Congress when the Trade Act of 1974 was passed has been at least temporarily thwarted, the sense of Senate Resolution 76 and House Resolution 238 has at the least been temporarily finessed by EC internal trade subsidies, and the threat of the continued prosperity of an important segment of California agriculture remains as great, or greater, than before the proceedings began.

Mr. Chairman, you will remember, I'm sure, the House debate in December, 1973. During the part devoted to Section 301, Chairman Ullman declared,

In view of the committee, this revision of section 252 is necessary to protect the interests of U.S. producers and exporters against unfair practices of foreign countries. The revised language will give wide authority to the President, subject to appropriate safeguards, to retaliate against these practices, and will strengthen the hand of the administration in resolving through negotiation disputes which arise by reason of these practices.

Chairman Ullman went on to suggest that the decisionmaking process in the GATT is "such as to make it impossible in practice for the United States to obtain a determination with respect to certain practices of our trading partners which appear to be clear violations of the GATT."

The Chairman further declared that "so long as decisions in the GATT are made on the basis of political consensus of the contracting parties, the United States will have no assurance that questions of consistency with the GATT will be resolved." Finally, he concluded,

The committee believes that it is essential for the United States to be able to act unilaterally in any situation where it is unable to obtain redress through the GATT against practices which discriminate against or unreasonably impair export opportunities.

Mr. Chairman, the subsidy action taken by the EC on June 16 impairs unreasonably U.S. export opportunities for dried prunes and other specialty crops no less certainly than its illegal MIP system which it has now abandoned.

For 2½ years the government failed to resolve the matter of EC Regulation 516/77 and its predecessor regulations, an entirely bilateral matter. We have no evidence at any time that retaliation was contemplated. Rather, the government was content to rest the case on a GATT decisionmaking process which is generally discredited at least in the United States, and which process formed the very basis for writing the language of Section 301 to serve as a counter balance!!

With your permission, we should like to put on this record several quotations from the Senate and House Reports which accompany the legislation and which bear further on the apparent intent of the Congress.

In the House Report, p. 7, "the first U.S. objective is to expand agricultural trade, improve the trading system, and bring about a more efficient international allocation of agricultural resources through further reduction of trade barriers." The internal subsidy plan announced June 16 poses the same curtailment threat to California exporters as did the abandoned MIP system, this time on a price basis instead of on a quantitative and minimum price basis.

Further, the House Report in referring to subsidies, stated, "we want to normalize agricultural trade and place greater responsibility on individual governments to absorb more of the costs associated with agricultural programs (subsidies to keep the farmers on the farm) rather than shifting them to their trading partners." However, the size of the EC production subsidies announced on June 16 amounted to 64½ cents per pound for dried prunes, or *2.7 times* the price received by California farmers!! In addition, the processor receives an 18 cents per pound subsidy. By contrast, California prunes have recently been selling at 55 cents per pound CIF, not including a 9 cents per pound duty, or a total landed price of 64 cents per pound, and a price disadvantage of 18 cents per pound against California product.

In the Senate, responding to the role of Section 301, p. 34, that body's intent was "to assure a swift and certain response to foreign import restrictions, export subsidies, and price discrimination (dumping) and other unfair trade practices through the revision of U.S. laws." We believe it unrealistic to accept 2½ years of continuous threat followed now by reality as swift and certain response.

On p. 163, the Senate Report states, "The Committee intends that these powers (retaliation) be exercised vigorously to insure fair and equitable conditions for U.S. commerce" and goes on to name several representative practices.

Finally, the Senate Report declares on p. 164, "The Committee does not intend that this 'retaliation authority' be a dead letter."

Mr. Chairman, our only interest is to prevent foreign nations adopting methods which cause trade distortions in connection with historically satisfactory exported products, regardless of the name of the method. Some may call a border tax a trade restriction. For others it is a licensing system, quota, variable levy, export subsidy. We believe that an excessive internal subsidy such as that proposed by the EC constitutes fully as much a trade distortion device, a trade disruptive device if you will, as the Minimum Price System, or any of the other schemes contrived internationally to disturb trade.

From our experience with Section 301, we can note the following serious flaws which have had the effect of completely negating what we consider to be the statute's clear intent:

(*a*) No time limit is imposed for Presidential action, as is the case for the Countervailing Duty and Anti-dumping statutes.

(*b*) The President's authority is clearly discretionary, in that he *may* suspend benefits, or he *may* impose duties.

(*c*) No responsibility exists for reporting progress of any negotiations to petitioners, only to Congress.

(*d*) No specific authority exists in the complaint procedure for anticipating future damage by imposition of restrictive trade practices which are commonly known to inflict such damage, as in the case of Walnuts.

Further, in our view, the government's position is seriously flawed in its administration of the statute:

1. The matter of restrictive regulations by the EC is, and ought to be, a *bi-lateral* matter since dried prunes and walnuts are produced almost exclusively in France and in the United States. Failure to insist on bi-lateral negotiations, and instead allowing it 2 years ago to become a part of the MTN and the GATT decision-making apparatus meant falling into the very trap Chairman Ullman warned of in the House debate in 1973; a political consensus arrived at by a panel of nationa *in no way* involved in the proceedings, and with no stake in its outcome.

2. By interpreting the statute, Section 301, as compelling discretionary so far as affirmative action is concerned and delaying the matter for 2½ years, it has not served well the interests of California growers, and it has denied "due process' to many thousands of California citizens requiring the continuation of an uninterrupted flow of product in the export market to the EC.

Mr. Chairman, the threat to these growers by the impact of the new subsidies is very real. It is altogether obvious now the only forum

available to them is the Congress to resolve their complaint that the EC means to withdraw itself as a profitable short term market for their products, and to withdraw itself entirely in the long term.

In view of our experience so far in the matter of dried prunes and other specialty crops, we offer the following recommendations for changes in Section 301 of the Trade Act of 1974:

1. Adoption of specific criteria to be used in determination of unfair trade practices applied by foreign entities, by the President.
2. Establishment of a time period for the President for consideration of evidence of unfair practices, not longer than 6 months after application by industry petitioner.
3. Statutory provision for consultation with responsible Committees of the Congress and affirmative action required within 30 days following consideration of evidence assembled.
4. Provision for petitioners to supply data to the President and to participation in any hearing held in connection with the matter.

We appreciate the opportunity to put this statement in the record, and will be prepared to discuss further any of these matters at the pleasure of the Chairman.

MEMORANDUM

To: William A. Steiger, Member of Congress.
From: Bedell Associates.
Subject: EC Regulation 1152/78, Production Subsidy Analysis for Dried Prunes.

Production subsiides in the EC for specialty crops are new. In addition, all the details of the proposed plan are not yet completely available. As a result the experience level and knowledge level for these particular schemes is sketchy.

But, production subsidies per se are not new, and, based on some numbers available from EC Brussels and our own information concerning subsides of this type, several relevant observations regarding likely impact on California prune growers trade to the EC are offered.

First, the production and grower subsidies adopted by the EC on June 16 constitute a *replacement* for its MIP system abandoned now and generally regarded as illegal in most circles in the U.S. and finally declared so by a GATT panel on June 16, the effective date of the EC Regulation which is the subject of this memo.

Second, the numbers are curiously similar to what was understood to be the MIP structure had that device for import restriction been preserved.

Third, the EC is clearly committed to a "Mediterranean" agricultural policy which, when added to the Mediterranean Preference Scheme of the mid-1960's and the Lome Convention completed just before the Trade Act of 1974 was passed, provides the EC with the economic long term foundation for a completely exclusive preferential system for at least specialty crops, at the expense of any other country or combination of countries in the world.

Fourth, the subsidy scheme described in EC Regulation 1152/78 contemplates a 64½¢ per pound minimum price to the growers, exclusively in France. The funds are to be disbursed to the growers through the processors who, after agreeing with the growers to the 64½¢ payment then can collect 18¢ per pound as their subsidy. The grower subsidy is 2.7 times the price typically received by California growers during the past 3 years, at 24¢ per pound.

Fifth, we calculate, on the basis of an economic study in France 2 years ago, that California growers are on average 33% more efficient all factors considered than the average French farmer. That makes a 32¢ per pound return to growers roughly comparable to the 24¢ per pound in California. The EC has *doubled* that figure, to 64½¢ per pound, for the purposes of this regulation.

Sixth, nearly 50% of French prune production is done through co-operatives where processors and growers are in fact one entity. On that basis, the pricing latitude offered these grower/processor groups in meeting U.S. competition is absolutely devastating.

Seventh, U.S., or California, prune growers offer product in the EC at 55¢ per pound CIF during the past 2 years. When the duty is paid, 16% ad valorem

or about 9¢ per pound, the landed price is roughly 64¢, a most unusual coincidence since the French grower price is 64½¢ under the regulation.

Eighth, based on current U.S. pricing of prunes to EC, the French processor has an 18¢ per pound advantage in the EC market and, for co-operatives the advantage could be as high as 32¢ per pound if the excess over a fair return of 32¢ per pound and the net 46¢ per pound net acquisition price of the processor is considered (64½¢ less 18¢ processing subsidy=46½¢ net processor cost, less 32¢ fair return to growers=32¢).

Bill, in our view the production subsidy is nothing more than an MIP in different form. Obviously, we can have no complaint if the EC wants to dip into its own pocket and pay its farmers, rather than to take it out on border duties or other border restrictions. But, quite obviously any subsidy can be pegged at a level that it is guaranteed to achieve the very trade distortion objective that in this case the U.S. has complained of.

It has been our opinion from the beginning that this entire matter should have been handled by the government as a bi-lateral matter with the EC. Instead it was allowed to become an MTN matter involving many other countries in a GATT proceeding with which the other countries had, and will not have any stake whatever.

Diamond/Sunsweet, Inc. must reserve its rights under GATT and under the Trade Act of 1974 if in fact these subsidies cause trade distortion, and we would hope that we could still merit the support of the House and Senate if the EC cannot now be persuaded to believe that this move is a serious violation of the spirit of the Trade Act of 1974 and the very foundation of GATT itself.

What options are available?

(1) U.S. threat of retaliation unless the subsidies are reduced to a realistic price, along the lines described above, and the EC must agree not to indulge itself in further adjustments without consultation.

(2) The threat that negotiations concerning imports of dairy products from the EC to the U.S. would be ended, or the U.S. would follow a similar unilateral course and reduce imports of Section 22 products, without some agreement on specialty crop subsidies.

(3) The threat that intransigeance on this matter, together with intransigeance on other subjects could form the basis of Congressional dis-satisfaction with the shape and course of the MTN.

(4) Reminding the EC that the Trade Act of 1974 does not expire until the end of 1979 and that certain retaliatory provisions of the Act remain in force after that period.

(5) Reminder that U.S. producers will continue to monitor pricing actions taken by French producers and processors and will be prepared to petition U.S. government for redress of its grievances.

Bill, these sound hard; "retaliation" for example. Yet, as you know that threat is as much a part of commercial life, and as much a part of U.S. law, including Section 301 of the Trade Act of 1974 as any other provision. Ambassador Strauss has employed threats on the Japanese and the EC on other matters not as large, but no less gross in implication.

During your stay in Geneva, you might consider seeking answers to the following questions:

(1) Does the EC plan to provide specific assistance to French growers to increase production?

(2) Will the EC provide assurance that the subsidy program is in fact to help farmers at the present level of production and that should planting increase because of the new found prosperity appropriate reductions will automatically be made?

(3) Will the EC guarantee that subsidy payments are negotiable with the U.S. if they in fact become trade distortion devices?

(4) Does the EC plan any similar action with regard to walnuts, which prospect has been projected many times during the past 3 years, as you know?

I appreciate very much indeed your willingness to take on the task of being our emissary in these important negotiations. The specialty crop growers in California are industrious, productive, imaginative and deserving. They receive no federal subsidy; the single tax of co-operatives in the U.S. is matched by the single tax of co-operatives in France.

I plan to return to Washington on July 3, but will be in constant touch with my Washington office. Please let me know in whatever way I can be helpful.

WASHINGTON, D.C., *April 14, 1978.*

JOHN M. MARTIN, Esq.,
Chief Counsel, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. MARTIN: The following is submitted in response to Chairman Vanik's invitation of February 6, 1978, for recommendations and comments for legislation to restructure and simplify the U.S. law and its administration in the area of unfair trade practices.

The changes suggested on your invitation are responsive to a number of problems that I encountered when I was Assistant Chief of the Foreign Commerce Section in the Antitrust Division, U.S. Department of Justice, from 1970 to 1973, and which I observed from a different perspective in the White House Counsel's office from 1973 to 1976. I am also concerned with these problems in research I am presently doing for a book dealing with government regulation of competition, both domestic and international.

A detailed analysis of improvements in the present legislation would make this submission much too lengthy, though I would, of course, be willing to elaborate later for the staff or in hearings on whichever of the points summarized below you may wish to pursue in greater depth.

1. The concept of "dumping"

"Dumping" is a term nowhere defined in the 1921 act and the two differing standards which it uses—"foreign market value" and "fair value"—reflect an unresolved conflict in the original legislation. The essence of the problem is that dumping is a very imprecise term that has been applied to a variety of situations, some of which do, and others of which do not, amount to unfair competition.

A major problem resulting from this confusion is the issue of whether meeting competitive prices in the U.S. is a defense to a dumping charge. Since the injury determination was transferred to the Commission, the defense of meeting competition was, until recently, allowed as a basis for finding no injury. The meeting competition defense is basic to our domestic price discrimination legislation, the Robinson-Patman Act. Should this defense not be allowed in dumping cases, and as part of the fair value determination as well as injury?

The lack of a clear concept of dumping is also reflected in the common perception of the Treasury's investigation by lawyers on both sides as an incoherent numbers game, unpredictable and irrational in result. The computation of the foreign market value involves a highly technical formula that is subject to arbitrary decisions on whether particular items of cost should be allowed or disallowed, and this kind of technical detail can swing the decision either way, without any judgment being made as to whether the prices were set to achieve some unfair competitive object.

2. Administration of the antidumping law

This same conflict over what dumping is has made the administration of the law an anomaly. The original concept, embodied in the House bill, would have avoided all issues of unfair competition and simply imposed a tax on the difference between the higher price at which goods are sold abroad than in the United States. That is why the administration was lodged in the Treasury Department. The Sen-

ate amended the bill to restore the concept of unfair competition by adding the term "fair value" with respect to the U.S. selling price. The administrative scheme was not altered, however, and the Treasury Department, which has no expertise in unfair competition, has administered the statute essentially as if the House version of the bill had not been amended by the Senate. The International Trade Commission, too, lacks expertise in the field of unfair competition.

The two-step proceeding involving two different agencies, in which Treasury makes a finding on whether sales have been made at less than "fair value" and the International Trade Commission makes a further finding whether such sales are causing injury to a domestic industry, adds to the awkwardness of the whole proceeding. As noted below, it is an obstacle to judicial review; but it also has a prejudicial effect on importers as to which the Treasury finds sales at less than fair value. Technically, dumping is not established absent a finding of injury, but the public at large, and possibly some members of the International Trade Commission, take the view that the Treasury has already found dumping to exist. In past years, the Tariff Commission treated the injury finding as part of the substance of the charge of dumping, as in its acceptance of the meeting competition defense, for example. The separation of these two findings has therefore had an impact on the substance of what amounts to dumping that does not appear to have been intended.

3. Judicial review

In dumping cases it is practically impossible for an importer to obtain effective judicial review of an erroneous determination by either the Treasury or the Commission, especially the former. Jurisdiction is vested exclusively in the Customs Court, which can only reach the merits of an appeal through a suit to recover duties assessed under the Act. This is frustrated in several ways. First, if the Treasury finds sales at less than fair value but the Commission finds no injury, the importer stands labeled as a dumper with no basis on which to appeal the Treasury's finding, which can be damaging to his commercial relationships. Second, the actual imposition of duties, which is a prerequisite to suit to recover them, is frequently delayed substantially. (The Treasury has only this year set duties on Japanese television sets imported in 1972 and 1973). Moreover, since the duties only apply if the price is below a certain level, the common practice is to raise the price in lieu of paying duties. Not raising the price in order to preserve a possibility of appeal entails an obvious financial risk in view of the substantial delays that so often occur.

Two beneficial reforms would therefore be: (1) to provide judicial review immediately following the completion of the dumping finding, without requiring a suit to recover duties; and (2) consolidate the fair value and injury findings into a single decision that would be immediately subject to such review.

With respect to imports generally, the law remains in a very backward state in terms of due process, based on the obsolete notion that importers have no rights, only what Congress gives by discretion. Congress should exercise that discretion to assure some reasonable control over administrative agencies that are vested with arbitrary power over very substantial amounts of trade and dollars.

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4. Procedural reform

The determinations under all of these statutes are adjudicative in nature but are not generally conducted in accordance with the Administrative Procedure Act. One particularly serious defect is the treatment of confidential information. It is inherently unfair when material evidence is withheld from counsel for any party on the ground that it is proprietary. Some procedure should be worked out to accommodate the conflicting interests.

5. Uncertainty and delay

Domestic industries complan that the proceedings take too long to be effective, and importers that the withholding of appraisement damages their business severely before an actual dumping finding has been made.

6. Overlapping of antidumping, Section 337, countervailing duties, antitrust and Section 5 of the Federal Trade Commission Act

As the Committee's invitation suggests, there is substantial overlap between the cited trade laws and antitrust statutes, as well as Section 5 of the Federal Trade Commission Act. Whatever the solution, there is both a substantial overlap of legal concepts among these various statutes, and of agency jurisdictions over the same subject matter. Moreover, to the extent that the International Trade Commission and the Treasury Department are involved in deciding questions of unfair competition, they are operating outside their respective fields of expertise. The suggestion for a new, single agency appears to have considerable merit, but consideration should also be given to lodging this function in an existing agency which already has expertise in unfair competition under an almost identical statutory mandate—the Federal Trade Commission. (The FTC opposed such a transfer as part of the Trade Act of 1974; but the new leadership at the Commission, and the special concern of the current administration with matters of government organization might warrant raising the question again.)

Substantively, the broad concept of unfair competition embodied in Section 337, if it were accompanied by a more flexible set of remedies than are now available under that statute, may render a separate dumping statute unnecessary, as some commentators have already urged. The drastic remedy of barring imports altogether under the existing law could be replaced by a broad administrative remedial power that would enable the agency to tailor the remedy to the individual problem. Such a reform would add to the appeal of this section as a substitute for dumping legislation, because the duties mandated by that law are another form of unnecessary rigidity.

In sum, the existing legislation is procedurally awkward, conceptually confusing and generally impractical as a remedy for the problems it was intended to solve. The recent resort to "trigger prices" because of dissatisfaction with the normal statutory procedure is one particularly dramatic example of this.

7. Conflict with antitrust enforcement

Settlement agreements in dumping cases, with or without participation by the Treasury Department, entail a risk of agreements between private parties to limit competition among themselves that could raise serious questions under the antitrust laws.

8. Countervailing duties

The present statute takes a crude, sledgehammer approach to one of the most difficult, sensitive, and complex problems in international trade. Here, too, the essence of the matter is unfair competition, but the remedy is fashioned as a simple matter of taxation.

The problem of unfair competitive advantage as the result of numerous forms of state subsidization is both difficult to establish factually in particular cases and even more difficult to remedy. Experience thus far suggests that diplomacy may be the most realistic means of coping with the problem. But there must also be a very sophisticated technical staff to make the necessary factual judgments, and the automatic resort to a prohibitive tax should be eliminated.

I have omitted from the foregoing list the commendable objective of bringing U.S. law into closer accord with the International Antidumping Code. My reason is that the Code was drawn up largely in reaction to complaints about the U.S. law and the Code itself incorporates some of the anomalies of the 1921 act as it has been administered. It would seem preferable that the Congressional review wipe the slate clean and draw up a statute based on a sound concept, unconstrained by former law or the International Antidumping Code.

That the need for an in depth Congressional review in this field of law has long been recognized and action too long postponed is attested by the following quotation from a House Report recommending a minor change to the Antidumping Act in 1958:

> Suggestions have been advanced for the amendment of the Antidumpting Act to provide for a statutory definition of "fair value," definition of the terms "injury" and "industry," judicial review of the determinations of the Treasury Department and the Tariff Commission, Presidential review of dumping findings, etc. Consideration of these aspects of the Act would involve reexamination of the basic policy issues involved in antidumping legislation. There is a wide divergence of views as to what the appropriate policy objectives of antidumping legislation should be and how they may best be implemented. . . . Your committee is of the opinion that these matters require careful and detailed study and that amendment of the Act in these respects would be premature. The amendments to the Antidumping Act contained in H.R. 6006 are of a technical nature and do not involve any changes in the basic policy of the Act. H. Rep. No. 1261, 85th Cong., 1st Sess., (1958) p. 2.

No such comprehensive Congressional review has yet been made.

The changes proposed in your statement of issues are an encouraging sign that this long overdue review of antidumping and other unfair trade legislation is seriously underway. I wish your Committee every success in completing this work that you have so ably begun.

Sincerely,

DUDLEY H. CHAPMAN.

COLD FINISHED STEEL BAR INSTITUTE,
Washington, D.C., May 11, 1978.

Mr. JOHN M. MARTIN, Jr.,
Chief Counsel, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. MARTIN: I am writing in response to the request of Congressman Vanik that interested parties submit recommendations for amendments to U.S. laws relating to unfair international trade prac-

tices. Our recommendation relates to the Antidumping Act of 1921, 19 U.S.C. § 160, et seq., specifically the provisions therein concerning the determination of "constructed value," 19 U.S.C. § 165, as amended.

Our recommendation grows out of our representation of the Cold Finished Steel Bar Institute. That group has followed carefully the program recently instituted by the Treasury Department to establish a series of so-called "trigger prices" by which the Department hopes to determine quickly whether sales of imported steel products at less than fair value are taking place. The trigger prices were purportedly calculated on the basis of the costs of production of the various products in the most efficient exporting country, Japan. These calculations have generally resulted in reasonable trigger price levels. However, one anomaly has developed that could undermine the value of the program and could, we fear, substantially weaken the provisions of the Antidumping Act.

This anomaly occurs when costs of production are calculated for steel mill products made from other, semiprocessed products. Both the finished product and the semiprocessed product may have trigger prices, each ostensibly reflecting costs of production. However, in calculating the cost of production of the finished product, the Treasury has not necessarily assigned a cost for materials attributable to the semifinished product equal to the trigger price on that product. To illustrate, cold finished steel bars are made from wire rod or hot-rolled bars. In calculating the Japanese costs of making cold finished bars, the Treasury failed to use as a raw material cost (for wire rod or hot-rolled bars) the same costs it had previously incorporated into the trigger prices for wire rod and hot-rolled bars. Instead, Japanese cold finished bar producers were permitted to use a raw material cost substantially below what the Treasury had determined to be the cost of production for those products. The end result is that Japanese cold finished steel bar will be permitted to enter the United States at substantially below its true cost of production.

The Treasury takes the position that the Antidumping Act does not reach arm's length transactions under which foreign producers acquire their raw materials, even if the price at which those materials are purchased is substantially below the cost of production. We believe that this interpretation does not meet the objectives of the Antipricing program and is inconsistent with the objectives of the trigger dumping Act, which is intended to prevent injurious sales of imported products in the United States at less than their fair value. Moreover, the possibilities for abuse of the Antidumping Act under that interpretation are substantial, and the problem is compounded in dealing with a country such as Japan where joint activities, common membership in trading companies and control through banking enterprises makes the concept of an arm's length transaction exceedingly elusive.

If the Treasury position is to prevail and its interpretation of the Antidumping Act to be applied, we believe that an amendment to that Act is necessary. The legislation that we propose would amend section 206 of the Act (19 U.S.C. § 165) to require expressly that, in calculating the "cost of materials" as an element of constructed value, sale prices shall be disregarded (1) if the sale price does not fairly reflect the true cost of production of the raw material and (2) the raw mate-

rial in question constitutes at least 50 percent of the cost of the finished product. Draft language that would achieve this result is appended hereto.

We thank you for your consideration of this issue. We request that, when the subcommittee schedules hearings on these recommendations, we be given the opportunity to appear and testify.

Sincerely yours,

MURRAY J. BELMAN.

PROPOSED AMENDMENT

Subsection (d) of section 206 of the Antidumping Act of 1921, as amended, (19 U.S.C. § 165(b)), is hereby amended by adding the following:

"The cost of any material included in the determination of constructed value made under subsection (a) of this section shall be the higher of (1) the price at which the said material was purchased by the foreign manufacturer of the imported merchandise and (2) the constructed value of the said material as determined by applying thereto the calculations of subsection (a), unless the purchase price and the constructed value of the said material are each less than fifty per cent of the constructed value of the imported merchandise."

STATEMENT OF JOHN E. KAISER, JR., CHAIRMAN, COMMITTEE OF DOMESTIC STEEL WIRE ROPE AND SPECIALTY CABLE MANUFACTURERS

I am pleased to respond to the press releases of the Subcommittee inviting comments on the administration of the Antidumping Act of 1921, as amended, and other trade laws of the United States. The Members of the Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers, whom I serve as Chairman, are set forth in Attachment I hereto. Together, the Members of our Committee represent over nine-tenths of the steel wire rope production capability of the United States, and employ three thousand or more workers.

Steel wire rope products are basic to all major segments of the United States industry—to our national economy and security. The major application of general wire rope use includes elevators, oil and gas drilling, coal and phosphate mining, industrial cranes and hoists, logging, maritime rigging, and general construction. Specialty cables are used in aircraft and military specifications, automotive, boating and various recreational vehicles and other market areas.

Steel wire rope imports have been the subject of concern to Members of the Committee for many years. Heavy imports into certain regional markets produced an antidumping complaint in 1972, which resulted in a dumping finding (T.D. 73-296) against Steel Wire Rope from Japan. However, though we were successful in proving dumping—at considerable time and expense—we have found that the provisions of the Antidumping Act of 1921, as amended, do not supply adequate relief from the unfair trade practices which are so injurious to our Committee.

The aim and purpose of our American antidumping laws is a correct and important one: the elimination of less than fair value sales causing injury to American industry. American manufacturers cannot compete for long against artificially low priced imports. In the case of the steel wire rope industry, six plants have closed between 1968–1973, one com-

pany is in Chapter XI proceedings at the present time and has been certified for trade adjustment assistance due to adverse import impact, and other companies are operating at marginal profit levels, with further plant closures during this year. The Committee presently supports a second antidumping investigation initiated by the Treasury Department in 1977—this second investigation focuses on the greatly increased penetration of less than fair value imports of Korean steel wire rope. But we are not sanguine about the chances for lasting or quick relief under the Antidumping law as it is now administered by the United States.

We will briefly enumerate the problems we have experienced with the Antidumping law and its implementation during the course of two investigations, first in 1972–73 and presently in 1977–78. With these problems as background, we submit recommendations with regard thereto.

1. Both in 1972 and in 1977 our Members filing petitions under the Antidumping statute were required to expend considerable amounts of time, trouble and money to accumulate the information which Customs Regulations require for the initiation of an antidumping investigation. Particularly in 1977, the Customs requirements of indications of foreign home market prices or costs of production were difficult to meet. Individual firms are hardly in a position of collecting data about Korean steel wire rope costs of production. The problem of providing detailed U.S. and foreign industry profiles and pricing data is complicated also by the antitrust laws of the United States, and by the simple unavailability of certain types of specific data in the format requested by the Customs Service Regulations. Thus, there are no separate, officially-gathered statistics available on the levels of unemployment or underemployment among steel wire rope and specialty cable workers. In the face of Customs officials requests to provide information with respect thereto prior to the initiation of an antidumping investigation, small firms and special product lines divsions are put to a frequently insuperable task. The Antidumping statute may remain a dead letter for those unable to finance or hire specialized legal and economic consultants.

Recommendation 1.—Shift the burden of initiating antidumping investigations to the Department of the Treasury or other appropriate agency; provide for technical assistance to domestic manufacturers in collecting and preparing data for proof of dumping and injury.

2. The Members of the Committee have had to come to terms with the long lead-times built into the application of the Antidumping law to the marketplace. From the time of Member recognition of the unfairly priced imports in the early 70's to initiation and processing of the investigation into injurious Japanese less than fair value steel wire rope imports, to the drawing up of a master list from which to assess dumping duties on steel wire rope which had already had its effect on the marketplace, to the first small assessments of duties in 1974/75, to the realization that dumping of Japanese steel wire rope had shown the way for Korean dumping, to the accumulation of new data on Korea's improbably low prices, to the preparation and initiation of the second antidumping investigation, to the anticipation that the Trigger Price Plan might help steel wire rope manufacturers, . . . and that brings us to 1978. Millions of feet of foreign steel wire rope from

Japan and Korea have come in almost untouched in the meantime, to the injury of the American industry trying to help itself.

The latest evidence of the slack which is built into the Antidumping law came on May 1, 1978. On that day, the Treasury Department would under the statute's mandate of a six-month investigation have been required to announce its determination of less than fair value sales. While the statute mandates a six-month investigation, it has been the norm for the Treasury Department to make use of a provision permitting nine-month investigations if a tentative determination is reached by the sixth month. So we were prepared possibly to be advised tentatively of dumping margins, with the consequence of withheld appraisement for Korean imports, and a further three-month investigatory period, totalling nine months. But there is a further provision in the statute for another three months of investigatory time—making a total of twelve months from date of initiation—if the Treasury Department deems the case "complicated". Only the close watch of specialized counsel, the experience of Committee Members, and the assistance of Members of Congress has prevented a full twelve months period being consumed by the Treasury Department to analyze a case in which, except for country of origin, there has already been a precedential investigation. The Committee counts itself lucky at having received only a "one" month extension due to "complexity", on May 1, 1978.

Recommendation 2.—Impose a nine-month limit on Treasury Department investigations, except where a prior finding exists, when a six-month maximum should be imposed, eliminating the provision for "complex" cases; provide additional funding or staff or both for U.S. customs service.

3. During the months of Treasury Department investigation, there is no incentive for foreign importers to answer the Treasury Department's questionnaires in a timely fashion, with the possible exception that the American manufacturer's data will stand undisputed if no questionnaire response is given. During the time that Customs Service is collecting and verifying the questionnaire responses, the U.S. manufacturer has had to continue to suffer the effects of cheap imports. Indeed, the imports of steel wire rope have in some cases picked up upon the initiation of the antidumping complaint, as low-priced stocks began to be built up behind the possible increased duty, if any. Thus, the legitimate use by American manufacturers of their statutes has served to injure them even further as foreign manufacturers are on the one hand alerted that the free ride may come to an end, while on the other hand given the throttle to obtain as many last go-rounds as they wish. Although the Customs Service Regulations spell out the statutory provision for retroactive withholding of appraisements, little or no use of this potentially useful device has been made by the Treasury Department. Retroactive withholding of appraisement, even if only implemented once or twice, would serve as an *in terrorem* measure to signal that the initiation of an antidumping complaint is the time to "straighten up and fly right".

Recommendation 3.—Require Treasury to impose retroactive withholding of appraisement whenever questionnaire responses are not received within two months of delivery thereof; require Treasury Department to impose retroactive withholding of appraisement to

date of initiation of investigation whenever imports of articles increase more than a given amount from a comparable period prior to filing of the antidumping petition.

4. Committee Members have experienced the long delays, as outlined previously, that occur after the publication of a dumping finding before the assessment of dumping duties occurs. We support proposals that would require the assessment of duties within twelve-months after the end of each quarter. Our special counsel remains involved with providing information about the pricing, costs, and specifications on steel wire rope during 1975 and 1976 as of this date in May, 1978. This is being done to assist the understaffed Treasury Department charged with assessing dumping duties from master lists which it must laboriously draw up in confidence and usually without the benefit of commodity expert advice. Thus, we support proposals to have Customs make available meaningful nonconfidential summaries of the foreign producers' and importers' master list questionnaire responses. We support the disclosure by Customs from time to time of any changes in its methods of calculating dumping duties. The disclosure of such information pertaining to master list questionnaire responses and methods of dumping duty calculation would help the American steel wire rope producers determine if the Japanese are attempting evasions of the law, and ensure that the Koreans, should a dumping finding be entered, do not evade the intent of the statute.

Recommendation 4.—Impose twelve-month deadline for assessment of dumping duties on entries of articles subject to a dumping finding, by quarters; provide for disclosure of non-confidential summaries of master list questionnaire responses and disclosure or confrontation hearing or both at yearly intervals after the dumping publication to allow for review of methods of dumping duty calculation.

5. Even if master lists are drawn up in timely fashion, and assessments are duly made, Committee Members remain concerned that these assessments occur in a manner and at a time so far removed from the initial decision to import less than fair value articles that the deterrent effect of the law is almost completely vitiated. Anyone who violates a criminal law often ends up in jail; our trading partners in Japan and Korea have, we believe, consistently violated our antidumping law. The counterpart to jail in foreign trade would appear to be in embargo. Repeated violations of the law by imports of less than fair value from a specific foreign country should trigger a review by the U.S.I.T.C. with proper remedial action available. More teeth must be put into our antidumping law. The strongest remedial action would be an embargo on all imports until our government receives assurances that proper controls are being established on exporters to comply with our laws. This places the cost and responsibility for compliance upon the violators.

Recommendation 5.—Provide for USITC review of dumping duty assessments at one year intervals after a finding; provide for an embargo order to be imposed on all imports of articles from specific countries which have repeatedly violated the United States dumping statute, such embargo to be applicable to specific articles or all articles from a specific country.

6. Members of the Committee have given consideration to other methods of assuring compliance after a dumping finding apart from

the procedures spelled out above. During the dumping case against the Japanese in 1973, Committee Members stated that they would be receptive to a discontinuation by the Secretary of the Treasury under Section 153.15 of the Customs Regulations, based on assurances from the Japanese manufacturers and importers, provided that such assurances were policeable through the establishment of a proper reporting system of entries of Japanese steel wire rope. Enforcement of a dumping finding could be implemented more swiftly if public reports on entries under dumping finding were made in lieu of assessment of dumping duties: that is, that provided assurances were given and kept and reports of values of imports were filed as entered, no dumping duties would be assessed nor master list questionnaires sent out. At the end of a twenty-four month period from the date of the dumping finding, the respondents choosing this route would automatically be relieved from further reporting requirements and the antidumping finding.

Recommendation 6.—Provide alternative action after dumping finding whereby importers chosing to give assurances, subject to double assessments if broken, are relieved from assessment of dumping duties conditioned upon public reporting of all entries subject to the finding; provide for twenty-four month termination automatic termination date if this method is chosen.

7. The Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers has had experience over the last several years in addressing the problem and consequences of foreign, low value, unfairly traded imports. The Committee is greatly concerned about a consequence of the less than fair value imports from the Republic of Korea. The Republic of Korea is at present a beneficiary developing country for purposes of the Generalized System of Preferences. Despite predictions that removal of the MFN duty on steel wire rope imports for purposes of GSP would wreak injury on an American industry already sensitive to imports as determined by the Treasury Department in T.D. 73-296, steel wire rope was placed on the list of articles eligible for duty-free treatment when imported from a country such as Korea. Thus, despite clear findings in the U.S.I.T.C. investigation of the steel wire rope industry in 1972-73 that the Western regional market, to name one example, was sensitive to imports, another powerful Asian trading partner was given the go-ahead signal on imports of steel wire rope by the removal of the duty with respect thereto. The Committee feels that one of the consequences of a dumping finding should be the automatic exclusion of the subject articles from eligibility for, or further duty-free treatment under, the Generalized System of Preferences.

An additional reason for this recommendation is that the present competitive-need limitation and value-ceiling on GSP imports can be evaded by less than fair value imports. This is an evasion of the Congressional intent that GSP not work to the detriment of the American industries which have experienced import impact. An example will suffice to tell the story: under present law, if Korea has exported to the U.S. a quantity of steel wire rope equal to or exceeding 50 percent of the appraised value of the total imports of steel wire rope during a calendar year, then Korea should be excluded from GSP benefits on its steel wire rope. If however the value of the Korea's imports are ar-

tificially kept under 50 percent because of less than fair value pricing, this Congressional limitation on duty-free imports is not triggered. The Committee feels that a consequence of the initiation of an antidumping investigation should be that the GSP value limitation be reduced from 50 percent to 33 percent of the appraised value of the total imports of the article during a calendar year.

Recommendation 7.—Add a clause which prohibits articles under dumping findings from receiving benefits under Title V of the Trade Act of 1974 and requires the removal of articles receiving GSP benefits at the time of a dumping finding from the continued eligibility; require President to reduce from 50 percent to 33 percent the value limitation contained in Section 504 of the Trade Act of 1974 upon the initiation by the Treasury Department of a dumping investigation.

In summary, the Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers believes that the current administration and in part the provisions of the Antidumping Act have proven to be less than effective. We urge that the Act be amended to promote the effectiveness of a dumping finding as a remedy for unfair pricing practices and to promote the enforcement of the Act that the additional amendments in the Trade Act of 1974 be made.

ATTACHMENT I

COMMITTEE OF DOMESTIC STEEL WIRE ROPE AND SPECIALTY CABLE MANUFACTURERS

Armco Steel Corp., Kansas City, Mo.
Bethlehem Steel Corp., Bethlehem, Pa.
Bridon-American Corp., Wilkes-Barre, Pa.
Broderick & Bascom Rope Co., St. Louis, Mo.
E. H. Edwards Co., So. San Francisco, Calif.
Macwhyte Co., Kenosha, Wis.
Paulsen Wire Rope Corp., New York. N.Y.
Rochester Corp., Culpeper, Va.
Universal Wire Products, Inc., St. Joseph, Mo.
Wire Rope Corp. of America, Inc., St. Joseph, Mo.

STATEMENT OF THE CORDAGE INSTITUTE, CHARLES H. ABBOTT, PRESIDENT

The Cordage Institute respectfully submits the following comments on U.S. laws and regulations that provide relief for domestic industries from unfair practices affecting import competition per your release of February 6, 1978.

The Cordage Institute is a nonprofit association of rope and twine manufacturers of the United States who produce approximately 85 percent of the total hard fiber and synthetic fiber rope and twine produced in the United States.

Since 1950 the U.S. cordage industry has gone through a period in which imports of hard fiber rope and twine have gradually overtaken the U.S. market and have virtually destroyed the U.S. cordage manufacturing capability in hard fiber rope and twine. In 1950 there were 22 companies producing hard fiber rope from raw fiber and they had about 95 percent of the U.S. market. Today there is one company producing such rope from raw fiber. A similar situation has developed over the years in the hard fiber farm and industrial twine market. For example, in 1950 there were fifteen companies producing hard fiber

farm twine used by American farmers. In 1951 the duty was removed from imported sisal farm twine and today only one manufacturer still produces such twine in the United States. The U.S. manufacturers' share of that market has dropped from 85 percent in 1950 to 8 percent in 1976. Attachments A, B, and C are tables summarizing what has happened to the U.S. hard fiber cordage industry from 1950 to 1976.

We are greatly concerned lest such a history repeat itself in the synthetic cordage business. Imports of synthetic stranded rope from Korea (TSUS 316.6020) have been increasing dramatically. In 1973 imports of this item from Korea were 28,518 pounds. In 1977 the poundage had increased to 1,365,923 pounds, an increase of over 4,600 percent. Korean imports of stranded synthetic rope as a percentage of all such imports have also been increasing rapidly—from 4.5 percent in 1973 to 66 percent in 1977 (see Attachment D).

It was this concern over the impact of synthetic stranded rope from Korea that the Cordage Institute filed a countervailing duty petition on October 28, 1976. On November 3, 1977, the Treasury Department announced its final countervailing duty determination. A copy of the petition and the Federal Register notice are Attachments E and F. The Customs Service found that the aggregate ad valorem benefits administered by the Government of Korea to the manufacture, production or exportation of cordage to be 0.15 percent during 1975 and 0.17 percent in the first six months of 1976, amounts which were considered de minimis.

In talking to the Customs official about the "investigation" performed by the Treasury Department, it was emphasized that it is Treasury policy to gather information from the country's government officials, in this case, the Republic of Korea. The Customs attache in the U.S. Embassy in Tokyo was directed to complete a questionnaire on the financing and tax-incentive programs of the Korean Government to the manufacturers of cordage. The information for this questionnaire was obtained by correspondence by our attache to Korean government officials. Further, this correspondence is not available for public inspection.

We question the validity of this type of investigation, the limitation to a simple exchange of "official" letters, and feel that at a minimum, direct examination of the records by U.S. Government officials of foreign manufacturers and other inquiries as may be necessary to obtain the facts is warranted.

A broader and more realistic definition of what constitutes a bounty or grant is required. This stronger mechanism to identify and measure foreign government subsidization of industries involved in international trade is an absolute necessity. The growth of government-owned or controlled enterprises among our trading partners constitutes a major and growing threat to our industry. Our statutes have been largely drawn from a private enterprise model. The growth of government participation among our trading partners is often motivated by political and public policy considerations, such as employment and foreign exchange criterion rather than by the classical free market supply-demand relationships that rule our American markets. Our statutes and philosophies must be amended to reflect these realities.

Our recommendations of what benefits should be added to current law as to what constitutes a bounty or grant would include:

(1) the exemption or refund of a commodity tax,

(2) the remission of commodity and textile taxes on imported goods when such goods are incorporated into an exported product,

(3) the remission of direct taxes such as income taxes imposed on the producer,

(4) monetary incentives, such as allowing an additional exchange rate,

(5) the refund of a percentage of the amount of the invoice of the product exported against any internal tax owed by the manufacturer,

(6) the difference of obtaining the raw material at a price much lower than the international price for similar materials.

As an example of the last item, polypropylene resin, a necessary component for the production of polypropylene cordage and twine, is produced in South Korea by a government-owned plant.

While we have no direct experience with the Anti-Dumping Act, we feel that this and the countervailing duty procedures should be simplified, replaced by a single statute with jurisdiction by a single department or agency, with an immediate course of appeal if the determination is negative.

Our basic concern is that we maintain a solid manufacturing base in the United States to produce all types of cordage to meet all requiremtns—military, maritime, indsutrial and farming. A flood of imports of synthetic cordage would ultimately result in a general weakening of the industry: a repeat of the demise of the hard fiber cordage industry.

During World War II, when the manila and sisal fibers for cordage were impossible to obtain, the American cordage industry pioneered the substitution of synthetic fiber for natural fibers. And so, for the first time in the history of the U.S. cordage industry, the oldest industry in the United States, the development of suitable manmade fibers for cordage products can eliminate total reliance on offshore sources for either raw materials or finished products. The direction of the industry is clearly one of greater and greater use of manmade fibers, for there the future of the domestic cordage industry lies.

We as an industry do not believe in protecting inefficiency and we look forward to continuing—as long as everyone is playing by the same rules. But today not everyone is playing by the same rules, and more importantly, the rules themselves are outdated.

American cordage manufacturers face much greater government regulation. Workplace safety regulations under OSHA, toxic substance controls, product liability, energy legislation are adding to our competitive burdens—as are air, noise, and water pollution abatement. While the cordage industry recognizes and supports the need for quality of life goals, we are facing these added costs to the detriment of our competitive position.

We pray that your Subcommittee, and ultimately the Congress, will be responsive to the changing realities of trade. Any success at reaching protectionist tendencies worldwide should not, and cannot, be at the expense of American industry and American workers.

Attachment A

ROPE—HARD FIBER

[Units in million pounds]

Source	1950	1952	1954	1956	1958	1960	1962	1964	1966	1968	1970	1972	1974	1976
IMPORTS														
Philippine Republic	4.3	4.4	2.5	5.5	5.4	4.6	5.2	5.8	5.7	5.5	5.9	6.8	9.6	2.19
Portugal	(1)	(1)	(1)	(1)	(1)	.4	.4	1.2	1.8	1.8	3.0	2.4	.5	1.1
Mexico	1.3	2.5	2.1	2.5	3.0	3.5	3.3	4.3	6.1	6.8	5.8	10.3	10.8	7.1
Other	1.7	1.3	1.6	.9	1.9	1.4	1.5	1.7	2.5	3.5	3.7	2.8	.8	1.5
Total imports (A)	7.3	8.2	6.2	8.9	10.3	9.9	10.4	13.0	16.1	17.6	18.4	22.3	21.7	22.5
U.S. PRODUCERS														
Commercial sales	107.2	109.0	83.3	101.5	82.3	67.0	64.4	56.8	62.9	47.2	35.0	29.7	27.7	22.1
Prison sales	1.0	.6	.6	.4	.3	.3	.3	.2	.2	.2	.2	.2	.2	.5
Total U.S. producers (B)	108.2	109.6	83.9	101.9	82.6	67.3	64.7	57.0	63.1	47.4	35.2	29.9	27.9	22.6
Total U.S. market (A+B)	115.5	117.8	90.1	110.8	92.9	77.2	75.1	70.0	79.2	65.0	53.6	52.2	49.6	45.1
Percent U.S. market.														
Imports	6.3	7.0	6.9	8.0	11.1	12.8	13.8	18.6	20.3	27.0	34.3	42.7	43.8	49.9
U.S. producers	93.7	93.0	93.1	92.0	88.9	87.2	86.2	81.4	79.7	73.0	65.7	57.3	56.2	50.1

[1] Included in "other" or no imports that year.

Attachment B

AGRICULTURAL TWINE—HARD FIBER

[Units in million pounds]

Source	1950	1952	1954	1956	1958	1960	1962	1964	1966	1968	1970	1972	1974	1975	1976
IMPORTS															
Canada	16 8	30.2	28.7	27.6	24.4	20.8	24.6	25.6	37.4	18.2	14.0	6.6	1.8	0.6	0.1
Mexico	13.9	39.5	63.5	78.0	109.8	103.7	134.1	102.0	73.8	54.7	65.6	83 2	79.5	30.7	63.2
Brazil	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	14.8	14.0	25.4	27.7	54.6	37.5	80.1
Netherlands	(1)	2.0	16.2	21.7	27.3	16.9	22.6	21.9	33.6	30 5	25.9	21.1	11.2	8.4	.5
Portugal	(1)	(1)	(1)	(1)	(1)	14.3	36.3	36.2	47.8	48.0	42.2	44.3	76.9	32.5	18.5
Tanzania	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	9.3	18.3	15.5	15.4	19.8	9.6	40.4
Other	1.3	6.1	19.5	40.0	63.6	50.6	59.7	47.8	47.6	70.0	56.4	80.2	87.0	56.7	22.6
Total Imports (A)	32.0	77.8	127.9	167.3	225.1	206.3	277.3	233.5	264.3	253.7	245.0	278.5	330.8	176.0	225.4
U.S. PRODUCERS															
Commercial sales	161.5	144.0	135 7	91.3	76.0	56.2	66.3	63.4	70.4	39.8	27.2	20.0	35.1	16.9	20 0
Prison sales	21.2	18.0	16.9	16.0	14.2	16.0	15.2	11.2	14.0	7.6	4.0	1.3	0	0	0
Total U.S. produce s (B)	182.7	162.0	152.6	107.3	90.2	72.2	81.5	74.6	84.4	47.4	31.2	21.3	35.1	16.9	20.0
Total U.S. market (A+B)	214.7	239.8	280.5	274.6	315.3	278.5	358.8	308.1	348.7	301.1	276.2	299.8	365.9	192.9	245.4
Percent U.S. market:															
Imports	14.9	32.5	45.6	61.0	71.5	74.0	77.2	75.8	75.8	84.2	88.7	92.9	90.4	91.2	91.9
U.S. producers	85.1	67.5	54.4	39.0	28.5	26.0	22.8	24.2	24.2	15.8	11.3	7.1	9.6	8.8	8.1

[1] Included in "other."

Attachment C

INDUSTRIAL TWINE—HARD FIBER

[Units in million pounds]

Source	1950	1952	1954	1956	1958	1960	1962	1964	1966	1968	1970	1972	1974	1976
IMPORTS														
Mexico	26.9	16.9	24.9	27.8	29.0	30.6	31.3	22.1	18.7	18.0	14.6	16.7	20.7	12.2
Canada	4.1	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
Portugal	(1)	(1)	(1)	(1)	2.2	5.9	10.1	11.2	18.2	13.8	12.7	10.7	2.7	3.5
Other	2.0	.8	1.9	3.2	4.6	3.3	3.1	1.6	1.8	1.8	1.0	1.2	1.1	.5
Total imports (A)	33.0	17.7	26.8	31.0	35.8	39.8	44.5	34.9	38.7	33.6	28.3	28.6	24.5	16.2
U.S. PRODUCERS														
Commercial sales	35.0	18.2	20.3	22.5	18.3	16.3	16.8	15.0	7.3	3.4	2.6	2.3	2.3	1.6
Prison sales	.8	.4	.5	.6	.7	.7	.8	.8	1.0	1.0	.8	.8	.6	.2
Total U.S. producers (B)	35.8	18.6	20.8	23.1	19.0	17.5	17.6	15.8	8.3	4.4	3.4	3.1	2.9	1.8
Total U.S. market (A+B)	68.8	36.3	47.6	54.1	54.8	57.3	62.1	50.7	47.0	38.0	31.7	31.7	27.4	18.0
Percent U.S. market:														
Imports	48.0	48.7	56.3	57.2	65.5	69.4	71.6	68.8	82.3	88.4	89.3	92.1	89.4	90.0
U.S. producers	52.0	51.3	43.7	42.8	34.5	30.6	28.4	31.2	17.7	11.6	10.7	8.9	10.6	10.0

[1] Included in "other" or no imports that year.

Attachment D

IMPORTS OF MAN-MADE FIBER CORDAGE OF STRANDED CONSTRUCTION (TSUS 316.6020), 1973–77

[In pounds]

Year	Total imports	Imports from Korea	Korea as a percent of total
1973	633,935	28,518	4.5
1974	492,120	106,778	21.7
1975	1,527,264	216,118	14.2
1976	1,442,960	889,966	61.7
1977	2,080,077	1,365,923	65.67

Source: National Technical Information Service, U.S. Department of Commerce.

Attachment E

CORDAGE INSTITUTE,
Washington, D.C., October 29, 1976.

Subject: Petition of the Cordage Institute for Countervailing Duties on Cordage of Man-Made Fibers 3/16 Inches or Over in Diameter Imported from the Republic of Korea

Hon. VERNON D. ACREE,
Commissioner of Customs, U.S. Customs Service, Department of the Treasury, Washington, D.C.

DEAR SIR: The Cordage Institute is a non-profit association of rope and twine manufacturers in the United States. The member firms of the Institute account for approximately two-thirds of the cordage produced in this country.

We submit that pursuant to Section 159.47(b) of the regulations of the United States Customs Service, 19 C.F.R. 159.47(b), *cordage of man-made fibers 3/16 inches or over in diameter manufactured in the Republic of Korea* is currently entering U.S. Customs Territory at prices which reflect significant government subsidization constituting "bounties or grants" under the countervailing duty section of the Tariff Act of 1930 (19 U.S.C. 1303), as amended by Section 331 of the Trade Act of 1974. We respectfuly request that the Customs Service conduct an investigation into the matter leading to the institution of countervailing duties to reflect the magnitude of the "bounties or grants" which Korea extends to this product.

I. PRODUCT ON WHICH "BOUNTIES OR GRANTS" ARE BEING BESTOWED

The product on which the Republic of Korea bestows "bounties or grants" is listed in the Tariff Schedules of the United States Annotated (1976) as TSUSA No. 316.6020: Cordage of man-made fibers measuring 3/16 inches on over in diameter. The Column 1 duty on this item is 12.5 cents per pound plus 15 percent ad [illegible]em.

[illegible]s of man-made fiber cordage from the Republic of Korea in TSUSA [illegible]020 are included within Category 305 of the textile bilateral agreement between the U.S. and the Republic of Korea, negotiated under the framework of the Multifiber Arrangement. Category 205 in this particular bilateral establishes a consultative mechanism for a basket of yarn imports of which man-made fiber cordage is considered a part for purposes of administration of the bilateral agreement. There are no restraints on imports from Korea of Category 205 as a whole or on any product within the category.

II. CORDAGE IMPORTS: TOTAL AND FROM KOREA

As Table 1 attached shows, imports for consumption classified under TSUSA No. 316.6020 increased substantially in 1975 and are continuing at this high rate through the first seven months of 1976. In the 4-year period 1972–1975, the total quantity of imports of man-made fiber cordage 3/16 inches or over in diameter (thereinafter referred to as "man-made fiber cordage") increased by 191 percent.

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III. NATURE OF KOREA'S "BOUNTIES OR GRANTS" ON MAN-MADE FIBER CORDAGE

The Republic of Korea maintains an elaborate system of subsidies designed to encourage the export of textile products such as man-made fiber cordage. These subsidies constitute "bounties or grants" within the meaning of Section 303 of the Tariff Act of 1930, (19 U.S.C. 1303). In this regard Airgram No. 310, American Embassy Seoul, December 23, 1974, spells out in detail many general as well as specific incentives offered by the Korean Government. This document as well as others cited below indicate that the Republic of Korea provides the following incentives for its domestic manufacturers of man-made fiber cordage:

Financing Incentives[1]

Short term

Export industries are normally eligible for 90-day credits at a preferential interest rate—9 percent for financing procurement of domestically produced materials and for financing other export expenses. These credits can normally be extended to a maximum of 135 days under certain circumstances. Furthermore, man-made fiber yarn has more recently been added to a list of products which could qualify for up to a 270-day credit grace period.

Longer term

In order to provide supplies to export industries, financing for facilities for export industries is available at a 12-percent interest rate for a period of up to 8 years, and foreign currency loans are available at 9½ percent for 8 years also.

Credit on Duty Payments

There are incentives offered by the Korean Government for installment payment of tariffs for imports of plant and machinery by export industries including chemical fiber manufacturers. Payment schedules have been lengthened to provide for the first payment within 12 rather than 6 months and with the final (fifth) installment due in 36 rather than 30 months.

Internal Tax Incentives

Deferral of due dates for certain domestic taxes

The due dates for payment of commodity taxes and textile taxes can be extended for particularly distressed industries, by 6 months where full payment is involved and by 3 months when installment payment is permitted. While exports are exempted from these taxes, many exporters also produce for the domestic market and will benefit from the deferred tax collection on that portion of their production. The textile industry is one of a few industries currently eligible for these provisions.

Exemption of commodity and textile taxes

Commodities for export and raw materials to produce such commodities are free from the payment of commodity tax and textile tax.

Inclusion in loss accounts of reserve funds for losses from exports

A corporation engaged in an export or tourist industry may include reserve funds for losses from exports in the corporation's loss account amounting to 1 percent of foreign exchange earnings, or 50 percent of net income accruing from foreign exchange earnings during the applicable period, whichever is smaller.

Special depreciation allowance

If a corporation has obtained at least 50 percent of total proceeds from foreign exchange earning business, the relative depreciation allowance will be increased by 30 percent over the normal depreciation allowance.

The chart below provides a handy capsule reference of major tax incentives available to exporting firms:[2]

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[1] See also "Guide to Investment in Korea," 1974, Economic Planning Board.

[2] See Overseas Business Reports, Marketing in Korea, U.S. Department of Commerce, September 1974.

	Taxation basis	Tax rates	Tax reduction or exemption
Income tax on unincorporated enterprises.	Amount of income or earnings.	15 percent~48 percent.	(1) Exemption for 5 years in proportion to the ratio of stock or shares owned by the foreign investors. (2) 50 percent reduction of the above for following 3 years.
Corporation tax	(1) Income in each business year. (2) Liquidation income	(1) Open Corporation, 16 percent~27 percent. (2) Closed corporation, 26 percent~40 percent, 7 percent~48 percent.	(1) Exemption for 5 years in proportion to the ratio of stock or shares owned by the foreign investors. (2) 50 percent reduction of the above for following 3 years.
Wages and salary income tax.	Salary or wage of foreign employee working in foreign invested enterprise.	7 percent~48 percent.	Full exemption.
Dividend income tax	Amount of dividends received.		(1) Exemption for 5 years on foreign investor. (2) 50 percent reduction of the above for following 3 years.
Tax on technology income	Amount of income received from supplying technology (royalty).	15 percent~18 percent.	(1) Exemption for 5 years. (2) 50 percent reduction of the above for following 3 years.
Interest income tax	Gross receipt or derived from interest on loans or deposits.		Full exemption for loans approved.
Commodity tax		2 percent~100 percent for 76 commodity items.	Full exemption on capital goods approved.
Customs duty	Ad valorem basis (CIF price).	5 percent~150 percent by commodities.	Exemption on capital goods approved.
Property tax	Assessed value of land, buildings, vessels, mining district, etc.	(1) Land 0.2 percent. (2) House, and vessels 0.3 percent.	(1) Exemption for 5 years in proportion to the ratio of stock or shares owned by the foreign investors. (2) 50 percent reduction of the above for following 3 years.
Acquisition tax	Acquisition price of real estate, motor vehicles, land, buildings, and ships.	(1) 1 percent (2) 2 percent in Seoul and Pusan.	(1) Exemption for 5 years. (2) 50 percent reduction of the above for following 3 years.

Export Industrial Estates

Export industrial estates are areas set aside near the cities of Seoul and Incheon to accommodate medium and small scale industries whose products are intended for export. The purpose of these industrial estates is to aid in domestic Korean regional development. We understand that the Kurodong Estate near Seoul is the site of man-made fiber and related plants which most assuredly are benefitting from preferential export treatment. This preferential treatment takes the form of subsidized utility and transportation facilities, financial and export assistance in the construction of plant buildings and factories, low land costs, and the assurances of adequate amounts of water and power.

Masan Free Export Zone (MAFEZ)

Adjacent to the port of Masan, Korea, an area has been designated to be a free-zone manufacturing area where raw materials are landed duty-free and the goods produced are designed expressly for export. Maximum incentives are provided to export activities in this zone. For example, income taxes, corporate taxes and other taxes normally imposed elsewhere in Korea are exempt in this zone for five years, and then greatly reduced for an extended period thereafter.

Among the limited number of industries eligible to set up operations in this zone are firms producing man-made fiber products such as man-made fiber cordage for export.

Other Incentives

In addition to the foregoing, it is requested that the Customs Service investigate other "boundaries or grants" bestowed by the Republic of Korea on exports of man-made fiber cordage to the United States.

IV. CONCLUSION

The Cordage Institute respectfully submits that the subsidization of man-made fiber cordage by the Republic of Korea represents a *prima facie* case of "bounties or grants" being bestowed in contravention of the countervailing duty statutes. Under the standards developed by the Department of the Treasury, the Cordage Institute asserts that the "bounties or grants" discussed above meet the standards for the levy of a countervailing duty.

Respectfully submitted,

WILLIAM A. DUNGAN,
President.

TABLE 1.—IMPORTS FOR CONSUMPTION INTO THE UNITED STATES OF MAN-MADE FIBER CORDAGE 3/16 INCH OR OVER IN DIAMETER (TSUSA 316.6020), 1972-76

[Quantity in pounds; value in dollars]

Year	Total		From Korea		Korea as a percent of total	
	Quantity	Value	Quantity	Value	Quantity	Value
1972	475,768	307,337	33,888	9,530	7.3	3.1
1973	553,309	501,311	28,518	12,080	5.2	2.4
1974	427,750	392,569	105,969	66,612	24.8	17.0
1975	1,382,620	1,039,967	208,126	104,849	15.1	10.1
1975 (January-July)	994,153	793,206	21,850	17,960	2.2	2.3
1976 (January-July)	768,643	654,307	445,318	220,189	57.9	33.7

Source: U.S. Department of Commerce.

Attachment F

[Federal Register, vol. 42, No. 212—Thursday, Nov. 3, 1977]

[4810-22]

CUSTOMS SERVICE

CORDAGE OF MAN-MADE FIBERS MEASURING 3/16 INCH OR LARGER IN DIAMETER FROM THE REPUBLIC OF KOREA

Final Countervailing Duty Determination

Agency: Customs Service, U.S. Treasury Department.

Action: Final countervailing duty determination.

Summary: This is to advise the public that a counte vailing duty investigation has resulted in a final determination that the Government of the Republic of Korea has not given benefits considered to be bounties or grants within the meaning of the Countervailing Duty Law on the manufacture production or exportation of cordage of man-made fibers measuring 3/16 inch or larger in diameter.

Effective date: November 3, 1977.

For further information, contact: Edward F. Haley, Operations Officer, Technical Branch, Duty Assessment Division, Office of Operations, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229, telephone 202-566-5492.

Supplementary information: On May 9, 1977, a "Preliminary Countervailing Duty Determination" was published in the FEDERAL REGISTER (42 FR 23573). The notice stated that it preliminarily had been determined that no benefits had been received by the Korean manufacturers/exporters of cordage of man-made fibers measuring 3/16 inch or over in diameter which constitute bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303) (referred to in this notice as "the Act") under three programs administered by the Government of Korea. It was determined that the aggregate ad valorem benefits received under these programs were 0.15 percent during 1975 and 0.17 percent for the first 6 months of 1976, amounts which were considered de minimis.

The subject cordage is classifiable under item 316.6020 of the Tariff Schedules of the United States Annotated (TSUSA) and is dutiable at the rate of 12.5 cents per pound plus 15 percent ad valorem. It is not eligible for preferential treatment under the Generalized System of Preferences.

The preliminary investigation dealt with eleven (11) programs alleged to bestow bounties or grants. The preliminary determination provided interested parties 30 days from the date of publication for the submission of any relevant data, views, or arguments regarding the preliminary determination.

Subsequent to the publication of the preliminary determination, no factual information relating to the issues addressed in the preliminary determination has been submitted.

Accordingly, for the reasons stated above and the reasons set forth in the "Notice of Preliminary Countervailing Duty Determination," it is hereby determined that any benefits received are de minimis in size and therefore no bounties or grants are paid or bestowed, directly or indirectly, within the meaning of section 303 Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacture, production or exportation of cordage of man-made fibers 3/16-inch or greater in diameter from the Republic of Korea.

This notice is published pursuant to section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303)).

Pursuant to Reorganization Plan No. 26 of 1950 and Treasury Department Order 190 (Revision 14), July 1, 1977, and the provisions of Treasury Department Order No. 165, Revised, November 2, 1954, and section 159.47 of the Customs Regulations (19 CFR 159.47), insofar as they pertain to the issuance of a final countervailing duty determination by the Commissioner of Customs, are hereby waived.

ROBERT H. MUNDHEIM,
General Counsel of the Treasury.

October 28, 1977.

[FR Doc. 77-31868 Filed 11-2-77; 8:45 am]

THE FERROALLOYS ASSOCIATION,
Washington, D.C., May 15, 1978.

MR. JOHN M. MARTIN, JR.,
Chief Counsel, Committee on Ways and Means,
House of Representatives, Washington, D.C.

DEAR MR. MARTIN: The Ferroalloys Association thanks the Subcommittee on Trade for its interest in amending various American trade laws and regulations to provide more expeditious, effective and equitable relief from unfair practices affecting import competition. The Ferroalloys Association and its members appreciate this opportunity to respond to the Subcommittee's request for recommendations of such amendments.

The Ferroalloys Association ("TFA") represents the fourteen companies which account for virtually all of the American production of chromium, manganese and silicon ferroalloys, metals and related products. Ferroalloys and related metals are intermediate products essential to the production of steels, irons and aluminums.

The ferroalloy industry is critically important for our nation's economy and defense. For example, chromium is essential to the production of alloy and stainless steels and almost all specialty steels and superalloys. No steel at all can be made without manganese; and, silicon is a basic necessity for the production of iron and aluminum castings and all silicone chemicals. In recognition of their importance, our strategic and critical materials stockpile contains substantial quantities of both chromium and manganese ferroalloys and the ores required for their production.

Unfortunately, the ferroalloy industry in the United States is in dire straits because of the increasingly great volume and often unfair pricing of imports. Imports of ferroalloys from other countries have long been a problem. But, in recent years, the volume of imports in tons and the penetration of the domestic market have reached crisis proportions. Imports have grown from 143 thousand tons in 1960 to 373 thousand tons in 1970, and exceeded one million tons in 1977. During the same period, imports have climbed from 8 percent of domestic consumption in 1970, reaching a level of 47 percent last year. These imports have driven the American ferroalloy industry to the brink of collapse as a viable domestic industry.

The domestic ferroalloy industry is convinced that the high volume and low prices of many ferroalloy imports is a result of unfair trade practices, such as dumping and the granting of export subsidies, bounties and grants by a number of other producing countries. If trade in ferroalloys is fair, the domestic industry can compete and will survive. But, without significant governmental efforts to assure that trade is indeed fair, its is doomed.

Producers of silicon metal have filed an antidumping petition with Treasury naming a Canadian company as the violator, a petition Treasury recently accepted for investigation. Various ferroalloy producers and TFA are presently preparing other petitions under both the antidumping and countervailing duty statutes.

The ferroalloy industry needs more equitable treatment in the multilateral trade negotiations—American duties on most of these products are significantly lower than those of the EEC and Japan. Tariff equalization, however, is by no means enough. Our producers are as efficient and competitive as any in the world. Yet, they cannot compete with unfairly priced imports—with imports which are subsidized by foreign governments or which are priced below cost of production or prevailing prices in other major markets.

One of the problems of the American ferroalloy industry is that there is considerable excess capacity to produce ferroalloy products in the rest of the world. The result of overcapacity abroad is a tale that American industries are hearing more and more often and more and more menacingly. Rather than reducing production in times of oversupply (as do most American producers), offshore producers are increasingly sustaining production (and, hence, their own employment and selling at very low prices that often are below cost. Likewise, the foreign producers' governments frequently encourage these trade practices by subsidizing export sales to the point where the foreign producer can undersell American companies.

The statutes on which the Subcommittee has sought comment provide major legal bulwarks against these unfair trade practices. Unfortunately, these statutes often do not work as the Congress intended. They are cumbersome in operation, their enforcement is unduly drawn-out and they frequently close the barn door only after the horse is gone. To be effective, these statutes should be amended to provide streamlined, clear, fair and expeditious means of attacking these practices, and to provide a real deterrence to importers and foreign producers contemplating actions these statutes make unlawful.

I. The Antidumping Statute

If the antidumping statute is to provide an effective means of preventing and deterring the unfair trade practice of dumping in the United States, it should be amended in a number of ways. These amendments should (A) make the procedures for enforcing the Act more expeditious and effectual than they now are; (B) provide remedies in cases where violations are found which will prevent and deter dumping far more effectively than present remedies; and (C) clarify the statute in ways necessary to make its enforcement more uniform and more consistent with the intent of Congress than is often now the case. These areas of proposed amendments are discussed in turn.

A. Amendments to Enhance Enforcement Procedures

TFA believes t hat the principal problems with present enforcement procedures are fivefold: (1) enforcement actions now take much too long; (2) a procedure is necessary to expedite further dumping enforcement in industries in which dumping has been proven to be prevalent through earlier successful antidumping proceedings; (3) there is need for fairer procedural safeguards than the Department of the Treasury now provides; (4) there is need for more effective judicial review of the actions of Treasury and the International Trade Commission in enforcing the statute; and (5) there are presently not enough personnel enforcing the statute.

1. Compressing the Time for Considering Dumping Petitions

It now takes too long for an antidumping petition to be investigated and for the investigation to be concluded. This problem can be alleviated by two amendments which would compress the time for carrying out an antidumping investigation to its conclusion to a suggested total period of six months.

(*a*) *Compressing the Time for Treasury to Act.*—First, the time allotted to the Department of the Treasury to determine whether sales have been made at less than fair value should be reduced. Today, once Treasury decides to undertake an investigation, it has from six to nine months to make its final fair value determination. In fact, Treasury completes most investigations in two or three months. If Treasury were to be provided adequate staffing and other resources, the time for a preliminary decision could be reduced to three months—allowing three additional months for the final determination. Further, the Customs Service could speed up the process by ceasing to grant routinely extensions of the time required to answer its questionnaires.

(*b*) *Simultaneous Reference to the International Trade Commission.*—Second, the time for conclusion of a dumping case could be reduced by three months if dumping petitions were referred to the ITC at the time an affirmative preliminary determination of sales at less than fair value is made by Treasury. This would cause the injury determination from ITC to be available simultaneously with the final decision by Treasury—three months after the preliminary decision.

2. Expediting Further Enforcement in Industries Where Dumping Is Prevalent

There are industries in which dumping is endemic. This can be because there is world overcapacity, or because foreign producers coordinate their unfair practices, or for other reasons. When dumping becomes routine, the affected domestic industry is often left without any effective remedy and must resort to an expensive and time consuming case by case procedure. No sooner is it successful in stopping dumping from one country than it loses sales to dumping from some place else.

The Act should be amended to provide some form of automatic procedure for Treasury to initiate, on its own, dumping investigations in an industry in which previous antidumping petitions have resulted in two or more preliminary affirmative dumping determinations. To make this work, we would suggest the establishment of guidelines by Treasury not dissimiliar to the reference price system now in force for steel products. If Customs finds sales of imports below the guideline price, it would inform Treasury which would automatically initiate an antidumping investigation.

3. Providing Fair Procedural Safeguards

The procedures of Customs and of Treasury should be made fairer than is now the practice.

(*a*) *The Standard for the Secretary's Decision.*—First, the Act should require that the decision of the Secretary be supported by substantial evidence on an adequate record. Without a formal record, judicial review cannot be effective—unless it is *de novo*.

(*b*) *Procedural Safeguards.*—At present, the Treasury Department has very broad authority to discontinue cases to reopen issues and to revise determinations without procedural safeguards generally afforded in the case of governmental actions of considerably less magnitude. The Act should be amended to require the application of procedural due process to such decisions.

4. Providing Effective Judicial Review

The actions of the Secretary of the Treasury and of the International Trade Commission should be made subject to more rigorous, effective judicial review than they are under present law.

(*a*) *The Extent of Review of the Secretary's Actions.*—The actions of the Secretary—both his substantive and procedural decisions and actions—must be subject to effective judicial review. *Any* decision of the Secretary on the existence and extent of less than fair value margins by a foreign producer which adversely affects a petitioning United States producer should be reviewable. And, the reviewing court should sustain those actions only if fully consistent with the statute and if supported by substantial evidence on the record.

(*b*) *Review of the ITC Actions.*—The Act should be amended to eliminate the present uncertainty concerning judicial review of ITC injury determinations by providing that such decisions are subject to "substantial evidence" judicial review, and that the forum for review of all antidumping actions, including those of the ITC, is the Customs Court.

5. Providing Adequate Staff

The antidumping statute can be adequately enforced only if the agencies which enforce it are adequately staffed. The President and other high officials in the Administration have made it clear that they support vigorous enforcement of this law. The Congress, therefore, should increase substantially the staff and resources assigned to antidumping enforcement to permit the proper enforcement of the statute in the face of the wave of dumping practices now engulfing the United States.

B. AMENDMENTS TO PROVIDE MORE EFFECTIVE REMEDIES

At present, the importer who dumps has considerable incentive to keep dumping until he is caught. Indeed, the dumper suffers no meaningful penalty until a year or more after Treasury initiates an investigation. And, that is usually well after the dumping has begun.

As a result, an importer contemplating dumping has little reason not to dump—for even if he is caught, he will already have for a long time gleaned the benefits he sought: and, he will be subject to no penalty for his past illegal actions. Shortening the time for antidumping investigations will help this problem, but that alone is not enough. What is essential is that the statute be amended to improve the effectiveness of the remedies available to those injured by dumping.

1. Making Dumping Duties Retroactive

At present, dumping duties are assessed only back to the date of Treasury's preliminary determination of sales at less than fair value. This permits the importer six months of "free" dumping while the investigation is proceeding—on top of the dumping that preceded the investigation. Thus, dumping goes unpunished for much longer than this six month period.

In all cases where dumping duties are finally ordered, they should be made retroactive to the beginning of the period during which Treasury finds there have been less than fair value sales. To fail to impose dumping duties for the entire period of less than fair value sales is an open invitation to foreign producers to dump their wares in the United States.

2. Requiring an Importer to Deposit Additional Duties

Further, the importer should be required to deposit with Treasury the actual additional duties at the time of a preliminary affirmative determination of dumping. At present the importer is required only to post bond at the time of the preliminary determination. Obviously, the cost of the bond is only an insignificant portion of the duty that would eventually be assessed if a final determination is made; and, as such, the bond deposit is just not an effective restraint against further dumping.

This would be no new departure since, in other circumstances, an actual deposit of duties is required. For instance, importers must deposit the higher duty claimed by the Customs Service in valuation cases pending before the Customs Court. Similarly, foreign antidumping laws provide for the assessment of provisional duties.

3. Authorizing a Private Cause of Action

The antidumping law is a statute designed to prevent unfair trade practices. Dumping is an unfair trade practice—recognized as such throughout most of the world—which is highly injurious to the domestic producers who must compete in the marketplace with unfairly and illegally priced material. One of the major problems with the American antidumping law is the fact, described above, that it does not adequately discourage an importer or foreign producer from dumping.

The antidumping statute could be made far more effective and could enhance the relief available to domestic producers harmed by dumping if it authorized one harmed by dumping to bring a private cause of action against importers and foreign producers who have engaged in the dumping which injured him.

At present, there is a private cause of action available—but only for violations of the very restrictive criminal provisions of the antidumping statute of 1916. There is no such provision in the Antidumping Act of 1921, as amended, which is the statute by which dumping has been combatted since its initial enactment 57 years ago. While the 1916 Act permits private treble damage suits, it puts a plaintiff to unduly stringent elements of proof. For example, it requires a successful plaintiff to prove that the dumping importer had a specific malicious intent to destroy or injure an American industry or to restrain or monopolize United States trade. Because it is difficult to prove such matters, the 1916 Act has been virtually unused by private complainants injured by dumping.

What is needed is an amendment to the Antidumping Act of 1921 to permit private suits by those harmed by violations of that statute. That is the antidumping statute which is operative today. And, private causes of actions have worked extremely well in the antitrust area. Indeed, it is the prospect of private treble damage suits that often provides a disincentive for potential antitrust violations far greater than that of the fear of facing an agency investigation.

The amendment authorizing damage actions in dumping cases should provide for treble damages for successful plaintiffs. The difficulty and expense of successfully concluding such an action and the benefits importers gain from engaging in unlawful trade practices are both so great that treble damages are necessary and entirely appropriate to induce producers incurring harm to bring suits and to deter would-be dumpers.

C. AMENDMENTS TO CLARIFY THE STATUTE TO IMPROVE ITS ENFORCEMENT CONSISTENT WITH ITS BASIC INTENT AND THE WILL OF CONGRESS

In many cases, antidumping enforcement is hamstrung by very narrow administrative interpretations of the statute. A related problem is that the vagueness which permits the statute to be read unduly narrowly also fosters inconsistent applications. These problems can be significantly alleviated by statutory amendments which specify and clarify its meaning.

1. Determinations by the Department of the Treasury of Sales at Less Than Fair Value

The statute should specify in greater detail the factors which the Secretary of the Treasury is to consider in making the calculations necessary to determine whether there are, in fact, sales by the importer at less than fair value.

(*a*) *Cost of Production Cases.*—Such amendments are especially necessary with regard to the definitions used and factors considered in calculating the "cost of production" basis for ascertaining the existence of dumping sales. While cost of production cases formerly were infrequent, they have grown in importance. Many world industries have considerable excess capacity which foreign producers are loathe not to use fully, even when demand is slack. As a result, the focus of dumping often now has shifted from selling in the United States below the home market price to selling everywhere, whenever necessary, below cost.

The massive dumping of ferroalloys into the United States is largely of the below "cost of production" sort. It is critical that the statutory and regulatory definitions of such cost of production items as overhead costs, depreciation and cost-of-capital employed be refined, clarified and made more specific, and more in accordance with appropriate economic considerations, than is now the case.

(*b*) *Sales Price Comparison Cases.*—More specificity and greater clarity is likewise needed in the definitions used and factors considered in dumping cases where the issue is whether an importer's United States prices are below his prices in the home market or in some significant third market. The statute should be amended to specify in greater detail than at present the factors to be considered in calculating home market prices, purchase prices, foreign market value and exporter's sales prices.

(*c*) *State-Controlled Companies.*—The statute and regulations also should be made more specifically and clear as to the rules used when a dumping allegation is made against a company which is state-controlled. These cases are made especially difficult by accounting and economic differences between the state-controlled and free market systems. However, it is important that these difficulties be adequately addressed in that it is just such companies that are particularly likely to keep production high by selling below cost or by selling below the "fair" home market price. The statute and regulations require better guidelines than at present for dealing with the special problems of accounting practices and of the availability and comparability of meaningful price and cost data posed by state-controlled companies.

2. Injury Determinations by the International Trade Commission

There are three problems concerning the ITC's injury determinations that are unlikely to be adequately solved unless addressed by the Congress. They involved (a) the statutory meaning of "injury" and of the causal connection required between less than fair value sales and that injury; (b) the statutory injunction to consider the likelihood of injury from less than fair value imports; and (c) the cumulation, for injury purposes, of less than fair value imports from a number of countries.

(*a*) *The Meaning of "Injury" and of the Causal Connection Between Less Than Fair Value Sales and That Injury.*—The statute directs the ITC to determine whether an American industry "is being or likely to be injured, or is prevented from being established, by reason of the importation of [less than fair value] merchandise into the United States." The legislative history of the Trade Act of 1974 makes clear that that "injury" need not be "material" or "serious" (as is required for an Escape Clause determination) so long as it is not inconsequential or insignificant. That legislative history also makes clear that the causal link between less than fair value sales and injury need not, as is the case in the Escape Clause section, be a "substantial" one.

The antidumping statute is not the Escape Clause. Congress meant the injury and causation tests to be more stringent for the Escape Clause—and wisely so in that an ITC injury determination in a dumping case has effect only in the context of a finding that the importer has committed the unfair trade practice of making less than fair value sales.

Unfortunately, not all of the ITC Commissioners always adhere to this clearly expressed intent of Congress. Often, an ITC dumping opinion reads like an Escape Clause opinion—holding the domestic industry to unduly rigorous standards for proving injury and causation. It is this kind of inappropriate reading of the antidumping law that has permitted some Commissioners to make negative injury findings in eighty, ninety or more percent of the cases considered. It is this kind of inappropriate reading of the statute that Congress should eliminate.

The statute should, accordingly, be amended to reflect the afore-described legislative history. To quote that history (S. Rep. No. 1298, 93d Cong., 2d Sess. 180 (1974)):

> The term "injury," which is unqualified by adjectives such as "material" or "serious," has been consistently interpreted by the Commission as being that degree of injury which the law will recognize and take into account. Obviously, the law will not recognize trifling, immaterial, insignificant or inconsequential injury. Immaterial injury connotes spiritual injury, which may exist inside of persons not industries. Injury must be a harm which is more than frivolous, inconsequential, insignificant, or immaterial.
>
> Moreover, the law does not contemplate that injury from less-than-fair-value imports be weighed against other factors which may be contributing to injury to an industry. The words "by reason of" express a causation link but do not mean that dumped imports must be a (or the) principal cause, a (or the) major cause, or a (or the) substantial cause of injury caused by all factors contributing to overall injury to an industry.

(*b*) *The Use of the Criteria of Likelihood of Injury.*—Although the statute requires the International Trade Commission to consider both actual injury and likelihood of injury, in fact, current Commission decisions often focus on actual injury only and seem to ignore prospective injury. With little or no ITC consideration of likelihood of injury, domestic producers often face an impossible choice: bring a case soon after dumping begins and risk a loss at the ITC because the injury from that dumping has not yet fully manifested itself, or delay bringing the case until the injury has becomme severe—in which event the ACT provides no retroactive remedy. The Act requires the ITC to consider both prospective and actual injury and does so to permit its

remedies to be employed promptly to avoid business declines and failure and resulting unemployment. Congress should make clear to the ITC that it is to consider this prospective, likely injury as well as actual injury.

(c) *Cumulation, for Injury Purposes, of Less Than Fair Value Sales From Several Countries.*—The ITC has often dismissed injury claims because it finds the less than fair value imports to be *de minimus* and therefore not capable of adversely affecting the United States industry. Where the total of less than fair value sales is in fact meaninglessly small and those sales have not harmed the domestic producers in any way, this result is appropriate. On the other hand, of course, if small volume imports from one country have caused injury, there should be an affirmative determination.

However, there are circumstances in which there are less than fair value imports from more than one country. In that instance, the ITC should consider those imports together—rather than ignoring their cumulative effect. Obviously, the problem of such imports should not be viewed in isolation. Rather, the ITC should consider them as, in fact, they affect the market place—that is, cumulatively.

II. The Countervailing Duty Statute

If the countervailing duty statute is to provide an effective means of preventing and deterring the unfair trade practice of export subsidies, bounties and grants, it should be amended in a number of ways. These amendments should (A) expedite the procedures for enforcing the Act and make them far more effective than they now are; (B) provide more effective remedies than those presently available; and (C) clarify, specify and improve the substance of the statute.

A. Amendments to Enhance Enforcement Procedures

The Ferroalloys Association suggests five forms of legislative action to enhance the enforcement procedures under the countervailing duty statute. These would (1) compress the statutory timetable; (2) require fairer procedural safeguards than Treasury now provides; (3) provide for effective judicial review of agency actions; (4) supply adequate enforcement staff; and (5) provide information available to the Executive Branch to American industry on possible foreign government subsidies of exports to the United States.

1. Compressing the Time for Treasury to Act

The time for the Department of the Treasury to consider countervailing duty petitions should be substantially shortened. Currently, Treasury need not make its preliminary determination as to whether or not a foreign government is giving its exporter a bounty or grant for six months, and its final determination until one year from the date the case is initiated. TFA recommends that these time periods be cut in half—to three months for a preliminary determination and six months for a final determination. This is especially necessary given the damage which delay causes the domestic industry which must compete with these unfairly priced imports.

2. Providing Fair Procedural Safeguards

The procedures under the statute should be made fairer.

(*a*) *The Standard for the Secretary's Decision.*—First, the Act should require the decision of the Secretary to be supported by substantial evidence on an adequate record. Without a formal record, judicial review cannot be effective—unless it is *de novo.*

(*b*) *Procedural Safeguards.*—At present, the Treasury Department has very broad authority to discontinue cases, to reopen issues and to revise determinations without any procedural safeguards generally afforded in the case of governmental actions of considerably less magnitude. The Act should be amended to require the application of procedural due process to such decisions.

3. Providing Effective Judicial Review

The actions of the Secretary of the Treasury—both his substantive and procedural decisions and actions—should be made subject to more rigorous, effective judicial review than they are under present law. The reviewing court should sustain those actions only if fully consistent with the statute and if supported by substantial evidence on the record.

4. Providing Adequate Staff and Resources

The countervailing duty statute can be adequately enforced only if the Department of the Treasury is adequately staffed with personnel and resources assigned to do that enforcement. The compressing of Treasury's time-table to consider countervailing duty petitions may well require additional staff and resources. If domestic producers are to avoid having to compete any more or any longer than necessary against unfairly subsidized imports, Treasury must have enough staff and resources to do its job quickly and effectively.

5. Providing Information on Possible Subsidies to American Producers

A major problem with countervailing duty enforcement is that it is especially difficult for American industry to learn the details of foreign government subsidies. However, much of this information is doubtlessly available to the Department of the Treasury and to other American governmental agencies, such as the State Department. Treasury should be required to consult with those other agencies and to make periodic public reports in the Federal Register detailing direct and indirect subsidies paid by foreign governments to exporters known to those agencies.

B. AMENDMENTS TO PROVIDE MORE EFFECTIVE REMEDIES

As is the case with the antidumping statute, the countervailing duty statute does not now provide either an effective remedy against the offending parties or a meaningful disincentive to the grant or acceptance of illegal subsidies. This problem is greatly exacerbated by the practice by which a foreign government tentatively found to have engaged in a subsidy merely promises not to provide that subsidy in the future. Three amendments are necessary to address this problem of ineffective remedy: (1) making duty assessments retroactive; (2) requiring Treasury to self-initiate investigations in certain circum-

stances; and (3) authorizing an injured United States producer to bring a private cause of action against foreign producers and importers who benefit from illegal subsidies.

1. Making Duty Assessments Retroactive

Presently, countervailing duties are wholly prospective. Unlike dumping duties, they are not even retroactive to Treasury's preliminary determination that illegal bounties or grants exist—which is made six months after the investigation is launched.

Given that the bounty or grant has been paid at least throughout the one year period of investigation, and, realistically, for some time before, it is unfair not to collect the duty for at least the period of the investigation—and for any earlier period in which the subsidy is found to have been made. Since a year or more of bounties and grants are subject to no countervailing duty, the present statute is nothing less than an invitation to foreign governments to give, and to foreign producers and importers to accept, illegal subsidies.

Thus, when a final determination is made that a countervailing duty is to be imposed, the duty should be imposed retroactively at least to the initiation of the investigation—and properly to the time when the subsidy began. To effectuate this imposition of duty, Customs should also be required to withhold appraisement on affected imports upon the initiation of a countervailing duty investigation.

Further, if the foreign government promises to cease granting the subsidy and Treasury accepts that assurance as a condition of not imposing prospective countervailnig duties, there should be two further results of the case. First, a retroactive countervailing duty, as discussed above, should be imposed. Second, Treasury should automatically and periodically re-investigate the matter to ascertain that the subsidy is not re-initiated or replaced by a different subsidy. Treasury should conduct this re-examination at least once every year for a period of ten years from its initial decision.

2. Requiring Treasury Itself to Initiate Investigations in Certain Circumstances

As noted above, Treasury and other federal agencies doubtlessly frequently learn of foreign government subsidies that may be illegal under the countervailing duty statute. The nature of these illegal subsidies is such that United States producers often do not have access to that kind of information. Accordingly, the Act should be amended both to require Treasury to consult with State and other agencies as to information they may have on illegal subsidies, and to require Treasury to initiate a countervailing duty petition as to any products whose exports are subsidized on its own motion whenever the information which it and other agencies have indicates the likelihood of substantial subsidies unlawful under the countervailing duty statute.

3. Authorizing a Private Cause of Action

As suggested earlier with regard to the antidumping law, the countervailing duty statute should be amended to authorize a domestic producer harmed by illegal subsidies to bring a private cause of action against any importers and foreign producers who benefit from that subsidy. As discussed more fully in the antidumping context, a private cause of action is a traditional remedy that has greatly enhanced the

enforcement of the antitrust laws. The creation of a private cause of action in the case of illegal foreign government subsidies would provide domestic producers with a remedy far more effective than those now possible under the Act and would significantly deter foreign producers and importers from accepting bounties and grants.

C. AMENDMENTS TO CLARIFY, SPECIFY AND IMPROVE THE SUBSTANCE OF THE STATUTE

1. The Term "Bounty or Grant"

The statute should be amended to define with some specificity the pivotal term "bounty or grant." The few cases decided in this area hardly provide the clear meaning which effective statutory enforcement requires. Fleshing out the bare bones of the term "bounty or grant" involves a number of considerations. While these issues are not limited to the two that follow, these are major questions which clearly need the attention of Congress.

(*a*) *The Remission of Indirect Taxes.*—The *Zenith* case, now before the Supreme Court presents the issue of whether the remission of indirect taxes (such as excise taxes) is a "bounty or grant" under the Act. Treasury and the courts have differed on the matter. Such a remission is indeed a subsidy for exports—a benefit given only to one who sells his goods to other countries. Whatever the Supreme Court decides, it would greatly enhance the Act's effectiveness if Congress specifies that such a remission is a "bounty or grant" and illegal under the Act.

(*b*) *The Effect of Subsidies of Exports to Third Countries.*—In some circumstances, a foreign government may cease or never initiate illegal subsidies for exports to the United States while granting those subsidies for exports to third countries. The Act should be amended to provide that, in that circumstance, the subsidies must be pro-rated among all exports, including those to the United States, for countervailing duty purposes. Money is fungible—and, a subsidy for exports to a third country clearly permits a foreign producer to reduce his price to the American market by giving him additional funds designated solely to subsidize his exports. Indeed, without such an amendment, an exporter can accept subsidies for third country exports but not, technically, for United States-bound exports—and thereby readily gain the desired subsidy of *all* exports and yet evade the structures of the American countervailing duty statute.

2. Inquiry Determinations and the Generalized System of Preferences

The Act requires an injury determination only if a product is normally imported free of duty. However, if the reason for the duty-free status of imports is that those imports have been permitted to avoid the payment of duty under the Generalized System of Preferences, an injury determination should not be required. In that case, the imports would be dutiable but for the special waiver of tariffs through GSP. It is most inequitable to require the additional hurdle of an injury determination where a country granted the benefit of GSP treatment has been found to have abused that grant by illegally subsidizing United States exports.

The Ferroalloys Association gain thanks the Subcommittee for its interest in the serious problems of effective enforcement of our unfair

trade laws relative to imports, and its desire to address those problems. The Association also thanks the Subcommittee for the opportunity to suggest some answers to these problems. It believes that new legislation as suggested herein is necessary to correct the present abuses and weaknesses. Our industry is beleagured by unfairly priced imports; and, as is true of many other industries, these problems must be dealt with realistically and reasonably promptly for the future welfare of our industry.

We will be happy to provide any additional information which the Subcommittee may request.

Very truly yours,

GEORGE A. WATSON, *Executive Director.*

FLORIDA FRUIT & VEGETABLE ASSOCIATION,
Orlando, Fla., March 30, 1978.

Mr. JOHN M. MARTIN, Jr.,
Chief Counsel, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. MARTIN: Florida Fruit & Vegetable Association (hereinafter referred to as "FFVA") is an agricultural, nonprofit cooperative association without capital stock, incorporated under Florida law, for the purpose, among others, of providing its members with the means of securing State and Federal recognition of problems incident to Florida agriculture, and aid in the solutions thereof.

Under its charter the members, who must be agricultural producers, elect a Board of Directors and a President from amongst is grower members. The Florida Commissioner of Agriculture is also an *ex officio* member of the Board which is the governing body of FFVA and formulates its overall policies.

FFVA operates on a committee system which initiates recommendations for the Board of Directors. These Committees include eleven Commodity Committees, and two Grower-Processor Committees, each of which is chaired by a member of the Board of Directors and is comprised of a sufficient number of members to give adequate representation to each geographic area of production within the State. There is also a Committee on Labor and a Committee on Competition and Marketing Agreements, each of which is comprised of a sufficient number of committee members to adequately represent the FFVA membership geographically. The President and the Florida Commissioner are *ex officio* members of all FFVA committees.

Efficient vegetable production in Florida depends upon a more or less continuous operation during the fall, winter and spring seasons of each year with the tropical fruit industry taking up the slack in the summer. Each growing season or period is an integral and vital factor in the overall vegetable operation within the State as there is an interdependence of one season upon the other for labor, equipment, marketing specialists and efficient farm operators. If any growing season or period is removed or weakened a situation is created in Florida that encourages imports of certain commodities which, in turn, limits Florida's production, and has a direct bearing and influ-

ence on the activity and success of the preceding, as well as the succeeding growing season.

The production of agricultural products in Florida, particularly fresh fruits and vegetables, is quite different from any other industry. For some commodities, the seasons are very short. The producer has only a few weeks to market his product and due to the high perishability of most items, storage is out of the question. This prevents him from averaging his profit or loss over long periods of time. If he is placed in an unfair position to compete, then he has no chance of recovering later.

In recent years, production costs of Florida growers have increased sharply each year while the agricultural picture has changed rapidly in some of the competing countries, primarily Mexico and the Caribbean. Thus, Florida producers now find that present tariffs are inadequate and for the past several years they have consistently asked that the Federal government give serious consideration to some type of import quota or marketing program in order that a viable Florida agricultural economy may be preserved.

In response to Press Release No. 37 of the Subcommittee on Trade released on February 6, 1978, FFVA recommends and urges that the Subcommittee initiate an oversight hearing on the adequacy of existing U.S. law to assure that fruits and vegetables produced in Florida during the fall, winter and spring seasons will have fair access to markets in the United States. Such hearing should look to the development of legislation other than and in addition to the specific legislation and legislative proposals referred to in Press Release No. 37. Such other legislation should be specifically designed to provide an opportunity for continuing and improved fair market access for the agricultural production of Florida.

It is the sentiment of the Florida grower that as a citizen of the United States he should be entitled to full priority when it comes to domestic marketing opportunities and that he and his employees should not be subjected to the adverse effects of foreign competition when their own productivity is adequate to meet the needs of the American people. The transfer of increasing numbers of farm operations and food processing operations to nearby foreign countries is evidence that we do not have an economic climate conducive to the continued expansion of our agricultural industry in competition with countries which have cheap labor and much lower standards than ours even though the population growth alone warrants and, in fact, will demand an increased production of food stuffs in the immediate years ahead. Much of the problems we have are documented in the record of previous hearings of your Committee on matters of foreign trade.

In view of the foregoing, it is evident that there is very little relief from unfair competition provided for an industry like ours in the enumerated sections of Title II of the Trade Act of 1974. In fact, the entire Act has been a threat to our industry.

Sincerely yours,

JOFFRE C. DAVID,
Secretary-Treasurer.

Statement of the Florida Tomato Exchange, Wayne Hawkins, Executive Vice President

The Florida Tomato Exchange is a non-profit cooperative agricultural association whose members represent about 80 percent of the volume of fresh tomatoes shipped from Florida each season. The Florida Tomato Industry has F.O.B. sales totaling more than 150 million dollars annually and represents more than one-third of the total value of all fresh vegetables commercially produced in Florida each year. The Florida Tomato Industry provides jobs for more than 7,000 workers, many of whom are not qualified for other employment due to their educational background.

There is a great need for a new United States foreign trade policy that is reasonable and fair. It should protect the jobs of Americans whose source of livelihood is removed or threatened by foreign competition. For many years, the Nation has been experimenting with the strange philosophy of inviting progressively greater volumes of assorted alien commodities to be marketed in this country, irrespective of their effect on this Nation's employment situation and irrespective of our balance-of-payments position. The free trade doctrinaries have prevailed because they have been able -- through the masquerade of promise and concession -- to divide industry against industry and section against section each time that opportunity for enactment of sensible trade legislation is in the making.

As a consequence, steadily increasing imports have forced a number of domestic producers out of business, taking a steady toll of jobs all across the country.

Our present foreign trade policy is somewhat confusing since the United States, a relatively new but very successful nation, is trying to change the policies of other older nations who are more experienced in the field of foreign trade. We should strive for truly reciprocal trade with the proper restraints necessary to prevent serious injury to our own industries, just as other nations have been doing and are doing today.

The present tariff schedules are not sufficient to protect American industry -- yet, many of these will be further reduced or eliminated if free trade advocates have their way. The United States is the greatest nation in the world, even with all of its foreign give-away programs. However, it is time that consideration be given to the American producer. The Florida tomato producer cannot compete with imports from Mexico, which has very low wage rates, as long as the federal government continues to grant special privileges to the imported goods. The great technological advantages once enjoyed by American producers are rapidly disappearing because we share them with our competitors at the expense of the American tax payer. Unfortunately, the producer cannot operate on a deficit budget like the federal government. He must pay his debts or go out of business. In order to pay his debts, he must be able to market his products at a reasonable profit. It has reached the point where this can be done only with protective tariffs or implementing an import quota or market-sharing type program that will assure him of a market for his commodity.

Current policies of the federal government seem to be inconsistent and, therefore, place the agricultural producer in an impossible position. On the one hand, every attempt seems to be to force the producer to increase his production costs. This phase includes the imposition of higher wages and taxes, stricter laws and administrative policies concerning labor and the use of insecticides, the payment of more and more welfare and unemployment -- which depletes the available work force. On the other hand, attempts are constantly being made to reduce or remove present duties and tariffs, to grant concessions to importers giving them a marketing advantage and ignoring pleas for relief by the affected industries, thereby forcing the American producer to compete with foreign countries which have substandard levels of living as compared with the United States.

If the producers of food stop producing, the United States could rapidly lose its position as the best-fed nation in the world and citizens could actually starve to death in the "land of plenty." Many people who depend on agriculture for their livelihood will be out of employment, not to mention the serious effects that further imports will have on our balance of payments, or the fact that in due course of time, the American people's dependence on many important food items would be at the mercy of the frivolities or caprice of foreign government.

The present fuel shortage in this country is an excellent example of what can happen if you depend too heavily on imports. You can park your automobile and walk if you are forced to; but what will happen if the present trend continues and we end up depending on foreign countries to supply our food. You can't very well stop eating and prices will immediately escalate to whatever level the traffic will bear.

Most of the preceding statements were taken from testimony presented to the Ways and Means Committee more than twelve years ago. Since then, testimony has been presented or briefs filed with the U. S. Tariff Commission, the House Ways and Means Committee, the Senate Finance Committee, the Senate Agricultural Committee, the House Agricultural Committee and the International Trade Committee along the same lines. Also on two occasions, the President of the United States has been petitioned to obtain an agreement with Mexico under Section 204 of the Agricultural Act of 1956, limiting the export from that country and the importation into the United States of fresh tomatoes since domestic producers are being adversely affected by increased and excessive tomato imports from Mexico.

No relief has been granted and the situation now is worse than ever. The only success we have had has been blocking attempts to reduce or remove the present import duty on tomatoes. Florida's production of fresh tomatoes has remained relatively constant for the past 14 years with total shipments ranging from 19 to 25 million 30-lb. equivalents. One or two variations occurred, but they were due to adverse weather condition in those particular years.

The greatest threat facing the Florida Tomato Industry today is still unrestrained imports from Mexico, a country that is not even a member of

GATT but is granted all of the privileges of GATT by the United States. The statistics contained in Appendix No. 1 attached to this statement verify that imports have been climbing at an alarming rate. During 1976-77 the United States imported 781,716,000 pounds of tomatoes from Mexico. This set an all-time high and was 35 percent more than the imports of 1971-72, only five years ago; it was 103 percent more than 1966-67, only ten years ago; and it was 240 percent more than 1961-62, only fifteen years ago.

The 1976-77 imports also reflect a 70 percent increase over 1968-69, the year that Federal Marketing Order No. 966 covering Florida tomatoes was reactivated in an effort to aid in the orderly marketing of Florida tomatoes. Most of the regulations issued under the order deal with grade, size, quality and maturity standards. These regulations have helped to standardize the package of Florida tomatoes offered for sale, have provided the consumer with a better product and have offered some degree of stability in the market.

Unfortunately, most of the orderly marketing procedures provided by the marketing order have been seriously undermined by imports from Mexico and the preferential treatment granted to Mexican imports by the United States government.

An example of this is the efforts of the Florida Tomato Industry to amend Section 8(e) of the Agricultural Marketing Agreement Act of 1937 so that Mexico would have to grade and size tomatoes in accordance with the regulations imposed on domestic shipments. This amendment has passed the Senate twice, most recently as S.91, and passed the House as an amendment to the 1977 Farm Bill, but was stricken in the Conference Committee. The companion bill, H.R. 744, is now buried in the Subcommittee on Domestic Marketing, Consumer Relations and Nutrition of the House Agricultural Committee, with apparently no hope for action. All Mexico has to pack is a U.S. No. 3 that is at least 2 and 4/32 inches in diameter. There is no way of really knowing what is in a box of Mexican tomatoes, so consequently, they are usually cheaper and totally disrupt the orderly marketing practice.

There are numerous avenues for relief under the present trade laws; however, most of them do not apply to perishable goods or the investigative mechanism moves so slowly that the patient is dead before the doctor ever arrives. The United States continues to lose every time we sit down to negotiate trade agreements. We can no longer sit down at a table and see how much we can give away and get nothing in return.

Basically, the principal of free trade is good, but it must be fair trade. The only way to have complete free trade is to have complete free movements of the inputs to trade. In other words, don't impose federal restrictions on our land, equipment, seed, fertilizer, pesticides, water usage, labor usage, packing facilities, cartons, transportation, social security, taxes, etc., and allow our competition to operate totally free of these requirements unless some compensating import restrictions are placed on them. Unless this is done, there is no way you can compete equally.

Imports from foreign countries should meet the same stringent requirements placed on domestic commodities. They should be labelled all the way to the consumer so they know what they are buying and where it was produced. Regulations should be put on imports preventing them from being consigned all over the United States to compete with domestic products that have a much higher cost of production. There are laws preventing dumping but they have never been properly used to protect the perishable agricultural industry.

We have an excellent example of the need for protection in fresh tomatoes this year. Last year we had a freeze in Florida and Mexican imports of tomatoes set an all-time record at extremely high prices. The Mexican growers increased plantings 20 percent this year and have been flooding the United States market since January 8, 1978, with fresh tomatoes that are offered for sale at Nogales, Arizona, at prices that reflect a fraction of the Florida F.O.B. market. During most of January, February and March, these tomatoes were offered for sale at prices that didn't even cover costs of production which certainly constitutes dumping.

A number of inquiries were made to determine what action could be taken to obtain relief. In every instance, representatives of the government bodies who would rule on such requests in effect told us not to waste our time or money asking for an investigation since they would rule against us. We did request action under Section 204 of the Agricultural Act of 1956 on February 7, 1978 (attached as Appendix No. 2). As of this date, no action has been taken on our request. Again, we point out the mechanism for relief for perishables does not work and takes too long to be helpful if it did work.

We hope this subcommittee will consider relief from imports for the perishable agricultural industries based on average wholesale prices. For instance, if the average F.O.B. price for tomatoes is 90 percent of parity or better, there would be no restrictions on imports other than the present tariffs. If the average F.O.B. price dopped below 90 percent of parity, imports would be limited to 75 percent of the base period which could be the average imports of tomatoes for the previous five or ten years. If the average price dropped below 80 percent of parity, then imports would drop to 50 percent of the base period; and when they were less than 70 percent of parity, the imports would drop to 25 percent of the base period, etc.

The percentage figures used here may not be exact, but the concept would still prevail. The base periods should be as short as possible, preferably weekly and certainly no longer than monthly. This idea would assure the consumer of a steady flow of merchandise at reasonable prices. When the market is high, imports would come in freely; and when it is cheap, the American producer would supply the market. There certainly should be no objections to a program of this type.

Mexico imposes very strict regulations on imports into their country. It is impossible for Florida to ship fresh produce into Mexico during their season. It is difficult to explain to a Florida producer why our government continues to make concessions to Mexico, threatening his very livelihood, when Mexico in turn slams the door in his face. There is a lot of truth in the statement made by Senator Talmadge at the Senate Agricultural Committee hearings on March 8, 1978, when he said, "What we need is an American desk in the State Department."

Agriculture made this country what it is today and it can save it with just a little help. We don't expect a guaranteed profit like so many industries today. We just want a fair chance to make a profit and increased government interference in running our business is not the answer. Supporting us by controlling imports is the answer.

APPENDIX 1

TOMATOES, FRESH. U. S. Imports fro MEXICO

Season	October	November	December	January	February	March	April	May	June	July	August	Sept.	Total
				- - - - - -1,000 Pounds- - - - - -									
1960-61	166	3,233	29,589	28,156	33,033	44,650	32,163	7,658	716	1,468	1,502	127	182,461
061-62	92	1,592	4,922	44,155	46,656	48,687	56,384	23,606	3,371	329	287	26	230,097
1962-63	43	270	9,404	37,254	61,223	52,379	51,547	22,218	1,132	219	227	---	235,916
1963-64	2	3,416	10,347	32,103	51,910	52,834	53,522	34,708	8,985	691	363	335	249,216
1964-65	159	1,139	9,373	37,052	44,563	57,726	55,869	40,942	10,660	606	299	121	258,509
1965-66	642	4,271	12,709	40,324	70,864	68,799	80,759	51,328	7,964	1,233	909	256	340,058
1966-67	1,870	10,645	23,791	51,596	72,100	66,745	69,015	60,190	21,517	4,650	3,343	284	386,106
1967-68	1,083	2,494	8,978	49,124	81,191	56,656	60,494	69,537	21,953	4,046	2,323	1,141	359,020
1968-69	2,720	10,698	27,518	72,206	79,180	84,112	76,546	70,502	32,816	2,182	2,125	713	461,318
1969-70	1,497	5,647	18 713	77,745	104,869	122,267	151,675	98,469	38,200	3,570	2,373	1,804	626,829
1970-71	1,993	7,464	30,587	58,533	120,497	87,834	120,869	108,452	35,468	4,280	2,278	2,028	580,283
1971-72	3,169	8,166	18,714	39,398	154,577	79,236	126,312	111,305	23,027	1,212	3,023	2,347	577,170
1972-73	5,200	16,211	13,753	59,433	131,104	110,551	195,393	115,183	81,594	8,983	5,412	2,329	745,146
1973-74	4,809	17,511	16,820	83,723	135,969	84,697	90,242	114,682	40,248	6,945	2,511	1,090	599,247
1974-75	4,463	15,792	10,239	23,589	83,320	85,640	98,386	124,796	79,753	23,750	3,433	4,380	557,541
1975-76	6,668	9,605	15,774	56,255	142,090	92,545	118,003	4,677	147,379	18,977	3,159	2,721	617,848
1976-77	13,070	26,023	23,690	53,759	168,021	118,116	175,554	129,812	52,069	8,854	7,152	5,596	781,716
1977-78	23,561	21,251	21,646										

SOURCE: STRAWBERRIES AND SELECTED FRESH VEGETABLES, U.S. IMPORTS (FOR CONSUMPTION) FROM MEXICO (BY MONTHS), PREPARED BY FOREIGN AGRICULTURAL SERVICE, FOREIGN COMMODITY ANALYSIS, FRUIT AND VEGETABLE DIVISION.

APPENDIX 2

FLORIDA TOMATO EXCHANGE

A Nonprofit Agricultural Cooperative Association

Telephone (305) 894-4071

February 7, 1978

The Honorable Robert Bergland
Secretary of Agriculture
U S Department of Agriculture
Independence and 14th Streets
Washington, D. C. 20250

Dear Secretary Bergland:

It has been two weeks since I sent you a Mailgram explaining the disastrous effect that unrestrained imports of Mexican tomatoes are having on the Florida Tomato Industry by totally shattering the United States pricing structure for this commodity. I explained that the situation was desperate and asked your help in recommending a solution to the problem. To date, I have not received a reply from you.

The situation has become more desperate. I told you that from January 15 through January 23 Florida shipped 636,804 30-pound equivalents of tomatoes while Mexican imports totalled 1,319,794 30-pound equivalents. Updating these figures to include shipments through February 6, 1978, Florida has shipped 1,901,863 and Mexican imports total 3,695,745. The price being asked for Mexican imports is much less than the price being quoted for Florida tomatoes. In fact, the price for Mexican imports is considerably below costs of production in both Florida and Mexico. Many of the Mexican tomatoes are being sold on the cuff all over the United States and you, as an agriculturist, know what this does to any market.

The Florida Tomato Exchange on behalf of its members who represent about 80 percent of the volume of fresh tomatoes shipped from Florida each year respectfully requests through you that the President of the United States, under the authority contained in Section 204 of the Agricultural Act of 1956, seek to obtain an agreement with Mexico limiting the export from that country and the importation into the United States of fresh tomatoes since domestic producers are being adversely affected by increased and excessive tomato imports from Mexico.

During recent years, imports of fresh tomatoes into the United States from Mexico have increased to such an extent as to disrupt the market for tomatoes produced in the United States. This increase in imports has been caused in large part by lower costs of production in Mexico, especially in wages paid to agricultural employees, which it is the policy of the United States to maintain at relatively higher levels than other countries. Because of this unfair disparity in costs of production which exists in Mexico by reason of the payment of substandard wages, it is practically certain that imports of fresh fruits and vegetables will continue to increase and further destroy the market for tomatoes produced in the United States.

Post Office Box 20645 • 4401 East Colonial Drive • Orlando, Florida 32814

This problem has been well documented in recent years and is known to the United States Department of Agriculture, the International Trade Commission, the United States Department of State, the Special Representative for Trade Negotiations, the Committee on Ways and Means and other responsible officials and groups who have been concerned with foreign trade. It is therefore not my intention to burden this formal request with evidence of a problem that is already a matter of record.

The Exchange further respectfully suggests and recommends that before initiating such an agreement with the Mexican government that those authorities in the United States government who will be empowered to effectuate these negotiations seek the advice and counsel of representatives of the Florida Tomato Industry who have been affected by these imports in order to arrive at fair and just terms that will provide for orderly marketing. Any agreement reached should include quantitative limitations on the amount of fresh tomatoes imported into the United States that will avoid injury or threat of injury to domestic producers and the economy in the American areas of production affected by the importation of Mexican tomatoes.

We urge that this request be given immediate and favorable consideration since any further delays in appropriate action on the part of the United States government to resolve this problem will be disastrous to the affected segments of our agricultural economy.

Sincerely yours,

Wayne Hawkins
Executive Vice President

WH:mjc

cc: Florida Congressional Delegation
Florida Tomato Exchange Membership

STATEMENT OF NOEL HEMMENDINGER, ESQ., WASHINGTON, D.C.

RECOMMENDATIONS FOR AMENDMENTS IN U.S. LAWS TO PROVIDE RELIEF FROM UNFAIR TRADE PRACTICES

This statement is submitted in response to the Committee's invitation (Cong. Rec., February 9, 1978, page H935) by Noel Hemmendinger of the Washington law firm of Hemmendinger, Whitaker & Kennedy, 1825 K Street, N.W., Washington, D.C. 20006.[1]

The Subcommittee has invited views on how U.S. laws to provide relief from unfair trade practices and regulations pursuant to such laws should be amended to provide more expeditious, effective, and equitable relief for domestic industries from unfair practices affecting import competition, with respect specifically to operations of the Antidumping Act, the countervailing duty law, Section 337 of the Tariff Act of 1930 as amended and Section 301 of the Trade Act of 1974.

The law firm has had long experience in representing U.S. importers and foreign exporters to the United States in proceedings under these laws. The law firm is registered under the Foreign Agents Registration Act as an agent for a number of foreign principals. However, this statement reflects the views of Noel Hemmendinger only and is not necessarily in accord with the views of every member of the firm or of any particular client.

SUMMARY

Introduction

For both substantive and procedural reasons, the laws against so-called unfair trade give just cause for complaint to both American importers and U.S. trading partners and need amending. Because of the time and expense involved, they are also frustrating to U.S. producers having just complaint. The remedy lies not in tighter laws but in consolidation of proceedings and in mechanisms to resolve the controversies at an early date.

Antidumping Act

(a) Section 205(b) of the Act, added in 1974, (the so-called cost of production provision), is ill conceived and should be repealed.

(b) The administration of the Antidumping Act errs seriously against exporter-importer interests in disallowing adjustments for circumstances of sale that are required by the law and in comparing each export transaction with an average home market price, contrary to the intent of the law. Procedures for settlement of cases at an early stage should be developed.

Countervailing Duty Law

Assuming Treasury's discretion is affirmed by the Supreme Court in *Zenith*, the countervailing duty law still has serious defects harmful to U.S. domestic and international economic interests. Regardless of the outcome in the MTN, an injury test should be introduced as soon as possible. The Executive should have discretion to weigh the com-

[1] The law firm is the successor to Stitt, Hemmendinger and Kennedy which on July 1, 1977 merged with the Cleveland, Ohio law firm of Arter & Hadden and Columbus, Ohio law firm of Knepper, White, Arter & Hadden.

peting interests involved, including the legitimate interest of developing countries in offering incentives to exports.

Section 337 is burdensome and unnecessary and should be repealed, except perhaps with respect to patent cases.

Unified Procedure.—In the longer term, the statutes presently embraced in Titles II and III of the Trade Act of 1974 should be thoroughly reviewed and revised with a view to the establishment of a single consolidated proceeding for relief against imports.

INTRODUCTION

U.S. unfair trade practice laws at present are justly accused of amounting to non-tariff trade barriers, because the proceedings are expensive and complex, because there are duplicative proceedings, and because there is risk of overkill. Defects are detailed below in respect of each of the laws. In contrast, Title II of the Trade Act, the so-called escape clause, appears to have achieved a proper balance and is working as it was intended to work. It is natural that domestic interests are not always content with the result, but if they cannot persuade the President, after an affirmative finding by the ITC, they have the recourse of Congressional override. Trade issues, like all other issues, in the last analysis involve a contest of competing forces in the American society. The present Title II permits these forces to be exerted and leads to a decision based upon all of the legitimate considerations involved.

The laws against so-called unfair trade, on the other hand, present two grave problems. First, the conception that certain types of conduct can be characterized as unfair and automatically stopped when discovered is a serious oversimplification. Intelligent decisions in the field of trade policy require a balancing of the various interests involved. Some person must have the authority to do this. Second, the laws directed at "unfair" acts require investigations of conduct in the home country, which are resented and which are frequently not effective. It is much better, whenever possible, that trade policy decisions be based upon facts which are discoverable in the United States rather than to require determinations by U.S. authorities with respect to foreign acts.

The laws lead to frustration and vexation for the U.S. complainants and not just for the respondents. This has led to some suggestions for tighter time limits, but this is no solution. For instance, dumping investigations under the present law are extremely complicated, and it frequently taxes Treasury's resources to accomplish them within the existing time limits. Much of the frustration could be removed if suggestions are adopted for a unified proceeding and for mechanisms to resolve disputes without going through the full proceedings, both of which are discussed below.

1. The Antidumping Act [2]

A. Comparison of each export transaction with average home market prices is unfair.—The Treasury phase of a U.S. antidumping

[2] The material in A. B and C is based upon the statement of this law firm in the November, 1977 Oversight Hearing of this Subcommittee on the Adequacy and the Administration of the Antidumping Act of 1921, Serial 95-46, pages 124-27.

investigation normally involves a comparison of prices in sales to the United States with prices in sales in the home market, with appropriate adjustments. Section 153.16 of the regulations provides as follows:

> Where the prices of the sales which are being examined for a determination of fair value vary (after allowances provided for in §§ 153.9, 153.10, 153.11, and 153.15), determination of fair value will take into account either the prices of a preponderance of the merchandise, or the weighted averages of the merchandise thus sold. Unless there is a clear preponderance of merchandise sold at the same price, weighted averages of the prices of the merchandise sold will normally be used. If there is not a clear preponderance of the merchandise sold at the same price and weighted averages of the prices of the merchandise sold are determined by the Secretary to be inappropriate, the Secretary will use any method for determining fair value which he deems appropriate.

Under this regulation, in the course of the fair value phase of the dumping case, i.e. the Treasury Department investigation, information is given to Treasury with respect to each export sale and this price is then compared with an average home market price as calculated by Treasury from the data submitted.

If one imagines a simple model in which the sales in the home market are exactly the same as the sales for export to the United States in a given period, then it is obvious that by the prevailing test one-half of the sales for export are found to be at less than fair value margins. Thus, it is commonplace that under the administration of the U.S. law, dumping is found where by any normal test there is no dumping, and margins are found exceeding true margins. This practice does not flow from the language of the statute and can readily be remedied by changing the practice.

We understand that after a dumping finding is made Treasury does not follow the average technique, but looks for a sale in the home market with which to compare each entry into the United States. This practice should be adapted to the fair value phase of the investigation. Less than fair value sales should not be found if, in comparing the band of export sales with the band of home market sales, there exists a home market sale corresponding to the export sale under examination.

B. Section 205(b) of the Act relating to sales in the home market below cost of production is seriously defective.—In the Trade Act of 1974 an amendment was made to the Antidumping Act of 1921 to add § 205(b) as follows:

> Whenever the Secretary has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, he shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the Secretary determines that sales made at less than cost of production (1) have been made over an extended period of time and in substantial quantities, and (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade, such sales shall be disregarded in the determination of foreign market value. Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than cost of production, are determined to be inadequate as a basis for the determination of foreign market value, the Secretary shall determine that no foreign market value exists and employ the constructed value of the merchandise in question.

The regulations (§ 153.5) track the statute but add the following sentence:

> The cost of production ordinarily will be computed on the basis of the actual costs of materials, labor and general expenses, excluding profit, or, if necessary on the basis of the best evidence available.

The provision was drafted in the Treasury Department and was in the Trade Act of 1974 as submitted to the Congress by the Executive Branch. There is very little legislative history. The observations of the House Ways and Means Committee and the Senate Finance Committee express concern that sales below cost of production would otherwise escape the purview of the Act, without further explanation, and stress the provisions that to be operative the provision must involve sales for an extended period in substantial quantities and at prices that would not fully cover all costs within a reasonable period of time, implying that the application of the rule would be unusual.

Section 205(b) may appear to represent a reasonable defense to excessive foreign competition when world demand is slack, but in actuality it is contrary to U.S. international obligations, crude, capricious and very likely to be harmful to U.S. economic interests.

Section 205(b) was challenged in the Antidumping working party of the GATT as contrary to Article VI of the GATT which provides that the comparison shall be made with "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or, in the absence of such domestic price, . . ." by third country sales or cost of production, and Article 2 of the Antidumping Code. The latter repeats the above quoted language of Article VI of the GATT, but additionally provides in Article 2(d): "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined" by third country sales or cost of production.

It is submitted that the challenge is correct because Article VI is unambiguous; if there are domestic sales, they must be used. The Antidumping Code expression "if such sales do not permit a proper comparison" was intended to cover the case of an inadequate number of sales, and thus to legitimize the practice of disregarding home market sales if too few to indicate a comparable market. That expression cannot be stretched to legitimize disregarding a large number of domestic sales made in the usual course of trade, on the ground they were below average costs. So drastic a change cannot be read into a general expression of this sort. Nor can it reasonably be argued that below-cost sales are *ipso facto* not in the usual course of trade.

Section 205(b) can also be productive of maximum international discord by requiring an examination by U.S. officials of data of foreign producers that may be highly confidential, and not revealed even to their own governments.

The provision had its genesis in the Canadian Sulfur Case of 1972–73 in which counsel for complainant, the Duval Corporation, a Texas sulfur producer, had claimed that sales below cost of production were *ipso facto* sales below fair value under the Antidumping

Act. The Canadian sulfur in question was a byproduct of the production of natural gas; it was claimed that it was sold at prices which did not fully cover all costs. After briefs and extensive considerations, the Treasury Department rejected the contention that sales below cost of production were *ipso facto* violations of the Antidumping Act. F.R. April 23, 1973. (Ironically margins were nevertheless found and that case has been caught up in the assessment of antidumping duties since the 1974 Act. A large file has accumulated on the issue of when a product is a co-product and when it is a by-product, since if it is a by-product it is not expected that its price will cover fully distributed costs.)

Based upon discussion with many people involved in the 1974 Act legislative process, we believe that little if any thought was given to the consequences of using statutory constructed value, with its built-in minimum 10 percent general expenses and 8 percent profit. (Section 206 of the Antidumping Act, 1921, as amended, 19 U.S.C. § 169.) The drafting technique that was adopted permits an argument to be made that the provision is consistent with the International Antidumping Code. It provides that less-than-cost domestic sales and third country sales would be disregarded, leaving constructed value as the third basis for fair value. In fact, however, there is a largly unanticipated consequence, which is not only unfair to the foreign producers but potentially quite undesirable for U.S. consumers and the U.S. economy. If prices in the home market are 1 percent below production cost, export sales to the U.S. cannot be made unless there is an 8 percent profit.

In the case of economic goods like steel mill products, harm to the U.S. economy is a likely and serious consequence of the application of the new rule. Faced with decline in demand, the strong tendency of the oligopolistic U.S. industry is to reduce production and (since that increases unit costs) maintain or increase prices, at the very time that the U.S. economy faces the dilemma of combined recession and inflation. Absent price controls, the discipline of imports on price is essential, but (considering freight and duty have to be added) is completely removed.

Surprisingly, there is very little history of the application of constructed value with the built-in minimums of 10 percent administrative cost and 8 percent profit, although it has been long in the U.S. law. We believe that the first case in which constructed value was applied as a standard was in 1974, and that the only case in which a dumping finding resulted was the *Birch Doorskins* case, 40 F.R. 48383, October 15, 1975. Accordingly, the economic consequences of constructed value, if it should be widely applied, have never been tested.

Constructed value will not always be applied, because there are often enough sales above cost in the home market to be a basis of comparison. This has been cited as mitigating the otherwise extreme effects of Section 205(b), but in fact it means that a new element of unfairness is becoming a routine aspect of administration of the Antidumping Act.

The normal practice in dumping cases is to compare average prices in the home market with each sale for export to the United States. Section 205(b) requires the Treasury Department to disregard certain prices that are below cost in arriving at the average price. The

result is to create margins that would not otherwise exist or to enlarge margins, without the slightest justification in principle.

This unfairness is compounded by the fact the each export transaction is compared with average prices in the home market, as explained in A above. Export transactions at prices above the domestic standard are disregarded, so that a double bias is introduced by Section 205 (b). A group of sales below average for export to the United States is compared with a group of sales above average in the home market.

The unfairness could be mitigated somewhat by procedures which are believer to be within Treasury's discretion in interpreting the law. It could find the home market price for a particular article in the usual way, using average or predominant price, and then apply Section 205(b) only if that price is below cost of production; and exclude only those sales that bring the average below cost.

The effects of Section 205(b) can also be mitigated by a high threshold test. As a matter of statutory construction, the words "reasonable ground to believe or suspect" in 205(b) should be construed in *pari passu* with the expression "reason to believe or suspect" used in Section 201(b) of the Act, relating to the preliminary determination which is made after six months of investigation. That finding is made upon a substantial evidentiary record. The Congress was well aware of that in enacting 205(b). There is a strong argument, therefore, that a similarly strong evidentiary record should be before the Secretary of the Treasury before he investigates cost of production. The practice of the Treasury Department has been to investigate cost of production upon fairly thin allegations in the complaint, and to decide at the beginning of the investigation whether or not to do so. It is believed that decision at that point is not necessary. The Secretary has authority to extend investigations to nine months, and that could be the normal course if cost of production is investigated. Only after a strong showing by complainants which has been thoroughly reviewed in Treasury or after the initial stages of the investigation have disclosed good reasons, should there be an investigation of cost of production. It would also be desirable that the Treasury Department make the charges public and invite comments from interested parties before such a decision.

It is clear tnat Section 205(b) represents overkill that should be eliminated from the U.S. law. This conclusion is not inconsistent with the trigger price mechanism (TPM) under which the United States Treasury Department monitors steel imports into the United States. Section 205(b) is in a sense the foundation for the TPM, but only in its broad principle of referring to cost of production and not in its details. In using the cost of the world's most efficient producer as the basis for deciding whether an antidumping investigation will be made *sua sponte*, the Treasury Department is employing an economic and not a legal concept. The Treasury Department has broad discretion what circumstances will cause it to initiate an investigation, and even when the trigger price mechanism is triggered this results only in a preliminary investigation to determine whether a formal and expedited investigation will be instituted. Logically, therefore, if the TPM were legally linked to cost of production it should be different for each foreign supplier. If Section 205(b) is completely repealed, this will not impair the operation of the trigger price system.

It is also evident that the long standing 8 percent profit in the definition of constructed value should be made more flexible, lest it lead to excessively anticompetitive consequences.

C. Differences in circumstances of sale.—The law provides in Section 202 (b) and (c) that if it is established to the satisfaction of the Secretary that the difference between the home market prices and the export price is "wholly or party due to * * * differences in circumstances of sale * * * then due allowance should be made therefor."

The regulations, Section 153.10, put an unjustified limitation on the unambiguous words by providing that "differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration."

This small difference in language results in rejection of adjustments for selling and distribution costs that are clearly different in the two markets and can readily be calculated under accepted accounting principles. It leads to findings of dumping where there is no dumping, and to larger margins than truly exist. Treasury has been officially considering change under one regime after another.[3]

There are two main methods by which foreign goods are sold to the United States. One is an arm's length sale in the country of origin to the U.S. importer who is not related to the producer or exporter. In this situation the so-called "purchase price" is applied. The other is where the foreign producer maintains an affiliated company in the United States. Here, because of that relationship, the sale in the United States is the basis for comparison. Under the U.S. law, this is called "exporter's sales price."

Let us suppose that for a given article there is a price at the factory, including a reasonable profit, of 100, and that export price or "purchase price", including costs of shipping is 105. Let us further suppose, as is often true, that the manufacturer maintains a sales staff, and provides advertising in the home market, so that the home market price is 110. If commissions are paid, these are deductible by terms of the U.S. statute, but the salaries and expenses of the sales staff and the advertising in the home market are not permitted to be deducted (unless shown to be directly related to the retail sale). Let us add one more circumstance which frequently occurs, namely, that in addition to a sales staff at the factory, the manufacturer maintains distribution centers throughout the country of origin, at which point the price is 125. The overhead of these centers is clearly related to the sales in the home market and not to exports, and yet it is not allowed. In this situation, the foreign businessman is confident that he is not dumping, because the price at the factory level is the same for both markets. Yet the U.S. Treasury would decide that there is a less-than-fair-value margin of 25.

In short, it often happens that the importer buys abroad at the factory cost, plus profit and perhaps the cost of putting the goods aboard ship, and all the overhead costs of wholesale distribution in the United States are borne by the importer. The comparable distribution costs in the country of origin are borne by the producer, and yet they are

[3] The following paragraphs are based upon testimony of this law firm before the Ways and Means Committee when it was considering the Trade Act of 1974 (Hearings before the Ways and Means Committee on H.R. 6767, 93d, Cong., 1st Sess., page 1357, May, 1973).

included in the home market price and excluded from the export price, in making the price comparison under the Act.

This is the practical consequence of the innocuous-sounding provision of the Regulations that costs must be "directly related to the sale under consideration."

The unfairness is highlighted by the practice of the U.S. Treasury Department in the case of "exporter's sales price", that is, where the foreign manufacturer sells through an affiliated company in the United States. In this situation, the Treasury Department is required by the terms of the Act to deduct from the sale price in this country the general expenses which are allocable to the sales under consideration. To avoid a most blatant unfairness, the Treasury Department will in this situation allow deduction of the general expenses in the home market subject, however, to the limitation of the same dollar and cents amount per unit as were deducted on the American side. This peculiar rule is nowhere to be found in the Regulations. What it amounts to is that in comparing the wholesale price in the United States with the wholesale price in the home market, the U.S. Treasury will deduct general expenses from both sides of the equation if to do so would tend to increase a possible dumping margin, but will not do so if the result will tend to decrease a possible dumping margin. Imagine the furor if such an unprincipled rule were to be written into the Regulations!

To apply our simplified calculations to the exporter's sales price situation, if the factory price was 100, than the landed duty paid cost might be 125 and the whole sale price in the United States, after general expenses and profit of the selling company in the United States, 150. Stripping the U.S. sales price down to the factory price plus the profit of both factory and U.S. affiliate would result in a figure of 105. Let us suppose that in examining the expenses in the United States it is found that advertising and salesmen's salaries and general sales overhead total 15.

As we have seen, on the home market side the wholesale price is 125, and the expenses for advertising, salesmen's salaries and overhead are 25. Only 15 of the 25 would be allowed, leaving a price of 110 and a less-than-fair-value margin of 5.

This would be a far smaller margin than if "purchase price" were applied, but it proves the unfairness in the purchase price situation. Treasury has no difficulty in deducting general expenses from the sale in the United States, so where is the difficulty in deducting them from the sale in the home market? [End of material referred to in Footnote 3]

D. Discretion is Needed to Terminate Dumping Cases Short of a Dumping Finding.—It is not necessary for a case to proceed to a dumping finding, with the consequent administrative burdens both on the Customs Service and the trade, in order to discourage excessively low prices. Normally companies charges with dumping are willing to reconsider their prices if faced with threats of a legal proceeding. A liberalized procedure is needed to facilitate such settlement. This can be accomplished under present regulations relating to discontinuance, (Sec. 153. 73). The moment the Treasury Department has word that a dumping complaint is being filed, it should notify the government

concerned and discussion should take place, if desired, leading to an undertaking on the part of the industry concerned (with or without the participation of its government) that dumping will not take place. This procedure should be analogous to a consent order in judicial and Federal Trade Commission cases, that is, without admitting any violation, the business concerned would agree that the acts complained of would not take place in the future. Treasury should receive the views of interested parties, as at present, before the discontinuance is finally granted.

Such a procedure does require safeguards so that it does not become a device for illegal private agreements. The Treasury Department should normally receive the views of other interested agencies before acting, and it would need basic information on which to form a judgment. Normally, therefore, termination would await the filing of responses to questionnaires, but there would frequently be sufficient information for an informed judgment to be made without awaiting this step. The anticompetitive consequences of such settlement procedures are worthy of serious consideration, but it should be borne in mind that the Antidumping Act itself is a highly anticompetitive measure. Therefore the scrutiny appropriate in the case of a proposed settlement through a voluntary discontinuance should be designed to make sure first, that there is a genuine problem arising under the Antidumping Act, and second, that the resolution is not more anticompetitive than would be a dumping finding.

2. COUNTERVAILING DUTIES

The question of subsidies is one of the most important being taken up in the MTN and we hope a comprehensive agreement is brought back from that negotiation to deal with this problem. The lines of necessary legislation will flow from that agreement. However, at this writing there is considerable difficulty both in reconciling the views of the developed nations on this question and in the problem which is no less serious, of taking account of the special interests of the developing nations. Therefore, this Subcommittee may wish to give consideration to changes in the U.S. law regardless of the MTN.

Unquestionably an injury test belongs in the U.S. law. The main reason is that importations at low prices are in the interest of the U.S. economy, unless some significant U.S. interest is hurt. In defense of the present U.S. law, it is said that no industry will complain unless it is hurt and that this is a type of injury test, but this is much too shallow.

The original rationale of the countervailing duty law was that governments should not be permitted to subsidize exports to overcome the effects of U.S. tariffs. For this reason, until the 1974 amendment, application of the countervailing duty law was limited to dutiable products. Recently the principles of the countervailing duty law have been pressed as a corollary of liberal trade theory, namely, that subsidies represent governmental interventions inconsistent with the principles of the free market. Such a rationale for countervailing duties, we submit, is unrealistic. The conditions under which international trade takes place have been determined in very large part by governmental interventions, both historic and existing. This is true for the United

States, as well as all other countries. For the United States to insist that certain types of intervention are illegitimate and will be unilaterally penalized is regarded by many nations, particularly in the developing world, as an unjustified intervention into their own economic strategies.

There is no country in recent times that has developed rapidly that has not used various forms of incentives. Further, the United States has recognized the necessity of providing stimulus to development by extending certain trade concessions to developing countries through Generalized System of Preferences in the Trade Act of 1974. It is submitted that certain practices of developing countries designed to encourage the development of new industries should also be recognized as legitimate by our international trade laws. Consequently, the Congress, in conjunction with its consideration of an injury test, should examine the special requirements of developing countries with a view to recognizing legitimate forms of export subsidization and the circumstances under which the United States will accept the imports of such subsidized products.

The application of simple mechanical rules cannot possibly do justice to the problems which are presented in such situations. It is essential, at a minimum, that before countermeasures are taken against the imports of a friendly country into the United States, there be an examination of the way in which this trade affects the totality of U.S. interests involved. This puts the focus, as it should be, upon the question of injury. In the long run (except perhaps with respect to developed countries, where there are agreed rules that can be elaborated) the true test should be the same as under the escape clause. This approach would involve an abandonment of the most favored nation approach to the remedy, if countermeasures were found to be desirable. The President has this authority now, but is reluctant to use it in the face of the international obligations of the United States. If more drastic change is not made, then, at the very least, it should be provided that there is discretion in the President to negotiate solutions to countervailing duty problems on a government-to-government basis, and some special treatment for developing countries should be permitted. Because this law deals with internal measures of foreign governments, it is essential that the Congress make provisions permitting U.S. decision making to be in the total context of the U.S. interests affected and U.S. foreign economic policy toward the country concerned.

3. SECTION 337 OF THE TARIFF ACT OF 1930 AS AMENDED

Of laws, legal proceedings and government staffs it should be said, if it is not necessary to have them, then it is necessary not to have them. For fifty years Section 337 and its predecessor served scarcely any purpose except in patent cases, and for those it was ill-suited. An appropriate remedy, in the Trade Act of 1974, would have been the repeal of Section 337 and, since there did appear to be a place for *in rem* proceedings against imports in patent cases, expansion of the jurisdiction of the Federal court in a patent suit. Instead of repeal, in a well meant effort to remedy the clear defects of the previous law, an elaborate procedure was established resulting in a legal and administrative hybrid. It is excessively cumbersome and burdensome,

because the proceedings are under the Administrative Procedures Act, because a special staff of the ITC is a third party in the proceeding, and because in addition to a presiding officer, the six commissioners, make the decisions.

We believe that the essential vice of Section 337 is that it combines vindication of private and of public rights. Where private rights are involved the courts remain open, and there is no showing that the Commission is a be ter forum. Where public interests are also involved, the Federal Trade Commission Act, the Antidumping Act and the Countervailing Duty law afford adequate remedies.

While Section 337 remains in force, the ITC should respect the intent of the Congress and suspend its proceedings when parallel proceedings involving essentially the same circumstances are underway under the Antidumping Act or the countervailing duty law. Although the intent of the Congress is not as clear in the case of other proceedings, it should also exercise its discretion to suspend if there are other measures underway, such as a proceeding under Section 201 of the Trade Act of 1974, that promise relief to the particular grievance. The decision of the President to disapprove the Commission's Cease and Desist Order in the case of Stainless Welded Pipe and Tube may help the ITC to reach this conclusion. A view has been expressed that the ITC has an obligation to go ahead in view of the statutory provision that § 337 is in addition to other remedies. To construe this as making it mandatory not to suspend is a distortion of the intent of the Congress and would represent unjustified harassment of the import trade. Respondents would be forced either to count on Presidential disapproval, which no one would be in position to promise, or to defend at undue expense. This Subcommittee should make its views on this subject known to the ITC.

It has been suggested that proceedings under § 337, dealing with "unfair trade" are preferable from the standpoint of U.S. policy to Section 201 proceedings, dealing with "fair trade." We submit that even in the case of dumping and countervailing duty, this is very doubtful and that it is even more untrue in the case of Section 337, which applies standards and procedures that are not internationally acepted. To categorize foreign acts as unfair and to conduct investigations of what is done in the foreign country is the way to provoke maximum discord in international economic relations. Foreigners will always respect the right of the United States, even if they regret the action, to take such action as the United States Government finds necessary to counter adverse effects of foreign competition within the U.S. economy. From the standpoints both of rationality and international harmony, it is much better that the investigations focus upon what is happening in the United States rather than what is happening in the country of origin.

Recently there appears to have arisen a new viewpoint, that the Commission should not simply react to complaints under Section 337 but that its staff should actively inquire into situations in which the Commission might itself institute proceedings. The Federal Trade Commission has jurisdiction over unfair acts in the commerce of the United States already, and there is no occasion for the development of a further bureaucracy devoted to this purpose. It is important, we suggest, that the interested committees of the Congress make clear that such an institutional growth does not correspond to their wishes.

4. A SINGLE PROCEEDING

We think there is much to be said for bringing together in a single proceeding the various cases that are now brought under Title III of the Trade Act of 1974. We would also combine in such a proceeding those now brought under Title II dealing with so-called fair trade. We made a proposal along this line in testimony before the Senate Finance Committee in 1974 (Hearings on H.R. 10710, pages 1941–1942).

With some modifications, that proposal follows. We believe that it is trade neutral, in the sense that if enacted it would favor neither imports nor domestic products over the present situation. It would, however, remedy a justified complaint against the complexity of the choices among different procedures that domestic producers have to face if they seek relief from import competition. We believe this is a legitimate grievance and that this type of measure could do much to help. It would eliminate harassment from multiple proceedings, which gives justification for complaint to our trading partners.

1. Every application for relief from imports should be addressed for the Internataional Trade Commission and may, but need not, specify the relief sought. The applicant should be required to furnish all the information available to him relating to any of the present statutory standards, i.e., escape clause, dumping, foreign subsidies, unfair competition.

2. The International Trade Commission should promptly institute its own investigation, if a preliminary review determines that this is justified, and should make a finding with respect to the effect of the imports complained of upon the U.S. industries producing competitive products and upon other U.S. interests.

3. Whenever it appears that foreign investigations are needed, the ITC should so notify the Executive Branch and in that case such investigations should promptly be undertaken by the Treasury Department if dumping or subsidization are in issue or by the foreign service of the United States as to other types of inquiries.

4. Reports of the ITC on the effect of imports on the domestic producers, workers, communities in the U.S. economy and the reports of the foreign investigations, if any, should expeditiously be placed before the President or his designee. The ITC should indicate the degrees of injury, if any, which are found so that distinction may be made if appropriate, among the different standards of the present law relating to remedy. If dumping is involved, consideration should be given in assessing injury to the margins of dumping, as at present.

5. After receiving an affirmative report, the President should expeditiously take any action of the types authorized by present law that he finds appropriate. If the President does not take action to restrict imports, he should report to the Congress with his reasons and the Congress should have the power to override.

6. The public and the foreign government concerned should be promptly informed of the institution of an investigation, and the investigation should be terminated at any point that the President, or his designee, after considering also the views of the complainant and the ITC, determines that the grievance has been removed.

KAISER STEEL CORP.,
Oakland, Calif., April 14, 1978.

JOHN M. MARTIN, Jr.,
Chief Counsel, House Committee on Ways and Means,
Washington, D.C.

DEAR MR. MARTIN: On February 6, 1978, the Subcommittee on Trade requested interested persons to submit their views regarding desirable changes in the trade laws. Kaiser Steel Corporation welcomes the opportunity to present its views on this subject.

We agree with the Subcommittee that there is a demonstrated need for the Subcommittee to consider legislative and administrative changes in these laws. At the present time, steel imports are taking an average of 50% of the steel market in the Western United States. This is the largest import penetration ever reached in our region. We believe that imports have attained this position, and will seek to maintain this position, by predatory pricing, dumping, and other unfair methods of competition. In response to this situation, we have investigated the present trade laws and supported various legal and administrative remedies designed to stop unfair competition. However, it is apparent to us that the present trade laws have serious deficiencies. We therefore support the Subcommittee's efforts to remedy these deficiencies. Our recommendations are as follows:

1. *Amendments to the Antidumping Act:*

(*a*) *Lessen the Burden on Petitioners.*—Under present Treasury regulations, the petitioner in a dumping case must present a prima facie case for relief in his petition. This burdensome requirement forces a petitioner to gather all his evidence and present it before an investigation will even be initiated. We believe that a minimal complaint should be sufficient to initiate an investigation. The investigating agency would then gather the facts, instead of the petitioner.

(*b*) *Shift the Burden of Proof.*—In addition to filing a massive petition, the domestic industry must attempt to prove facts, such as foreign market value, that are easily accessible to the importer. A simple way to solve this serious problem would be to provide that, upon filing a petition, the burden of proof shifts to the importer to prove that he is not dumping. The importer would then have to introduce evidence of his costs, home market values, and constructed costs.

(*c*) *Amend the Dumping Standard.*—The present preference in the dumping law for determinations based upon home market prices should be eliminated. The importer should have to prove both foreign market value and constructed value. Relief should be given if there is dumping under either theory.

(*d*) *Exclusive ITC Jurisdiction.*—One general issue raised by the Subcommittee is resolution of the conflict arising from overlapping jurisdiction in dumping cases. We recommend resolution of this conflict by transferring all responsibility for administering the antidumping law to the ITC. If the ITC controlled the investigation, and if it were given the necessary resources, we think it would be willing to investigate, self-initiate, and vigorously pursue antidumping cases. Since all responsibility would be in one agency, we believe the time for completing investigations could be substantially shortened.

(*e*) *Reducing the Time for Investigation.*—The Subcommittee also raises the question of reducing the time for investigation by making

the present three-month periods concurrent rather than consecutiv We support this change.

(*f*) *Retroactive Withholding of Appraisement.*—We recommen that withholding of appraisement be made retroactively to the filin of a petition, or to initiation of an investigation. This change, and r lated changes, will eliminate the importers incentive to dela proceedings.

(*g*) *Reducing Time for Payment of Duties.*—Another way to elimi nate the incentive to delay is to require full payment of estimate dumping duties upon entry of the merchandise. Bonds would not b permitted. This change would encourage importers to cooperate in th dumping investigation.

(*h*) *Provide Penalties for Violation of the Law.*—Instead of pro spective penalties, there should be fines for violations of the dumpin laws. Flagrant or repeated violations should lead to cease and desis orders. Violations of such orders should lead to exclusion of the goods

(*i*) *Causal Connection and Injury.*—Despite the already heavy burdens on petitioners in dumping cases, the Treasury has proposed to substantially increase those burdens in its "causal linkage" proposal (43 F.R. 2407). If the present split jurisdiction between ITC and Treasury is retained, it should be made clear that ITC has the sole responsibility for causation and injury determintaions. Congress should should reaffirm its intention that only a minimal causation linkage is necessary. A minimal standard should also be applied in the ITC's injury determination. Specifically, injury should be found even if the product is a minor product and its market penetration is small.

2. *Amendments to the Countervailing Duty Statute:*

(*a*) *Remedies.*—We recommend that liability attach as of a tentative affirmative determination.

(*b*) *Rebate of Value Added Taxes.*—Although the issue is presently pending in the Supreme Court, we recommend an amendment to the statute that would make it clear that rebate of an indirect tax is a subsidy.

3. *Amendments to the Unfair Practice Law (19 USCA § 1337):*

(*a*) *Jurisdiction.*—In our view, neither the authority of Treasury under the Antidumping Act nor the authority of Justice under the antitrust laws has been sufficient to attack specific antitrust type violations by importers. Section 337 was designed to give a specialized commission jurisdiction over such practices. We believe it should be made clear that the Commission has full authority to decide any case filed under Section 337, even though the case involves dumping, predatory pricing, or other antitrust type violations.

This issue could become especially crucial after the President makes his decision in the Welded Stainless Steel Pipe and Tube case. (No. 337-TA-29). On April 11, 1978 the Wall Street Journal, page 3, carried a report that indicated that the President may overturn the Commission's decision in that case. If he does so, Section 337 may become totally useless unless Congress acts.

(*b*) *Appeal Procedures.*—The Welded Stainless Steel Pipe and Tube Case also demonstrates the need to amend Section 337 to provide a review by Congress of the President's determination. This review would be the same as the review of Section 201 actions under Section 203(b) and (c). These two sections would then have consistent remedies.

(*c*) *Removal of Domestic Industry Requirements.*—Section 337 is the only section that requires proof that the U.S. industry in question is "efficiently and economically operated." This provision is irrelevant to the question of unfair competition. The provision can also be misused to focus the Commission's attention on the manner in which the domestic industry is run, rather than on the unfair practices of the importers. We recommend deletion of this provision.

(*d*) *Penalties.*—We support increased penalties for violations of Section 337, including a provision which would allow the ITC to impose fines of up to $10,000 a day for violation of a cease and desist order. We believe that exclusion should remain as an appropriate remedy for violation of a cease and desist order.

We also recommend that fines and other penalties be levied retroactively to the day the unfair practices commenced, or the day on which the Commission commenced an investigation. This change, and similar changes, should remove the importers incentive to delay and obstruct proceedings. These changes would also make the penalty sections parallel to those in the Antidumping Act and other statutes.

4. *Amendments to Section 301 (19 USCA § 2411).* In October, 1976, the American Iron and Steel Institute filed a Section 301 complaint with the Office of the Special Representative for Trade Negotiations. In January, 1978, this investigation was discontinued without any action being taken. The history of this case demonstrates the need for amendments to Section 301. We recommend an amendment which would remove jurisdiction from the Special Representative for Trade Negotiations to the ITC.

Kaiser Steel Corporation appreciates the opportunity to present its views on this subject. We support your efforts to correct the glaring deficiencies in the present trade laws. The cumulative effect of these deficiencies is to deprive domestic industry of effective remedies for obviously unfair and illegal competition from foreign goods. Please let us know if you desire any elaboration of the points raised in this letter, or any further information from us.

Very truly yours,

RAYMOND A. HAILE,
Vice President, General Counsel, and Secretary.

K MART CORP.,
Troy, Mich., May 11, 1978.

JOHN M. MARTIN, Jr., Esq.,
Chief Counsel, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. MARTIN: By way of generalized response to the Trade Subcommittee's February 6, 1978 press release solicitation of recommendations from the public on how United States international trade laws and regulations "should be amended to provide more expeditious, effective, and equitable relief for domestic industries from unfair practices affecting import competition", we wish to indicate first that the Subcommittee's statement of the question per se is a statement of some political subjectivity.

With the current pendency of the Multilateral Trade Negotiations under GATT auspices in Geneva, and with the generally existing efficacy of current trade laws protecting against truly unfair trade prac-

tices, no currently demonstrated need exists to consolidate or change existing statutes and governmental agencies dealing with any unfair import trade practices, whether they be antidumping cases, "Section 337" infringement or unfair competitive practice cases, countervailing duty cases, or withholding of appraisements.

Any procedural or substantive tightening of existing Import Restrictions would seriously increase non-tariff, and conceivably some tariff barriers to reasonable and economically healthy international trade competition which benefits every American consumer and taxpayer.

Indeed, on May 9, 1978, Robert S. Strauss, the Administration's Special Representative for Trade Negotiations (and special inflation counselor) linked free trade policy to the Administration's increasing anti-inflation efforts. He stated that: "Costs, and therefore inflation, are best held down when goods are produced by the most efficient system, wherever it exists in the world."

Recent in-store comparison shopping and some purchases of 20 selected import and domestic items (11 items being "hard goods" and 9 being "soft goods" (garments)), selected by merchants because of sales popularity and qualification as "like or directly competitive" (under Trade Act standards of comparability) with domestically-manufactured merchandise, shows that fully 19 of the 20 compared domestic items exceeded the K mart retail sales prices on the imported items, and shows that the retail selling prices of the 20 domestically-manufactured items were on average 75.9 percent higher in price when this average was computed over the average price percent increases for each of the 20 groups of comparison prices. The retail competitors variously shopped were 8 in number, and ranged from 3 discount-price merchants of general and specialty merchandise to the medium and very largest sized general mechandise retail chains.

While the 20-item in-store shopping comparison survey was not a statistically-designed sample of weighted representation, it nevertheless does indicate that when merchandise items are actually inspected on retail shelves with respect to retail selling prices, imported merchandise does provide consumers with anti-inflationary bargains and presumably an improved aggregate economic standard of living.

To sum up, protectionist political adjustments of existing foreign trade laws are not needed and would be harmful.

Sincerely,

JAMES C. TUTTLE,
Antitrust and International Counsel.

MAN-MADE FIBER PRODUCERS ASSOCIATION, INC.,
Washington, D.C., April 14, 1978.

Hon. CHARLES A. VANIK,
Chairman, Subcommittee on Trade, Committee on Ways and Means, Washington, D.C.

DEAR CONGRESSMAN VANIK: The Man-Made Fiber Producers Association wishes to file the attached statement in response to your request for recommendations in regard to necessary changes in the Anti-Dumping and Countervailing Statutes.

Our Association represents member companies which manufacture more than 90 percent of the man-made fibers produced in the United States. Man-made fibers, in turn, account for more than 70 percent of the fibers consumed by American textile mills.

Our industry is severely impacted at this time by the dumping activities of off-shore producers. Our members in the last year have filed nine (9) anti-dumping petitions and we expect others to be filed in the near future. Our experience is that the anti-dumping and countervailing laws are cumbersome, time consuming and in many cases inequitable. We believe it is necessary to amend these laws to shorten time periods, effectively penalize violators and to improve their administration.

We appreciate the opportunity to file this statement and we stand ready to provide any other information you desire.

Sincerely,

CHARLIE W. JONES, *President.*

STATEMENT OF THE MAN-MADE FIBER PRODUCERS ASSOCIATION, INC.

The Man-Made Fiber Producers Association appreciate the opportunity to respond to the Subcommittee's request for recommendations in regard to the need for more expeditious and effective relief from unfair practices affecting import competition.

The Man-Made Fiber Producers Association (MMFPA) represents member companies which manufacture more than 90 percent of the man-made fibers produced in the United States. Man-made fibers, in turn, account for more than 70 percent of the fibers consumed by American textile mills. The total fiber/textile/apparel industry, of which man-made fibers is an integral part, employs some 2.5 million people, the largest manufacturing employment of any U.S. industry sector.

There has been a rapid growth of imported textiles of man-made fiber, cotton and wool in the last decade—from $1.1 billion in 1966 to $4.4 billion in 1976 and a further substantial gain in 1977. Current textile imports in all forms have reduced U.S. employment by more than 350,000 jobs. Additional displacement in occurring in the apparel sector at the rate of about 20,000 jobs per year in direct employment. Of course, as directed jobs are lost in our industry, other jobs—e.g., suppliers, services, etc.—are also lost.

This increase in imports and resulting increase in American unemployment can only be controlled by maintaining current U.S. duties on textile products and by efficient and equitable administration of the Multi-Fiber Arrangement.

However, particularly in the fiber area, renewed attention must be given to the problems caused by unfairly priced imports. The American man-made fibers industry is as efficient and competitive as any in the world. But we cannot compete with imports which are subsidized by foreign governments or which are unfairly priced below manufacturing costs or the prevailing prices in the country of origin.

Throughout the world, the man-made fiber industry is plagued by excess capacity. Since 1960, 90 polyester plants, 88 nylon plants and 16 acrylic plants have been built in just the developing countries.

World-wide capacity for non-cellulosic fibers—i.e., polyester, nylon, acrylic, etc.—in 1978 is expected to be 28.3 billion pounds, about 50 percent greater than 1976 production of 19 billion pounds. Substantial excess capacity also exists for cellulosic man-made fibers—i.e., rayon and acetate—where world capacity this year is reported to be 8.8 billion pounds compared to 1976 production of 7.1 billion pounds.

This overcapacity has forced fiber producers in recent years to operate at marginal or unprofitable levels and in the United States a number of fiber producers have been forced to shut down their plants which now sit idle. However, in many foreign countries, producers are prevented by legislation or regulation from closing plants and reducing production. By necessity, these producers must sell fiber at whatever price it will bring and wherever a market can be developed. All too often, the United States has been the market of opportunity for this unfairly priced forced production.

In theory, the remedy against such practices is the filing of anti-dumping or countervailing duty petitions by American manufacturers. Members of this Association have in the last year filed nine anti-dumping petitions against offshore fiber producers and more are expected to be filed in the near future.

However, experience indicates that the U.S. statutes governing such trade practices are extremely cumbersome and of dubious effectiveness in protecting American industry against unfair competition from imports. An addendum to this statement describes the difficult experience of one MMFPA member company in filing an anti-dumping petition.

Under current law, it takes too long for an anti-dumping petition to be acted upon and the importer suffers no significant financial penalty until a year or more after the initiation of an anti-dumping investigation, even longer after the time it started dumping. Moreover, foreign producers that coordinate their unfair practices can evade the impact of the laws for years. In order to make these statutes effective, the process must be expedited and the perpetrator of the unfair trade practice must be penalized at an earlier date. Further, more effective methods for dealing with situations involving several foreign manufacturers must be developed.

The Man-Made Fiber Producers Association has seven specific recommendations which would greatly improve the effectiveness of the Anti-Dumping Statute.

First, the time-table for consideration of petitions should be compressed. With adequate staffing and resources at Treasury, a preliminary decision could be made in three months with another three months for the final determination. Most investigations today actually take no more than two or three months with an equal amount of time being taken up simply waiting in line to be considered. Elimination of the practice of routinely granting extensions for responses to Customs Service questionnaires would in itself significantly speed up this phase of these proceedings. Further, MMFPA recommends that petitions be referred to the ITC at the time an affirmative preliminary dumping determination is made by Treasury. Under this procedure, the injury determination from ITC would be available simultaneously with the final decision by Treasury three months after the preliminary decision. These two changes in law would compress the timetable for consideration of anti-dumping petitions to six months.

Second, the importer should be required to deposit with Treasury the actual additional duties at the time of a preliminary affirmative determination of dumping. Currently, importers are required only to post bond at the point of preliminary determination and the cost of the bond is only an insignificant portion of the duty that would eventually be assessed if a final determination is made. This bond deposit is simply not an effective bar against further dumping. Ample precedent exists for such a requirement. Importers are required by the government to deposit the higher duty claimed by the U.S. Customs Service in valuation cases pending before the U.S. Customs Court, and foreign anti-dumping laws provide for the assessment of provisional duties.

Third, upon final determination of both dumping and injury to domestic industry, the importer should be required to pay the additional duty retroactive to the beginning of the period of investigation during which less than fair value sales were made. Currently, additional duties are assessed only to the date of preliminary determination and this allows the importer six months of dumping without penalty. Given the fact that most investigations are not initiated until sales at less than fair value have persisted for a period of time, dumping usually goes unpunished considerably longer than six months. Not to impose duties for the entire period where less than fair value sales are actually found to have occurred can only be seen as an invitation to foreign producers to dump their goods here.

Fourth, an industry which has already demonstrated the existence of significant dumping activity should not be required to file a new petition against each foreign company that enters the market. MMFPA recommends that Treasury be required to establish "trigger price" guidelines for any industry in which at least two preliminary affirmative dumping determinations have been made. When Customs finds these guidelines being violated by other importers, it shall alert the Department of Treasury who shall then initiate an anti-dumping investigation on its own behalf. On the basis of the Treasury's previous investigations of "cost of production" for efficient producers it may make a preliminary affirmative dumping determination. We believe that the "trigger price" system has worked well in curbing unfair practices by foreign steel manufacturers. We do not, however, feel that this industry alone is suffering from such practices. The legal basis on which the Treasury acted in establishing the "trigger price" system for steel imports would certainly support similar action in the man-made fiber area.

Fifth, we believe that the statute should be amended to limit the discretionary authority currently vested in the Secretary of the Treasury in making less than fair value sales determinations. This should be done both by specifying with more detail in the statute the factors to be considered in calculating home market prices, purchase prices, exporter's sales prices, and costs of production and by subjecting the Secretary's actions, substantive and procedural, to more rigorous judicial review. The Department's essentially unchecked authority to discontinue cases, to reopen issues, and to revise determinations without any of the procedural safeguards that it accords to far less significant actions is particularly in need of judicial oversight. Further,

the Secretary's decision should be required by statute to be supported by substantial evidence in the record of the proceeding, as a predicate to effective judicial review. In the absence of a decision formally based on the record, judicial review must be de novo to be effective; if decisions are required to be on the record, judicial review of whether there is substantial evidence on the whole record supporting the decision will adequately protect the public. Finally, in this connection, the statute should eliminate the present uncertainty about judicial review of ITC injury determinations by providing that the forum for review of both ITC and Treasury decisions is the U.S. Customs Court.

Sixth, it is also recommended that the International Trade Commission review its decision-making process to ensure that the mandate in the Antidumping Act of 1921 is adhered to, especially with respect to likely injury. Decisions of the Commission appear to focus on actual injury and ignore prospective injury. By giving consideration to prospective as well as actual injury, remedies under the Act can be adopted promptly to prevent business failures with attendant unemployment.

Furthermore, on many occasions, the Commission has tended to dismiss injury claims on the basis of de minimis imports. We believe such a decision is justified if imports from a single foreign country are the subject of a complaint and if such imports have had no effect on the selling prices of competitive articles produced domestically. However, in those instances where there are small volume imports from two or more countries which are the subject of antidumping petitions, the cumulative effect thereof should be considered in determining injury. Also, if small volume imports from one source have depressed domestic prices, we feel this clearly calls for an affirmative injury determination.

Finally, there are several other steps which should be taken to improve the efficiency of our laws governing unfair trade practices. There is considerable confusion in regard to definitions used under the "cost of production" basis for filing anti-dumping petitions. Treasury should conduct a formal review, complete with public hearings, designed to refine definitions used, particularly of "overhead" costs such as depreciation, cost-of-capital employed and the transfer price for owner-made raw materials. Public hearings also should be held to develop guidelines for state-controlled companies exporting to the United States, recognizing that the accounting practices, comparability and availability of meaningful price and cost data present special problems.

To improve the effectiveness of the administration of countervailing duties, MMFPA has the following six recommendations.

First, the time-table for consideration of petitions should be shortened. Currently, Treasury has up to six months to make a preliminary determination and up to one year to make a final determination as to whether or not a foreign government is giving its exporter a bounty or grant. MMFPA recommends that these time periods be cut in half—to three months for a preliminary determination and six months for a final determination. If necessary, the stafing and resources at Treasury should be expanded in order to insure that domestic producers do not have to compete with unfairly subsidized imports any

longer than is necessary for Treasury to complete its investigation. The damage caused by delay is highlighted by the lack of retroactivity when a countervailing duty is imposed.

Second, we recommend that when a final determination is made that a countervailing duty should be imposed because a foreign government is granting its exporter a bounty or grant, the duty should be imposed retroactively to the commencement of the investigation. Currently, unlike dumping, the duty is not even retroactive to the preliminary determination made six months after the beginning of the investigation. Given that the bounty or grant has been paid at least throughout the one year period of investigation, and realistically, for sometime before, it is unfair not to collect the duty for the period of the investigation. Indeed, the one year period for the foreign producer is nothing less than an invitation to foreign governments to give bounties and grants since a year or more of such assistance does not give rise to a countervailing.

Third, the statute should be amended to define the term "bounty or grant." The limited case law in this field is confused—so confused, for example, that the Supreme Court will shortly decide in the *Zenith* Case one aspect of this problem upon which Treasury, the Customs Court and the Court of Customs and Patent Appeals have not been able to agree. The issue in *Zenith* is whether the remission of indirect taxes, such as the excise tax, is a bounty or grant. Guidance from Congress is needed.

Fourth, the Secretary's decisions should be required by statute to be supported by substantial evidence in the record of the proceeding, as a predicate to effective judicial review. If the Secretary need not formally base his decision on the record, judicial review must be *de novo* to be effective. If decisions are required to be on the record, judicial review of whether there is substantial evidence or the whole record supporting the decision will adequately protect the public.

Fifth, in countervailing duty situations it is most difficult for American industry to learn the details of foreign government subsidies. Yet much of this information certainly is available to American governmental agencies. Treasury should be required to make periodic public reports detailing direct and indirect subsidies paid by foreign governments to exporters. Also, in countervailing duty petitions, there should be no need to prove injury on a product which is normally dutiable but is being imported free of duty from an eligible beneficiary company under the Generalized System of Preferences Program.

Finally, MMFPA realizes that both Treasury and the International Trade Commission have limited resources to deal with the many unfair trade practices cases which have been filed in recent months and the many more which will be filed in the near future. The Association recommends that the Ways and Means Committee take whatever steps necessary to assure that the Department and Commission are provided adequate resources to deal with these more important problems.

Once again, this Association appreciates the opportunity to comment on these statutes and congratulates the Subcommittee for its interest and intent of coming to grips with the problems involved. We stand ready to provide any additional information which the Subcommittee may request. We believe that the Subcommittee should institute legis-

lation to correct the abuses and weaknesses of the present statutes. This subject is of the greatest importance to the future welfare of our industry, as it is to many others.

ADDENDUM

In February 1977, Avtex Fibers Inc. filed a petition requesting that an investigation be initiated by the Treasury into the dumping of rayon by an Austrian manufacturer, Lenzing. This dumping had, of course, been going on at least since late 1976, but the requirements imposed by the Treasury on a petitioner prior to its undertaking an investigation are so extensive that it is doubtful that any petition "in the proper form" could be filed in less than two months from the time a domestic producer became aware of dumping. Small companies with few international connections, of course, take much longer. Petitions not "in the proper form" are returned to the manufacturer, though they are rarely accompanied by the "detailed written advice" required by the regulations, and their return is not always prompt, so more delay results.

It was not until October 1977, or approximately a year after Avtex became aware of Lenzing's dumping, that the Treasury finally determined that Lenzing was dumping and withheld appraisement of its rayon. In November, however, Lenzing lowered its home market price and Treasury announced that the case would be discontinued. Industry was shocked at this abridgement of the spirit and intent of the anti-dumping law. It took until late January 1978 to get the Treasury to focus on the fact that Lenzing's new home market price might be lower than its cost of producing rayon so that its sales were still in violation of the Antidumping Act. In March, the Department agreed to reopen its investigation to determine this issue. A determination is expected in August or September—that is, almost two years after Lenzing first appeared to be dumping. By that time, if a determination is made that Lenzing is indeed selling at less than cost of production, it will have been permitted to make sales at less than fair value without any penalty whatsoever for approximately two years: twelve months prior to October 1977, when the tentative finding was issued, and eleven more months after the tentative determination and the lowering of the home market price. This type of abuse must be corrected by legislation.

MARITIME TRADES DEPARTMENT, AFL-CIO,
Washington, D.C., April 3, 1978.

Hon. AL ULLMAN,
Chairman, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR CHAIRMAN ULLMAN: The Maritime Trades Department, AFL-CIO, represents 43 affiliated international unions, many of which work in service industries. The MTD is concerned that workers and industries victimized by unfair foreign trade practices receive neither proper nor prompt redress of their complaints. This is especially true in instances of "dumping," when a nation sells products in the United States at less than fair market value.

The Maritime Trades Department appreciates the interest which the House Subcommittee on Trade is taking on this issue, and we would like to make the following recommendations with respect to improving upon the U.S. anti-dumping laws.

When dumping occurs, the U.S. Department of Treasury does not act upon the matter until a complaint is registered. Then, the investigation takes many months. In the interim, U.S. industries sometimes suffer irreparable damage. They are often unable to compete with an onslaught of undervalued imports. Jobs are lost; many will never be recovered.

To reduce the length of the investigation and limit damage to U.S. industry, the MTD believes that the Treasury and the International Trade Commission should be required to reach a final determination on the dumping charges within six months of the date that a complaint is filed. Proving that dumping has occurred is a difficult, time-consuming and expensive task. Most frequently, the injured party has little or no access to the data necessary for conclusive proof. Therefore, it would expedite the investigation if the burden of proof were shifted to the alleged offender. This is especially true in the case of state-controlled economies, when data is impossible to obtain.

The U.S. government itself should initiate investigations when imports rise suddenly or when dumping is suspected for other reasons. In blatant cases, the entire investigatory process should be expedited. For example, after Treasury found that Japanese steel mills were dumping, it was discovered that the British were landing steel in the United States at an even lower price than the Japanese, yet there appeared to be no way to dispense with the cumbersome investigative procedure. ITC and Treasury investigations might be concurrent rather than consecutive. Time limits should be established for reaching final determinations under Section 301 as well as in anti-dumping cases. All redundant or conflicting jurisdiction between the ITC and Treasury should be rationalized. The investigative process is already long and costly. This should not be exacerbated by needless bureaucratic red tape.

Furthermore, the United States should reserve the right to impose countervailing duties where nations subsidize their exports. Export subsidies constitute a widespread unfair trade practice which cannot be redressed except through countervailing duties. What constitutes an export subsidy should be clearly defined to preclude lengthy litigation on the issue such as occurred in the Zenith television case. An export subsidy should be defined as any special loan, assistance, or tax concession granted to exports which is not granted equally to goods sold on the domestic market.

Most importantly, the MTD believes that all of the protective provisions of the 1974 Trade Act which apply to goods-producing industries should also be applied to service industries. The Act should be amended so that service industries have equal access to redress of injury from dumping. Service industries and workers experience as much damage from dumping as do goods-producers. For example, the U.S.-flag merchant marine faces a myriad of non-tariff barriers hindering its entry into foreign markets. However, because the U.S. does not erect such obstacles to participation in its own trade, whenever world overton-

naging occurs, excess shipping is dumped on the easy-to-enter U.S. market. The U.S. service industries must be protected from such injury by full inclusion under improved anti-dumping provisions of the 1974 Trade Act.

For these reasons, the Maritime Trades Department urges that the Committee not only expedite and improve access to anti-dumping penalties, but that it consider including the service industries under those provisions.

We would ask that this letter be made part of the official record of the review of changes in U.S. anti-dumping laws.

Sincerely,

PAUL HALL, *President.*

WASHINGTON, D.C., *May 10, 1978.*

Hon. CHARLES A. VANIK,
Chairman, Subcommittee on Trade, House Committee on Ways and Means, Washington, D.C.

DEAR MR. CHAIRMAN: On February 6, 1978, the Subcommittee on Trade of the Committee on Ways and Means announced the interest of the Subcommittee in receiving recommendations for resolving, among other things, the "overlapping or conflicting jurisdictions between the Department of the Treasury and the International Trade Commission, particularly in antidumping and Section 337 cases."

I am transmitting, in this connection, a copy of a speech entitled, "Dealing with Unfair Competition" that I shall be delivering on May 11 before the Conference Board in New York.

I believe that the part of my speech dealing with section 337 will be of interest to the Subcommittee in connection with its announcement of February 6.

All best wishes.

Sincerely,

MATTHEW J. MARKS.

COMMENTS OF MATTHEW J. MARKS, PARTNER, WENDER, MURASE & WHITE, BEFORE THE CONFERENCE BOARD, THE WALDORF ASTORIA, NEW YORK, N.Y. MAY 11, 1978

DEALING WITH UNFAIR COMPETITION

Introduction

Official United States trade policy calls for minimal governmental interference with market forces. However, there are, of necesstity, limitations on such an overall approach, for no democratic society can indifferently expose its citizens to the untempered mercy of the marketplace. Democratically oriented governments therefore draw a line between protectionism, which we reject as a national policy, and the need to react effectively against unfair imports.

Although, within reason, our government considers it healthy to expose American business to the rigors of international competition, there is nevertheless no intent to allow American industry to suffer, without remedy, injury from unfair competition. A domestic industry which is being unfairly harassed by foreign competition has numerous options at its disposal for defending its legitimate business interests, for Congress has enacted a variety of measures designed to protect domestic enterprises against unfair imports. These include the Anti-dumping Act to nullify the impact of dumping, the countervailing duty law to counter subsidized imports, Section 301 of the Trade Act of 1974 to retaliate against foreign import restrictions and export subsidies, Section 337 of the Tariff Act of 1930 to respond to foreign predatory pricing practices, and the antitrust laws to penalize anti-competitive practices by foreign cartels.

What is unfair trade?

Although the subject of this conference is how to deal with unfair competition, it should be realized that the distinction between fair and unfair is not so clear as some would think. Some U.S. policy makers tend to regard import quotas and tariff increases under Section 201 of the Trade Act of 1974, better known as the escape clause provision, as protectionist, no matter how temporary and justified the safeguard action may be. On the other hand, they have no question regarding the right of the U.S. to impose restrictions on imoprts to offset "unfair" foreigh trade practices. When a foreign competitor engages in "unfair" practices, there is considered to be a moral justification to offset the "unfair" advantages by restricting his imports or levying charges thereon. Such action is regarded as helping to preserve the forces of free competition. To a considerable degree, this dichotomy is reflected in the Trade Act of 1974, which delineates the remedies available to American industry, depending upon whether injury is being suffered from fair or unfair imports.

Quite a different approach is taken by some of our trading partners. In a speech some months ago, William Haferkamp, the European Community's Commissioner for External Affairs, implied that any action to restrict imports, whether it takes the form of countervailing or antidumping duties, or safeguard actions, is protectionist. In certain respects, our trading partners tend to be more realistic and less moralistic than we about issues such as these. In a sense, when a complaining party is asking for greater fairness, he simply wants more of the pie for himself and less for his competitors. If he considers a situation as "unfair," what he really means is that he is not receiving enough of the total available benefits in relation to his efforts. It is thus easy to see how the term "fair trade" could come to mean restricted trade—more for us, less for them.

A similar attitude has long been prevalent with respect to dumping. On the one hand, the practice of dumping is recognized as an evil. However, during the Kennedy Round negotiation of the International Anti-Dumping Code, our trading partners seems to be as much, if not more, concerned with controlling governmental reactions to dumping through antidumping measures, than they were to the discouraging of dumping.

A similar ambivalence is currently reflected in international attitudes with respect to the current Tokyo Round negotiation of an international subsidy-countervailing duty code. The Americans are primarily interested in obtaining an international understanding, which will allow the United States and other governments maximum latitude for action against subsidized imports. Our trading partners, on the other hand, are more concerned with circumscribing governmental countervailing duty actions that may be taken in such cases.

We, in the United States, regard dumping and export subsidies as an interference with the market mechanisms which calls for strong governmental counteraction. Our trading partners, on the other hand, tend to be more concerned with the nature of the governmental counteraction, which they fear will provide an excuse for establishing new forms of nontariff trade barriers.

Multiple complaints—multiple remedies

There has been a tendency, of late, by some domestic interests to attack unfair imports with a variety of actions taken more or less simultaneously, all directed at the same product. The burden of defending against these multiple complaints increases enormously the cost to foreigners of doing business in the United States, to the point where only the largest and most powerful are in a position to survive such attacks.

Tactics such as these were followed in the efforts of the domestic electronics industry to block what they regarded as unfair imports of television receivers from Japan. A mere cataloguing of the actions taken by the domestic industry against imports of television receivers is instructive in understanding the remedies available to a determined domestic complainant who is prepared to stop at nothing to block what he regards as unfair competition.

(1) A complaint under the Antidumping Act terminated with the issuance of a dumping finding against Japanese TV imports by the Treasury Department in 1971. Only recently, the Treasury Department announced a plan for assessing dumping duties against these imports which will total untold millions of dollars. The Japanese TV producers and importers involved are challenging the methodology used by the Treasury Department in computing the duties and it seems likely that it will take years before this issue is finally resolved, probably in court actions.

(2) A countervailing duty complaint against subsidized electronics products imports from Japan, including TV's, was rejected by the Treasury Department in 1976 on the ground that it did not fall within the provisions of the U.S. countervailing duty law as traditionally interpreted by the Department over three quarters of a century. The Department's refusal to act was appealed, and the Treasury decision was overturned by the U.S. Customs Court. Subsequently, the Customs Court decision was, in turn, reversed by the Court of Customs and Patent Appeals. The grounds for this reversal were argued two weeks ago in the U.S. Supreme Court, and a final decision is expected to be handed down before the summer recess. The issue under consideration in what has come to be known as the *Zenith* case is whether rebates, upon exportation, of the Japanese commodity tax, an indirect tax, constitute subsidies within the meaning of the countervailing duty law. Under the rules of the General Agreement on Tariffs and Trade (GATT) to which the United States is a signatory, it is clear that such rebates do not constitute a countervailable subsidy. However, since the GATT does not have the status of a treaty under U.S. law, it remains to be seen how this extremely complex issue will ultimately be decided by the Supreme Court.

(3) Still another complaint by the domestic industry, this time under Section 337 of the Tariff Act of 1930, as amended by the Trade Act of 1974, alleged that Japanese television receiver exports to the United States were being imported under unfair methods of competition. This case was finally resolved by the International Trade Commission (ITC) with a "no contest" settlement. I shall speak more of Section 337 later.

(4) A complaint filed with the ITC against television receiver imports under the Section 201 escape clause provision was resolved by the negotiation of an Orderly Marketing Agreement (OMA) restricting Japanese TV exports to the U.S. Although, as mentioned earlier, escape clause actions do not fall within the unfair trade area, the Executive Branch justification of the OMA in this case referred to the "unfairness" of Japanese practices in their exports of television receivers. Thus, despite the previously described American dichotomy between "fair" and "unfair" imports, the restrictions imposed under a "fair trade" statute in this case were, by implication, justified as non-protectionist because of unrelated "unfair" trade practices.

This is still not the end of the efforts of the domestic industry to restrict TV imports.

(5) After three years, a civil antitrust suit for $300 million in damages (before trebling) is still being litigated in the U.S. District Court against exporters and importers of Japanese television receivers.

(6) In addition, certain domestic television interests endeavored to persuade members of the Antitrust Subcommittee of the Senate Judiciary Committee to intervene with the Antitrust Division for the purpose of reversing an earlier refusal by the Antitrust Division under the Ford Administration to initiate a formal U.S. antitrust investigation of Japanese TV exports to the United States. The Antitrust Division only recently announced that it had reconsidered the earlier decision and found no basis for such a reversal.

The expenses involved in initiating and defending against these multiple actions, all relating primarily to TV imports from Japan, have run into untold millions of dollars. The Trade harassment involved in these shot-gun tactics by domestic complainants has not gone unnoticed by our trading partners. They fear, with good reason, that a dangerous, new nontariff trade barrier is taking form in the United States. Among other things, the EC and Canada joined with Japan in expressing strong reservations at the highest GATT levels regarding the manner in which Section 337 was being employed in violation of U.S. GATT obligations to discourage imports of TV receivers from Japan.

Use of section 337 in dealing with unfair competition

Introduction.—Congressman Charles Vanik, Chairman of the Subcommittee on Trade of the House Ways & Means Committee announced last February the interest of the subcommittee in receiving recommendations for resolving the "overlapping or conflicting jurisdiction between the Department of the Treasury and the International Trade Commission, particularly in antidumping and Section 337 cases."

Legislative background of section 337.—Section 337 was originally enacted as Section 316 of the Tariff Act of 1922, better known as the Hawley-Smoot Act. It provides statutory sanctions against "unfair methods of competition and un-

fair acts in the importation of articles into the United States." The sanctions take effect when the tendency of the prescribed acts "is to destroy or substantially injure an industry efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States."

Section 316 later became Section 337 of the Tariff Act of 1930. It was thereafter reenacted, with major procedural amendments as part of the Trade Act of 1974. The basic prescriptive language has remained unchanged from Hawley-Smoot days to the present. I shall describe later some of the procedural amendments made by the 1974 Trade Act.

It is clear that Congress in the Hawley-Smoot period intended for the broadest possible interpretation to be given to the terms "unfair methods of competition" and "unfair acts in the importation of articles into the United States." Thus, the Senate Finance Committee report relating to the Tariff Act of 1922, stated:

"The provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American Industry than any antidumping statute the country has ever had."

Senator Smoot elaborated further on this point on the Senate floor, where he stated:

"We have in this measure an antidumping law with teeth in it—one which will reach all forms of unfair competition in importation. This section not only prohibits dumping in the ordinary accepted meaning of that word; that is, the sale of merchandise in the United States for less than its foreign market value or cost of production; but also bribery, espionage, misrepresentation of goods, full-line forcing and other similar practices frequently more injurious to trade than price cutting."

Trade Act of 1974 amendments of section 337

Congress' intent in the 1974 reenactment of Section 337 is, unfortunately, not as clear as it might have been. It is, however, certain that Section 337 was not intended to replace the countervailing duty law or the Antidumping Act, for a new provision was added requiring the ITC, whenever it has reason to believe that the matter before it might come within the purview of the countervailing duty law or the Antidumping Act, to notify the Secretary of the Treasury "so that such action may be taken as is otherwise authorized. . . ."

The Senate Finance Committee report, in referring to this language, stated:

"It is expected that the Commission's practice of not investigating matters clearly within the purview of either Section 303 [the countervailing duty law] or the Antidumping Act will continue."

Although the substantive prohibitions in Section 337 remain basically unchanged from the Hawley-Smoot period, the Trade Act of 1974 did nevertheless make a number of important procedural changes.

Previously, upon completion of a Section 337 investigation by the Tariff Commission (the predecessor of the ITC), the Commission made recommendations to the President, who then made the final decision. Under the 1974 amendment, it is now the ITC which has the formal decision-making authority, subject however, to disapproval by the President within 60 days for policy reasons.

There are also other important procedural changes. The Trade Act amendment now imposes tight statutory time limits for the completion of Section 337 investigations. It also requires for the first time that these investigations be conducted pursuant to the provisions of the Administrative Procedure Act. Perhaps most important of all, the Trade Act provides a choice of remedies in cases where violations are determined. Whereas previously the sole remedy was the issuance of an exclusion order, now the ITC has authority to issue cease and desist orders as well.

It seems clear from these revisions that the Congress desired some change in the traditional administration of Section 337. What these changes were, however, and how they were to be implemented was left unclear in the Trade Act amendment and its legislative history.

Administration of section 337 since Trade Act amendments

Despite the Hawley-Smoot legislative history indicating a Congressional intent calling for broad interpretation of the Section 337 sanctions, in fact the administration of the legislation had been largely confined to patent and trade-

mark infringement cases. From 1922 until the Trade Act amendment in 1974, Section 337 had been employed only twice in cases falling outside the patent-trademark area, and neither of these had terminated with the application of sanctions.

Following the 1974 amendment of Section 337, the ITC made known its intent to construe the statute as a major U.S. bulwark against unfair trade practices. Government agencies in Washington are frequently prone to interpret their jurisdiction and authority in the broadest possible terms. Thus the ITC announcement regarding Section 337 caused no undue surprise among trade law practitioners familiar with the Washington scene. It was equally clear, however, that those agencies which had traditionally played a role in the unfair trade field, namely, the Treasury Department, the Antitrust Division of the Justice Department, and the Federal Trade Commission, would not willingly yield ground to the ITC in what they regarded as their established jurisdictional areas.

Thus the battlelines were quickly drawn and soon led to inter-agency disputes, with foreign producers being caught in the middle. In the Section 337 investigation of color television receivers, the ITC investigated allegations that Japanese TV's were being sold in the United States below cost and at unreasonably low prices; and also that the Japanese producers were receiving incentives and economic benefits from the Government of Japan which facilitated low-cost pricing in the United States.

From a trade policy standpoint, these same basic allegations had already been investigated by the Treasury Department under the Antidumping Act and the countervailing duty law. The Treasury had issued a dumping finding against TV receivers from Japan, and these remain subject to dumping duties to the extent they are being sold in the United States below fair value. Moreover, under a 1974 amendment of the Antidumping Act, sales below cost are required to be taken into account by the Treasury Department in considering the assessment of dumping duties.

Similarly, the Treasury Department had investigated under the countervailing duty law whether electronics products from Japan, including TV receivers, were benefiting from export subsidies. This investigation had terminated with a negative decision, which, as I mentioned earlier, is currently under review in the U.S. Supreme Court.

It was clear in the TV case that, for purposes of construing under Section 337 terms such as "below cost," "unreasonably low prices," "incentives" and "economic benefits," the ITC did not consider itself bound by prior Treasury Department interpretations under the Antidumping Act and the countervailing duty law. Since no definition of these terms is laid down in Section 337, the ITC took the position that it was appropriate, under the circumstances, to define these terms within the broader concepts of federal and common law governing unfair trade practices.

Foreign reactions to new interpretations under section 337

The position taken by the ITC in the Section 337 TV case caused considerable concern among our trading partners. Many had already questioned the legality, under GATT, of the sales below cost Trade Act amendment of the Antidumping Act. Now they found themselves constrained to deal with below cost issues under Section 337 as well, with entirely different guidelines being followed under the two statutes. Thus even if a foreign producer could demonstrate to the satisfaction of the Treasury Department that it had not engaged in sales below cost or below fair value under the Antidumping Act, this was no defense against a charge of sales below cost or at unreasonably low prices under Section 337.

Most difficult of all from the standpoint of the foreigners, was the new uncertainly caused by the ITC interpretation of Section 337 following the Trade Act amendments. Foreigners desiring to do business in the U.S. market have a need to know whether particular actions which they contemplate undertaking are, or are not, in contravention of U.S. law. While this problem of uncertainty already exists under the Antidumping Act and the countervailing duty law, at least in the case of those statutes, the foreigners can rely, to some extent, on a body of interpretative rules which has been built up over a period of years. The new, expanded interpretations of Section 337 increased enormously the problems of foreign businessmen who had no intention or desire to resort to unfair trade practices and who were interested only in achieving an enduring, stable trade relationship with the United States.

Many foreigners regarded the new interpretations of Section 337 as subjecting them to a civil form of multiple jeopardy. To the extent that domestic petitioners proved unable to establish unfair trade practices through complaints under the more traditional statutes, they were now free to initiate new actions against the same imports under Section 337. The concern of our trading partners regarding Section 337 increased even more when the ITC issued on February 22 its first cease and desist order in a Section 337 case not involving patent or trademark infringements (against welded stainless steel pipe and tube). That order prohibited certain named firms from pricing their products below the average variable costs of production without commercial justification therefor.

Two months after the issuance of this cease and desist order, the Treasury Department issued a determination of sales at less than fair value with respect to the same product. Like the ITC, the Treasury had also, in its investigation under the Antidumping Act, looked into sales below cost. The difference in approach taken in the two investigations became obvious from the fact that the ITC had ordered one Japanese company, Toa Seiki Company, Ltd., to cease and desist from selling at a price below the reasonably anticipated marginal costs, while the Treasury Department had expressly excluded this same firm from the antidumping determination of sales below fair value on the ground that no dumping margins had been found with respect to its export sales to the United States.

Presidential disapproval of ITC cease-and-desist order

The President disapproved the ITC cease and desist order on policy grounds. The Presidential determination was couched in broad policy terms in what is clearly an effort to lay down future guidelines for inter-relating the administration of Section 337 with the other U.S. unfair trade statutes. The determination notes, for example, that the Treasury's decision of sales below fair value under the Antidumping Act, which has now been referred to the ITC for an injury determination, provides "adequate protection against the unfair trade practices described in the Section 337 complaint." The Presidential decision also refers to the Administration's concern over the overlapping investigations and determinations that are taking place under the unfair trade laws and observes in this connection:

"As a result of this duplication, the imposition of the cease and desist order would be viewed by our trading partners as a precedent and a departure from internationally agreed procedure for dealing with below cost sales. Such a result would be an irritant in relations between the United States and those governments whose firms are being subjected to duplicative investigations, often at considerable expense to the parties and governments concerned. If allowed to stand, the cease and desist order would be viewed by foreign governments as undesirable harassment of their producers and as an unjustifiable burden on international trade. It would invite retaliation against United States exports, would complicate our current efforts to negotiate revisions of the international trading rules, and would be detrimental to the national economic interest and to the international economic relations of the United States.

". . . Unnecessary duplications and conflicts in the administration of those laws result in confusion and the inefficient use of both private and governmental resources. Unfair trade practice laws should be administered so as to provide reasonable certainty to private parties as to which forum they should devote their resources in bringing their petition. To do otherwise is to impose an unreasonable burden upon the parties, both complainants and respondents."

Future of section 337 in dealing with unfair competition

It remains to be seen whether, in light of the Presidential determination, Section 337 will continue to be used in connection with cases going beyond the patent and trademark infringement area. Because of the new statutory requirement that Section 337 investigations be conducted pursuant to the Administrative Procedure Act, with all its administrative safeguards and accompanying complexities, domestic petitioners will weigh carefully the considerable expense entailed in filing future complaints under Section 337. This is particularly true if in the final analysis it appears that ITC determinations of violations will probably lead to Presidential disapproval. On the other hand, the ITC continues to be free to initiate Section 337 investigations on its own motion without a complaint from the domestic industry.

It still remains to be seen to what degree, if any, the Presidential disapproval in the welded stainless steel pipe and tube case provides a guideline regarding

possibly overlapping investigations and determinations between Section 337 and the antitrust laws.

In any event, the Presidential decision may not necessarily reflect the final word on the subject of Section 337. If Congress believes that certain parts of the unfair trade area are not, in fact, adequately covered under existing statutes, then Congress may conceivably wish to weigh other alternatives, such as amendments of existing unfair trade statutes or the enactment of new legislation directed at specific problems. If there is any lesson to be learned from the Section 337 experience, it is that unfair trade problems in the final quarter of the twentieth century cannot be resolved by a refurbished version of broad, general legislation dating from the Hawley-Smoot period.

Duplicative investigations and remedies should be avoided at all cost, for as noted in the President's determination in the stainless steel pipe and tube case, they are in the interests of neither complainants nor respondents. One final word—if Congressional action is taken in this area, it will hopefully be done in such a way as to avoid disruption to the Multilateral Trade Negotiations currently under way in Geneva.

METZGER, SHADYAC & SCHWARZ,
ATTORNEYS AT LAW,
Washington, D.C., May 15, 1978.

JOHN M. MARTIN, Jr., Esq.,
Chief Counsel, House Committee on Ways and Means,
Washington, D.C.

DEAR MR. MARTIN: We represent Melex USA, Inc. ("Melex"), an importer of electric golf cars from Poland. Melex is a Delaware corporation and a wholly-owned subsidiary of Pezetel, the Foreign Trade Enterprise of the Polish Aviation Industry.[1]

This statement is submitted pursuant to the invitation of the Subcommittee on Trade with respect to its consideration of possible legislative and administrative changes to the Antidumping Act of 1921, as amended by Section 321 of the Trade Act of 1974. See Subcommittee PR#37 (Feb. 6, 1978) and PR#44 (April 18, 1978).

In the Oversight Hearing of the Subcommittee on November 8, 1977, testimony was taken from Donald A. Webster, representative of AMF/Harley-Davidson, and Charles Verrill, Esquire. See *Hearing* at 106–123. Included in the record are letters to Treasury Department officials from Mr. Verrill dated April 22, 1977, and October 24, 1977. These letters are only part of a series of correspondence which Mr. Verrill, representing a domestic golf car manufacturer, and this law firm, on behalf of Melex, have submitted to the Treasury Department. We believe a review of all of this correspondence is necessary in order for the Subcommittee to fully understand the issues with respect to the Trade Act of 1974 and its impact upon the importation of merchandise from state-controlled-economy countries.

Accordingly, I enclose for the use of the Subcommittee the letter to Peter D. Ehrenhaft from Carl W. Schwarz, dated November 17, 1977. This letter is in direct response to Mr. Verrill's letter of October 24, 1977 (printed at *Hearing* pages 107–113).

Section 321 of the Trade Act of 1974 was a positive effort to codify an objective and fair approach to imports from state-controlled-economy countries for the purpose of the Antidumping Act of 1921. Among other things, the 1974 Act added section 205(c) to the Antidumping

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[1] This firm is registered as an agent of Melex USA, Inc. under the Foreign Agents Registration Act of 1938, as amended (Registration No. 2861).

Act to facilitate determinations of foreign market value of merchandise from state-controlled-economy countries, and it amended 212(3) of the Antidumping Act to correct the "inequities [of] subjecting a manufacturer to liability for dumping duties in situations where he cannot control and, most often, does not know the prices which will form the basis for comparison with his prices to the United States." House Report No. 93-571, at 72, (to accompany H.R. 10710). Unfortunately, when the Treasury Department adopted 19 C.F.R. § 153.7 in an effort to carry out these changes to the 1974 Act,[2] it either modified or ignored important parts of the 1974 Act.

As you know, Treasury has pending a proposed amendment to § 153.7. In general, Melex welcomes the present proposal for amending § 153.7. We think the proposed revision to the "constructed value" test is entirely consistent with the purpose of the Antidumping Act and facilitates the administration of the constructed value determinations required by the Act. The introduction of the concept that a fair comparison must take into account the comparabilities of the national economies concerned is clearly in accord with the basic purpose of the Act. However, although the proposed regulation's provisions with respect to constructed value are a significant improvement over the existing regulation, we think that in several important respects the language and the spirit of the Act are still not being honored.

Proposed § 153.7 continues and, indeed, except with respect to constructed value, *reinforces* the basic errors already embodied in the present § 153.7. These errors are three-fold:

(1) The proposed regulation expressly codifies the erroneous, and dangerous, concept that the Secretary has the authority to use the prices (or constructed value) of merchandise produced by United States competitors of a foreign exporter to determine that foreign exporter's "foreign market value." Such a concept would shelter the oligopolistic golf car industry from any possible price competition from abroad. Next to an embargo, it's hard to imagine a more effective protectionist device. Apart from its manifest anticompetitive nature, it is clear that Congress has never granted Treasury the authority to use United States prices as "foreign market value" for merchandise from state-controlled-economy countries. See pages 9-14 of Melex's comments of February 22, 1978, with regard to the proposed rulemaking ("Melex's comments"), enclosed herewith.

(2) The proposed regulation's use of the term "such or similar merchandise" strongly suggests that Treasury may ignore the definition of that term in section 212(3) of the Antidumping Act, as amended by the 1974 Act. As the amendment to the Act makes clear, it is no longer appropriate to determine foreign market value by reference to the "prices" or "constructed value" of some other manufacturer's merchandise. See pages 7-9 of Melex's comments.

(3) The proposed regulation wrongly codifies a preference for "prices" over "constructed value" in determining the foreign market value (or "fair value") of merchandise from state-controlled-economy countries. This is in conflict with the express terms of section 205(c) of the Antidumping Act which, when added to the Act by the 1974 Act, deliberately elevated "constructed value" to a level *equal to* that of

[2] T.D. 76-176, 41 F.R. 26204, June 25, 1976.

"prices" to become a co-equal part of the definition of "foreign market value" itself. This contrasts with the statutory provisions for *non*-state-controlled-economy countries for which "constructed value" is clearly subsidiary to "foreign market value." Thus, there is no "preference" for "prices" over "constructed value" for merchandise from state-controlled-economy countries in the Act. Nor should there be, at least so long as Treasury ignores the definition of "such or similar merchandise" and continues to use the "prices" of some other manufacturer's merchandise as the basis for foreign market value. See Pages 3–6 of Melex's comments.

If the Subcommittee determines that hearings or further proceedings would be useful on these questions, we would appreciate the opportunity to submit additional information on behalf of Melex.

Sincerely,

CARL W. SCHWARZ.

WASHINGTON, D.C., *March 21, 1978.*

MS. JAN ARCHIBALD,
Subcommittee on Trade, House Committee on Ways and Means, Washington, D.C.

DEAR MS. ARCHIBALD: This law firm represents Melex U.S.A., Inc. ("Melex"), importer of electric golf cars from Poland. Melex is a Delaware business corporation and wholly-owned subsidiary of Pezetel, the Foreign Trade Enterprise of the Polish Aviation Industry. Melex's principal offices are in Raleigh, North Carolina.

In the Oversight Hearing of the Subcommittee on November 8, 1977, testimony was taken from Donald A. Webster, representative of AMF-Harley-Davidson, and Charles Verrill, Esquire. See *Hearing* at 106–123. Included in the record are letters to Treasury Department officials from Mr. Verrill dated April 22, 1977, and October 24, 1977. These letters are only part of a series of correspondence which Mr. Verrill, representing a domestic golf car manufacturer, and this law firm, on behalf of Melex, have submitted to the Treasury Department. We believe a review of all of this correspondence is necessary in order for the Subcommittee to fully understand the issues with respect to the Trade Act of 1974 and its impact upon the importation of merchandise from state-controlled-economy countries.

Accordingly, I enclose for the use of the Subcommittee the following letters:

1. Letter to Peter D. Ehrenhaft, Deputy Assistant Secretary and Special Counsel (Tariff Affairs) from Carl W. Schwarz, dated October 13, 1977.

2. Letter to Peter D. Ehrenhaft from Carl W. Schwarz, dated November 17, 1977.

The November 17, 1977, letter is in direct response to Mr. Verrill's letter of October 24, 1977 (printed at *Hearing* pages 107–113).

As you know, Treasury and Customs have proposed an amendment to Section 153.7 of the Customs regulations (19 C.F.R. § 153.7). While in part the proposed amendment is both appropriate and consistent with the *Trade Act of 1974* ("the Act"), in several respects it is inconsistent with the Act. First, the proposal wrongly codifies a preference for "prices" over "constructed value" in determining the

foreign market value of merchandise from state-controlled-economy countries. Second, the proposal continues the old practice (which was changed by the Act) of determining foreign market value by reference to the "prices" of some other manufacturer's merchandise. Third, the proposal codifies the anticompetitive concept of using a competitor's United States prices as the foreign market value of imported merchandise. Each of these points is discussed in Melex's comments on the proposed regulation. See letter to Commissioner of Customs from Metzger, Shadyac & Schwarz dated February 22, 1978 (attached).

Please let me know if you need anything further with respect to these matters. Also, if further hearings should be held on these points, we would appreciate the opportunity to testify on behalf of Melex at such proceedings.

Sincerely,

SAMUEL SHEPARD JONES, JR.

Enclosures.

METZGER, SHADYAC & SCHWARZ,
ATTORNEYS AT LAW,
Washington, D.C., February 22, 1978.

Re Notice of proposed rulemaking: proposed amendments pertaining to merchandise from state-controlled-economy countries.

COMMISSIONER OF CUSTOMS,
U.S. Customs Service,
Washington, D.C.

Attention: Regulations and Legal Publications Division.

GENTLEMEN:

I. INTRODUCTION

On January 9, 1978, the Customs Service published in the *Federal Register* (43 F.R. 1356) a notice of proposed rulemaking and an invitation for the public to comment upon certain described contemplated revisions of Customs Regulation Sections 153.7 (19 C.F.R. § 153.7) and 153.27 (19 C.F.R. § 153.27) pertaining to merchandise from state-controlled-economy countries. The deadline for receipt of comments was subsequently extended to February 22, 1978 (43 F.R. 4871, Feb. 6, 1978).

The undersigned is counsel to Melex U.S.A., Inc. ("Melex"),[1] importer of record of electric golf cars from Poland, which is a participant in a pending antidumping proceeding involving such merchandise. In light of the importance of this proposed rulemaking to this proceeding, and to the future business of Melex, the undersigned respectfully submits these comments on behalf of Melex.

II. COMMENTS

A. Summary

In general, we welcome the present proposal for amending § 153.7. We think the proposed revision to the administration of the "constructed value" test is consistent with the purpose of the Antidumping Act of 1921 ("the Act")[2] and is a positive step which recognizes the need for a new standard for making the comparisons required by the Act. The introduction of the concept that a fair comparison must take into account the comparabilities of the national economies concerned is clearly in accord with the basic purpose of the Act. However, although the proposed regulation's provisions with respect to constructed value are a significant improvement over the existing regulation, we think that in several important respects the language and the spirit of the Act are still not being honored by the proposed regulation.

The proposed regulation § 153.7 simply republishes a great deal of the present language of § 153.7, and our major concerns are more with what remains of the

[1] Melex is a Delaware business corporation which is a wholly-owned subsidiary of Pezetel, the Foreign Trade Enterprise of the Polish Aviation Industry. Melex's principal offices are in Raleigh, North Carolina.

[2] 19 U.S.C. §§ 160–173 (Supp. V 1975).

present regulation than with the changes as proposed. It is our firm belief that § 153.7, which was first adopted by the Secretary of the Treasury ("the Secretary") less than two years ago[3] as an attempt to carry out amendments to the Act enacted by the *Trade Act of 1974*,[4] was an unjustified extension and modification of the Act, as amended. Proposed § 153.7 continues and, indeed except with respect to constructed value, *reinforces* the basic errors already embodied in the present regulation. These errors are three-fold:

(1) The proposed regulation wrongly codifies a preference for "prices" over "constructed value" in determining the foreign market value (or "fair value") of merchandise from state-controlled-economy countries, in conflict with the express terms of § 205(c) of the Act (19 U.S.C. § 164(c)) which, when added to the Act by the *Trade Act of 1974*, deliberately elevated "constructed value" to a level *equal to* that of "prices" to become a co-equal part of the definition of "foreign market value" itself. This contrasts with the statutory provisions for *non*-state-controlled-economy countries for which "constructed value" is clearly subsidiary to "foreign market value." Thus, there is no "preference" for "prices" over "constructed value" for merchandise from state-controlled-economy countries in the Act. Accordingly, the proposed section's attempted codification of such a preference is unauthorized by Congress and therefore invalid.

(2) The proposed regulation's use of the term "such or similar merchandise" strongly suggests that the Secretary may ignore the definition of that term in section 212(3) of the Act (19 U.S.C. § 170a(3)), as amended by the *Trade Act of 1974*. As the amendment to the Act makes clear, it is no longer appropriate to determine foreign market value by reference to the "prices" or "constructed value" of some other manufacturer's merchandise.

(3) The proposed regulation expressly codifies the erroneous, and dangerous, concept that the Secretary has the authority to use the prices (or constructed value) of merchandise of United States competitors of a foreign exporter to determine that foreign exporter's "foreign market value." Apart from its manifest anticompetitive nature, it is clear that Congress has never granted the Secretary any authority to use United States prices as "foreign market value" for merchandise from state-controlled-economy countries.

B. Discussion

1. *The Supposed Primacy of the "Prices" Standard for Foreign Market Value.*—(*a*) Section 205(c) of the Act provides a *single* standard of foreign market value for merchandise from state-controlled-economy countries, *viz*, "the normal costs, expenses and profits" of producing the merchandise in question. Section 205(c) provides two alternative and co-equal sources for arriving at these "normal costs, expenses and profits": (a) Section 205(c)(1)—a price approach—whereby if the merchandise is being made in a market economy country by the manufacturer in question the price of that merchandise could be taken as a base figure and adjusted to reflect differences between the merchandise in that country and in the state-controlled-economy country;[5] and (b) Section 205(c)(2)—a constructed value approach—whereby the hypothetical costs, expenses and profits are calculated, pursuant to § 206, by aggregating each of the individual costs of materials and labor, plus overhead and profit, in producing the merchandise in a non-state-controlled-economy country (choosing the country that bears as close an economic resemblance to the state-controlled-economy country as possible and making appropriate adjustments).[6]

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[3] T.D. 76-176, 41 F.R. 26204, June 25, 1976.

[4] Pub. L. No. 93-618, 88 Stat. 1978, Jan. 3, 1975.

[5] See footnote 9, *infra*.

[6] In the Appendix hereto, we suggest language which we feel would afford a reasonable basis for determining the non-state-controlled-economy country most nearly equivalent. *See* Draft § 153.7(d). Such determination would be based on comparative cost data if available. If such data are not available, comparisons could still be made on the basis of more basic comparative data regarding per capita gross national product and natural and human resources. Data regarding these categories are generally available in standard reference works. See *e.g.*, *World Bank Atlas*, published annually. Population data, type of labor force, types of natural resources are matters well-known to political scientists, economists, geographers, other officials of U.S. Governmental agencies and departments. Moreover, a monumental work is in the final stages of preparation which compares the real GDP per capita of many countries, including those with controlled economies, such as Poland, with each other from nearly every conceivable economic viewpoint. This project, I. B. Kravis, Z. Kenessey, A. Heston and R. Summers, *A System of International Comparisons of Gross Product and Purchasing Power* is a cooperative effort sponsored by the United Nations with the support of the World Bank and which will greatly facilitate future comparisons of this sort.

(*b*) Neither the prices nor the constructed value approach is favored by the language of the statute, since the law clearly says that "either" may be used.[7] Had the Congress wanted to give one test or definition primacy over the other, it was well aware of how it should be done. [illegible] 19 U.S.C. §§ 161 and 170. In adopting § 205(c) Congress set forth an a[illegible]cal standard for state-controlled-economy countries which is clear on its face and which makes "constructed value" a co-equal alternative to the "prices" test, which is clearly the statutorily preferred standard in dumping cases involving *non*-state-controlled economy countries.

As a matter of statutory construction it is obvious that § 205(c) controls over § 202, not the reverse. Section 205(c) is the specific law applicable to state-controlled economy situations, not § 202. Section 205(c), in contrast to former Customs regulation § 153.5(b), uses the disjunctive and deliberately elevates "constructed value" to a level equal to that of "prices" to become part of the definition of "foreign market value" itself, unlike § 202 which makes "constructed value" subsidiary to "foreign market value" for market economy countries.

(*c*) Since § 205(c) does not dictate a preference for either the prices or the constructed value approach, how shall the Secretary determine which method to use? By choosing the method which comes closest to meeting the goal of § 205(c), *i.e.*, the method which *best reflects* the "normal costs, expenses and profits" of producing the particular merchandise being appraised.

As the Act is not intended to be a protectionist device, but to eliminate only unfair and injurious international price discrimination, in the absence of such unfairness the Act is not meant to thwart ordinary low-priced sales, which are proper features of successful international competition. In enacting § 205(c) Congress concluded that either (c)(1) or (c)(2) could be used as a price standard against which U.S. manufacturers could fairly be asked to compete and, of course, the encouragement of fair competition was the purpose of the statute.[8]

The result, therefore, is that Treasury must, in the normal case, choose *the lower* of the values arrived at by (c)(1) or (c)(2) as its fair value or foreign market value. Section 153.7 should be amended to reflect this statutory imperative.[9]

2. *The Use of Prices Charged by Other Manufacturers.*—Neither the Notice nor the proposed regulation makes reference to the definition of the term "such or similar merchandise," which is used *eight times* in the proposed regulation. The term is expressly defined in § 212(3) of the Act, as amended by the *Trade Act of 1974*, and yet the proposed regulation reads as if the statutory definition did not exist. This oversight should be corrected by amending § 153.7 to make clear that it is not appropriate to determine foreign market value by reference to the price (or constructed value) of some *other* manufacturer's merchandise.

Section 212(3) was amended by the *Trade Act of 1974* to eliminate from the definition of "such or similar merchandise" merchandise "produced by another person."[10] The purpose of this amendment, as stated in both the House and

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[7] The prior, pre-1975 practice of Treasury of mixing these two methods of calculation (see former Customs regulation § 153.5(b)) was changed by § 205(c).

[8] In enacting the Antidumping Act of 1921, Congress was avowedly concerned with protecting American industry from *unfair* competition, not competition itself. In the study which prefaced the Act, the U.S. Tariff Commission of 1919 wrote:

"[D]umping is generally regarded as occurring whenever there is a sale of imported merchandise at less than its prevailing market or wholesale price in the country of production. [It] . . . contrasts with . . . ordinary low-priced sales, which, in the absence of some unusual and unfair advantage, are generally deemed proper features of successful competition." [Third Annual Report of the United States Tariff Commission 11 (1919).]

Therefore, the Antidumping Act of 1921 is principally a measure to combat international price discrimination, not to forestall foreign competition.

The 1974 amendments were clearly based on the same notions. As the Senate Finance Committee wrote:

"This Act is a "protectionist" statute designated to bar or restrict U.S. imports: rather, it is a statute designed to free U.S. imports from unfair price discrimination practices.

* * * * * * *

"The Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry." [S. Rep. No. 93-1298; 1974 U.S. Code Cong. and Ad. News 7316 (emphasis added).]

[9] We assume that the proposed regulation does not encompass any change to the existing Treasury practice of making adjustments to prices to reflect differences between the merchandise in question and the merchandise in a non-state-controlled-economy country, including differences in economies of scale in the production of the merchandise. If this assumption is in error, then appropriate language should be incorporated in § 153.7(a) to reflect this practice.

[10] Subparagraphs (B), (D), and (F) of § 212(3), each of which referred to merchandise "produced by another person," were dropped from the definition. *See* 19 U.S.C.A. § 170a (1977 pocket part at 29).

Senate Reports, was to avoid imposing dumping duties on the basis of prices which the foreign manufacturer "cannot control and may not even know about."[11] When this definition is read into § 205(c)(2), as it must be, since § 212 by its own terms applies to "this title," it means that the constructed value in a non-state-controlled-economy country is the constructed (hypothetical) value of the state-controlled country's merchandise in that country, not some other producer's merchandise. When this definition is read into § 205(c)(1) it means that if the state-controlled-economy country's merchandise is also being made in a non-state-controlled-economy country, the prices of that merchandise can be utilized.

Thus, in making its determination of which method *best reflects* the "normal costs, expenses and profits" of producing the state-controlled-economy country's merchandise, the Secretary must examine: (a) the prices of such merchandise in a non-state-controlled-economy country if such merchandise is also manufactured there, and (b) the constructed value of such merchandise in a non-state-controlled-economy country. In most cases it would appear that only the constructed value approach would be available, since it is not often that a state-controlled-economy country would also be manufacturing its merchandise in a non-state-controlled-economy country. Obviously, though, such a situation is not impossible. For example, it is conceivable that the factory in Poland which makes Melex golf cars could begin producing the Melex golf car in another, market economy country. Were that to happen, the prices at which such merchandise was sold in that country could be used as a basis for determining the foreign market value of golf cars exported to the United States from Poland.

3. *The Use of U.S. Prices.*—Subsections (a) and (c) of proposed regulation § 153.7 expressly provide for the use of United States prices (or constructed value) except, first, where the provisions of subsection (b) apply, that is, where the Secretary concludes that "such or similar merchandise is not produced in a non-state-controlled-economy country or countries which is (are) . . . comparable in terms of economic development to the state-controlled-economy country from which the merchandise is exported," and except, second, where "sales of such or similar merchandise in any other non-state-controlled-economy country are . . . available or . . . provide an adequate basis of comparison." It seems safe to assume that in many circumstances the Secretary will feel required by this regulation to use United States prices, although the absence of any definitions of such language as "comparable" and "adequate basis of comparison," and the absence of any standards circumscribing the Secretary's decision in this matter, make the regulation unnecessarily vague and ambigious with respect to a given fact situation. If nothing else is done, the proposed regulation should be redrafted to provide clear, objective definitions and standards so that exporters from state-controlled-economy countries can have some reasonable basis for making business decisions regarding their exports.[12] As it now stands, the Secretary proposes to reserve for himself so much "flexibility" that the likelihood of arbitrary and ad hoc applications of the Act to particular fact situations seems almost inevitable.

An even more serious problem exists with respect to the proposed regulation, however. This regulation, both as proposed and as adopted for the first time in 1976, incorporates a new, major—but unfortunate—concept into antidumping law—the use of prices of United States produced merchandise as the "foreign market value" of "fair value" of imported merchandise from state-controlled-economy countries.

This concept is a creation of the Secretary without any basis in law. Worse, the referent to United States prices is inherently protectionist. Obviously, there will always be United States prices in these cases; if such prices are the referent, price floors will automatically be established which would read comparative advantage out of the law and pass that cost off on to the American consumer.

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[11] *See* H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 72 (1973) ("Your Committee believes that this language creates inequities by subjecting a manufacturer to liability for dumping duties in situations where he cannot control and, most often, does not know the prices which will form the basis for comparison with his prices to the United States."); Sen. Rep. No. 93-1298, 93d Cong., 2d Sess. 177 (1974) ("This produces occasional inequities . . . by rendering them liable to the imposition of dumping duties on the basis of prices which they cannot control and may not even know about.")

[12] For example, in the Appendix we recommend that the phrase "most nearly equivalent in terms of economic development" be used in lieu of the term "comparable in terms of economic development." Almost anything is "comparable," even apples and oranges.

(a) The language of § 205(c)

The touchstone for the validity of the proposed regulation must be the words of the statute itself. As the Supreme Court has noted in another context: "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress *as expressed by the statute*'." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213 (1976) (emphasis added.) No greater authority has been granted the Secretary under the Act. See 19 U.S.C. § 173.

A comparison of §153.7 with § 205(c) of the Act shows that the clause "including the United States" has been inserted in subsection (a) of the regulation even though it does not appear in the corresponding section of the statute. Moreover, subsection (c) of the regulation is entirely a creation of the Secretary, since it nowhere appears in § 205(c) (or elsewhere in the Act).

A careful reading of § 205(c) shows that the term "non-state-controlled-economy country" cannot be read to include the United States. First of all, § 205(c) does include the term "including the United States," but in *another* part of that section. Congress clearly knew how to refer to this country when it wanted to. Its failure to use the term in juxtaposition with "non-state-controlled-economy country" suggests that it did not wish to include the United States in that term. Second, if "non-state-controlled-economy country" was meant by the Congress to include the United States, then a straightforward reading of § 205 (c)(1)(B) makes no sense. That section would read:

"* * * the Secretary should determine the foreign market value of the merchandise on the basis of the normal costs, expenses and profits as reflected by * * * the prices * * * at which such or similar merchanise of [the United States] is sold * * * (B) *to other countries, including the United States.*" [Emphasis added: added material is in brackets.]

Since the United States is not an "other" country with respect to itself, such a reading is nonsense. The only way the section can be read to make sense is if "non-state-controlled-economy country" does *not* include the United States, the only reading which is consistent with the basic purposes of the antidumping law and the antitrust law.

(b) The legislative history

The legislative history of the *Trade Act of 1974* as it applies to § 205(c) clearly demonstrates that no "U.S. prices" concept was ever enacted into law. On September 5, 1973, Senator Carl Curtis introduced a bill in the Senate, S. 2374, to amend the Antidumping Act to provide for a "substituted constructed value" where the normal methods for determining foreign market value could not be utilized and where there was not sufficient evidence from which a constructed value could be determined. Under the bill, "substituted constructed value" would be *the cost of similar merchandise at its place of manufacture in the United States, as determined by the Secretary of the Treasury*" (*emphasis added*). This bill was discussed during Senate hearings on H.R. 10710.[13] The bill's significance, however, is that it was *not* adopted by Congress as part of the *Trade Act of 1974* and, thus, did *not* become part of the Act.

What did become a part of the Act was the original language of H.R. 10710 as reported by the House Committee on Ways and Means on October 10, 1973.[14] That language is now § 205(c). With respect to that section the House Report states:[15]

"A new subsection (c) to Section 205 is also added to adopt in the law the substance of the existing Treasury Department practice, as reflected in § 153.5(b) of the Treasury's antidumping regulations (19 C.F.R. 153.5(b)), under which decisions regarding dumping are made with respect to merchandise from state-controlled-economy countries. From time to time, a case arises in which the information indicates that the economy of the country, from which the merchandise is exported, is controlled to an extent that determinations cannot be made in accordance with the usual technical rules. The amendment would confirm the Treasury practice under which the Secretary makes the necessary dumping determinations with respect to state-controlled-economy countries based on prices at which such or similar merchandise of a non-state-controlled-economy country is sold either for consumption in its home market or to other countries,

[13] See Hearings at 1320–28.

[14] See House Committee on Ways and Means, *Report on the Trade Reform Act of 1973 to accompany H.R. 10710*, H.R. Rep. No. 571, 93d Cong., 1st sess. (1973).

[15] Id. at 72.

or based on the constructed value of such or similar merchandise in a non-state-controlled-economy country."

It is significant that there was no suggestion in the House Report that the reference to a "non-state-controlled-economy country" included the United States, or that the prices or the constructed value of United States produced merchandise generally were utilized under the then existing Treasury practice where other methods were not available.

This point is confirmed by § 153.5(b) of the then existing Treasury regulations (mentioned in the House Report, *supra*). The 1973 regulation provided:

"*Merchandise from controlled economy country.*—Ordinarily, if the information available indicates that the economy of the country from which the merchandise is exported is controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of fair value under § 153.3 or § 153.4, the Secretary will determine fair value on the basis of the constructed value of the merchandise determined on the normal costs, expenses, and profits as reflected by the prices at which such or similar merchandise is sold by a non-State-controlled-economy country either (1) for consumption in its own market; or (2) to other countries, including the United States." [19 C.F.R. § 153.5(b) (1973).]

Obviously, this regulation did not embody the concept that the prices of United States produced merchandise could be used to determine foreign market value. Indeed, such a concept would have constituted a major change in antidumping law.

When the Senate took up H.R. 10710 they passed what is now § 205(c) "unchanged from the House Bill." [16]

Then a curious thing happened. When the Senate Finance Committee's Report on H.R. 10710 was prepared, somehow language crept in that purported to incorporate the very concept which S. 2374 had unsuccessfully proposed, and which H.R. 10710 had not accepted—the use of United States prices as a referent. The Senate Report stated:

"*State-Controlled-Economy Dumping.*—The second amendment to Section 205, to be added as a new subsection (c), *also unchanged from the House Bill*, would adopt, in substance, existing Treasury regulations concerning standards for comparison to be employed in investigations of merchandise imported from State-controlled-economy countries. The Committee is concerned that the technical rules contained in the Act are insufficient to counteract dumping from State-controlled-economy countries where the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison purposes. Accordingly, the amendments would confirm the existing Treasury practice of comparing the purchase price or exporters' sales price of the merchandise in question with the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either (1) the prices (determined in accordance with Sections 202 and 205(a) of the Act) at which such or similar merchandise produced in a non-State-controlled-economy country is sold either for consumption in the home market or to other countries (including the United States), or (2) on the basis of the constructed value of such or similar merchandise in a non-State-controlled-economy country (as determined under Section 206 of the Act). *The amendment is intended to permit comparison of the purchase price or exporters' sales price of the merchandise in question with the prices of such or similar merchandise produced in the United States in the absence of an adequate basis for comparison using prices in other non-State-controlled-economy countries.*" [Senate Report at 174; emphasis added.]

Clearly, the last sentence of the Senate Report was a gratuitous addition to the legislative history of H.R. 10710 which had, and has, absolutely no basis in fact or law. Not only had the language of § 205(c) been unchanged from the House bill, there was *not* an "existing Treasury practice" of using United States prices under any circumstances. This has been confirmed by a letter of a Treasury Department official in April, 1974 that "[o]ur experience indicates that this situation has never arisen to date." [17] (A "practice" is, of course, an "habitual

[16] Senate Committee on Finance, *Report on the Trade Reform Act of 1974 to accompany H.R. 10710*, Sen. Rep. No. 1298, 93d Cong., 2d sess. 174 (1974).

[17] Letter of Ben L. Irvin, Director, Office of Tariff and Trade Affairs, to Bart Fisher, Esq., Patton, Boggs & Blow, dated April 19, 1974.

or customary performance,"[18] not something which has never arisen.) It also has been confirmed by Treasury's decision in the Fall of 1974 to use Canadian prices in the Polish golf cars antidumping proceeding, instead of United States prices as urged by counsel for a domestic golf car manufacturer. Following that decision Senator Curtis, who introduced S. 2374, in a letter to Secretary Simon on December 20, 1974,[19] acknowledged in effect that there had been no change in the law on this point, by stating that "it appeared the Melex matter would be resolved administratively and legislative relief would not be necessary."

Accordingly, there is no basis for the Secretary now to accomplish by administrative regulation that which the Congress refused to do by law in 1974.

C. Conclusion

While we support the proposed revision to the "constructed value" test—standing alone—we nonetheless believe it has been necessary to direct attention of the Customs Service and Department of Treasury to serious questions regarding the basic validity of the current regulation and its proposed amended form. Section 153.7 should be redrafted to reflect the Act which it is intended to implement. To that end, we enclose as an Appendix to this letter draft language which we feel adequately reflects the requirements of the Act.

Sincerely,

CARL W. SCHWARZ.

Enclosure.

APPENDIX

DRAFT OF PROPOSED REGULATION

§ *153.7 Merchandise from state-controlled-economy country*

(*a*) If available information indicates to the Secretary that the economy of the country from which the merchandise is exported is state-controlled to an extent that sales or offers of sales of such or similar merchandise (as defined in subsection (c)) in that country or to countries other than the United States do not permit a determination of fair value under §§ 153.2, 153.3 or 153.4, the Secretary shall determine fair value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either:

(*i*) The prices, determined in accordance with section 205(a) and section 202 of the Act (19 U.S.C. 164(a), 161), at which such or similar merchandise (as defined in subsection (e)) is sold either (1) for consumption in the home market of a non-state-controlled-economy country or countries, or (2) to other countries, including the United States, provided such or similar merchandise is produced in such non-state-controlled-economy country or countries; or

(*ii*) The constructed value of such or similar merchandise (as defined in subsection (c)), determined in accordance with section 206 of the Act (19 U.S.C. 165), as if produced in such non-state-controlled-economy country which the Secretary finds, in accordance with subsection (d), is at the time of exportation most nearly equivalent in terms of economic development and resources to the state-controlled-economy country from which the merchandise is exported.

(*b*) In making the determination required by subsection (a) of this section, the Secretary shall utilize the method (either (a)(i) or (a)(ii)) which best reflects the normal costs, expenses and profits of producing the merchandise. Ordinarily, in the absence of other factors found by the Secretary to be material, the method which results in the lower fair value shall be utilized.

(*c*) The term "such or similar merchandise" as used in this section shall mean merchandise which was produced by any person (as defined in 19 U.S.C. 172) of, or other agency or affiliate of, the state-controlled-economy country whose merchandise is under consideration, in the first of the following categories which applies:

(*i*) The merchandise under consideration and other merchandise which is physically identical with the merchandise under consideration;

(*ii*) Merchandise which is like the merchandise under consideration in the purposes for which used and approximately equal in commercial value to the merchandise under consideration;

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[18] *Random House Dictionary of the English Language* at 1128 (1967 ed. unabridged).

[19] The letter is unavailable to the undersigned, but it is quoted by Charles Owen Verrill, Jr., Patton, Boggs & Blow, in his letter of October 24, 1977 to Mr. Peter D. Ehrenhaft, Deputy Assistant Secretary (Tariff Affairs), at 13.

(*iii*) Merchandise which is of the same general class or kind as the merchandise under consideration and in the purposes for which used and which the Secretary determines may reasonably be compared for anti-dumping purposes with the merchandise under consideration.

(*d*) In determining the non-state-controlled-economy country which is at the time of exportation most nearly equivalent in terms of economic development and resources to the state-controlled-economy country from which the merchandise is exported, the Secretary shall give due consideration to the best available data reflecting the normal costs of producing the merchandise in non-state-controlled-economy countries and in the state-controlled-economy country from which the merchandise is exported. In the absence of reliable data of such nature, the Secretary shall give due consideration to the best available data reflecting similarities in per capita gross national product and in natural and human resources of non-state-controlled-economy countries and the state-controlled-economy country from which the merchandise is exported.

(*e*) As used in this section, the term "non-state controlled-economy country" shall not include the United States.

METZGER, SHADYAC & SCHWARZ,
ATTORNEYS AT LAW,
Washington, D.C., November 17, 1977.

Re Electric golf cars from Poland.

Hon. PETER D. EHRENHAFT,
Deputy Assistant Secretary and Special Counsel (Tariff Affairs), Department of the Treasury, Washington, D.C.

DEAR MR. EHRENHAFT: At the risk of over-burdening you with paper on this subject I believe it is necessary to respond not only to what we perceive to be important but misconceived observations by Mr. Verrill in his letter to you of October 24, 1977, but also to certain points we understood you to suggest at our joint meeting on October 14, 1977. We agree with you that the issues presented by this proceeding are complex, and we very much appreciate your willingness to listen to both sides. It is my hope that this dialogue is of assistance to you and your staff.

A. GENERAL OBSERVATIONS

Now that I have had an opportunity to see Mr. Verrill's written response, I think at least two conceptual areas of disagreement between us have crystallized:

(1) Mr. Verrill insists that there are no "cosmic principles of international or east/west trade" involved here and implies that all we are concerned with here is a minor and isolated dispute in a small industry. In fact, however, there are and will be other agreements between Polish and American industries which provide for delivery of merchandise made only in Poland and the United States for use only within the United States. Moreover, in our legal system the development of a "cosmic principle" is always preceded by one or more individual cases of discrimination, hardship, injustice or persecution. I would not wish to count the instances in which the Federal Courts have been asked to ignore an individual's complaint because it did not raise "cosmic" issues but which, when addressed by the Court nevertheless, provided the stimulus for new and far-reaching policies. What we believe we have documented for you is just such a case.

The fact is that there are issues involved here of significant importance to the continuation of fair east/west trade, to the commitment of this country to fair play and due process and to our obligations under international law. The most basic of these are:

1. In "state-controlled economy" dumping cases, does the law require Treasury to utilize only the price approach to foreign market value (or, as Mr. Verrill calls it, the "reflected value" test) and to ignore the "constructed value" approach? Mr. Verrill says yes; we say no.

2. In such cases, does the law *now* permit the use of the prices of an unrelated, third-country manufacturer as a basis for foreign market value? Mr. Verrill says yes; we say no.

3. In such cases, has the law *ever* permitted Treasury to use "U.S. prices" as foreign market value when the obvious and inevitable result would be to prevent price competition (and thus imports) altogether from such countries? Mr. Verrill says a yes; we say no.

(2) Mr. Verrill—at page 2 of his letter—argues that since "Pezetel had no role in developing" the U.S. golf car market, and since Melex cars have been built for export to the U.S. and not for the home market, that "Pezetel is not,

therefore, in the position of the ordinary exporter who seeks access to the United States market." Presumably he means that in cases where a product is specifically made for the U.S. market, the exporter cannot expect to be treated like an "ordinary" exporter and must be subjected to special burdens from Treasury and an extra measure of hostility from the entrenched U.S. industry which must compete against those imports.

Such sophistry only points up the need for you and your colleagues to keep firmly in mind what Mr. Verrill is attempting to obscure: *viz.*, the real purpose of the antidumping laws. Every statute must be interpreted and enforced in light of the purpose it was designed to serve, and the Antidumping Act is no different. This statute's basic purpose, as you are well aware, was to prevent a foreign manufacturer from injuring an efficient, competitive U.S. industry by "dumping" goods on the U.S. market at prices below the prices which *that manufacturer* normally charges elsewhere. It was *not* designed to prevent importers from engaging in price competition with American industry. It was *not* designed to prevent a foreign exporter from capitalizing on its natural economic, geographic or other advantages in its battle for markets and thus repeal the principle of "comparative advantage," upon which all international trade is based. It is these principles that Mr. Verrill is asking you to ignore through a tortured reading of the clear language of the statute in question, 19 U.S.C. § 164(c).

We do not deny that in many circumstances the calculation of what is the "normal" price for a particular manufacturer's product will be very difficult, and this is true for many reasons besides the fact that the exporter's economy may be "state controlled"[1] or its home currency non-convertible. But in determining foreign market value the lodestar must always be the price which is *normal for that exporter*, taking into consideration his own efficiency, technology and production advantages.

B. SPECIFIC ISSUES

1. The Alleged Primacy of the "Price" Standard for Foreign Market Value.

Throughout his memorandum, Mr. Verrill attributes to Treasury a "traditional" reliance upon "the price of such or similar goods that are manufactured in a western [presumably non-state controlled] economy." According to Mr. Verrill, this "price" (which he labels "reflected value") has been used in state-controlled economy dumping cases since *Bicycles from Czechoslovakia*, 25 Fed. Reg. 6657 (1960) to the specific exclusion of the "foreign market value" standard *and* the "constructed value" standard (Memo. pp. 2–3). Former section 153.5(b) of the Customs regulations, which was not adopted until 1968,[2] is cited as the basis for that "tradition," but Mr. Verrill concedes, as he must (Memo. p. 3), that this regulation or the practice itself did not have "specific statutory support." The "statutory sanction" for the practice, he argues somewhat lamely, stemmed from the 1913 Underwood Tariff Act (which had nothing to do with dumping or with state-controlled economies) "which defined 'actual market value' *almost* precisely the same as 'foreign market value' in the 1921 Act." (Memo. p. 3; emphasis added).[3]

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[1] I am not aware of any guidelines under which this "state-controlled economy" situation should be deemed to exist, however. Mr. Verrill claims—at page 8—that wage levels may be lower in Poland due to "free education or medical care" which "are often a burden on wages in western economies." Which western countries does he think have "true" wage levels? He will be hard-pressed to find a country, east or west, that does not provide any "free" education, "free" medical care, "free" retirement benefits, etc. New York City and Washington, D.C. have rent controls. Congress regularly manipulates tax policy to encourage investment in certain industries and to influence prices in others. Direct subsidies to agriculture, airlines and even the manufacturing sector are not unknown in this nation. Is our economy now "state-controlled"? Is Italy's economy or that of Japan or the Philippines? Was our economy "state-controlled" while the Trade Act of 1974 was being drafted? (During President Nixon's "Phase I," "Phase II," and "Phase III" various "Price Boards" and "Wage Panels" told every American how much he could charge for his goods and how much his salary would be.)

[2] T.D. 68–148, 2 *Cust. Bull.* 303 (1968).

[3] Mr. Verrill neglects to point out that at the same time Congress was enacting the 1921 Antidumping Act it was, in the Emergency Tariff Act of 1921, re-drafting the term "actual market value" as it had been used in the Underwood Law to take account of the situation then prevailing of depreciated currencies in Europe, whereby export prices were higher than domestic prices and domestic prices at prevailing exchange rates were extremely depressed. This was obviously a situation which could not be tolerated under revenue-producing tariff legislation and hence the re-definition. See the *Statement of the Managers on the Part of the House* in the *Conference Report* accompanying the Emergency Tariff Bill (H. Rep. 79, 67th Cong. 1st Sess.), p. 12; see also, Levett, *Through the Customs Maze*, p. 161. We must also note that one year later Congress, in the Act of Sept. 21, 1922, c. 356, Title IV, 42 Stat. 990, revamped the entire system of customs terminology and dropped "actual market value" from usage altogether. Thus the term has been dead for fifty-five years. How Mr. Verrill derives "statutory support" for former Customs Reg. § 153.5(b) from this obscure history is not yet clear to me.

We see no need, at this time, to debate with Mr. Verrill as to whether there actually was a "tradition" at Treasury of the sort he urges or whether, if it did exist prior to the *Trade Act of 1974*, it was valid or invalid.[4] What we do think is important to our dispute, however, is whether, in the 1974 Act, *Congress* passed a law *requiring* that "reflected value" be used to the exclusion of "constructed value" (thus "confirming the existing Treasury practice," Memo. p. 4) or whether Congress set forth an analytical standard for cases such as these which is clear on its face and which makes "constructed value" a co-equal alternative to the "price" test which is clearly the statutorily preferred standard in dumping cases involving "western" economies.

As a matter of statutory construction it is obvious that § 164(c) controls over § 161, not the reverse. Section 164(c) is the specific law applicable to state-controlled economy situations, not § 161. Section 164(c), in contrast to the old regulation, used the disjunctive and deliberately elevated "constructed value" to a level equal to that of "price" to become part of the definition of "foreign market value" itself, unlike § 161 which makes "constructed value" subsidiary to "foreign market value" for market economy countries. Had the Congress wanted to give one test or definition primacy over another, it was well aware of how it should be done. See 19 U.S.C. § 161 and § 170.

2. The Hypothetical Nature of "Constructed Value."

It is obviously true, as Mr. Verrill points out, that a "constructed value" is a hypothetical one. But since the statute, at § 165, carefully spells out how a "constructed value" is to be calculated and in § 164(c) specifically makes "constructed value" a standard for calculating foreign market value, to rail against the uncertainties of "constructed value" is to rail against the Act. Indeed, contrary to Mr. Verrill's claim that "transaction prices are less subject to manipulation than are cost calculations with all the variables and allocations that are possible" (Memo. p. 7) we think that, in this case, the exact opposite is true. Costs of labor, material, energy, etc. are readily determined on the basis of published data, and the manufacturing processes can be established by independent engineers and other experts. The two "constructed value" studies submitted by Pezetel were done by independent professionals without knowledge of the real purpose for their work. The "reflected value" calculations urged by Mr. Verrill and utilized by Customs were based upon unsworn *ex parte* information given to Customs by a competitor of Pezetel which has enjoyed a cozy relationship with Mr. Verrill's clients while denying Pezetel equal access to its facilities and information. "Reflected value" calculations are themselves easily subjected to manipulation.

It must be remembered that Section § 164(c) directs the Secretary to "determine the foreign market value of the *merchandise* [the Melex car, *not* 'such or similar merhcandise']" (emphasis added). Some other producer's prices simply are not the normal costs, expenses and profits of the Melex car and therefore are not the "best evidence" of them.

3. The use of U.S. Prices as a Standard.

Mr. Verrill's response to our Memorandum of October 13, 1977 offers nothing of significance to change the reality of the situation that Congress did not grant the Secretary any authority to use the prices of United States competitors of a foreign exporter to determine that foreign exporter's "foreign market value." We reiterate that:

(*a*) the language of § 164(c) makes no internally logical sense if interpreted to include United States prices (see our October 13th Memorandum at 9–10); and the current regulation, § 153.7, adopted in 1976, extends and modifies the language of § 164(c), a presumption of authority not permitted to Federal administrative agencies.

(*b*) Not even former Customs regulation § 153.5(b), the embodiment of the then "existing Treasury practice," contained any "U.S. prices" concept.

(*c*) There was in fact no "practice" in Customs of using U.S. prices for Congress to have adopted. The letter of Ben L. Irvin, Director, Office of Tariff and Trade Affairs, to Mr. Verrill's law partner confirms that "[o]ur experience indicates that this situation has never arisen to date." A "practice" is, of course, an "habitual or customary performance" (*Random House*

[4] We must note, however, that even prior to 1975 the existing law (§ 161) clearly said that "constructed value" was to be used "in the absence of" foreign market value, and no fabricated "reflected value" standard was authorized. This is still true for cases involving "western" countries. Since the LTFV finding in this case, on June 11, 1975, indicates—on its face—that it was based upon the standard set forth in the old regulation, and not upon § 164, it is invalid and must be vacated.

Dictionary of the English Language at 1128 (1967 ed. unabridged)), not something which has never arisen. In any event, an administrator's opinion rendered in an uncontested and *ex parte* situation is entitled to virtually no weight.

By way of passing we note that Mr. Verrill quotes from a letter from Senator Curtis to Secretary Simon on December 20, 1974, that "it appeared the Melex matter would be resolved administratively and legislative relief would not be necessary."[5] Since the administrative "relief" then provided by Treasury was to determine the Melex golf car's foreign market value on the basis of Marathon's prices, as opposed to Mr. Verrill's arguments at that time that U.S. prices should be used, that letter appears to support our view that the Congress did not enact any law that would permit resort to United States prices.

4. The Use of Prices Charged by Other Third-Country Manufacturers.

Mr. Verrill argues (Memo. p. 14) that "[i]t would be absurd for the Treasury Department to construe [§ 164(c)] as having been negated in its entirety by [§ 170a(3).]" We, of course, do not argue to the contrary; we note, however, that a reasonable interpretation of the two sections does not requrie such a drastic result.

Section 170a(3) was amended by the Trade Act of 1974 to eliminate from the definition of "such or similar merchandise" merchandise "produced by another person."[6] The purpose of this amendment, as stated in both the House and Senate Reports, was to avoid imposing dumping duties on the basis of prices which the foreign manufacturer "cannot control and may not even know about." When this definition is read into § 164(c)(2), as it must be, since § 170(a) by its own terms applies to "this title," it means that the constructed value in a non-state-controlled-economy country is the constructed (hypothetical) value of the *Melex* golf car in that country, not some other producer's golf car. When this definition is read into § 164(c)(1) it means that if a *Melex* car were also being made in a market economy country, the price of that car could be taken as a base figure. *Even if* § 164(c)(1) is to be read by ignoring all of § 170a(3), so that the "prices" referred to are some other producer's prices, the choice between (c)(1) and (c)(2) continues to apply. In this case, for the reasons stated elsewhere, (c)(2) must be chosen and requires that the constructed value of the Polish-made *Melex* golf car be determined in a non-state-controlled economy country, *not* the constructed value or actual price of someone else's golf car, such as a Marathon.[7]

5. The Announcement of Marathon's Demise is Premature.

Out of an abundance of caution, we feel compelled to comment upon Mr. Verrill's references to Marathon.

Mr. Verrill says (Memo. p. 9): "We have previously objected to the use of Marathon prices as the foreign value referent in the liquidation phase of this proceeding primarily because that company has not produced a golf cart since 1974. . . ." We have seen nothing from Mr. Verrill to support this bare allegation, and, to the contrary, information available to us (and to Mr. Verrill) clearly establishes that Marathon continues to sell golf cars both as golf cars and as "personnel carriers." *See* the invoices attached as Exhibits H, I, J and K to Professor Soltysinski's letter of August 25, 1977, and the October 21, 1977, invoice attached hereto. The price indicated. Can $1,100 per unit, is consistent with the earlier invoices for 1976 and 1977 sales. We do not see how Mr. Verrill or the Treasury can ignore these Marathon transactions. Furthermore, I do not see how Mr. Verrill can presume to make unsupported allegations of fact such as "we understand that Marathon's costs, when it was producing golf cars, far exceeded the prices its car commanded in the market." This allegation, which we presume originated with Mr. Verrill, has been floating around during the last year, but if it is supported by any evidence whatsoever we are unaware of it. Indeed, the evidence, now supplemented by the referenced invoices, would go far to disprove the allegation.

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[5] As best we can determine, such a letter is not in the public files and has never been made available to counsel for Melex or Pezetel.

[6] Subparagraphs (B), (D), and (F) of Section 170a(3), each of which referred to merchandise "produced by another person," were dropped from the definition. *See* 19 U.S.C.A. § 170a (1977 pocket part at 29).

[7] Mr. Verrill—apparently attempting to conjure up some sort of an estoppel doctrine—claims that the use of Marathon as a referent was suggested by Pezetel itself (Memo. p. 5), but fails to note that this was only after Treasury had made it clear that *some* such referent *would* be used and it was only a matter of which one was to be chosen. In any event, the point is irrelevant since the matter was raised under the old law, prior to enactment of § 164(c).

While we fully understand why Mr. Verrill and his clients would like to see Marathon leave the business, or at least to convince Treasury that it had done so, we continue to feel strongly that if the "reflected value" standard is to be used, it shoud be administered fairly.

C. SUMMARY

1. Section 164(c) of Title 19, United States Code, is the governing law in this case. That statute provides a *single* standard of foreign market value, *viz.* "the normal costs, expenses and profits" of the Polish-made Melex golf car. Section 164(c) provides two alternative sources for arriving at these "normal costs, expenses and profits"; (a) Section 164(c)(1)—a price approach—whereby if a Melex car were being made in a market economy country the price of that car could be taken as a base figure and adjusted to reflect the difference between that country and Poland; (b) Section 164(c)(2)—a constructed value approach—whereby the hypothetical costs, expenses and profits are calculated, pursuant to § 165, by aggregating each of the individual costs of materials and labor, plus overhead and profit, in producing the Melex car in a market economy country (choosing the country that bears as close an economic resemblance to Poland as possible and making appropriate adjustments).

2. Neither the price nor the constructed value approach is favored by the language of the statute, since the law clearly says that "either" may be used and since Congress knew how to use language expressing a preference if it had wanted to do so. The prior, pre-1975 practice of Treasury of mixing these two methods of calculation (see the old Customs regulation §153.5(b)) was changed by § 164(c). It is important to recall that the June 11, 1975 Determination of Sales at Less than Fair Value in this case was improperly based upon a mixed method of calculation.

3. Since § 164(c) does not dictate a preference for either the price or the constructed value approach, how shall the Secretary determine which method to use? By choosing the method which comes closest to meeting the goal of §164(c), i.e., the method which *best reflects* the "normal costs, expenses and profits" of producing the Polish-made Melex car, including allowance for the natural economic advantages that may exist in the exporting country, here Poland.

As the Act is not intended to be a protectionist device, but to eliminate only *unfair and injurious international price discrimination*, in the absence of such unfairness the Act is not meant to thwart ordinary low-priced sales, which are proper features of successful competition. In enacting § 164(c) Congress concluded that either (c)(1) or (c)(2) represented prices against which U.S. manufacturers could fairly be asked to compete and that the encouragement of fair competition was the purpose of the statute. The result, therefore, is that Treasury must, in the normal case, choose *the lower* of (c)(1) or (c)(2).

4. For the reasons stated above and in our Memorandum of October 13, 1977 United States prices are *never* an appropriate basis for an exporter's foreign market value. Moreover, pursuant to the amendment of the definition of "such or similar merchandise" by the 1974 Amendments, it is no longer appropriate (if it ever was in the case of state-controlled-economy countries) to determine foreign market value by reference to the price of some *other* manufacturer's merchandise. In this case, application of the definition of "such or similar merchandise" to § 164(c) requires a constructed value approach—the constructed value of the Polish-made Melex car in an appropriate market economy country (other than the United States).

Again, my apologies for the length of this letter, but we feel the matter is simply too important to let the record stand without a rebuttal to Mr. Verrill's letter. We, of course, stand ready to assist you further in any way possible.

Sincerely yours,

CARL W. SCHWARZ.

[illegible] STREET
ST. LEONARD,
MONTREAL, QUEBEC H1P 2A2

TEL : [illegible]
(514) 325-3031

MARATHON GOLF CAR LTD.

DATE Oct. 21 1977

QUAN	PART NO	DESCRIPTION	AMT	PARTS

M White Eagle Imports

ADDRESS 5145 Hennan Dr., Oldcastle, Ont. N0R 1L0

MAKE & MODEL	SERIAL NO	PROMISED

DESCRIPTION OF WORK	AMOUNT
re: Your Purchase Order No.5307	
Our Delivery Slip No.62881	
8 Marathon M-151 Personnel	
Carriers without batteries	
and battery chargers.	
Excluding Federal Sales Tax	
$1,100.00 ea.	8800.00
Serial Nos. 1037, 1040, 1118, 1165	
1171, 1187, 1230, and 1257	

Paid
Ck. 0099
Oct 21/77

I HEREBY AUTHORIZE THE ABOVE REPAIR WORK AND AGREE TO CONDITIONS BELOW

OWNER

ALL EST MATES ARE FOR LABOR ONLY [illegible] COMPANY DOES NOT ASSUME ANY RESPONSIBILITY FOR NON-USE [illegible] OR FOR ANY LOSS LOSS [illegible] ON ACCOUNT OF DELAYS OR DEFAULTS DUE TO [illegible] AT ORDER & O.D. IN THE EVENT OF NON PAYMENT OF THE OR A TOTAL CHARGE THE OWNER AUTHORIZES THE COMPANY TO REPOSSESS THE VEHICLE OR VEHICLE AND HOLD IT UNTIL THE TOTAL BILL IS PAID OR TO SELL IT

TOTAL LABOR	
TOTAL PARTS	
TAX	
TOTAL	$8800.00

CUSTOMER'S COPY

№ 2543

F. LEONARD,
MONTREAL, QUEBEC H1P 2A2

TEL.: (514) 325-3038

MARATHON GOLF CAR LTD.

DATE Oct. 21 1977

LABOR	PART NO	DESCRIPTION	AMT	PARTS

M. White Eagle Imports

ADDRESS 5145 Hennan Dr., Oldcastle, Ont. NOR 1LO

MAKE & MODEL	SERIAL NO	PROMISED

DESCRIPTION OF WORK	AMOUNT
Re: Our Invoice No. 2543	
Omitted to charge F.S.T.	
Federal Sales Tax @12% on 8,800.00	1056.00

I HEREBY AUTHORIZE THE ABOVE REPAIR WORK AND AGREE TO CONDITIONS BELOW

SIGNATURE

ALL ESTIMATES ARE FOR LABOR ONLY. + MATERIALS ARE EXTRA. THIS COMPANY DOES NOT ASSUME ANY RESPONSIBILITY GUARANTEED FOR ANY ELECTRICAL APPLIANCES OR OTHER EQUIPMENT LEFT FOR REPAIRING OR OVERHAUL OR FOR VEHICLES LEFT IN VENTILATED OR COLD PAINT VEHICLES BOTH AT OWNER'S RISK. IN THE EVENT OF NON PAYMENT OF THE ON A TRIAL BASIS THE OWNER AUTHORIZES THIS COMPANY TO REPOSSESS THE NEW CAR OR VEHICLE AND HOLD IT UNTIL THIS TOTAL BILL IS PAID OR TO SELL IT

TOTAL LABOR	
TOTAL PARTS	
TAX	
TOTAL	$1056.00

CUSTOMER'S COPY

№ 2544

METZGER & SCHWARZ,
ATTORNEYS AT LAW,
Washington, D.C., October 13, 1977.

Re Electric Golf Cars from Poland.

Hon. PETER D. EHRENHAFT,
Deputy Assistant Secretary and Special Counsel (Tariff Affairs), Department of the Treasury, Washington, D.C.

DEAR PETER: As you suggested in your letter of September 30 to Lou Schwarz, I am forwarding to you herewith a short memorandum which focuses upon the "American selling price" point discussed in Professor Soltysinski's August 25, 1977 memorandum to Mr. Mundheim.

At your specific request, I am sending a copy of the enclosed, and of this letter, to Mr. Verrill. In this connection, I look forward to seeing the draft regulations on *ex parte* communications in these cases which you mentioned during our recent telephone conversation, and I note with interest that Treasury now apparently considers antidumping proceedings such as ours to be adversary in nature.

We would also like to direct your attention to a further point not previously raised, to our knowledge, by either side which we would suggest be considered in addition to the points raised in Professor Soltysinski's August 25 memorandum.

The Trade Reform Act of 1974 amended the definition of "such or similar merchandise" in the Antidumping Act to eliminate inclusion in the definition of that term merchandise "produced by another person." *See* 19 U.S.C. § 170a(3). On its face this suggests that it is no longer appropriate to determine foreign market value by reference to the price of some *other* manufacturer's merchandise. Indeed, it is stressed in the House and Senate reports which accompanied H.R. 10710 (the Trade Reform Act) that under the definition as it previously existed a company could become "liable to the imposition of dumping duties on the basis of prices which they cannot control and may not even know about," a result which Congress clearly considered to be unfair (Senate Finance Committee Report at p. 177). This, of course, is precisely what has happened with respect to Melex golf cars through the reference to the price of a Marathon car as the basis for the Melex foreign market value. Section 170a(3) was amended to correct such inequities, and yet Customs has not adjusted its analysis to reflect that amendment.

I look forward to meeting with you and your colleagues on this matter on Friday at 3:00 p.m., in your office. In view of your letter of September 30 and based upon the short discussion I have had with Professor Soltysinski I think we should concentrate our meeting on the issues raised by the above, and by the enclosed memorandum, as two new legal points of significance. Attending the meeting, in addition to Professor Soltysinski, Lou Schwarz, and myself for the Polish side will be: Henry W. Sawyer, III, Esq., Counsel for Pezetel and Melex in the Delaware antitrust litigation (of which you are aware); Dr. Stanislaw Ferenstein, a director of Pezetel; Dr. L. Dzikiewicz, Legal Counsel at the Polish Embassy; Dr. Edmund Wojcinski, Counsel to Pezetel in Warsaw; and Samuel Shepard Jones, Jr., an associate in my firm.

Sincerely yours,

CARL W. SCHWARZ.

Enclosure.

MEMORANDUM

OCTOBER 13, 1977.

To: Hon. Peter D. Ehrenhaft, Deputy Assistant Secretary and Special Counsel (Tariff Affairs), Department of the Treasury.

From: Stanislaw J. Soltysinski and Carl W. Schwarz.

Subject: Use of the prices or the constructed value of "United States produced merchandise" to determine "fair value" of merchandise from state-controlled-economy countries.

In connection with the antidumping proceedings on electric golf cars from Poland, it has been stated recently by the Department of the Treasury that the foreign market value of presently unliquidated entries of Polish golf cars may be based upon the price at which similar merchandise of a United States manu-

facturer of golf cars is sold.[1] The authority for so determining the foreign market value of Polish golf cars apparently rests upon 19 C.F.R. § 153.7 (1977), which provides as follows:

"If the information available indicates to the Secretary that the economy of the country from which the merchandise is exported is state-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of fair value under §§ 153.2, 153.3 or 153.4, the Secretary shall determine fair value on the basis of the normal costs, expenses and profits as reflected by either:

"(*a*) The prices, determined in accordance with section 205(a) and section 202 of the Act (19 U.S.C. 164(a), 161), at which such or similar merchandise of a non-state-controlled-economy country or countries, *including the United States*, is sold either (1) for consumption in the home market of that country or countries, or (2) to other countries including the United States; or

"(*b*) The constructed value of such or similar merchandise in a non-state-controlled-economy country or countries, *including the United States*, as determined under Section 206 of the Act (19 U.S.C. 165).

"The prices or the constructed value of the United States produced merchandise generally will be utilized where sales or offers for sale of such or similar merchandise in any other non-state-controlled-economy country do not provide an adequate basis for comparison." [19 C.F.R. § 153.7 (1977), emphasis added.]

It is submitted that there is no authority for this regulation under the Antidumping Act of 1921, as amended, 19 U.S.C. §§ 160–172 ("the Act") and that, in adopting this regulation, the Secretary made new law rather than giving effect to the Act as amended by the Trade Reform Act of 1974, Pub. L. 93-618, 88 Stat. 1978 et seq., January 3, 1975 ("the Trade Reform Act").[2]

I

Section 153.7, which was adopted by the Secretary in 1976,[3] is a purported paraphrase of 19 U.S.C. § 164(c), as enacted by the Trade Reform Act, which says:

"(c) If available information indicates to the Secretary that the economy of the country from which the merchandise is exported is state-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a) of this section, the Secretary shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either—

"(1) the prices, determined in accordance with subsection (a) of this section and section 161 of this title, at which such or similar merchandise of a non-state-controlled-economy country or countries is sold either (A) for consumption in the home market of that country or countries, or (B) to other countries, including the United States; or

"(2) the constructed value of such or similar merchandise in a non-state-controlled-economy country or countries as determined under section 165 of this title."

A careful reading of § 153.7 against § 164(c) of the Act shows that the clause "including the United States" has been inserted in the regulation in two places even though it does not appear in those places in the statute. Moreover, the last sentence of the regulation is entirely a creation of the Secretary, since it no-

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[1] Letter from Robert H. Mundheim, General Counsel of the Treasury, to Dr. Jozef Soldaczuk, Economic Counsellor, Polish Embassy, dated August 17, 1977:

"* * * I understand that you have now discussed with Customs representatives the methodology employed in our calculation of the 1976 foreign market value based upon the price of a U.S. manufacturer of golf carts. Pezetel representatives may of course comment upon these calculations at any time, and we welcome the submission of any evidence you or counsel may have relevant to those calculations. * * *"

[2] As the Supreme Court recently noted in another context: "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213 (1976).

[3] T.D. 76-176, 41 Fed. Reg. 26204, June 25, 1976.

where appears in § 164(c) (or elsewhere in the Act).[4] As will be shown below, these were not merely technical variations, but rather constitute a startling new principle of antidumping law.

In this connection, the legislative history of the Trade Reform Act as it applies to § 164(c) consists of at least three relevant sources: first, a proposed amendment to the Act (which would have expressly acomplished what § 153.7 purports to accomplish) which was *not* accepted; second, the House Report of the Committee on Ways and Means on H.R. 10710 (he Trade Reform Act); and third, the Senate Report of the Committee on Finance on H.R. 10710.

On September 5, 1973 a bill was introduced to amend the Anti-dumping Act to provide for a "substituted constructed value" where the normal methods for determining foreign market value could not be utilized and where there was not sufficient evidence from which a constructed value could be determined. Under the bill, "substituted constructed value" would be "*the cost of similar merchandise at its place of manufacture in the United States, as determined by the Secretary of the Treasury*" (emphasis added). This bill was discussed during Senate hearings on H.R. 10710 (the Trade Reform Act).[5] The bill's significance here, however, is that it was *not* adopted by Congress as part of the Trade Reform Act and, thus, did *not* become part of the Act.

What did become a part of the Act was the original language of H.R. 10710 as reported by the House Committee on Ways and Means on October 10, 1973.[6] That language is now 19 U.S.C. § 164(c). With respect to that section the House Reports states:[7]

"A new subsection (c) to Section 205 is also added to adopt in the law the substance of the existing Treasury Department practice, as reflected in § 153.5(b) of the Treasury's antidumping regulations (19 C.F.R. 153.5(b)), under which decisions regarding dumping are made with respect to merchandise from state-controlled-economy countries. From time to time, a case arises in which the information indicates that the economy of the country, from which the merchandise is exported, is controlled to an extent that determinations cannot be made in accordance with the usual technical rules. The amendment would confirm the Treasury practice under which the Secretary makes the necessary dumping determinations with respect to state-controlled-economy countries based on prices at which such or similar merchandise of a non-state-controlled-economy country is sold either for consumption in its home market or to other countries, or based on the constructed value of such or similar merchandise in a non-state-controlled-economy country."

It is significant that there was no suggestion in the House Report that the reference to a "non-state-controlled-economy country" included the United States, or that the prices or the constructed value of United States produced merchandise generally were utilized under the then existing Treasury practice where other methods were not available.

This point is confirmed by § 153.5(b) of the then existing Treasury regulations (mentioned in the House Report, *supra*). The 1973 regulation provided that:

"*Merchandise from controlled economy country.*—Ordinarily, if the information available indicates that the economy of the country from which the merchandise is exported is controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of fair value under § 153.3 or § 153.4, the Secretary will determine fair value on the basis of the constructed value of the merchandise determined on the normal costs, expenses, and profits as reflected by the prices at

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[4] It is interesting to note that some of the language of the last sentence of § 153.7 was suggested by Charles O. Verrill, Jr., Esq., of Patton, Boggs & Blow, who represented the original complainant in these antidumping proceedings. In his letter dated October 30, 1975 to the Commissioner of Customs, Regulations Division (attached hereto as Exhibit A), Mr. Verrill suggested, as a proposed sentence in the regulation, the precise language [except for a grammatical correction] now appearing as the last sentence of § 153.7. It is also worth noting that these antidumping proceedings, in which Mr. Verrill was a major participant, were pending before the Department at the same time his letter to the Regulations Division, but, significantly, the letter does not indicate Mr. Verrill's interest as counsel to a party in those proceedings.

[5] It is of interest that Mr. Vaughn Border, an official of Outboard Marine Corporation, the original complainant, Mr. Verrill and Mr. Bart Fisher, both of Patton, Boggs & Blow, counsel to Outboard Marine, testified in support of S. 2374 on March 28, 1974 during the hearings on the Trade Reform Act. *See* Hearings at 1320–28. The subject of their testimony was Polish golf cars.

[6] *See House Committee on Ways and Means, Report on the Trade Reform Act of 1973 to accompany H.R. 10710*, H.R. Rep. No. 571, 93d Cong., 1st Sess. 157 (1973).

[7] *Id.* at 72.

which such or similar merchandise is sold by a non-State-controlled-economy country either (1) for consumption in its own market; or (2) to other countries, including the United States." [19 C.F.R. § 153.5(b) (1973).]

Obviously, this regulation did not embody the concept that the prices of U.S. produced merchandise should be used to determine foreign market value. Indeed, such a concept would have constituted a major change in antidumping law. Even Outboard Marine and its counsel recognized that use of United States prices would be such a change in antidumping law, and so they strongly lobbied in favor of passage of S. 2374.[8] Had H.R. 10710 already given Outboard Marine what they sought, there would have been no need to seek passage of S. 2374.

Yet S. 2374 was not adopted, and when the Senate considered what is now § 164(c), they passed it "unchanged from the House Bill."[9]

Then a curious thing happened. When the Senate Finance Committee's Report on H.R. 19710 was prepared, somehow language crept in that purported to incorporate the very concept which S. 2374 had unsuccessfully proposed, and which H.R. 10710 had not accepted—use of United States prices! The Senate Report stated:

"*State-Controlled-Economy Dumping.*—The second amendment to Section 205, to be added as a new subsection (c), *also unchanged from the House Bill*, would adopt, in substance, existing Treasury regulations concerning standards for comparison to be employed in investigations of merchandise imported from State-controlled-economy countries. The Committee is concerned that the technical rules contained in the Act are insufficient to counteract dumping from State-controlled-economy countries where the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison purposes. Accordingly, the amendments would confirm the existing Treasury practice of comparing the purchase price or exporters' sales price of the merchandise in question with the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either (1) the prices (determined in accordance with Sections 202 and 205(a) of the Act) at which such or similar merchandise produced in a non-State-controlled-economy country is sold either for consumption in the home market or to other countries (including the United States), or (2) on the basis of the constructed value of such or similar merchandise in a non-State-controlled-economy country (as determined under Section 206 of the Act). *The amendment is intended to permit comparison of the purchase price or exporters' sales price of the merchandise in question with the prices of such or similar merchandise produced in the United States in the absence of an adequate basis for comparison using prices in other non-State-controlled-economy countries.*" [Senate Report at 174; emphasis added.]

Clearly, the last sentence of the Senate Report was a gratuitous addition to the legislative history of H.R. 10710 which had absolutely no basis in fact or law. Not only had the language of § 164(c) been unchanged from the House bill, there was not an "existing Treasury practice" of using United States prices under any circumstances. Such a practice was not in the regulations, and was not in the law (as was recognized by Outboard Marine's own counsel in his testimony on S. 2374.)[10]

How the underscored sentence in the Senate Report came to be included therein is not presently known to Pezetel or its counsel. However, the circumstances existing with respect to the very active role of Outboard Marine Corporation and its counsel, in this matter, as demonstrated by (a) its testimony in favor of S. 2374 and (b) its impact in the creation of 19 C.F.R. § 153.7, suggest the possibility that representatives of Outboard Marine may have suggested that this language be included in the Senate Report.

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[8] *See* Exhibit B, attached. Mr. Border, an official of Outboard Marine, conceded in his testimony on March 28, 1974, that S. 2374, providing for assessment of antidumping duties on U.S. sales prices, "is in contravention to our general attitude of obtaining costs in the country of origin." Hearings at 1322. His counsel Mr. Fisher, recognized that the then existing law did not permit assessment of antidumping duties on the basis of U.S. prices:

"What we are saying is let us amend the dumping laws one way or another. We prefer your bill [S. 2374] because your bill gives us certainty, and it is easy to prove because we can be sure of our figures in the United States." [Hearings at 1324.]

Based on information received from the Office of Public Records, United States Senate, we are advised that Patton, Boggs & Blow was a registered lobbyist for Outboard Marine Corporation from April, 1974 (the same month in which Outboard Marine filed its antidumping complaint with the Treasury Department) through September, 1976.

[9] Senate Committee on Finance, *Report on the Trade Reform Act of 1974 to accompany H.R. 10710*, Sen. Rep. No. 1298, 93d Cong., 2d Sess. 174 (1974).

[10] See note 8, *supra*.

Quite apart from the legislative history of § 164(c), a careful reading of that section shows that the term "non-state-controlled-economy country" cannot be read to include the United States. First of all, § 164(c) *does* include the term "including the United States," but in *another* part of that section. Congress clearly knew how to use the term when it wanted to. Its failure to use the term in juxtaposition to "non-state-controlled-economy country" suggests that it did *not* wish to include the United States in that term. Second, if "non-state-controlled-economy country" was meant by the Congress to include the United States, then a straightforward reading of § 164(c)(1)(B) makes no sense. That section would read:

"* * * the Secretary should determine the foreign market value of the merchandise on the basis of the normal costs, expenses and profits as reflected by * * * the prices * * * at which such or similar merchandise of [the United States] is sold * * * (B) *to other countries, including the United States.*" [Emphasis added; added material is in brackets.]

Since the United States is not an "other" country with respect to itself, such a reading is nonsense. The only way the section can be read to make sense is if "non-state-controlled-economy country" does *not* include the United States.

III

In summary, it can be seen that Customs regulation § 153.7, adopted in 1976, placed the Secretary in the posture of making law rather than carrying into effect the words of the statute. The legislative history plainly establishes that a bill to base foreign market value on United States prices was not accepted, and that, instead, an existing Treasury practice was codified—a practice which did not include a concept of basing foreign market value on United States prices. Even without the legislative history, the language of § 164(c) makes no internally logical sense if interpreted to include United States prices.

If this matter were just some minor technical point, perhaps greater leeway of interpretation by the Secretary might be justified. But where, as here, the regulation purports to establish a whole new principle of antidumping law—that, in effect, a foreign manufacturer can be required to price its merchandise at a price *never less than* the prices set by U.S. competitors [11]—then that regulation must be grounded on something more than a sentence inserted into a Committee Report at the eleventh hour (under unknown circumstances) which was inconsisent with the Act itself and the existing Treasury practice which was meant to be codified. Such a regulation must be based on "the will of Congress *as expressed by the statute.*" [12] Such a statute does not exist here, and, accordingly, the Secretary should take steps to remove the references to United States prices from § 153.7. Whether a proposed rulemaking is initiated or not, the Customs Service should be directed by the Secretary to ignore United States prices in computing the foreign market value of golf cars from Poland.

A failure to take remedial action would necessarily mean that, for reasons unrelated to the fairness or unfairness of the competition Melex is providing to the U.S. producers, the Melex golf car would be unable to compete in the American market. And even more seriously, it would mean that a principle would then be in place which could bar, on the same basis, imports to the United States from state-controlled-economy countries. It is difficult to believe that such was the intent of the Congress or the Administration in the enactment of the Trade Reform Act of 1974.

PATTON, BOGGS & BLOW,
Washington, D.C., October 30, 1975.

Re Notice of Proposed Rulemaking: Antidumping Petitions by American Manufacturers, Producers and Wholesalers.

COMMISSIONER OF CUSTOMS,
Regulations Division,
Washington, D.C.

GENTLEMEN: On July 23, 1975, the Customs Service published in the *Federal Register* a notice of proposed rulemaking and an invitation to comment upon

[11] Indeed, a *higher* price would inevitably be required since under §§ 162 and 163 the foreign manufacturer must also bear, for purposes of computing dumping duties, the additional costs, charges and expenses, and normal United States import duties, incident to bringing the merchandise from the place of shipment in the country of origin to the place of delivery in the United States.

[12] *Ernst & Ernst* v. *Hochfelder, supra* note 2, (emphasis added).

contemplated revisions of the Customs Regulations (19 CFR, Parts 153 and 175) pertaining to antidumping petitions by American manufacturers, producers and wholesalers. We have the following comments on the proposed regulations:

(a) *Section 153.7 Merchandise from State Controlled Economy Country:* This proposal would amend present § 153.5(b) to conform to newly-enacted § 205(c) of the Antidumping Act relative to determinations in the case of merchandise exported from controlled-economy countries. The pentultimate sentence of the proposed regulations suggests that United States prices will be utilized only in the absence of sales or offers for sale of such or similar merchandise in other non-state-controlled-economy countries. This appears to be a more restrictive reading of the Trade Act amendment than intended by Congress.

The Senate Report states that newly-enacted § 205(c) "is intended to permit comparison of the purchase price or exporters' sale price of the merchandise in question with the prices of such or similar merchandise produced in the United States in the absence of an *adequate* basis for comparison using prices in other non-state-controlled-economy countries." Senate Report Number 93-1298, page 174 (Emphasis Added.) While § 153.7 reflects Treasury practice prior to enactment of the Trade Act, it is clear that Congress intended U.S. *prices* be used whenever other non-state-controlled-economy sales were not an *adequate* basis for comparison even though there may have been such sales in such countries. Accordingly, we would recommend that the last sentence of § 153.7 be amended to read as follows (deletions are in black brackets, new matter in italics):

"The prices or the constructed value of the United States produced merchandise generally will be utilized [in the absence of] *where* sales or offers for sale of such or similar merchandise in any other non-state-controlled economy country *does not provide an adequate basis for comparison.*"

This revision would preclude use of third-country sales of nominal or significant quantity in relation to sales in the United States.

Sincerely,

CHARLES O. VERRILL, Jr.

[S. 2374, 93d Cong., 1st sess.]

A BILL To amend the Antidumping Act, 1921, to provide for a substituted constructed value in the case of certain imported merchandise

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Antidumping Act, 1921 (19 U.S.C. 160-171), is amended by inserting after section 206 the following new section:

"SUBSTITUTED CONSTRUCTED VALUE

"SEC. 206A. (a) For the purposes of this title, the substituted constructed value of imported merchandise shall be the cost of similar merchandise at its place of manufacture in the United States, as determined by the Secretary of the Treasury.

"(b) For the purposes of this title, the substituted constructed value shall be used, in lieu of the constructed value, with respect to impored merchandise only if the Secretary of the Treasury determines that—

"(1)(A) the quantity of the imported merchandise (i) sold or offered for sale for home consumption in the markets of the country from which exported, or (ii) sold for exportation to countries other than the United States, is so small in relation to the quantity sold for exporation to the United States as to form an inadequate basis of comparison for the purpose of determining foreign market value, and (B) there is not sufficient evidence from which a constructed value can be determined for the reason that all transactions available for consideration are between persons described in subsection (c) of section 206 and there is not sufficient evidence as to what a constructed value would have been had the transaction occurred between persons not specified in such subsection; or

"(2) the evidence available shows that the purchase price of the imported merchandise is established by the seller or exported without reference to the cost of the manufacture or production of such merchandise, for the purpose of fixing a purchase price less than that of competing merchandise.".

SEC. 2. (a) Section 201(b) of the Antidumping Act, 1921 (19 U.S.C. 160) and section 202(a) of such Act (19 U.S.C. 161) are each amended by striking out "(or, in the absence of such value, than the constructed value)" and inserting

in lieu thereof "(or, in the absence of such value, than the constructed value or the substituted constructed value, whichever is applicable)".

(b) Section 209 and section 210 of such Act (19 U.S.C. 168 and 169) are each amended by striking out "or the constructed value" and inserting in lieu thereof ", the constructed value, or the substituted constructed value".

SEC. 3. Section 406 of the Act of May 27, 1921 (19 U.S.C. 172), is amended by striking out "associations; and" and inserting in lieu thereof "associations, and also includes foreign governments, and agencies and subdivisions of foreign governments, when engaged in the production of merchandise in a proprietary capacity; and".

STATEMENT OF VAUGHN E. BORDER, DIRECTOR OF MARKETING, OUTBOARD MARINE CORP., ACCOMPANIED BY CHARLES O. VERRILL AND BART S. FISHER, COUNSEL

Mr. BORDER. My name is Vaughn Border. I am director of marketing of OMC Lincoln, a division of Outboard Marine Corp. We are manufacturers of Cushman golf cars.

Mr. VERRILL. My name is Charles Verrill with the firm of Batten, Boggs, and Blow. We are counsel to Outboard Marine Corp.

Mr. FISHER. My name is Bart Fisher. I am also with Batten, Boggs and Blow.

Senator CURTIS. Mr. Border, we in Nebraska are very happy with the long record of Cushman Motor Works and products which appear in all parts of the United States, and are in sympathy with the problems they face in the field of international trade. We are very happy to have you here to present your statement.

You may proceed.

Mr. BORDER. Thank you, Senator Curtis. We appreciate your concern.

I would like to state at the outset that Outboard Marine Corp., in essence, supports the trade bill, and that we are in favor of such legislation. We do, however, in the golf car industry have a peculiar problem which we would like to explain to you and answer any questions you may have.

The golf car industry began about the middle 1950's and continued to grow at a modest rate to about 1970. There are some 17 manufacturers in the industry now, or were about a year ago, at least. The peculiarity of this industry is primarily in the fact that practically all sales of golf cars throughout the world as of this moment occur in the United States. There is a small market in Canada, it is probably less than 10 percent of our own. There is the beginning of a small market right now in Japan. But this has only been going on the last 6 months or so.

As of this moment, there are very few golf cars actually in existence in Japan. There is a sprinkling of golf cars in the United Kingdom, but only a very few. The golf car is the product of an affluent society that is quite interested in the game of golf. As a result, the only true market for golf cars in the world right now is in the United States.

The manufacture of golf cars was limited to United States manufacturers until recently. In 1970 all the manufacture was domestic. Beginning immediately thereafter, a golf car began to be imported into the United States that was manufactured in Poland. The golf car is a direct copy of one of our principal competitors; in fact, the copy is so great that it is difficult to tell them apart even if you are in the industry.

In 1970, there was no foreign import. By 1973, this had grown to 15 percent of the industry by our estimate. Incidentally we calculated quickly as best we could the employment involved in the manufacture of golf cars, and we estimate that each worker in the golf car industry produces about 200 units a year. Total shipments of new golf cars annually are about 55,000.

So this would indicate that there are some 2,200 to 2,500 employees within the United States who rely on the golf car industry for their employment.

As I mentioned a moment ago, we estimate right now that the Polish golf car is 15 percent of our total sales in 1973. We project that they will probably reach 22 to 25 percent in 1974, and I shall explain briefly why that is true.

The rate of growth of golf courses within the United States is about 3.5 percent annually, and has continued at that rate for the last 8 to 10 years. However, there has been one significant change in the type of golf courses that have been established in the last few years. In recent years, they are far more likely to be involved in a land development operation rather than to be an independent country club. This means that the management of the club is far more profit-

oriented then they are concerned about the comfort and desires of the membership.

This has implications on the purchase of golf cars, which I shall explain briefly. One other statistic you should know first. Golf car sales are quite unlike the automobile industry, for instance, because only 15 percent, according to our returns are sold to individuals. In other words, 85 percent of all golf car sales are in fleets to country clubs.

Now, the Polish golf car normally sells at $150 to $200 less per unit delivered to the club than domestic models, and if you multiply that by the size of the average fleet, which is about 30 golf cars, you find that we are quoting of a differential of $4,500 to $6,000 per fleet. To a land development company who is just beginning their own golf course, these are quite important figures and they very frequently buy the less expensive golf car.

We also estimate that sales of Polish golf cars should skyrocket in the next 2 or 3 years if something is not done, because once they get a good parts availability and service availability within this country, many clubs who would not consider them at the outset may very well do so later on.

We have two basic recommendations, gentlemen. The first recommendation, and by far the preferred one from out point of view, is the Curtis bill, S. 2374. This bill provides that the fair market value for the purpose of assessing anti-dumping duties would be based on the ex-factory U.S. sales price of golf cars.

Now, you may say at the outset that this is in contravention to our general attitude of obtaining costs in the country of origin, and it is a good point. The problem there is that the only good cost figures that we are likely to be able to develop are cost figures that you would develop in this country.

Our second recommendation would be to give the Treasury explicit authority to calculate a constructed value in the controlled economy country, and this would require an amendment to the Trade Reform Act. As I mentioned a moment ago, these figures could be very difficult to obtain. The controlled economy countries, as I understand them, are not necessarily operated on a profit-making basis, and it is quite possible that they do not even develop a product cost in their accounting procedures as we know them in our country.

Therefore, our request could be something that they do not even have.

Second, if they have it, it might be quite difficult to obtain it, and if we obtained it, there would be some question as to its accuracy.

Our third recommendation would be under title IV of the Trade Reform Act that the market disruption section be strengthened and that it apply to all controlled economies, whether they are most favored nations or not. They specifically should include Poland and Yugoslavia. We feel that this was a serious drafting mistake in the original draft of the bill.

Section 405 of the bill provides that the Tariff Commission provide remedies if there is market disruption, and the definition of market disruption is that, (a) it be substantial; (b) there be a rapid increase both in percent of market and in absolute units; and (c) that the sale be at substantially lower prices. The bill also provides that material injury be proved.

We feel that this provision is unnecessary, and history indicates that those who have attempted to seek relief under this section have found material injury very difficult to prove. We feel that the material injury section should either be removed entirely or made to apply on the basis of a de minimis injury standard.

I timed that pretty well apparently. I want to thank you gentlemen for your time. I shall be happy to answer any questions you might have.

Senator CURTIS. May I say that you are the final witness on this panel this morning. If you have something further you were about to add before the bell, please proceed.

Mr. BORDER. No, sir; I had just finished.

Senator CURTIS. I would like to get a clear picture of this situation. These Polish golf carts retail, or sell rather for $150 below comparable products in this country?

Mr. BORDER. It is common in the industry to quote each country club separately. It is virtually impossible to say that it is a specific figure each time. But the range is from $150 to $200.

Senator CURTIS. Yes.

Now, at the present time, what duty, tariff, is applied to a Polish import?

Mr. BORDER. 3 percent.

Senator CURTIS. And what is that based on?

Mr. BORDER. The automotive category is my understanding, sir.

Senator CURTIS. That is its origin in the Tariff Act, the automotive tariff?

Mr. BORDER. Yes.

Senator CURTIS. But 3 percent of what figure?

Mr. FISHER. Golf carts presently are classified as a recreational vehicle, and the 3 percent tariff is levied on the price that it is delivered into the United States, to the port.

Senator CURTIS. I see.

In other words, it is based upon what the Polish say their price is?

Mr. FISHER. That is right.

Senator CURTIS. Now, in countries that have a free economy, private enterprise economy, is it possible to ascertain a reasonable amount of figures as to what their costs and prices really are?

Mr. BORDER. It would be possible, sir, but the level of believability would be quite questioned for this reason: certain components of that product are very technical, very difficult to build. I shall give you two examples. Either an engine or a differential are very difficult to manufacture, and if you went to a company and said, what would it cost you, hypothetically, to build this product, they could not really give you an accurate answer unless you were prepared to spend thousands of dollars to employ their engineering and production staff to really look into it; precisely how they would build each one of these components, how they would assemble them, how they would test them.

Senator CURTIS. What I am trying to do is build an example here of just what actually takes place when this Polish golf cart arrives here subject to a 3 percent tax on what they say is the price——

Mr. BORDER. That is correct.

Senator CURTIS. And at least in a controlled economy, there is no practical way you can question what that price was?

Mr. BORDER. That is our feeling, yes.

Senator CURTIS. And that is the price that they offer to dealers, or do they use dealers?

Mr. BORDER. They use distributors—that is their term. Four of those distributors are actually importers. They divide the United States geographically, and it is up to them to either sell directly or establish other distributors.

Senator CURTIS. Now, what is the range of price that you would estimate one unit that they would apply that 3 percent tax to?

Mr. BORDER. Those figures are available, sir, because the only automotive products imported from Poland are golf carts.

Senator CURTIS. What does it amount to?

Mr. FISHER. The average price of the Polish cart moving into the United States through the importer last year was $383.

Senator CURTIS. $383?

Mr. FISHER. Yes, sir.

Senator CURTIS. About $11.50 tariff?

Mr. FISHER. Yes, sir.

Senator CURTIS. Now, if we enact the bill that I have introduced, S. 2374, what would be the results of the—how much tariff would be charged?

Mr. FISHER. Well, under your bill?

Senator CURTIS. Take it through step by step.

Mr. FISHER. Sure. Under your bill, you would permit the calculation of the home market value to be based on what it would cost to produce a similar product here in the United States. So let us say in the case—I think it is around $800 to $900 here in the United States. So that a 3 percent tariff would be levied on—well, the point is that the 3 percent tariff would continue to be levied for whatever the Polish people moving the golf carts into the United States say that their price is.

However, your bill goes to the problem of dumping, the antidumping law of the United States. We have two levels here.

Senator CURTIS. Yes.

Mr. FISHER. Now, that is the problem conceptually. So the 3 percent tariff will continue to apply to whatever the Polish are selling it to the importer here in the United States for.

However, step two is for the purposes of the antidumping law the home market value that we would use in order to calculate the margin of dumping, which is the difference between the foreign market price and the U.S. market price, would be the price in the United States. In other words, under your bill,

we would construct a home market value in Poland based on what it would cost to produce a similar product here in the United States.

So if there were an affirmative dumping determination, you would have, No. 1, the 3 percent duty which is presently under the antidumping laws in the United States; and No. 2, we would have a dumping duty equivalent to the margin of dumping, which we would then be able to calculate under your bill.

The problem presently is that under the dumping laws in the United States, if you have an alleged dumping situation from a controlled economy, the Customs will permit you to construct a value based on what that similar product sells for in a noncontrolled economy. And usually they pick a country in Western Europe, France, or Germany. The problem here is we have a unique situation. We only have two producers in the world, Poland and the United States. Therefore, there is no other third country on which a constructed value abroad could be made. And we have a vacuum or a void here in the law that has been pointed out by commentators and people who are in the field.

What we are saying is let us amend the dumping laws one way or another. We prefer your bill because your bill gives us certainty, and it is easy to prove because we can be sure of our figures in the United States.

Senator CURTIS. Senator Packwood?

Senator PACKWOOD. I do, too.

What you are suggesting is that we implement an American selling price for these carts based on manufacturing costs, because we have no other basis on which to compare it?

Mr. BORDER. Yes.

Senator PACKWOOD. Who else sells golf carts besides Cushman?

Mr. BORDER. There are 17 manufacturers. Several of the larger manufacturers would include Harley-Davidson, Easy-Go.

Senator PACKWOOD. Are you the largest?

Mr. BORDER. We are one of the largest, sir.

Senator PACKWOOD. Let me get some quick figures from you. You indicate that in 1973, 6,000 Polish golf carts—which is 15 percent of the market?

Mr. BORDER. Correct.

Senator PACKWOOD. I calculate that has to be about 34,000 remaining sold?

Mr. BORDER. About 55,000 totally sold every year.

Senator PACKWOOD. 55,000?

Mr. BORDER. Totally; you have 34,000 on top of the 6,000.

Senator PACKWOOD. That is 40,000.

Mr. BORDER. 55,000 is the total number of golf carts sold in the United States, gasoline and electric. Polish golf carts account for 15 percent of the U.S. electric golf cart market.

Senator PACKWOOD. Let me get into the last part of your statement about material injury and disruption of the market.

In 1970, the Poles had none of the market. In 1973, they have 6,000 of whatever is sold. How much have the domestic sales gone up from 1970 to 1973?

Mr. BORDER. Virtually none at all.

Senator PACKWOOD. Not at all?

Mr. BORDER. No.

Senator PACKWOOD. How does it happen that the Japanese have never gotten into this?

Mr. BORDER. The Japanese produced a couple of prototypes. They actually put them into this country and nothing came of it. Perhaps the market is not big enough to interest them; I do not know.

Senator PACKWOOD. I should think they would take a wheel of a small Toyota.

I have no other questions, Mr. Chairman.

Senator CURTIS. I regret that we have to go to the floor for a rollcall vote, but following through the questions that I was proposing to show just what would take place if this measure were enacted, if there is any further addition or clarification to make—because our staff and the other members of the committee will be looking at this record when this matter is called up—I would be very pleased if you would add any material that you choose to show in dollars and cents what you face now and what you are seeking and an explanation of it.

We thank you very much for your attention.

Mr. BORDER. Thank you. We appreciate your time.

Senator CURTIS. The committee is recessed until tomorrow morning at 10 a.m.

[The prepared statement and a letter to Senator Packwood of Mr. Border follows:]

PREPARED TESTIMONY OF VAUGHN BORDER, DIRECTOR OF MARKETING, CUSHMAN VEHICLES, OUTBOARD MARINE CORP.

Mr. Chairman: My name is Vaughn Border. I am Director of Marketing for Cushman vehicles and am responsible for the sale of golf cars that are produced by Outboard Marine Corporation. We generally support the Trade Reform Act of 1973 and regard it as constructive legislation which will hopefully lead to a more open world economy.

In my comments today, I would like to draw your attention to a practical problem that arises from trade with the state-controlled communist economies, the so-called non-market economy countries. Specifically, in training with those non-market economy countries, there is a potential for sales below fair market value in this country from which American manufacturers are not adequately protected by either the existing antidumping laws or the legislation pending before you. This problem is of particular concern to us at this time because the Trade Reform Act would give the President authority to grant many non-market economy countries Most-Favored-Nation (MFN) treatment which all such countries except Poland and Yugoslavia are now denied. The grant of MFN treatment to non-market economies such as the U.S.S.R., Czechoslovakia and Hungary will expand East-West trade and therefore increase the possiblity of dumping from such countries.

We are presently in the process of preparing and presenting to the Treasury Department a complaint alleging that golf carts manufactured in Poland are being sold in this country at "less than fair value." The problem which we confront in this action, however, is that there is no real market for golf carts in the world other than the United States and the only two significant golf carts manufacturing countries are the United States and Poland. Accordingly, the normal procedures used by the Treasury Department to ascertain whether or not "less than fair value" sales, or dumping, are occurring do not apply. The price that is generally used is the internal or external sales price in a *noncontrolled economy* where a similar product is produced. As I have just stated, however, we are in the position of having no other uncontrolled economy that produces significant numbers of golf carts to use as a referent. We are urging the Treasury Department to calculate a constructed value for golf carts in Poland, under the present antidumping law, but this is an uncharted area and precedents are lacking. Nevertheless the problem is real.

Let me give you an example of what has occurred under the present statutory framework. There has been a devastating market influx of golf carts from Poland into the United States in recent years. In 1970 no electric golf carts from Poland were exported to the United States. By 1973, at outrageously low prices that we believe are at "less than fair value," or dumping prices, 6,087 golf carts were imported into the United States, accounting for 15 percent of the U.S. electric golf carts market. In other words, we believe that Poland has taken over 15 percent of the U.S. electric golf cart market through dumping. However, we are in a dilemma because antidumping laws does not clearly address the situation where a communist country and the United States are the only producing countries and the United States is the only true market in the world for the product in question.

In order to improve the Trade Reform Act of 1973, and the administration of East-West trade relations after the enactment of the Act, we propose that three approaches to our trading problems with controlled economies be considered:

1. The first avenue of relief that might be considered when a controlled economy and the United States are the only producers of a product marketed solely in the United States and dumping is alleged, would be to base the home market price on the cost of producing the product involved in the United States plus the standard profit specified in the constructed value provisions of the antidumping law. This approach is suggested in S. 2374, introduced by Senator Curtis on September 5, 1973. Under the Curtis bill when the evidence is not available upon which to base a "foreign market value," the cost of producing a similar article at its place of manufacture in the United States would be ascertained by the Secretary of the Treasury, and would be used as the "value" for the purpose of calculating the antidumping duty. We feel that use of U.S. costs is justified in these circumstances simply because no other price is available unless a constructed value is calculated for the item in the communist country itself.

2. The second approach would be to provide the Department of Treasury with expelled authority to calculate a constructed value in the communist country itself when there is no true market for the product involved other than the United

States. We believe that this should be an amendment to the Trade Reform Act of 1973, and would fit logically under the technical amendments to the Anti-dumping Act of 1921 in the trade bill.

3. The third approach that we suggest is consistent with the prior two and would greatly strengthen the trade bill. We propose that the portion of Title IV that deals with "market disruption" as a result of community country imports be strengthened substantially.

First, the system should apply to all non-market economies, and not just those granted MFN treatment under Title IV of the trade bill. Poland and Yugoslavia, which have already been given MFN treatment, would be exempted from the trade bill's East-West Trade "safeguard" system as it is presently written. This would obviously be inequitable, and we feel that this was merely a technical drafting mistake, but one that is serious and should be corrected.

Our second criticism of the East-West Trade Safeguard system deals with the criteria of injury of domestic interests. Section 405 of the trade bill provides that the Tariff Commission can propose remedies if it finds both market disruption and material injury from communist country imports. Market disruption would be found to exist when imports are substantial, are increasing rapidly both absolutely and as a proportion of total domestic consumption, and are offered at prices substantially below those of comparable domestic articles.

We believe that the market disruption test alone is sufficient, and that the "material injury" test is redundant and unnecessary. Accordingly the "material injury test" should be eliminated from the bill. If the test of "material injury" is *not* removed from the bill, U.S. industries might be in the position of not being able to obtain needed relief even if market disruption was proved if "material injury" test should be eliminated from the bill. If the test of "material injury" Committee will recall, dumping cases in years past were very difficult to prove because the Tariff Commission applied a material injury test that has since been discarded. Therefore if the injury test is retained the injury required to be proved should be *de minimis*. As an alternative the concept of market disruption could be eliminated and the concept of "injury" retained. That injury, as stated above, should be *de minimis* in nature, and not material.

Mr. Chairman, we have tried to address our comments to the trade bill itself, proposing changes to provide for the type of economic competition that I have described and which will be increased after Most-Favored-Nation treatment is granted to more non-market economies. Our country must have fair trade as well as free trade. Thank you very much for listening to my remarks today. I will be glad to try to answer any questions you might have.

OMC–LINCOLN,
April 11, 1974.

Hon. ROBERT PACKWOOD,
U.S. Senate, Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR PACKWOOD: Please accept my thanks for taking time from your busy schedule to listen to my testimony regarding the dumping problem we are presently experiencing from Polish golf cars in the United States.

You question an apparent discrepancy in my figures, and, at the moment, I couldn't account for it. Subsequent investigation cleared it up quickly, however.

Polish golf cars presently constitute 15% of all the electric golf cars in the United States. We analyzed our statistics in that matter because the Polish presently manufacture only an electric golf car. We hear rumors, however, that they are presently working on a direct copy of a U.S. manufactured gasoline-powered golf car and that they will have it on the market within a few months.

Whether they produce a gasoline-powered golf car or not, we feel this unfair foreign competition is having a devastating effect on the domestic golf car manufacturing market, Senator Packwood, and it will undoubtedly get much worse rapidly, unless some legislative protection is provided by the Trade Bill. We support equitable world commerce, but certain safeguards from unconscionably low-priced foreign products must be provided.

Attached is a complete set of figures for new golf car sales, both gasoline and electric-powered for 1973 and unit and percent share-of-market figures for the Polish import. If you have any further questions, I will be happy to try to answer them.

Thank you again, Senator Packwood, for your interest.

Sincerely,

VAUGHN E. BORDER.

GOLF CAR INDUSTRY SHIPMENTS, 1972-73

Year	Total	Total gasoline powered	Total electric powered	Polish electric	Polish share of total electric (percent)
1972	47,300	17,400	32,700	2,809	9
1973	54,500	20,200	40,387	6,087	15

Source: National Golf Foundation, Department of Commerce—Polish golf car information.

MOTOROLA INC.,
Washington, D.C., April 14, 1978.

Hon. CHARLES A. VANIK,
House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN VANIK: We very much appreciate your February 9, 1978 invitation to submit comments and recommendations on how U.S. trade laws and regulations should be amended to provide more expeditious, effective and equitable relief for domestic industries from unfair import competition.

We agree completely that experience in recent years, much of which has been revealed through the hearings sponsored by your Subcommittee and other investigative bodies of both the House and Senate, demonstrates an urgent need to clarify and amend existing laws in order to more effectively accommodate present realities in world trade.

Motorola is a company with an internationalist outlook and philosophy. It owes no small measure of its success to the existence of an open world trading system, however flawed, but within which our technological and industrial capabilities have been able to create new products, markets and jobs for Americans as well as foreigners. We want to continue to help foster improvements to this system.

The Citizen's Band Radio Transceiver Escape Clause petition, which was recently concluded when President Carter awarded an increased tariff for a three year period, is instructional in many respects. Motorola's participation in the case was not lightly undertaken, because of a concern that our reputation as committed fair traders might be impaired. Having made the decision to assist the domestic industry because of the extraordinary circumstances in this case, we were dismayed to note that many government officials concluded—irrespective of the facts—that any measure which acts to impede the free flow of goods is deemed per se "anti-fair trade" or "protectionist," whether or not designed to stop unfair competition. The petitioner's case was frequently prejudiced by this misperception. Thus, it seems very important that new legislation more sharply define the distinctions between erecting trade barriers, on the one hand and, on the other hand, recognizing the need for providing legitimate protection to American industry against irresponsible behavior by foreign competitors.

As a matter related to Escape Clause petitions in general, experience in the CB case demonstrated that the International Trade Commission's procedures should specify a period that would allow a thorough examination of remedy alternatives. As the situation developed in the CB petition, the absense of such procedures resulted in scant attention being paid to this critical facet of the case. A recommendation to this effect has been made to ITC Chairman Daniel Minchew who approves

of it in concept; however, consideration should be given to incorporating this requirement in new legislation.

Virtually the entire six month CB investigation and the final hearings were devoted almost exclusively to questions dealing with injury and the causes thereof; once the Commissioners voted on these issues, a second vote on remedy was scheduled one week later. This did not allow sufficient time for deliberation on the suitability or relevance to the domestic industry of the various remedy alternatives. For example, three of the Commissioners voted for trade adjustment assistance even though this remedy was not applicable under the conditions set forth in the 1974 Trade Reform Act (the "Act") which requires a determination a) that funds are not avilable from the applicant firm's own resources *and* b) that there is a reasonable assurance of repayment. The companies involved in the CB petition were either able to obtain loans without government sponsorship or, in the case of one firm, would not be eligible because it had filed under Chapter XI of the Bankruptcy Act.

In a broader context, it may indeed be misleading (or at the least superfluous) for the Act to include trade adjustment assistance as an alternative remedy to be proposed by the ITC, inasmuch as firms which believe it to be relevant and helpful to their situations can, on their own initiative, apply for it directly to the Secretary of Labor.

The ITC devoted six months of what in all fairness must be described as an intensive effort to thoroughly investigate the CB petition, evaluate its merits and, having reached affirmative findings, to propose an effective remedy to the domestic industry's plight. Yet, the ITC's final report and recommendations were viewed by the Executive Branch as merely preliminary to the President's own decision-making process; indeed, even the ITC's fact-finding was reopened to question as well as its analysis and conclusions. Under the Act, the President is required to address broader issues such as the "national economic interest". In arriving at his decision, the necessity for such a provision is, in itself, not challenged. However, the effect, if the CB case is at all representative, is to encourage each Executive agency which participates in the President's Trade Policy Review Group to judge what the "national economic interest" is, or should be. The subjectivity of this process and its selective detachment from the facts which brought the petitioner to seek relief in the first instance, seem an essential unfairness which should be guarded against. Some of the Executive agency participants, perhaps more concerned with concluding a treaty negotiation with major trading partners of the U.S., were not willing to acknowledge the causal relationship between imports and injury or the grossly irresponsible import practices which all seemed evident from the circumstances. Thus, better definition of what constitutes "causation" in Escape Clause cases and what, in other cases, amounts to "unfair acts;" more express authority for the ITC to render findings and judgments which become binding; and some limitations on the boundaries within which are contained "national economic interests," all seem to be warranted and should be incorporated in any rewrite of the Act.

With regard to the issues identified in your invitation to comment, dated February 9, 1978, Motorola is in essential agreemnt that clarification and expansion of applicable trade laws and regulations are

required as you have indicated; the following suggestions relative to the three sections on issues are offered for your consideration:

"A single statute covering all causes of unfair trade practices, to replace the many different procedures which now exist, has great attraction. Yet it might have the unfortunate effect of diluting the expertise developed over the years regarding the various statutes; this expertise would require substantial time to reconstitute. The immense and growing complexity of the field of international trade seems to demand a degree of compartmentation in order to facilitate comprehension.

"Resolution of overlapping or conflicting jurisdiction between the ITC and the Treasury Department in antidumping and Section 337 cases is highly desirable in order to prevent a petitioner from being unfairly whipsawed between the two agencies. President Carter's impending decision in this regard on the Stainless Steel Pipe and Tube case, wherein Treasury and the ITC have each issued separate and partially conflicting judgments, will not obviate the need for clarifying legislation. However, there is a rationale for preserving alternative approaches to remedies in these two kinds of trade actions since one necessarily involves unfair trade practices (predatory pricing) and the other (antidumping) does not.

"Statutory criteria for what constitute "unfair methods of competition" and "unfair trade practices" badly require sharper definition. Present standards are ambiguous and often too subjective and thus do not enable a petitioner to adequately judge the merits of his case before filing; and, more important, too much discretionary authority is left to the administrative agencies.

"If a new statute authorizes discontinuance of an investigation on the basis of price assurance or special circumstances, then a condition precedent ought to be the petitioner's consent to the discontinuance."

With these comments in mind, we will review and will provide comments to you on the Senate draft bill cited as the "Fair Trade Act of 1978" and H.R. 11849 (a Bill to amend the Antidumping Act of 1921, as amended). Lionel H. Olmer, Director of International Programs, is our point of contact in these regards.

With appreciation for the opportunity to participate in this process of review of U.S. trade laws and regulations,

Sincerely,

TRAVIS MARSHALL,
Vice President, Director of Government Relations.

STATEMENT OF THE MONSANTO CO.

Monsanto looks to the Committee to identify the serious deficiencies in the trade laws, specifically antidumping. These deficiencies enable foreign manufacturers to act with impunity in disregard of the trade laws.

Monsanto is submitting this statement to point out particular areas of concern. Hopefully, the Committee will find these comments helpful.

Monsanto is a multinational corporation. A large percentage of its income is derived from extensive international operations. Monsanto

favors free and open trade. As a leader in chemical technology, Monsanto is prepared to do battle in any commercial arena; it only asks that the parties compete under the same rules.

Monsanto is interested and desires free but fair competition. Our antitrust and trade laws are designed and intended to promote free and fair competition. Monsanto supports these objectives, which is why it has taken this opportunity to address the Committee.

Monsanto regards the Antidumping Act as integral to free and fair competition. The Act fosters competition, by safeguarding U.S. manufacturers from the anti-competitive (destructive) actions of foreign producers. It promotes competition by protecting U.S. industry from unfair and predatory pricing schemes.

There are two areas which need attention: First, the politics of enforcement, and second, the potential ineffectiveness of the relief afforded.

It may seem trite to make this comment, but antidumping complaints should be judged on their merits. Fairly. We understand antidumping involves international trade policy, but policy considerations should not be permitted to dominate enforcement of the "law" to the detriment of the injured party. Even though the U.S. Department of Treasury has broad enforcement powers, including the power to initiate investigations, it has not to Monsanto's knowledge ever exercised those powers without industry prodding.

Without sufficient Congressional direction and guidance, current statutory procedures, in Monsanto's opinion, lack adequate safeguards, and principles of fundamental fairness and due process.

When a party files a petition it should, subject to matters of confidence, be able to participate in the proceedings and be apprised of the decisions impacting its complaint. Monsanto's experience, having recently filed a complaint, is in contrast to a fair, open and impartial proceeding. After nearly four months following Treasury's initiation of an investigation, Monsanto has absolutely no idea of the status of its complaint. It is totally in the dark, except that the statute provides for an initial decision to be forthcoming in late February, 1978.

The Antidumping Act has no provision for either discovery of information or meaningful appeal.

The injured party should be able to obtain a status report from Treasury, periodically, following the filing of the complaint. The current system fails to provide any means of determining Treasury's views and tracking its activities once filing has occurred. An unfavorable decision can be reached without a party having any opportunity to respond.

It is Monsanto's position that procedures could be established safeguarding confidentiality, but affording due process with minimal room for political maneuvering.

Monsanto's second area of concern arises out of the apparent ineffectiveness of the available remedies to deter unlawful conduct.

The procedures provided in the Antidumping Act are an ineffective deterrent. There are no fines, penalties or the threat of prison to deter violators. The only "threat", if discovered, is that they will be required in the *future* to obey the law. Until the final determination of sales of less than fair value, there are no effective penalties. It is Monsanto's concern, since recently filing a complaint, that foreign competitors

can subvert the Act by importing large quantities of material, even after Treasury initiates its investigation, and stockpiling that material in anticipation of a duty being imposed. The stockpiling of material extends the injury to the U.S. producer for a significant period following the imposition of a duty on future imports. The act empowers Treasury to impose duties retroactively, however, based on information in our possession, this is rarely done. Some recourse for past violations is absolutely necessary.

Without significant changes in this area, the relief may not be in time to save the U.S. producer.

Monsanto strives to conduct its business in a fair and responsible manner, and in conformance with the laws of the country in which it is engaged in business. We are not arguing for protection, just the opportunity to compete fairly.

STATEMENT OF THE NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION

The National Machine Tool Builders' Association (NMTBA) is a national trade association with 40 members acounting for about 90 percent of the United States' machine tool production. Most of the member companies are small businesses. Over 70 percent of these companies have less than 250 employees. The entire industry has approximately 86,000 employees.

We are pleased to respond to this Subcommittee's invitation of February 6 as to how U.S. laws and regulations should be amended to provide more equitable, expeditious and effective relief from unfair foreign trade practices.

NMTBA has previously testified before this Subcommittee on the operation and effectiveness of the antidumping laws and on the U.S. foreign trade deficit and its implications for domestic machine tool builders and their employees. Our testimony of November 4, 1977 demonstrates NMTBA's growing concern with the skyrocketing trend of machine tool imports. The foreign share of the U.S. machine tool market, which was as low as 5 percent in the mid-1960's, has grown to 21 percent today. As a result of this dramatic increase in imports, which has been led by Germany and Japan, the U.S. machine tool balance of trade surplus has declined from an average of 5-to-1 fifteen years ago to approximately 1-to-1 today, and the metalcutting trade balance has already gone into the red. If this downward trend continues, it is likely that the total American machine tool industry surplus will almost disappear this year and, for the first time ever in our industry, there will be a negative balance in 1979.

On the other side of the balance of trade equation, the prognosis for U.S. exports is equally alarming. Although the world machine tool market has been growing steadily and the dollar volume of U.S. exports has generally been rising, American exports of machine tools as a percentage of all world machine tool exports have been falling. In 1964, 21 percent of the world's machine tool exports were produced in the United States. That share has fallen to 9.5 percent today, representing a 55 percent loss in America's share of the world machine tool export market in only 12 years.

In summary, our share of the U.S. market has declined from 95 percent to 79 percent over the last twelve years, while, at the same time, our share of the world's export market has fallen from 21 percent to 9.5 percent. As a result, the U.S. share of the world's total machine tool output has declined 50 percent in twelve years, and our industry is about to face its first trade deficit.

Over the years, the American machine tool industry has steadfastly remained an outspoken advocate of free trade. In the past, as well as today, we have supported the principle of free, open and fair competition among all the world's machine tool builders. Our problem, however, is not free trade. It is unfair trade. As the Japanese and European economies continue to expand at a slow rate, the export pressure will continue. These governments will continue to refund value added taxes, maintain direct subsidies and export promotion subsidies, finance the working capital needs of their exporters at preferential rates, bail out bankrupt builders and maintain other aid, direct as well as indirect, which amounts to subsidies for foreign industries.

Against this background of continued predatory export policies, our industry believes that vigorous enforcement of the antidumping laws is essential to insure the maintenance of a free trade economy. To the extent that the Antidumping Act is designed to deter and penalize those who engage in predatory and other anticompetitive practices in international trade, that Act should constitute an effective tool in preserving the goal of free and open trade. However, there appear to be aspects of the Act, especially its administrative regulations in which a significant gap exists between the intention of the law and the actual administration and enforcement of the law.

We believe that a sensible approach to an effective realization of the goals of the antidumping laws is S. 2317, introduced last fall by Senator Heinz, which would amend the Antidumping Act of 1921, the Trade Act of 1974 and the Tariff Act of 1930 to improve certain procedures relating to unfair foreign trade practices. The bill, which has twenty cosponsors, would effect several significant procedural amendments to the Antidumping Act of 1921, as amended, 19 U.S.C. § 160 *et seq.*, which are designed to streamline investigatory procedures and mandate a more effective imposition of penalties.

First, the bill, as presently drafted, would amend section 208 of the Antidumping Act, 19 U.S.C. § 167, to change the handling of the imposition of duties. As the Act and its regulations provide now, after an initial finding of dumping is made by the Secretary of Treasury as provided in section 201, 19 U.S.C. § 160, an importer is required to post a bond to cover the imposition of prospective duties. The bill would require the importer to pay in escrow the full amount of estimated dumping duties, pending a final determination of less than fair value sales. If, upon final determination, the finding is not upheld, the amount of dumping duty paid in escrow would be returned with interest from the date on which the duty was paid. Interest rates would be paid at the annual rate in effect on the date on which such duty was paid, as established under section 6621 of the Internal Revenue Code. By significantly increasing the financial burden on the importer, this amendment would serve as an effective deterrent to violations of the Act.

Second, the bill, as presently drafted, would significantly streamline and expedite Section 209 of the Antidumping Act, 19 U.S.C. § 168, by providing that after the Secretary of Treasury makes a final determination of dumping, an across-the-board assessment of duties would follow, based on the fair value data compiled during the Treasury Department's dumping investigation, rather than utilizing the current system of case-by-case assessment based on the new figures. This would significantly reduce the time lag in antidumping determinations.

We understand that Senator Heinz and four of the bill's original cosponsors, Senators Randolph, Glenn, Metzenbaum and Bayh, have notified this Subcommittee of their intention to revise S. 2317 to combine these above two changes into one by requiring the importer to pay the full amount of estimated duties from the point of tentative determination of less than fair value sales to the completion of actual assessment pursuant to a final determination. At that point, liquidation would involve either a refund to the importer of the excess duties paid or a further payment by the importer of the balance due.

NMTBA supports this modification of S. 2317. These proposed changes would still substantially increase the financial burden on the importer from the tentative determination of less than fair value sales until actual assessment of duties pursuant to a final determination. Moreover, this approach would also induce the importer to speed up the assessment process.

S. 2317 would also amend section 201 of the Antidumping Act, 19 U.S.C. § 160, to expedite the two-stage investigatory process currently mandated by the Act by providing that the International Trade Commission's (ITC) three-month injury investigation would run concurrently with, rather than follow, the Treasury Department's three-month determination of sales at less than fair value.[1] This would cut three months off the current 13-month investigatory process.

A simultaneous determination of findings at less than fair value and injury might aid foreign as well as domestic manufacturers. The inequities under the current system are clear: A finding of sales at less than fair value may be made under the Act, even though there may be no injury, and the withholding of appraisement and bond requirements can impose substantial costs on an importer. Simultaneous resolution of these questions would result in the imposition of penalties only if domestic sales at less than fair value have caused or are likely to cause injury to the relevant U.S. industry. Moreover, the domestic industry would welcome any amendment which would expedite the process and provide quicker enforcement and relief.

Fourth, the bill would further streamline procedures under the Act by eliminating the possibility of interim referral to the ITC during the six-month Treasury Department investigatory process.

Lastly, the bill would amend the Act to require the Treasury Department to submit to Congress an annual report regarding the status of its action to enforce the Act.

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[1] Several commentators have recommended simultaneous determination of the dumping and injury questions. *See, e.g.*, Myerson, "A Review of Current Antidumping Procedures: United States Law and the Case of Japan," 15 Colum. J. Transnat'l L. 167, 194 (1976). Moreover, Article VI of the General Agreement on Tariffs and Trade (GATT) provides for simultaneous consideration of these questions. *See* Agreement on Implementation of Article VI of GATT, *opened for signature* June 30, 1967, 19 U.S.T. 4338, T.I.A.S. No. 6431, art. 5(b).

In addition to amending the Antidumping Act, S. 2317 contains several proposed amendments to other trade statutes:

It would amend Section 203 of the Trade Act of 1974, 19 U.S.C. § 2253, to provide for a two-House Congressional override of the President's decision to revise or revoke an earlier decision. In addition, it would permit a Presidential redetermination only once every twelve months, and it would provide that the Presidential determination must be made within 30 days of receipt of the required advice from the ITC and the Departments of Labor and Commerce.

It would amend Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, relating to foreign import restrictions and export subsidies, to provide that the Special Representative for Trade Negotiations must initiate an investigation within 45 days after the filing of a complaint, complete the investigation and transmit to the President a detemination and recommendations within six months thereafter, and, at the request of any interested party, commence hearings reviewing its determination within 45 days of receipt of determination. Section 301 currently contains no time limitations.

It would amend Section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303, relating to countervailing duties, to provide that the Secretary of Treasury must initiate an investigation within 30 days of receipt of a complaint or petition.

It would amend Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, relating to unfair methods of competition, to provide that an investigation must be commenced within 30 days of receipt of a complaint.

These procedural reforms of the trade acts, which would streamline the present processes for consideration of complaints and provide more effective penalties, represent an aggressive approach which is needed to maintain the free trade system while aggressively—and fairly—preventing unfair trade practices without violating due process considerations. By providing quicker relief for domestic industries and stiffer penalties for dumping, S. 2317 should strengthen our trade laws and establish stronger deterrents to dumping.

While S. 2317 represents an important start, we feel that this Subcommittee should study other aspects of the antidumping laws in order to effectuate further improvements. For example, we believe the average machine tool builder—or other small businessman—generally lacks the necessary resources to meet the threshold statutory requirements in initiate a dumping investigation. A single reading of 19 C.F.R. § 153.27 (1977), which contains the nature of the information required to allege a colorable charge of dumping, would be sufficient to discourage most small and medium-sized business firms from utilizing the Antidumping Act, even though they may be victims of unfair foreign trade practices. Moreover, some of the information required by § 153.27, such as evidence of home market price, discounts, freight costs and other aspects of the terms and conditions of private contracts to which domestic sellers are not a party, virtually obligate a businessman seeking to bring an antidumping complaint to hire overseas detectives to pry into foreign competitors' confidential business information.

NMTBA urges this Subcommittee to consider remedies which would lessen, or perhaps eliminate altogether, the heavy burden imposed on a domestic company to persuade the Treasury Department to open an investigation. One method to eliminate the burden would be to provide statutory guidelines, perhaps keyed to reference prices or market share fluctuation, which would automatically require a Treasury Department investigation if the relevant indicators suggested that certain goods were being dumped on the U.S. market. We do not mean to suggest that this system should necessarily be the exclusive procedure necessary to initiate an investigation; it might well complement other alternative mechanisms. But by maintaining current data on key indicators, this "early warning" system would help to reduce the lag time between a suspicion of dumping and the accumulation of the detailed and sometimes hard-to-obtain facts necessary to make a dumping determination.

Another area we urge this Subcommittee to explore concerns the timing of the assessment of duties after a dumping finding has been made. S. 2317 addresses the financial aspects of these duties, but consideration should also be given to the long delay between entry of dumped goods into the U.S. market and the ultimate assessment of dumping duties. At present, the initiation of a dumping investigation merely serves as a signal to the foreign violator to import as many goods as possible into the United States before an adverse determination is made. As a result, imports which enter the United States after a dumping investigation has begun but before a final determination has been made ordinarily escape dumping duties even if they are sold at less than fair value. We urge this Subcommittee to explore a remedy which would deter foreign competitors from importing products at less than fair value while a dumping proceeding is under way.

A third area we urge this Subcommittee to explore more thoroughly is the assessment of penalties for violations of the Antidumping Act. Again, S. 2317 constitutes a start, but consideration should be given to other alternatives, including more severe penalties for second violations.

The injury determination made by the International Trade Commission should also be re-examined to determine whether a lower burden of proof should be required to prevail on a finding of injury. We realize that the ITC's injury determination turns on the facts and circumstances of each individual case, but we urge this Subcommittee to explore possible statutory provisions that would, for example, establish certain rebuttable presumptions in favor of injury, on the basis of such factors as a declining market share by domestic industry, price depression or suppression, reduced profits, high unemployment, excess capacity, or other factors.

Although we have urged a lessening of the burden on a domestic firm to initiate a dumping investigation, we strongly urge this Committee to investigate the possibility of allowing more participation by the domestic industry once an investigation has been initiated. We recognize that much of the information collected by the Treasury Department is confidential business data, but, at the same time, some type of "sunshine" procedures should be promulgated in order to allow the domestic industry to monitor the course of an investigation. Leaving the domestic industry out in the dark in this day of procedural safeguards invites an unwarranted specter of political influence.

Lastly, we urge the Congress to take a very hard look at exploring other means of aiding domestic industry besides reform of the antidumping laws. In this respect, we note that most of the senators who joined Senator Heinz in introducing S. 2317 also joined Senator Bayh in cosponsoring S. 2318, which addresses the other side of the import coin by amending the 1933 "Buy American" Act to stimulate more governmental purchasers of domestic articles. Although S. 2318 is not directly related to the operation and enforcement of the antidumping laws (and has been referred to the Senate Governmental Affairs Committee), it would insure that public funds are not used to purchase foreign products sold in the U.S. at less than fair value prices. The bill would amend sections 1 and 2 of Title III of the "Buy American" Act (41 U.S.C. §§ 10a and 10c) as follows:

It would extend the Act to apply to any contract, more than half of which is financed by federal appropriations, subsidies, loans, grants, or loans which are federally insured or guaranteed. It thus expands the present statute to include state and local governmental agencies which receive more than half of their funding from the federal government.

The bill would set a statutory definition for a domestically manufactured product. The product would be deemed to be produced in the United States if the cost of the components which are mined, produced or manufactured in the United States exceeds 75 percent of the cost of all the components.

The bill would establish a preference floor of 15 percent and a ceiling of 50 percent of the value of the contract for articles, material or supplies mined, produced or manufactured in the United States. In short, this bill will directly aid domestic industries which may be the victims of unfair foreign trade practices.

We urge this Congress to explore S. 2318 and other alternative measures which would complement the Antidumping Act and protect American businesses and their employees from being victimized by foreign unfair trade practices.

We appreciate this opportunity to state our industry's concern on this matter of vital importance. We are hopeful that this Subcommittee will—by exercising its legislative or oversight function, or both—insure that the administration of the Antidumping Act and other "fair trade" statutes does not require the demise or serious and permanent debilitation of important American industries—and widespread layoffs of their workers—before curative and corrective measures are employed.

Statement of the National Retail Merchants Association

The National Retail Merchants Association (NRMA) is a nonprofit, national trade association with approximately 3,500 members that operate more than 35,000 department and specialty stores throughout the nation. NRMA's members sell more than $95 billion in goods and services annually. Quite naturally, some of the goods are imported. Most, if not all, of the members of the Association would be directly and substantially affected by any legislation that affects foreign trade. Accordingly, NRMA is pleased to take this opportunity to set forth its views on the issues raised in the Subcommittee's February 6, 1978 press release with which it is specifically concerned.

At the outset, it should be noted that issues raised in the press release constitute a wholesale reconsideration of the domestic laws dealing with unfair import trade practices. NRMA believes such a review is inappropriate at the present time because many of these same issues are currently the subject of negotiations in Geneva. For example, a comprehensive countervailing duty code to resolve the problem of export subsidies is on the agenda in Geneva. More generally, unilateral action by the United States at this juncture could well have a significant impact on the bargaining position of the United States at the negotiations since legislation adversely affecting our trading partners would severely harm the chances of obtaining favorable concessions from them. Indeed, efforts toward reciprocal reductions of both tariff and nontariff barriers could be greatly hampered.

Thus, even assuming a review of the trade laws of the United States is warranted, NRMA believes now is not the appropriate time for such review.

If, however, the Subcommittee is committed to a present consideration of possible legislation to amend U.S. import trade laws, NRMA takes this opportunity to present its views on the issues raised in the press release.

GENERAL ISSUES

1. Possible replacement of existing laws by a single statute and/or administrative procedure for petitions dealing with all unfair trade practices whatever their causes.

NRMA opposes the adoption of a single statutory or administrative procedure to deal with all unfair trade practices. Under the present multi-statute approach, each agency is responsible for a specific function which it is best suited to perform and for which it possesses the greatest expertise. For example, the Treasury Department, through the Customs Service, is the best agency to make the technical calculations necessary in an antidumping type proceeding. *See* J. Viner, *Dumping: A Problem in International Trade* (reprinted 1966) at 263. The normal entry procedure readily provides Customs with much of the information necessary to make determinations such as "fair value," "foreign market value," and "purchase price." Indeed, much of the same data is furnished Customs as part of that agency's role in ascertaining and assessing tariff duties. Similarly, in countervailing duty cases, Customs has ready access to information concerning the existence of countervailable programs through disclosures required on the entry documents.

It would create an unwarranted and inefficient duplication of effort to remove from Customs and give to another agency responsibility for making these kinds of calculations and determinations as part of a single statutory or administrative scheme. Similarly, to remove from the International Trade Commission responsibility for enforcing Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) with respect to patent and trademark infringement matters would inappropriately squander that agency's developed expertise.

In sum, scrapping the entire procedure and adopting a broad statute to cover all unfair practices, by virtue of its very broadness, would needlessly create uncertainty, conflicts and gaps. NRMA believes it would be counter-productive to change the responsible agencies or the basic statutes dealing with unfair import practices.

2. Resolution of overlapping or conflicting jurisdictions between the Department of the Treasury and the International Trade Commission, particularly in antidumping and Section 337 cases.

While under present law there is generally a clear line between the jurisdiction of particular agencies, NRMA agrees that legislation should be implemented to clarify those few instances where jurisdiction does overlap. Specifically, Section 337 should make clear that it does not apply to matters within the purview of the antidumping Act, Countervailing Duty Law, general unfair methods of competition, and the antitrust laws. The need for specific legislation in this regard, particularly in the antidumping area is made apparent by the ITC's recent decision which applied Section 37 in a dumping context despite the legislative history of the Trade Act of 1974 which indicates that the section was not intended to apply to dumping cases. Senate Rep. No. 93-1298, 93d Cong., 2d sess. *reprinted in* [1974] *U.S. Code Cong. & Ad. News* 7186 at 7328.

NRMA agrees with the Department of Justice (Letter from the Department of Justice to the International Trade Commission in *In the Matter of: Certain Welded Stainless Steel and Tube Investigation* No. 337-TA-29, Filed January 13, 1978) and the Federal Trade Commission that antidumping proceedings are best left to the Treasury Department which is far better equipped to administer the Antidumping Act effectively.

Further, many of the matters presently covered by Section 337 are specifically and adequately dealt with under the other statutes. In this regard, we note with approval the President's recent rejection of the recommendation of the ITC with respect to welded stainless steel pipe and tube from Japan, in light of the duplication and conflicts in the administration of the unfair trade practice laws of the U.S. caused by the ITC's intervention. In the interests of efficiency and lieves that Section 337 should be limited to patent infringement cases.

3. Coordination of unfair import practice provisions with other statutes dealing with prevention of unfair methods of competition, such as antitrust laws.

As noted above, NRMA believes that provisions prohibiting unfair import practices should be coordinated with statutes guarding against unfair competition in commerce generally. The desired goal should be fair and vigorous competition on the merits—regardless of whether its source be foreign or domestic—which results in U.S. consumers being offered the best product at the best possible price. This can be best obtained by entrusting enforcement of this competition to the agencies with the greatest expertise in safeguarding free competition.

Specific matters such as antidumping and countervailing duties are best left to Treasury, and patent infringement cases to the ITC. But matters of a more general nature should be the responsibility of those agencies charged with enforcement of the more general antitrust laws, *i.e.*, the Federal Trade Commission and the Department of Justice. Indeed, these agencies already have broad and adequate authority under Section 5 of the Federal Trade Commission Act, as well as under the Sherman and Clayton Acts, to attack unfair methods of competition and unfair acts affecting commerce within the U.S. Lewis A. Engman, former Chairman of the FTC, so stated with respect to the agency in acknowledging that transferring jurisdiction over Section

337 to the FTC would "not appear to extend the range of unfair practices beyond those now embraced by Section 5 of the Federal Trade Commission Act. . . ."[1] Thus, NRMA believes no change is presently needed.

4. More expeditious time periods for reaching determinations, including possible concurrent rather than consecutive three-month final Treasury dumping and ITC injury determinations and the inclusion of time limits for making determinations in Section 301 cases.

NRMA believes that any legislation which would reduce the already expeditious time periods under the Trade Act of 1974 is unnecessary and counter-productive.

By way of illustration, in an antidumping proceeding the Secretary of the Treasury must determine whether merchandise is being sold at less than its fair value. An initial decision as to whether an investigation should be initiated must be made within 30 days after a complaint is filed. Once an investigation is instituted, a tentative determination as to whether there is a reason to suspect sales at less than fair value must be made within six months (or nine months in "complicated" cases). Once the Secretary concludes the merchandise is being sold at less than fair value, he must notify the ITC of such findings. The ITC then has 3 months to conduct its investigation, which includes holding hearings on the question of whether anyone was injured by the less than fair value rules, and render its decision.

The present consecutive system of Treasury "dumping" and ITC "injury" determinations is preferable to a concurrent approach. Obviously, if Treasury does not make an initial finding that sales at less than fair value have occurred, there is no need for a petitioner, importer, or the Government to go through the expensive and burdensome proceeding before the ITC. Further, since the extent of less than fair value sales have a bearing on injury question a finding of such sales should be made before a full scale injury investigation is instituted. The brief 3 months that would be saved by a proposal to hold the proceedings consecutively, clearly cannot justify eliminating relevant information from consideration or having the Government, petitioners, and importers bear the additional burden and expense—particularly since appraisement on entries during the 3 month period is withheld and the entries ultimately subjected to any applicable dumping duties.

As for Section 337 proceedings, the time periods are already perhaps too brief (1 year in ordinary cases, 18 months in more complicated ones) to adequately deal with the complicated issues—particularly antitrust issues—the ITC has been handling. Similarly brief time periods are provided under the Countervailing Duty Law. (See Section 303(a)(4) of the Tariff Act of 1930 which requies a preliminary determination 6 months from date a petition is filed and a final determination within 12 months).

In sum, in view of the difficult questions posed by unfair import practice proceedings, and the need for substantial data to reach a just decision, the time periods should not be shortened.

5. Initiation of dumping and countervailing duty investigations by the Secretary of the Treasury.

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[1] Statement of Lewis A. Engman, Former Chairman of the Federal Trade Commission, before Senate Committee on Commerce on S. 1483 and S. 1774, p. 11 (September 13, 1973).

NRMA respectfully submits that under existing law and regulations the Secretary of the Treasury already has power to institute countervailing and antidumping investigations on his own initative. Section 201(c)(i) of the Antidumping Act does not limit the source of the information alleging sales at less than fair value to those outside Treasury, but rather merely requires that the Secretary act within 30 days "of the receipt of information." That Customs views this provision as permitting institution of an antidumping proceeding on its own initiative is clear from Section 153.25 of the Customs Regulations which provides:

§ 153.25. Suspected dumping; information from Customs Officers.

If any district director of Customs has knowledge of any grounds for a reason to believe or suspect that any merchandise is being, or is likely to be, imported into the United States at a purchase price or exporter's sales price less than the fair value (or, in the absence of such value, then the constructed value), as contemplated by Section 201(b) of the Act (19 U.S.C. 160(b) and § 153.1 he shall communicate his belief or suspicion promptly to he Commissioner. Every such communication shall contain or be accompanied by a statement of substantially the same information as is required in § 153.27, if the district director has such information or if it is readily available to hm.

Clearly this Section contemplates initiation of antidumping proceedings by Treasury through the Customs Service.

Likewise, Section 303(3)(B) of the Tariff Act of 1930, as amended, give the Secretary of the Treasury authority to institute an investigation as to whether countervailing duties should be assessed based upon information presented to him. Again, no limitation precludes the precipitating information from coming from within Customs or Treasury.

Accordingly, new legislation conferring authority upon the Secretary to institute antidumping or countervailing duty investigation is unnecessary, and certainly Treasury should not be required to institute proceedings in all instances where it has allegations of acts possibly coming within these two statutes since they may be wholly insufficient to support an action.

6. Judicial review procedures, including review of negative ITC injury determinations in dumping and countervailing duty cases.

Section 516(d) of the Tariff Act of 1930, as amended by the Trade Act, provides American manufacturers, producers, and wholesalers the right to judicial review of a determination "that a class or kind of foreign merchandise is not being, nor likely to be sold in the United States at less than fair value" or "that a bounty or grant is not being paid or bestowed." NRMA believes that inherent in the right to contest such determination is the opportunity for judicial review of a negative injury determination by the ITC. If, in an anti-dumping proceeding, the ITC finds no injury, then Secretary of the Treasury will not issue a dumping finding. If this occurs, an American manufacturer, producer or wholesaler may obtain judicial review of that decision in the Customs Court, and the issue of the alleged erroneous negative injury determination may be raised as part of the judicial proceeding reviewing the Secretary's failure to make a finding. Similarly, in those countervailing duty cases in which a finding of injury is required, judicial review may be had of a negative determination in the same manner. Therefore, no legislation is needed to provide judicial review.

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1. Amount and type of evidence of dumping and injury required by Treasury from petitioners in relation to capability of petitioner to provide such information.

NRMA believes that any proposal which would consider the capability of a petitioner to provide necessary information as a factor in determining whether a dumping proceeding should be instituted is wholly unjustifiable. In view of the severe market disruption and commercial uncertainties involved, as well as the expense of defending a dumping proceeding, a petitioner should be required to provide adequate information before such an investigation is instituted. There is no reason why a petitioner should have any difficulty in obtaining information to support its charges. Indeed, the fact that sufficient information has been gathered to institute hundreds of antidmping proceedings supports this conclusion.

2. Price comparisons and verification of data, particularly in cases involving state-controlled-economy countries.

NRMA believes dumping determinations should be required to be based on actual, verified or verifiable data. Where data are submitted, hypothetical formulae should not be employed to construct arbitrary and unrealistic values as was apparently done recently by the Treasury Department in the television dumping proceeding. Indeed, the Customs Court has recently confirmed that actual data must be used *where available. C.B.S. Imports Corp.* v. *United States*, 78 Cust. Ct. ———, C.D. 4739 (1978). Of course, where actual data are not available, estimates are necessary.

3. Retroactive withholding of appraisement and possible deposit of estimated duties in lieu of bond posting following a preliminary affirmative dumping determination.

Under Section 202 of the Antidumping Act, as amended, Treasury has the authority to assess special dumping duties on merchandise entered or withdrawn from warehouse for consumption up to 120 days before the question of dumping was first raised. However, Treasury has not exercised this authority and traditionally has assessed dumping duties only prospectively from the date of withholding of appraisement. To alter this practice and require retroactive withholding of appraisement would work a tremendous, unjustified hardship on importers who must pay the special dumping duty. Such an approach presumes an importer knows that his exporter is dumping and, therefore, should be penalized concerning merchandise which allegedly "escaped" Customs without assessment of dumping duties. Clearly, such an assumption is wholly unwarranted and would create damaging commercial uncertainty. Further, NRMA believes that requiring the payment of estimated dumping duties before a determination that a violation has occurred would be unjustly punitive and unnecessary. All that should be required is to protect the revenue of the United States. This is adequately and less onerously accomplished by bonding.

4. Discontinuance of investigations on a basis of price assurance or special circumstances.

NRMA strongly favors wider use of such a procedure. The main goal of an antidumping proceeding is to stop any dumping. Sometimes this

can be simply and inexpensively achieved by assurances demonstrating that sales at less than fair value have been terminated, and that there will be no future sales at less than fair value. The significant factor in an antidumping proceeding is results, not the manner by which the desired end is achieved.

5. Assessment of dumping duties, including a possible time limit for liquidating entries following a final dumping finding, and assessment of dumping duties across-the-board based upon price comparisons made during the fair value investigation rather than entry-by-entry based upon revised post-investigation data.

NRMA believes that the time-honored practice of assessing dumping duties upon an entry-by-entry basis and based upon the facts relating to the entry is the only fair way to make price comparisons. In this regard, NRMA deplores the recent Customs' action in using an arbitrary, shortcut approach to assessment in order to "rectify" Customs' own delays in effecting liquidations on televisions from Japan. While an across-the-board approach might suit administrative convenience, it can often lead to the assessment of dumping duties where none are justified. Simply because it may be somewhat time consuming to arrive at actual comparison prices for export sales to the United States and those for the domestic market does not justify proceeding in an arbitrary manner and employing hypothetical formulae which do not reflect the actual facts. Such an approach is not only unfair to importers, but it also improperly and adversely affects fair competition and raises prices to consumers. Administrative convenience, while desirable, can in no manner justify abridging the rights of importers and consumers by assessing unjustified penalties.

COUNTERVAILING DUTY LAW

1. Criteria or guidelines for determining what constitutes a direct or indirect "bounty or grant." Application to government-owned or subsidized facilities.

NRMA agrees that criteria for determining what constitutes a direct or indirect "bounty or grant" would be useful. The development of such criteria or guidelines is best done on an international level so that all nations have a clear frame of reference, and NRMA understands that formulation of such guidelines is currently the subject of negotiation at the Multilateral Trade Negotiations in Geneva. We believe that this forum is best suited to establish guidelines as well as to determine whether such guidelines should be made applicable to government-owned or subsidized facilities.

2. Possible injury criteria in connection with agreement on an international subsidy/countervailing duty code in the Multilateral Trade Negotiations.

NRMA believes that an injury test should be incorporated into any international subsidy or countervailing duty code to be negotiated in the Multilateral Trade Negotiations at Geneva. The injury criteria contained in Article 6, ¶ 5 of the General Agreement on Tariffs and Trade (GATT), 82 Treas. Dec. 305, T.D. 51802, (1947), provides a good reference for such a requirement.

CONCLUSION

NRMA stresses that it regards any attempt to restrict imports to the United States as inappropriate and against our national interest. Imports fill an essential need in the American economy, providing a broadened choice of products and lower prices. In this time of rising inflation, products from abroad present an effective means of reducing prices and stemming the inflationary tide. Of course, NRMA in no way condones unfair practices in the import trade—or for that matter in any trade—and believes that all appropriate steps should be taken to protect United States industry from such practices. However, fair and vigorous competition on the merits, be it from domestic or foreign concerns, is the very basis of the American system and should be promoted in every way possible.

RALPH EDWARDS SPORTSWEAR, INC.,
Cape Girardeau, Mo., July 20, 1978.

Mr. JOHN M. MARTIN, Jr.,
Chief Counsel, House Committee on Ways and Means,
Washington, D.C.

DEAR MR. MARTIN: Our firm manufactures Leather Wearing Apparel (jackets, coats) and our market (in the U.S.A.) was subject to penetration by foreign government subsidized Leather Wearing Apparel in 1977 at the rate of 62 percent—and the first quarter of 1978, according to import figures (released by Customs) showed an increase of 70 percent over the first quarter of 1977.

Our product (Leather Wearing Apparel TSUSA item number 791.7500) is an item currently on the generalized system of preferences.

In this context, I am making the following recommendations for change in the Trade Act of 1974—Chapter (3) Countervailing Duties, Section 331, Amendments to Section 303 and 516 of the Tariff Act of 1930.

Why? Because the present futile arithmetical exercise of Mr. Self and Ehrenhaft in Treasury would seem directly to contradict Congress' intent. When passing the law (see the Senate Finance Committee Report and the House Ways and Means Report on the Act).

Congress specifically directed that, "the otherwise mandatory provisions of the Act should be literally interpreted, and that the Waiver provisions—(Section 303(d)) should be used sparingly"—therefore, any prospective revision of the law should include a statement of the intent of Congress, and what it is the Secretary of Treasury is expected to do—because—Treasury has seen fit to use the waiver in every instance relating to Leather Products Industries . . . without exception.

Bill Simon (former Secretary of the Treasury of the U.S.A.) has said that, "Such action is the expression of the power lust of government clerks, who are engaged in bureaucratic empire building. Yet, severe damage to the economy of a long range type is caused by this steady regulatory, mis-interpretation by Treasury" —— in direct conflict with the stated intent of Congress.

I therefore recommend the following:

1. Section 303(a): eliminate the use of the word "Net", and insert therein, the word "Gross"—or, eliminate the word completely.

2. Section 303(a)(4): shorten the period of time from six months to three months on preliminary determination, and from twelve months to six months on final determination.

3. Section 303(a)(5): here again, change the word "Net" to "Gross", or eliminate the word completely.

4. On January 3, 1978, the waiver provisions—Section 303(d)(2) expire, *eliminate* this section completely.

Do not extend the waiver provisions—but if you have to extend waiver provisions, then make it *mandatory that the President/Treasury* has to assess duties when the I.T.C. rules affirmative on injury—do not allow the Executive Branch to abrogate the otherwise mandatory provisions of the Trade Act.

Our industry is quite small, home-owned—no General Motor types, and most have less than 50 employees, and we do not have the money, individually or collectively, to fight the President or Treasury.

A case in point—our industry filed, in December, 1976 or January 1977, a petition alleging the country of Uruguay was subsidizing their shipments of Leather Wearing Apparel into the U.S.A. by 30 percent, and five or six months later, Treasury indicated that we were correct.

A finding of Injury was made by I.T.C. in October, 1977—but—Treasury waived the "Net" bounty of 12 percent—Treasury reduced the Gross subsidy of 24 percent by Social Security Taxes, Housing Taxes, Health and Welfare Taxes, and a local tax on the subsidy, and a Slaughter-house Tax on Rawhides, Unemployment Taxes, V.A.T. on findings (like linings, buttons, etc.) that, in fact, is rebated when the item is exported—but—they did not take into consideration a subsidy on finished Leather of 12 percent in June of 1977—nor did they take into consideration Forgiveness of Income Taxes on Exporting Profits—or a more favorable government bank rate on loans made to exporting firms, and this comes to 12 percent of the value of the export value—and Treasury knew this when they discussed use of the waiver during their negotiations with Uruguay. (I am attaching herewith, a copy of notes made by Mr. Self and Ehrenhaft of Treasury during these negotiations.)

Every U.S.A. firm pays Social Security Taxes, Unemployment Taxes, Health, Welfare and Income Taxe , etc.

For the life of me, I cannot understand how our government (Treasury) can discriminate against local U.S. Industry—but—in our case they have, and they are continuing to discriminate—but—put this in reverse—give my firm forgiveness on Social, Welfare, Unemployment, Medical Insurance, Income Tax, and give me a more favorable bank rate—and I'll fight the world and *win*.

You have to understand my thinking—*I am for free, fair trade—I am against protection—but*—I want a law with teeth that will bite offenders—*What I don't want is a paper tiger law, Permissive, Passive, Ineffective*, which is exactly the way Treasury has interpreted the Act in our specific case.

The inclination of Treasury, is that there are no limits to man's capacity to govern others, and that it therefore follows that no limitation should be placed or imposed upon their interpretation of the Trade Act of 1974.

Our founding fathers, born to long ages of suffering, under mans dominion over man, was that the exercise of unlimited power by men with limited minds and self regarding prejudice is soon oppressive and reactionary.

In this regard, I am attaching herewith, a copy of the Columbia Law Review dated 1958, written by Peter D. Ehrenhaft, who currently occupies the position of Deputy Assistant Secretary, and Special Counsel (Tariff Affairs) in the Treasury Department in Washington—and the policies and thoughts expressed by Mr. Ehrenhaft in his treaties of 1958 are reflected currently in his work in Treasury today.

Please do not forget, our employment in the U.S.A., in direct manufacturing has declined steadily since 1960, and as a whole, our country is a growing service institution, at least Mr. Simon, former Secretary of Treasury of the U.S.A., has indicated this is so.

You also have to understand that the Leather and Leather Product Industries of our country depend upon an agricultural product—hides—and our hides are sold on a free world market, and the following will illustrate how some countries are circumventing "Free and Fair Trade" as espoused in the Trade Act of 1974.

(1) JAPAN

Japan has a protected leather tanning industry that is 1800 percent larger than it was 30 years ago—their leather products industries (shoes, garments, handbags, etc.)—are 800 percent larger than they were 25 years ago—WHY? HOW—by the following means and methods. (See Tanners Council of America, enclosure attached)

(1) Import duties on finished leather—20 percent. Import quotas on finished leather cost—5 percent to 10 percent additional. World import quota of $5 million (U.S.)

For a Japanese industry that produces over $675 million (U.S.) worth of finished leather—this quota would seemingly be ridiculous—and our duty is only 6 perecent (on average).

(*a*) Our tanning industry should be able to easily sell over $250 million (U.S.) within 36 months, if Japan reduced their tariff to 6 percent and eliminated quotas.

(*b*) Japan—Tariff on Leather Wearing Apparel—37 perecent, on shoes (leather)—30 percent, etc. The tariffs mentioned here—taken in context with the tariff on finished leather, means that the leather tanner and leather product manufacturer in Japan has a captive leather product consumer in their home market, and at a very handsome profit, which then allows them to sell leather in the Orient (Korea, Taiwan, Hong Kong) at less than fair market value—this is a subsidy that distorts Free, Fair International Trade and Commerce.

We should make it mandatory that Japan lower their trade barriers—or deny them access to raw material (hides) markets in the U.S.A. (they are the largest buyers of hides in our market).

(2) ARGENTINA

Argentina—currently forbids the export of their raw materials (hides)—this, in effect, depresses the local market far below Free World Market prices and gives the local tanneries and leather product (shoes, garments, etc.) a subsidized base to work on.—This has a dis-

torting effect on World Commerce, as our tanneries and leather product industries cannot compete with them in the Free World Market for Finished Leather and Leather Products.

The same condition as outlined in (2) is being utilized by the countrie of Uruguay, Brazil and India, and in addition to the above practices, Brazil subsidizes their exporting leather product industries to the sum of 27½ percent—Argentina 30 percent—and India 15 percent.

The above conditions outline for you briefly, why our tanning industry is only 60 percent as large today as it was 15 years ago . . . Why our shoe industry is only 55 percent the size it was 15 years ago . . . Why our leather garment industry is only 60 percent the size it was 5 years ago . . . Why our handbag industry is only 45 percent the size it was 10 years ago.

And I would like assurance—that the Congress will let our industry survive in a free and fair world market—But—Congress is going to have to see that enforcement is mandatory—do not let the Executive Branch of the Government (Treasury) have discretionary powers regarding "Title III, Relief from Unfair Trade Practices."

Please advise if you would care to have more detailed information regarding my comments, as I can document everything that I have indicated above, or better yet, I could bring everything to Washington for a discussion of our industries problems.

Very truly yours,

RALPH L. EDWARDS,
Chairman of the Board.

Enclosures.

Tanners' Council of America, Inc.

JOHN T JUSTEN
CHAIRMAN OF THE BOARD
ROBERT G AMYOUNY
TREASURER

EUGENE L KILIK
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October 19, 1977

Foreign trade is much in the news nowadays and I am certain that you are deeply interested for the sake of our economy and the jobs we are exporting through staggering imports of manufactured goods. In your state there are tanneries, shoe factories and plants manufacturing other leather products. Shrinking output and growing unemployment in this industry group is, in my opinion, the most glaring example of sheer outright injustice to American industry from absolutely unfair conditions of foreign trade. We think you will agree when you consider the indisputable facts about our case.

On Tuesday, October 11, 1977 the Office of Ambassador Strauss, the President's Special Representative For Trade, held a public hearing on our appeal under Section 301 of the Trade Act of 1974. Section 301 was written into the Act by Congress to give redress to American industries afflicted by unfair, discriminatory, unreasonable and unjustifiable trade barriers and restrictions imposed by other countries. We appealed for relief under this Section because:

(1) For the past 30 years the Government of Japan has maintained, in violation of treaty obligations, an import quota system which virtually excludes the import into Japan of U. S. leather and leather products. Our markets have been free and open to Japanese exporters but Japan has kept an impenetrable barrier against any competition from the United States.

(2) We have appealed time and again to every agency in the U. S. Government concerned with foreign trade to balance the scales of justice. The truth of our case has always been conceded; we have never asked for anything more than equity and reciprocity. Japan has persisted in keeping the gates completely shut and ruthlessly ignoring polite remonstrance from our Ambassadors or other officials.

(3) The economic damage to our country caused by the deliberately unfair trade policy of Japan has been devastating. Leather production in the U. S. has shrunk by more than 35%; scores of plants have had to close, jobs have been lost by the tens of thousands.

(4) Sheltered by their impenetrable quota system, plus import duties 400% greater than ours, the Japanese have deliberately expanded their tanning industry 18-fold. Getting monopoly leather prices at home, Japan has been able to raid our raw material market and now takes more than 20% of U. S. hide production. We know that American leather is better and cheaper than the Japanese product. By every tenet of common sense and economic fair play the United States should be tanning a large proportion of the hides unfairly captured by Japan and thereby we would maintain production and jobs in the U. S.

(5) The leather and leather products sector accounts for approximately one billion dollars of our foreign trade deficit and Japan, as you know, has a surplus of more than $5 billion on paid account with the U. S. Given fair and equal terms of trade with Japan our industry sector could and would make a substantial cut in the U. S. trade deficit. There would be an immediate incentive to open plants instead of closing them, to hire people instead of firing them.

We take it for granted that Congress meant business in Section 301, that it wanted our government to act decisively and put an end to blatant cases of trade iniquity and inequity of which Japanese leather quotas are the most monstrous and proven example. Our industry leads the world in efficiency and productivity, in technological products. Must we and our workers go down the drain as victims of demonstrable and incontestible trade injustice by Japan?

We ask for nothing more than equity and equality in terms of trade with Japan. If you agree with us, if you think that jobs in our country are vital, let Ambassador Strauss know your position. We need action before the damage to a vital American industry becomes irreparable.

A Fact Sheet is enclosed.

Yours very truly

Eugene L. Kilik

Eugene L. Kilik
President

elk/mr

FACT SHEET

JAPANESE TRADE BARRIERS PRESENT INSURMOUNTABLE OBSTACLES TO EXPORTS OF U. S. LEATHER

For more than 30 years, the Japanese government has maintained excessively high tariffs and stringent import quotas which have effectively prevented American tanners from selling their leather in this Far Eastern market. Such restrictive trade practices which offend the principles of free trade and violate domestic as well as international law have contributed to the decline of the American leather tanning industry which has lost more than 30 percent of its production and employment in the past eight years.

To remedy this critical problem, the Tanners' Council of America, Inc. has recently petitioned the Office of the Special Representative For Trade Negotiations to grant relief under the provisions of Section 301 of the Trade Act of 1974 which authorizes Presidential action when a foreign country "maintains unjustifiable or unreasonable tariff or other import restrictions which ... burden, restrict, or discriminate against United States commerce ...." Public hearings were held October 11, 1977.

Japanese Tariff and Non-Tariff Barriers

Specifically, Japan levies duties of 20 percent on imports of cattlehide, calfskin, sheepskin and goatskin leather in contrast to the average 6 percent duty levied by the United States on leather imports. In addition to this high tariff which serves more as a trade barrier than a source of revenue to the Japanese government, Japan imposes import quotas on leather, setting an estimated global quota of $8.7 million and an estimated U.S. quota of $2.5 million last year. These minimal quantities contrast sharply with the total Japanese leather market which is conservatively estimated to be $600 million. To further inhibit U. S. leather exports, Japan also maintains a complicated and obstreperous licensing system which not only makes it difficult to determine the quota ceiling and to identify quota holders but also imposes a price on the quotas themselves. The ambiguous nature of the system makes it impossible for either a willing seller or willing buyer to make plans for the utilization of the available quotas.

FACT SHEET - 2

The American Leather Tanning Industry Has Suffered Serious Injury as a Result of Such Unfair Trade Practices

Such unreasonable and unjustifiable impediments to international trade have contributed to the serious erosion of the American leather tanning industry which has lost almost one-third of its production and employment since 1968. That U. S. exports of leather to Japan would have been much higher if these trade barriers were removed is clear from recent export statistics. The U. S. tanning industry has succeeded in doubling its total exports in the last four years and has almost tripled its shipments to other Far Eastern countries, including Korea, Taiwan, Hong Kong and the Philippines. Yet, because of the high tariffs and stringent quotas imposed by Japan, exports to Japan have remained almost constant during this same period. Moreover, Japanese tanners who profit considerably from their closely protected home market are able to outbid American tanners in the U. S. market for American-produced cattlehides while at the same time underselling them on the tanned leather in third country markets, thus placing American tanners at a competitive disadvantage at home with respect to raw materials and abroad with respect to finished product.

American Leather Tanners Therefore Seek Presidential Action to Eliminate Japanese Trade Barriers

The Japanese quotas on imports of leather present an insurmountable barrier to free trade and persist in direct contravention of the General Agreement on Tariffs and Trade. They also contribute to the Japanese trade surplus with the United States which last year was an excessive $5.4 billion. The American leather tanning industry, one of the most efficient and productive in the world, merely asks for an equal opportunity to trade its product freely in Japan so that it can regain the employment and production that it has lost as a result of such restrictive trade practices.

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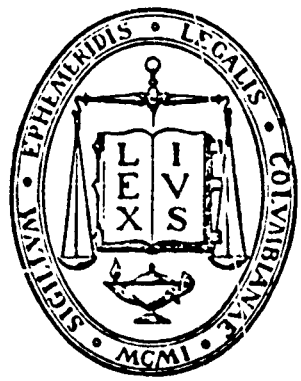
COLUMBIA LAW REVIEW

VOL. LVIII—1958



NEW YORK
1958

PROTECTION AGAINST INTERNATIONAL PRICE DISCRIMINATION: UNITED STATES COUNTERVAILING AND ANTIDUMPING DUTIES

PETER D. EHRENHAFT*

The American economy has, from its birth, been dedicated to the ideal of free competition. But as the economy has matured, this ideal has not infrequently been threatened by excesses grown out of unrestrained rivalry. Congress and courts have found it increasingly necessary to hedge economic free action, lest freedom strangle the competition it was meant to foster.[1]

Among the trade practices which have lent themselves to such abuse is that of price discrimination, *i.e.*, the sale of goods to one customer at a price other than that charged a second. As a 1914 House report summarized the predatory aspects of discrimination:

> [I]t has been a most common practice of great and powerful combinations engaged in commerce . . . to lower prices of their commodities . . . in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors. . . . Such a system is . . . manifestly unfair and unjust, not only to competitors who are directly injured thereby but [also] to the general public. . . .[2]

Section 2 of the Clayton Act, then enacted, included the first prohibition against certain price discriminations, *viz.*, those threatening "to substantially lessen competition or tend to create a monopoly in any line of commerce."[3] However, court interpretations of the enumerated statutory justifications for discrimination managed to excuse much differential pricing, and the development of new merchandising techniques (*e.g.*, retail chain store outlets that avoided middlemen and were supplied directly by manufacturers) revealed methods for circumventing its terms. Thus Congress was prompted to enact the Robinson-Patman Act[4] in an attempt to narrow

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* A.B., Columbia College, 1954; LL.B., M.I.A., Columbia University, 1957. The author wishes to express his gratitude to Professor Richard N. Gardner of Columbia Law School for his guidance.

1. Since the Sherman Act, 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952), as amended, 15 U.S.C. §§ 4-7 (Supp. IV, 1957), legislation has increasingly concentrated on more specific sectors of the economy. See, *e.g.*, 70 STAT. 1125 (1956), 15 U.S.C. §§ 1221-25 (Supp. IV, 1957) (Automobile Dealer Act).

2. H.R. REP. No. 627, 63d Cong., 2d Sess. 8 (1914).

3. 38 STAT. 730 (1914), as amended, 15 U.S.C. § 13 (1952). The prohibition was hedged by so many exculpatory qualifications that Senator Cummins was moved to remark, "there are not enough teeth in section 2 of the Clayton bill to masticate successfully milk toast. . . ." 51 CONG. REC. 14250 (1914).

4. 49 STAT. 1526 (1936), 15 U.S.C. §§ 13, 13a, 13b, 21a (1952). See Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059 (1957).

still further permissible price discriminations. The result of these and similar statutes has been a "legal pull toward price uniformity by sellers."[5]

The problem of predatory price discrimination is, of course, not a purely domestic one. For not only have American producers engaged in such practices, but foreign manufacturers have similarly sought to capture markets in the United States and elsewhere by artificially and temporarily reducing prices in the hopes of driving competitors out of business. Recognizing these facts, Congress enacted the Antidumping Act of 1916,[6] making it criminal for persons to import articles into the United States "at a price substantially less than the actual market value . . . Provided, That such act . . . be done with the intent of destroying or injuring an industry in the United States. . . ." But the difficulties inherent in attempting to prove the statutory intent have prevented active enforcement of this act.[7]

To remedy these inadequacies, and to combat anticipated post-war raids by European manufacturers on the American market, Congress enacted the Antidumping Act of 1921.[8] Its key features were the adoption of an administrative remedy enforceable against the imported goods themselves, and the elimination of the finding of "intent" on the part of the importer. This act has remained substantially unchanged,[9] but general dissatisfaction with existing antidumping legislation led the 1956 Congress to request[10] a report from the Secretary of the Treasury reviewing the operation and effectiveness of the 1921 act. The Secretary made his report on February 1, 1957, and, on the last day of the 1957 session of Congress, the House passed a bill embodying the substance of the Secretary's proposals.[11] The House report accompanying the bill recognized the fact that these proposals did "not involve any change in the basic policy of the act."[12] But in view of the attention the Antidumping Act has recently received, and the virtually uniform opposition its present operation has engendered—both by persons favoring and opposing increased trade liberalization—the relatively unimportant changes suggested by the Treasury and passed by the House must be considered disappointing. Reexamination of the act and its underlying policy seems called for.[13]

5. Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 2 (1956).

6. 39 STAT. 798, 15 U.S.C. § 72 (1952).

7. See Report to the Committee on Ways and Means from the Subcommittee on Customs, Tariffs, and Reciprocal Trade Agreements, *United States Customs, Tariff and Trade Agreement Laws and Their Administration*, 85th Cong., 1st Sess. 95-96 (1957) (hereafter cited as BOGGS REPORT).

8. 42 STAT. 11 (1921), as amended, 19 U.S.C. §§ 160-73 (1952), as amended, 19 U.S.C. §§ 162-73 (Supp. IV, 1957).

9. Some procedural changes were incorporated into the act by the Customs Simplification Act of 1954, § 301, 68 STAT. 1138, 19 U.S.C. § 160 (Supp. IV, 1957).

10. Customs Simplification Act of 1956, § 5, 70 STAT. 948.

11. H.R. 6006, passed by voice vote. 103 CONG. REC. 14923 (daily ed. Aug. 29, 1957).

12. H.R. REP. No. 1261, 85th Cong., 1st Sess. 2 (1957).

13. *Ibid.*

I. The Nature of Dumping

A. *The Theory*

Economists define "dumping" broadly as "price discrimination between national markets."[14] Usually these two markets are, on the one hand, that of the domestic-exporting country and, on the other, that of the foreign-importing country. Thus, "dumping" generally refers to sales for export at prices lower than those charged at the same time and under like circumstances to buyers in the domestic market.[15] However, it is clear that "price discrimination" can as well take place between two foreign markets and not involve a comparison with prices charged domestic buyers at all, or it may be practiced in reverse, with home prices lower than those charged for export.[16]

Economists' analyses of dumping emphasize that only those price differentials constituting unfair competition are to be condemned. Professor Viner has, for example, classified price discriminations in international trade into three distinct groups, each characterized by the motive of the dumper and the continuity of his dumping. He considers such a breakdown essential for the formulation of adequate responsive action, as it reveals that only one type of dumping may candidly be considered unfair competition.[17]

First, and probably negligible, is *sporadic* dumping. As the term implies, this is an occasional, unforeseen trade phenomenon. Its causes are generally overproduction and/or speculation by a producer who, originally entertaining no notions of selling goods more cheaply abroad, is forced to

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14. Viner, Dumping: A Problem in International Trade 3 (1923). This is considered the standard text on the subject, and its definitions have been accepted by leading economists. See Haberler, The Theory of International Trade 296 (1936); Kindleberger, International Economics 235 (1953).

15. This latter is the "working definition" used in Viner, Memorandum on Dumping 3 (League of Nations Pub. No. 1926.II.63) (hereinafter cited as Viner, Memorandum), and is the one generally used by legislators. See Ireendelenburg, Memorandum on the Legislation of Different States for the Prevention of Dumping with Special Reference to Exchange Dumping 5 (League of Nations Pub. No 1926.II 66). It was in these terms that Assistant Secretary of the Treasury Kendall explained the term to a congressional committee at the recent hearings on amendments to the Antidumping Act. *Hearings Before the House Committee on Ways and Means on H.R. 6006, 6007, and 5120, Bills to Amend Certain Provisions of the Antidumping Act*, 85th Cong., 1st Sess 32 (1957).

16. See Haberler, *op. cit. supra* note 14, at 297 Haberler would eliminate the "national markets" qualification altogether, for he finds the price laws underlying the "dumping" phenomenon to be the same whether the price discrimination occurs between buyers in two different countries or between buyers in the same country. Accepting his analysis would logically permit complete application of domestic anti-price discrimination statutes, such as the Clayton Act, to the international problem of dumping. Some have claimed that such a carry-over of principles and standards was the intention of the Congress that enacted the Antidumping Act of 1921. See, *e.g.*, statement of William Barnhard, Secretary of the National Anti-Dumping Committee, *Hearings, supra* note 15, at 345; Boggs Report 94.

17. Viner, Dumping: A Problem in International Trade 23 (1923). A similar analysis was attributed to William Culbertson, then a member of the Tariff Commission, in the course of Senate debate on the 1921 Antidumping Act. See remarks of Senator Stanley, 61 Cong. Rec. 1194 (1921).

resort to distress sales if he is at all to dispose of his surplus stock and at the same time not spoil his traditional market. Such dumping is naturally a temporary annoyance to competing producers in the importing country. On the other hand, it does provide consumers with short-lived bargains. As sporadic dumping is by definition unforeseen and sui generis, it cannot be considered of major significance for legislators in formulating a national trade policy.

The second type of dumping may be characterized as *intermittent*. It involves the more or less frequent and planned sale of goods abroad at prices below those charged to domestic buyers. The dumping producer may resort to such practices for any one of a number of reasons—to acquire a foothold in a foreign market or prevent its loss to competitors, to destroy a competitor, to prevent the establishment of a rival concern, or to retaliate for dumping practiced in the opposite direction. The temporary cheapness of the dumped goods is a small gain for consumers, compared with the extended deleterious effects such aperiodic dumping may have on domestic producers and on the working force. And once the competition has been driven out, the dumping producer may, and probably will, raise prices to the highest level the traffic will bear to the eventual detriment of consumers as well. This is predatory dumping used as a weapon of commercial warfare, endangering the industry and labor of the importing country.[18] It is at such unfair practices that antidumping legislation should (and the 1921 Antidumping Act was probably intended to) be aimed.

The third, and in many ways the most controversial, type of dumping is that characterized as *persistent*. This is the practice of systematic, extended sale for export at prices below those charged in the home market. Persistent dumping may be motivated by export bounties granted by governments for the purpose of earning needed foreign exchange, or for balance of payment or even prestige purposes. Or a producer may recognize that cheap foreign sales are economically feasible in industries where expanded production brings decreasing unit costs, and where domestic demand is inelastic.[19] Although such price discrimination may be branded as "dumping," it can nevertheless be of great economic advantage to the importing

Oh, No!!!

NOTE

18. See H. R. REP. No. 1, 67th Cong., 1st Sess. 23 (1921).

19. VINER, DUMPING, A PROBLEM IN INTERNATIONAL TRADE 31 (1923). Viner suggests still further categories, but those enumerated will suffice for present purposes.

There are, of course, other methods of classifying dumping practices. A Federal Trade Commission report, for example, characterized the various techniques as "bounty," "freight," "consignment," or "social" dumping, thus emphasizing the method rather than the frequency or motivation. S. Doc. No. 112, 73d Cong., 2d Sess. 2-14 (1934). However, since the methods of dumping are generally immaterial to an evaluation of its economic effects, while the economic effects, on the other hand, frequently are a function of frequency and motivation, the Viner classification seems preferable from the point of view of the legislator.

country, provided, of course, that the latter can be assured of a continuous supply of the goods at the bargain price.[20] Where antidumping duties are applied to such imports, the flexibility and elasticity of international markets are decreased and each nation's potential gains from trade are reduced.[21] In such cases antidumping duties become a protective tariff.

Economists are generally agreed that it is only the intermittent, predatory dumping of goods that is to be restrained. Despite the fact that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act,"[22] that act was drafted and is administered with a view to preventing this unfair competitive practice by domestic suppliers within the American market.[23] It is an open question whether the present Antidumping Act is similarly directed with respect to our foreign sources of supply. Part of the explanation for this may lie in the fact that the act has not been viewed primarily as a facet of American "free enterprise" legislation, but rather as a segment of tariff policy.[24] While not incorrect, such a view distorts the purpose of the act. It suggests a distinction between the fairness of discriminatory pricing practices in internal and international trade—a distinction presumably justified by the fact that producers abroad are not,

20. "Antidumping duties are legitimate only if . . . they are found not to be interfering with permanently cheap imports." Viner, in *Hearings Before the Subcommittee on Foreign Economic Policy of the Joint Committee on The Economic Report Pursuant to Sec. 5(a) of Public Law 304, 79th Congress*, 84th Cong., 1st Sess. 606 (1955). Two well known illustrations exist of the principle that importing countries may benefit from the persistent dumping of commodities on their markets by foreign producers. These are the extensive dumping sales of German steel in Holland at the turn of the century and the similar cut rate sales of American motion pictures abroad prior to World War II. See HABERLER, *op. cit. supra* note 14, at 315; KINDLEBERGER, *op. cit. supra* note 14, at 237. It was exporters of these products in third countries, such as American steel manufacturers and European movie producers, who were injured by this dumping, and who protested. *Ibid.*

21. *Id* at 239. However, Kindleberger too must admit that it is often difficult to distinguish between predatory and persistent dumping, particularly as the difference does not become apparent until some time has elapsed, during which domestic producers may have suffered irreparable harm. *Ibid.* Viner answers this argument with the assertion that since the average and marginal costs of dumped goods can be ascertained quite readily, the importing country can also judge whether or not the cheap price of a particular commodity is due to abnormal and predatory, rather than usual and economic reasons. According to this view, only those goods sold for export below marginal cost of production are really suspect and should be made the subject of antidumping duties. VINER, MEMORANDUM 11. However, ascertaining foreign costs of production creates very serious problems. Although the existing Antidumping Act has provisions for determining whether or not dumping is taking place by relating the export price of goods to their cost of production, the recent report of the Secretary of the Treasury asserts that this method presents such difficulties that its use "is generally warranted only as a last resort." REPORT OF THE SECRETARY OF THE TREASURY TO THE CONGRESS ON THE OPERATION AND EFFECTIVENESS OF THE ANTIDUMPING ACT AND ON AMENDMENTS TO THE ACT CONSIDERED DESIRABLE OR NECESSARY 7 (1957) (mimeographed edition) (hereinafter cited as 1957 TREASURY REPORT).

22. Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953).

23. See FTC v. Morton Salt Co., 334 U.S. 37 (1948). Predatory discrimination may also be actionable under the Sherman Act and the Federal Trade Commission Act. See, e.g., United States v. Paramount Pictures, 334 U.S. 131, 160 (1948), FTC v. Cement Institute, 333 U.S. 683, 720 (1948).

24. See remarks of Representative Reed during the debate on the 1957 amendments to the act, 103 CONG. REC. 14921 (daily ed. Aug. 29, 1957).

for example, subject to American antitrust and similar regulatory statutes.[25] The argument is then made that uncontrolled foreign producers can never be "fair competition" to domestic ones,[26] and that their sales to this country at discriminatory prices are unfair per se.

This argument, however, does not withstand economic analysis. As indicated earlier, there are many cases in which a producer may, or even must, charge higher prices at home than he can command abroad.[27] American agricultural products on the world market today are a case in point.[28] The fact that such goods may be overpriced at home does not necessarily render unfair their lower competitive price abroad. The point that foreign producers are not subject to antitrust laws is no more relevant in determining the "fairness" of their prices than is the availability to them of any other favorable factors, such as their proximity to raw materials or cheap power or labor.

why?

Discussion of the lack of foreign antitrust laws does point out, however, the economist's view that only a monopoly is able to engage in predatory dumping. Without a domestic monopoly in which high prices may be consciously maintained, a producer cannot cover the losses sustained through inordinately cheap foreign sales.[29] In addition, the dumper must be sure that his home market is effectively isolated from the markets in which his goods are being dumped, lest the cheap goods be reimported and then be used to undercut the producer's high home price.[30] All of these factors add up to the economic truism that predatory dumping in international trade is neither an easily arranged practice nor a common experience.

To recapitulate briefly, when creating a framework for the maintenance

25 See statement of Robert Hawes, counsel for The Hardwood Plywood Manufacturers, *Hearings*, *supra* note 15, at 152, BOGGS REPORT 94.

26 The argument has similarly been made with respect to imports from absolutely controlled economies, such as the Soviet satellites. In the course of the Tariff Commission's investigation of the dumping of potash from East Germany, one economist suggested that a greater likelihood of injury to American industry existed when goods were imported from countries where suppliers operated on a "non economic basis" than when identical goods were bought from foreign producers who were forced to take profits and losses into account. This argument was successfully presented to the Tariff Commission in 1933, when it ruled that imported goods produced in a communist country were, ipso facto, unfair competition within the meaning of § 337 of the Tariff Act of 1930, 46 STAT. 703, 19 U.S.C. § 1337 (1952), cited in BOGGS REPORT 17.

27. See note 20 *supra*. The traditional case involves a producer who could decrease unit costs by expanding production, but who is faced with an inelastic domestic demand.

28 See statement of Herbert E. Harris II, of the American Farm Bureau Federation, *Hearings*, *supra* note 15, at 336, see note 20 *supra*.

29 Furthermore, if the dumping producer has a local competitor, the latter could sell the goods at home at a price below that of the dumper, thereby forcing down the home price so that eventually the "discrimination" between home and foreign markets would be at an end.

30 Barriers to reimportation may be "natural," such as long geographic distances or high transportation and handling charges, or they may be "imposed," such as outright prohibitions on reimportation, tariffs, quantitative restrictions, or agreements with foreign buyers that they will not resell in the producer's market. See HABERLER, *op. cit. supra* note 14, at 301.

of free competition, the basic question regarding the price of any commodity is whether that price is economically defensible and still consistent with fair dealing. Import prices that are low due to favorable foreign factors of production must be so considered. Import bargains due to persistent dumping may also be so considered. It is only the unrealistically cheap goods of the predatory dumper (the monopolist who in this way seeks to take an unfair advantage of his economic strength) that must be stopped with forthright antidumping legislation. The relation between predatory price discrimination and commercial virility should help to explain, however, why the American Antidumping Act has not been applied extensively in the recent past: the simple fact is that since World War II few producers outside the United States have possessed the requisite economic power. But with accelerated international reconstruction and development, the preeminence of the American producer may not remain unchallenged. It is therefore timely to examine the administration and effectiveness of our protections against international price discrimination.

B.S.!!

key pt.!

why we need it...

B. *In Practice*

The methods of effecting price discrimination in international trade are varied and complex. A distinction is frequently drawn between differentials created by government action and those imposed by producers themselves. Price discriminations which stem from government intervention are created by exchange controls which cheapen exports, by tax rebates on exported commodities, by preferential shipping rates, or even, according to some foreign antidumping legislation of the past, by "social conditions" making for lower wage or overhead costs in the producing country.[31] Dumping by private producers (or by governments as producers) may take the open form of cheaper export price quotations or preferential treatment in payment,

31. See, *e.g.*, Austrian and British Antidumping Acts of 1924 and 1925, respectively, cited in S. Doc. No. 112, 73d Cong., 2d Sess. 13 (1934). The provision in § 307 of the United States Tariff Act of 1930, excluding the importation of goods produced by convict or slave labor, thus without fair economic cost, may be considered related. 46 STAT. 689 (1930), 19 U.S.C. § 1307 (1952); *cf.* § 336, 46 STAT. 701 (1930), 19 U.S.C. § 1336 (1952), permitting the President to vary the tariff in order to "equalize" foreign and American costs of production.

Although some have urged that the American Antidumping Act should also take account of low foreign wages, see, *e.g.*, statement of Robert Hawes, counsel for the Hardwood Plywood Manufacturers, *Hearings*, *supra* note 15, at 141, most economists would not consider low wages, long working hours, lighter social legislation charges, reduced food or material prices as the result of state subsidies, lower freight rates, and the like, elements of "real" dumping. Such elements in the factors of production affect the internal, domestic price of the commodities in question no less than their export price. Similarly "exchange dumping"—a price differential due to depreciation of the exporter's currency, has not been considered "true" dumping. See TRENDELENBURG, *op. cit. supra* note 15, at 5. But from the point of view of the importing country, the distinction between "real" and "false" is unnecessary. It need only inquire into the reason for the cheapness of particular imports, determine whether or not the bargain is likely to be permanent, and, finding other considerations (*e.g.*, national security) to be equal, then act accordingly.

shipping, packing, or priority of order fulfillment. There may be rebates to foreign buyers from the producer or his cartel. Or covert techniques, such as consignment dumping,[32] may be employed.

"The practice of dumping, or selling more cheaply in foreign markets, is as old as the mercantile system. In this country Alexander Hamilton called attention in 1791 to English Government bounties that made it possible [for British exporters] to dump sail cloth and linens into the United States."[33] When the anti-British Embargo Act was repealed in 1814, complaints about English textile dumping were allegedly instrumental in securing passage of America's first protectionist legislation—the Tariff Act of 1816.[34]

But as a bogeyman of major international significance, dumping first emerged toward the end of the nineteenth century.[35] As giant industries grew into cartels and trusts in both Germany and the United States, producers, particularly of heavy machinery and steel, engaged in extensive dumping of their excess manufactures in less adequately developed markets.[36] This was, however, more boon than bane to the importing countries, and it was not until the period following World War I that attempts were made to protect "war baby" industries from dumped imports and to fight depreciated currency dumping.[37] In this country, such endeavors coincided with efforts to curtail predatory domestic price discriminations.[38]

However, even prior to World War I, there existed a species of price discrimination in world trade that had both gained adverse recognition and been the target of attempted suppression. Nearly all European countries engaged in the practice of providing indirect subsidies, through various types of bounties or tax rebates, to the producers, and particularly to the exporters, of certain "essential" commodities. For historical reasons, the favored industries were primarily the producers of flour, sugar, and alcohol.[39]

32. This involves shipment to a consignee in another country for future resale at the dumping price, either within the country of the consignee or in some third country. See S. Doc. No. 112, 73d Cong., 2d Sess. 7 (1934).

33. *Id.* at 1.

34. KINDLEBERGER, *op. cit. supra* note 14, at 236-37. Viner, on the other hand, believes the fear of English dumping played but a minor part in the development of American protectionist sentiment. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 43 (1923).

35. For a thorough review of phenomena prior to 1890, that could be considered dumping, see *id.* at 35-50.

36. *Id.* at 51, 80, HABERLER, *op. cit. supra* note 14, at 315. See also FTC, SUPPLEMENTAL REPORT ON ANTIDUMPING LEGISLATION AND OTHER IMPORT REGULATIONS IN THE UNITED STATES AND FOREIGN COUNTRIES 25-63 (1938), reviewing the instances in which antidumping duties were levied on American exports, particularly machinery.

37. CHALMERS, WORLD TRADE POLICIES 9-10 (1953).

38. See text at note 8 *supra*.

39. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 164 (1923). The complexities of some of these bounty systems, meant to encourage cheap exports to the detriment of similar protected industries in other countries, are illustrated in Downs v. United States, 187 U.S. 496 (1903). There the Court found a devious method of excise tax collection,

When treaty disposition of the problems created by the bounty system failed, governments were eventually led to the unilateral imposition of "countervailing" duties on those imports receiving official export bounties abroad. The first measure of this type was the American Tariff Act of 1890.[40] It imposed an additional duty of one-tenth of one cent per pound above the ordinary duty on all refined sugar imported from countries that subsidized the export of such sugar with bounties greater than those used to subsidize the unrefined type. The act was, naturally, of very limited applicability, but by 1894 the provision for a countervailing duty had been extended to all bountied sugar,[41] and in 1897 to all dutiable merchandise receiving government export assistance.[42]

Particularly as it affected world production of sugar, the pyramiding of bounties and countervailing duties led to ever more ludicrous results. As early as 1864 negotiations were initiated among the world's beet sugar producing countries with the aim of abolishing or restraining bounties which impeded the economic flow of this staple. With the exception of Russia and the United States, all producing states finally signed the 1902 Brussels Sugar Convention.[43] Although applying a temporary check to a runaway development in a restricted area of trade, the Sugar Convention, together with its "enforcement bureau," faded out of sight at the end of World War I.[44] Other multilateral attempts at regulation of dumping met with varying success. Among these was the Convention for the Protection of Industrial Property,[45] to which the United States and 32 other nations acceded, and which vaguely bound its signatories not to engage in unfair competitive practices.[46] There were more vigorous antidumping resolutions adopted at the 1920 Brussels International Financial Conference, the 1927 Geneva World Economic Conference and at various meetings of the League of Nations.[47] However, in the 1920's little basis could be found for faith in

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employed by the Russian Government with respect to sugar exports, to be an export bounty, sufficient to subject the sugar to an American countervailing duty. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 174 (1923), is critical of this and similar decisions, on the ground that the exports involved did not receive genuine bounties within the meaning of the applicable statutes.

40. Chapter 1244, § 237, 26 STAT. 584 (1890). At the same time, this Government granted a bounty to American sugar producers. *Id.* § 231, 26 STAT. 583.

41. Tariff Act of 1894, c. 349, § 182 1/2, 28 STAT. 521.

42. Tariff Act of 1897, c. 11, § 5, 30 STAT. 205, reenacted in the [Underwood] Tariff Act of 1913, c. 16, § IV E, 38 STAT. 193, and in still broader form in the Tariff Act of 1922, c. 356, § 303, 42 STAT. 935. The present provision, similar to that of 1922, is a part of the Tariff Act of 1930, § 303, 46 STAT. 687, 19 U.S.C. § 1303 (1952).

43. 95 BRITISH AND FOREIGN STATE PAPERS 6 (1902) (in French), abrogated, Sept. 1, 1920, 1 LEAGUE OF NATIONS TREATY SERIES 400 (1920).

44. S. Doc. No. 112, 73d Cong., 2d Sess. 19 (1934).

45. Nov. 6, 1925, 47 STAT. 1789, T.S. No. 834.

46. *Id.* arts. 10, 10 bis, 10 ter.

47. All are reprinted in S. Doc. No. 112, 73d Cong., 2d Sess. 19-20 (1934).

the feasibility of international control of the dumping problem; the practice seemed too profitable to be outweighed by the resulting harm.[48]

But attempts at international regulation have not been abandoned. Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as GATT)[49] represents the latest mutilateral effort at control of the predatory aspects of dumping and export bounties. Its novelty lies in the fact that it also seeks to soften the rigors of the excessive, trade-stifling antidumping and countervailing duties that have been adopted by many countries in the past thirty years. Its extensive provisions, pursuing a middle course between these opposing considerations, provide a most reasonable guide for legislation in the field.[50]

As multilateral endeavors have so often proved ineffective, many trading countries have turned to independent legislation directed against dumping. The development of countervailing duties, designed to offset government export subsidies, has been discussed.[51] The first attempt at combatting unfair price cutting by private foreign exporters was the Canadian Anti-Dumping Act of 1904,[52] imposing an antidumping duty of up to fifteen per cent *ad valorem* on dutiable goods imported into Canada at less than their fair market value on the home market.[53] Prior to World War I, other members of the British Commonwealth passed similar legislation. But it was not until after the war that the United States and most of the European countries adopted antidumping statutes on the Canadian model.[54]

The American Antidumping Act of 1921[55] was a prototype of those then passed. Factors in securing its passage in this country were fears that renewed German exports would endanger the war-fostered chemical industry[56] and apprehension that imports generally would be excessive in the light of post-war European currency depreciations.[57] But a League

48. VINER, MEMORANDUM 16.

49. 61(5) STAT. A3, A23 (1947), T.I.A.S. No. 1700 (hereinafter cited as GATT, with appropriate article number).

50. See U.S. DEPT OF STATE PUB. No. 2983, ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 197 (1947).

51. See text at notes 41-50 *supra*.

52. An Act to amend the Customs Tariff, 1897, 4 EDW. 7, c. 11, § 19 (Canada 1904).

53. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 202 (1923), points out that as the act applied almost exclusively to imports from the United States, it was easy to administer and effective in its purpose. Today, Canadians are more concerned about American dumping, particularly of agricultural products, in *third* countries which Canada also supplies. Canadian antidumping duties can, of course, do nothing directly to prevent this practice.

54. See text at note 37 *supra*.

55. 42 STAT. 11 (1921), as amended, 19 U.S.C. §§ 160-73 (1952), as amended, 19 U.S.C. §§ 160, 161(a) (Supp. IV, 1957).

56. The Emergency Tariff Act, 1921, 42 STAT. 18, of which the Antidumping Act was title II, placed a complete embargo for a period of three months on certain chemicals, drugs and dyestuffs unless such articles or satisfactory substitutes were unavailable in the United States.

57. See remarks of Senators King, Hitchcock, and Smoot, 61 CONG. REC. 1021, 1028,

of Nations report in 1927 found antidumping legislation, both in the United States and elsewhere, "not enforced in actual practice."[58] In regard to the United States, this judgment, on the whole, was and remains accurate.[59] However, there have been indications that more vigorous enforcement may be forthcoming. And as the 1956 Senate report on foreign economic policy has pointed out, an indiscriminate application of antidumping duties could do much to negate this country's larger program of reciprocal trade liberalization.[60] This country's tariff policies, including both the reciprocal trade agreements and the Antidumping Act, are scheduled for congressional review in 1958.[61] Appreciation of the interconnection of these two aspects of our foreign economic policy will be an important factor in determining the direction of the future American tariff.

II. United States Countervailing Duties

A countervailing duty may be defined as a surtax, in addition to normal customs duties, imposed on imports whose exportation has been facilitated through a bounty or similar assistance in the exporting country. The additional duty is intended to neutralize the foreign subsidy, and thus prevent injury to the producers of comparable products in the importing country who operate without the benefit of such bounties.[62]

The evolution of such duties in the United States has already been outlined.[63] From the first countervailing duty of 1890, imposed on refined sugar receiving government export bounties, coverage was rapidly expanded to include all dutiable goods receiving an official or a private subsidy. The present provision, now to be examined, was enacted as section 303 of the Tariff Act of 1930.[64]

1029 (1921). However, the debate in the Senate would seem to indicate that truly predatory dumping in the United States was considered a virtual impossibility and that the act would therefore not have widespread application. See remarks of Senator McCumber, *id.* at 1021, 1024

58. Trendflenburg, *op. cit. supra* note 15, at 7.

59. The 1957 *Treasury Report*, annex B, indicates that between January 1, 1934, when records were first consistently maintained, and October 1, 1954, when the 1954 amendments to the act became effective, the Treasury Department entered seven findings of dumping, four of which concerned the same commodity, although from different countries, viz., "ribbon fly catchers." Following the effective date of the 1954 amendments, and through December 31, 1956, there was a single finding entered. This finding, however, was the center of great controversy. Its validity was unsuccessfully challenged before the Supreme Court. Horton v. Humphrey, 352 U.S. 921, *mem. affirming* 146 F. Supp. 819 (D.D.C. 1956).

60. S. Rep. No. 1312, 84th Cong., 2d Sess. 27 (1956). As Professor Viner was previously moved to tell a congressional committee: "Maybe it is getting into the hands now of men who do have ideas, and these ideas may be protectionist. If such is the case, what they can do with that anti-dumping law will make the escape clause look like small potatoes. They can, if they wish, raise the effective tariff barriers more than all the negotiations in Geneva will be able to achieve in the other direction." *Hearings*, *supra* note 20, at 607.

61. Jones, *Key Tariff Fight Put Off to 1958*, N.Y. Times, Sept. 1, 1957, § 3, p. 1, col. 1.

62. *Cf.* GATT, arts. VI(1), VI(3), VI(6)(a).

63. See notes 40-42 *supra* and text.

64. 46 Stat. 687 (1930), 19 U.S.C. § 1303 (1952).

Section 303 is broadly framed and has been liberally construed by its administrators. Generally, it imposes a countervailing duty on all dutiable merchandise receiving any export bounty or grant whatever, whether that source of assistance be public or private, collective or individual. The breadth of coverage is perhaps best illustrated by the variety of devices which the Customs Bureau (and the courts, in upholding the Bureau's findings) have construed as falling within the statute's words "any bounty or grant." Most controversial have been the decisions holding drawbacks,[65] excise tax refunds,[66] and exchange controls[67] to be "grants" assisting exportation. A leading economist has considered this enforcement "harsh" and often inconsistent with the economic justification for the existence of such duties.[68] It is certain that multiple exchange rates may as frequently tax the foreign exporter as subsidize him, and that, where the former is true, a countervailing duty is an unwarranted burden on trade.[69] At the very least, some official designation of those exchange controls which have been or may be interpreted to be subsidies should be made available to producers and importers.[70] For, as the recent *Boggs Report* indicated, in the "absence of any reports from the Treasury Department as to the basis on which its determinations of the existence of subsidization are made, it is difficult, if not impossible, to analyze the administration of section 303."[71]

When the Secretary of the Treasury finds that a particular import has received an export subsidy, he is directed in mandatory language to levy a countervailing duty on the merchandise equal to the net amount of the foreign bounty. Although the Secretary has discretion in determining whether or not a particular product has been subsidized, once he has found the subsidy he must levy the duty. His finding is then conclusive.[72] The statute requires no public hearings or notice of investigations regarding possible applications of countervailing duties, although Treasury Regulations do permit interested parties to present written representations to the

65. Downs v. United States, 187 U.S. 496 (1903).

66. G. S. Nicholas & Co. v. United States, 249 U.S. 34 (1919).

67. Robert E. Miller & Co. v. United States, 34 C.C.P.A. (Customs) 101 (1946); F. W. Woolworth Co. v. United States, 28 C.C.P.A. (Customs) 239, 115 F.2d 348 (1940).

68. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 173, 174 n.12 (1923).

69. BOGGS REPORT 95. In this connection it should also be noted that the proposed article XVI of GATT would exempt tax rebates on exports from characterization as "subsidies" for the purposes of countervailing duties legislation. U.S. DEP'T OF STATE, GENERAL AGREEMENT ON TARIFFS AND TRADE, PRESENT RULES AND PROPOSED REVISIONS 76 (1955).

70. BOGGS REPORT 95.

71. *Ibid.*

72. Downs v. United States, 113 Fed. 144 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903); Franklin Sugar Refining Co. v. United States, 178 Fed. 743 (C.C.E.D. Pa. 1910). The latter case upheld a finding and levy of duty signed by the Assistant Secretary of the Treasury. The court considered this insufficient to warrant upsetting the levy, although it did think the statute made the task of fact finding and duty assessment personal to the Secretary.

Commissioner of Customs once the latter has initiated an investigation under the act.[73] The regulations also permit any person, such as a competing domestic producer, to bring allegations of export bounties to the attention of the Commissioner.[74] Although this is an undoubted aid to enforcement, it also provides, by virtue of the act's vague standards, an opportunity for harassment and confusion of both the importer and the foreign exporter to the detriment of the stability that is the goal of a sound tariff policy.[75]

In considering possible applications of countervailing duties, the act neither requires nor permits the Secretary of the Treasury to take into account the lack of potential injury to a domestic industry from the imported goods,[76] nor may he consider the fact that the subsidy may have been granted in order to bring a high priced import down to, rather than below, the generally competitive level in the American market. Nor is there a "side door" through which the President may avoid the imposition of the duties for the sake of greater national interest, as is permitted under the "escape clause" mechanism of the Trade Agreements Extension Act of 1951.[77]

Countervailing duties are applicable even where the commodity is shipped from the subsidizing country to the United States via some third country. This provision would cover, for example, English jams and jellies made, in part, from the sugar dumped in England by subsidized continental sugar refiners. The fact that the bountied product has been extensively processed in a third country is irrelevant. Once the finding has been made and the duty has been assessed by the Collector of Customs, it must be paid before any review of the correctness of its assessment is available through appropriate proceedings in the customs courts.[78] The act does not prohibit

but not dumping

73. 19 C.F.R. § 16.24(d) (Supp. 1956). The similar situation with respect to Treasury findings of dumping has been criticized as "in effect star chamber practices contrary to American principles of justice." Minority Report of Representatives Reed and Simpson, appended to UNITED STATES COMMISSION ON FOREIGN ECONOMIC POLICY, REPORT TO THE PRESIDENT AND THE CONGRESS 8 (1954) (hereinafter cited as RANDALL REPORT). Although H.R. 6006, 85th Cong., 1st Sess. § 1 (1957), passed by the House on August 29, 1957, would require publication in the Federal Register of notice that a dumping investigation is being authorized, the bill still makes no provision for a mandatory hearing. Compare the hearing provisions under the "escape clause" of the Trade Agreements Extension Act, 1951, § 7(a), 65 STAT. 74, as amended, 19 U.S.C. § 1364(a) (Supp. IV, 1957).

74. 19 C.F.R. § 16.24(b) (Supp. 1957).

75. See RANDALL REPORT 292.

76. *Cf.* GATT, art. VI (6)(a), where a finding of injury is required. In 1953 the Treasury Department urged Congress to adopt an injury test for countervailing duties, but the recommendation was not adopted. Letter of Assistant Secretary Rose, in *Hearings Before the House Committee on Ways and Means on H.R. 5106, a Bill to Amend Certain Administrative Provisions of the Tariff Act of 1930 and Related Laws, and for Other Purposes*, 83d Cong., 1st Sess. 42 (1953).

77. 65 STAT. 74 (1951), as amended, 19 U.S.C. § 1364(c) (1952). See also recommendation 14 of S. REP. No. 1312, 84th Cong., 2d Sess. 31 (1956).

78. See United States v. Sherman & Sons Co., 237 U.S. 146, 152 (1915). As to the exclusive jurisdiction of the customs courts, *cf.* Morgantown Glassware Guild, Inc. v. Humphrey, 236 F.2d 670 (D.C. Cir.), *cert. denied*, 352 U.S. 896 (1956); Horton v. Humphrey, 146 F. Supp. 819 (D.D.C.), *aff'd*, 352 U.S. 92 (1956).

simultaneous imposition of countervailing and antidumping duties,[79] nor does it provide for automatic lapse or review of the levy. Of the twelve items presently subject to countervailing duties, some have been so listed for decades.[80]

The above observations point out some of the deficiencies apparent in the present countervailing duties statute. These duties have not been a particularly oppressive burden on United States trade because they have been seldom utilized in recent years.[81] Some sixty-one items have been subjected to such duties at one time or another, the most recent addition to the list being Cuban cordage, included in 1955. Twelve commodities are presently so taxed.[82] Nevertheless, the well considered judgment of the Randall Commission was that this legislation, together with the antidumping provisions, contributes to the feeling that United States trade policy is uncertain, if not Janus-faced, with respect to goods offered for sale at bargain prices.[83] It is true that other sections of our tariff laws, such as the "national security"

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79 *Cf.* GATT, art. VI (5). However, there is no indication that both have been applied to the same commodity in recent years. Although GATT does prohibit simultaneous application of the two duties to a single commodity, the inconsistency of present American legislation is unaffected. Because of the fact that the countervailing duties and antidumping statutes were enacted prior to October 30, 1947, the inconsistency is considered to be non-violative of GATT pursuant to a reservation to article XXVI adopted by the contracting parties in 1955. 2 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 48 (3d Supp., Geneva 1955). However, if new legislation in either field is adopted, presumably this reservation would be inapplicable. The argument may then of course be made that the revisions are mere "amendments" to existing legislation, and that the reservation would still permit continued inconsistency.

Considerable controversy existed at one time over the question whether countervailing duties were compatible with the unconditional most favored nation treatment which the United States had pledged by treaty to a number of countries on whose goods such duties were levied. The Wickersham report on the most-favored nation clause to the League of Nations, reprinted in 22 AM. J. INT'L LAW 134 (Spec. Supp. 1928), considered countervailing duties to be contrary to the principle of most-favored-nation treatment but justifiable due to the "overbearing necessity" of preventing dumping. *Id.* at 148. From the point of view of a third country, however, it would seem that *only* through imposition of countervailing duties on subsidized imports could it consider itself receiving equal treatment from the importer. See Note, *Dumping and "Most-Favoured-Nation" Treatment*, 75 SOL. J. 875, 876 (1931).

In any case, the United States Court of Customs and Patent Appeals has expressly held that countervailing duties do not violate the most favored nation clause of our reciprocal trade agreements. Balfour, Guthrie & Co. v. United States, 31 C.C.P.A. (Customs) 63, 136 F.2d 1019 (1943); Minerva Automobiles, Inc. v. United States, 25 C.C.P.A. (Customs) 324, 96 F.2d 836 (1938).

The implied permission of the use of countervailing duties by the contracting parties to GATT, despite the most-favored-nation clause in article I of that instrument, would seem to indicate general acceptance of the American theory of compatibility of countervailing duties with a most-favored nation pledge. Ratification of proposed article XVI, outlawing most export subsidies, and national action consonant with such a provision, would make the issue moot.

80. 19 C.F.R. § 16.24(f) (Supp. 1956).

81. See RANDALL REPORT 292.

82. 19 C.F.R. § 16.24(f) (Supp. 1956).

83. RANDALL REPORT 292. See also statements of Doctors Humphrey and Viner in *Hearings*, *supra* note 20, at 268, 606. This becomes painfully apparent when the United States itself heavily subsidizes the export of agricultural products at prices considerably below those maintained on the domestic market. See BOGGS REPORT 89-91.

clause in the Trade Agreements Extension Acts,[84] may present more serious threats to a consistent policy of trade liberalization. However, these are consciously not predicated on economic considerations. So long as the provisions for countervailing duties are meant to protect competition (rather than to protect producers) in the American market, they should include corrections along the lines indicated.

III. United States Antidumping Duties

An antidumping duty may be defined as a surtax, in addition to normal customs duties, imposed on imports whose price is less than some predetermined "fair value" for such goods. The additional duty is intended to restore the price of the goods to their fair value, and thus prevent injury to the importing country's producers of similar merchandise, who otherwise could not meet the abnormally low price.[85]

Artificial export price depression through government or private subsidy was the earliest form of international price discrimination. Defense against this technique has been left largely to the previously considered countervailing duties. But the later and more prevalent type of discrimination has been privately organized predatory dumping. Treating this as a manifestation of illegal unfair competition, and subjecting the participants to criminal penalties, was the first method attempted for handling this practice.[86] When this method proved ineffective, a more realistic administrative remedy, in the form of antidumping duties, was adopted.[87] With one major procedural

84 Trade Agreements Extension Acts of 1954 and 1955, 68 Stat. 360, 69 Stat. 166, 19 U.S.C. § 1352a (Supp. IV, 1957). These permit the President to adjust imports to whatever level he feels is consistent with the national security. The difficulties encountered in administering these vague standards are reviewed in Boggs Report 98 102.

85 The key phrase is "abnormally low price." Other aspects of competition from cheap foreign imports are covered by other parts of the tariff laws. For example, imports produced by convicts or slave labor, and thus without economic cost, are barred by Tariff Act of 1930, § 307, 46 Stat. 689, 19 U.S.C. § 1307 (1952). Imports produced in countries with costs of production lower than those prevailing in the United States are to be taxed so as to "equalize" the costs of production in the two countries. Tariff Act of 1930, § 336, 46 Stat. 701, 19 U.S.C. § 1336 (1952). The latter provision (which flies directly in the face of the economic justification for trade, precisely based on comparative advantages in costs of production) does not apply to articles imported from countries with which the United States has entered into a trade agreement. Trade Agreement Act of 1934, § 2(a), 48 Stat. 944, 19 U.S.C. § 1352 (1952). The United States has concluded such trade agreements with 41 countries. Boggs Report 33.

A more closely related aspect of attempted control over "abnormally low" priced imports is § 337 of the Tariff Act of 1930, 46 Stat. 703, 19 U.S.C. § 1337 (1952), which excludes imports brought into the country by "unfair methods of competition . . . the effect . . . of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. . . ." Although this may be interpreted to apply to goods being shipped to this country by a predatory dumper, it has generally been applied only to imports deceptively marked, goods infringing on American trade marks and patents, and misbranded products. Boggs Report 17.

86. See Antidumping Act of 1916, 39 Stat. 798, 15 U.S.C. § 72 (1952).

87. A provision for antidumping duties had been passed by the House as a part of the Underwood Tariff Act of 1913, but this section was stricken from the bill by the Senate

change, the Antidumping Act of 1921 as originally enacted is the law today.

Although the Antidumping Act is considerably longer and more detailed, and requires the consideration of a number of additional factors, its basic scheme is the same as the provision in the Tariff Act concerning countervailing duties. When the Secretary of the Treasury has reason to suspect that merchandise is being imported into this country at less than its "fair value," he is authorized to suspend appraising such goods for the payment of ordinary duties. If he finds the goods are in fact being sold here for less than their fair value, he issues a "finding of dumping." The amended act directs him then to advise the Tariff Commission of his finding. The Commission is to determine within three months whether or not an American industry "is being or is likely to be injured, or is prevented from being established, by reason of the importation of the merchandise in question."[88] Should the Commission so find, the Secretary is then to levy on such merchandise (and on similar goods unappraised or imported up to 120 days prior to the date the question of dumping was first presented to the Secretary) a special antidumping duty. This duty is, generally, the difference between the importer's purchase price and the "foreign market value" or, in the absence of data on the latter, the difference between the purchase price and a constructed "cost of production."

how can this be?

The aim of the act, as in the case of the countervailing duty provision, is to offset artificially low prices which American producers could not fairly be expected to meet. Its greatest differences from the countervailing duty provision are: (1) that antidumping duties may be applied to *all* imports, while countervailing duties are applicable only to goods otherwise dutiable; and (2) that the act includes an "injury test" which the countervailing duty statute does not. Both of these provisions are defensible from the point of view of the rationale of antidumping legislation, but the imprecise language in these and other parts of the act has aroused considerable criticism.[89]

Finance Committee. S. REP. No 80, 63d Cong., 1st Sess. 31 (1913). The present Antidumping Act began its congressional career in 1919 and was finally passed as title II of the Emergency Tariff Act of 1921, 42 STAT 11, as amended, 19 U.S.C. §§ 160-73 (1952), as amended, 19 U S C. §§ 160-61 (Supp. IV, 1957).

Tariffs are clearly the most suitable weapon for fighting dumping, since, however great the financial resources of the dumper may be, a duty of sufficient height will soon drain them. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 159 (1923). However, only prohibitive or ad hoc duties can prevent dumping, since ordinary tariffs, no matter what their height, may be surmounted by the determined dumper if they remain constant both before and during the attempted dumping. *Cf. id.* at 160-61.

88. 68 STAT. 1138 (1954), 19 U.S.C. § 160 (Supp. IV, 1957).

89. At the 1957 Hearings on the Antidumping Act, Assistant Secretary of the Treasury Kendall was in the very distinct minority when he stated his opinion that "a complete new law is not what is required but rather the comparatively simple and common sense changes which are recommended by [the Treasury Department]." *Hearings, supra* note 15, at 30. Soon after its original enactment, Professor Viner called it a "model of draftsmanship." VINER, *op. cit. supra* note 14, at 262. But its subsequent history has caused him to reverse his judgment. See his statement cited in note 59 *supra*.

A. *The Secretary of the Treasury's Investigation*

The procedures of the Antidumping Act are set into motion by an investigation by the Secretary of the Treasury into the question whether particular goods are being or are likely to be sold in the United States or elsewhere at less than their fair value.[90] The Secretary (or, in practice, the Commissioner of Customs) may initiate such an investigation *ex parte*, or after receiving information from a customs officer sufficient for him reasonably to suspect dumping is taking place. Private persons have no direct access to the Secretary but may present allegations of dumping to customs officials.[91] The statute vests virtually absolute discretion in the Secretary with respect to beginning or terminating a dumping investigation, a procedure which, while arbitrary, has consistently withstood constitutional challenges.[92]

The importance of this section lies in the fact that once a dumping investigation has been started, appraisement (i.e., the process of clearing through customs) of all merchandise of the type being investigated is suspended.[93] In effect, imports of the commodity in question are halted (or are admitted only on posting of a bond sufficient to cover antidumping duties) until the suspicion is affirmed or rejected. The result has been that considerable quantities of merchandise accumulate, their status in doubt, for the extended period of such an investigation.[94]

The claim has been made that importers regard the restrictions imposed during such investigations as worse than the penalties to which they may become subjected in cases where dumping is finally established.[95] Indeed, it is said that the trade-restricting effect of the Antidumping Act should not be measured by the relatively few findings of actual dumping, but rather by the much larger number of investigations that have been under-

90. 68 STAT. 1138 (1954), 19 U.S.C. § 160(a) (Supp. IV, 1957). The words "or elsewhere" are included so that the imposition of antidumping duties cannot be avoided by dumping merchandise in a third country and then transshipping it to the United States.

91. 19 C.F.R. § 14.6(b) (Supp. 1956).

92. Kreutz v. Durning, 69 F.2d 802 (2d Cir. 1934); C. J. Tower & Sons v. United States, 21 C.C.P.A. (Customs) 417, 71 F.2d 438 (1934). These cases rejected the argument that the grant of discretion to the Secretary was an unconstitutional delegation of legislative authority or that it violated due process of law. The *Tower* case also rebuffed the argument that the initiation of a dumping investigation is a non-ministerial act, which the Secretary may not delegate to a subordinate, such as the Assistant Secretary (the case before the court) or, presumably, the Commissioner of Customs (as provided by present regulations).

93. 68 STAT. 1139 (1954), 19 U.S.C. § 160(b) (Supp. IV, 1957); 19 C.F.R. § 14.9(a) (Supp. 1956).

94. At the time of the *Randall Report*, imports of commodities from Western Europe, with an annual value of $25 millions, were suspended while dumping charges were under investigation. RANDALL REPORT 292. At the hearings on the act in 1957, the claim was made that with over thirty investigations then in progress, appraisements were being withheld on imports having a value in excess of $100,000,000. Statement of William Barnhard, Secretary, National Anti-Dumping Committee, in *Hearings*, *supra* note 15, at 347.

95. *Hearings*, *supra* note 20, at 161.

taken pursuant to the act.[96] As the Tariff Commission has reported that the average time elapsed between the first request for an investigation and the final determination on the imposition or non-imposition of antidumping duties has, since the 1954 amendments, been eight to nine months,[97] the validity of this argument becomes more apparent. In 1954 the Senate Finance Committee proposed a ninety day limitation on the Secretary's investigation. But Treasury objections that such a limit would result in further hindrances to, rather than in enhanced efficiency of, administration of the act were apparently persuasive, for the suggestion was not adopted.[98] However, as protracted delays are harmful both to domestic industries and to importers, with both prevented from accurately determining their true market positions until a decision is reached, all sides can agree that some time limit would be appropriate.[99]

90 days

A further well-publicized flaw in this portion of the act is its lack of provision for public notice that a dumping investigation has been authorized or that one has been concluded. The Antidumping Act amendments passed by the House in 1957 (H.R. 6006) would remedy this situation by requiring announcement in the *Federal Register* both that an investigation is contemplated and that a decision has been reached, including the reasons therefor. This should go a long way toward correcting a much criticized omission.[100] However, no provision for hearings was included in H.R. 6006. Presumably, interested parties, now to be officially notified of the pendency of an investigation, must still avail themselves of the Treasury Regulations[101]

96. *Ibid.* As Assistant Secretary of the Treasury Kendall himself succinctly suggested, "Withholding of appraisement necessarily creates uncertainty. It is a major deterrent, often more feared than the imposition of the duty." *Hearings*, *supra* note 15, at 40.

Between January 1, 1954, and December 31, 1956, 198 investigations were undertaken. Eight final impositions of antidumping duties were ordered within the same period. 1957 TREASURY REPORT 15 16.

97. UNITED STATES TARIFF COMMISSION, INJURY DETERMINATIONS UNDER THE ANTI-DUMPING ACT (1955). The statute limits to three months the time within which the Tariff Commission must determine the question of injury to a domestic industry. 68 STAT. 1138 (1954), 19 U.S.C. § 160(a) (Supp. IV, 1957).

An extreme situation is presented in the case of United States v. Henry Peabody & Co., 40 C.C.P.A. (Customs) 59 (1952), concerning matches imported from Finland in 1929. Not until 1941 was dumping found and appraisal authorized, and not until the date of the decision, twenty-three years after the original importation, was the importer's liability finally determined.

98. S. REP. No. 2326, 83d Cong., 2d Sess. 3, 4 (1954).

99. Compare the nine month limit in the escape clause and the four month limit in the peril point clause of the amended Reciprocal Trade Agreements Extension Act of 1951, §§ 3(a), 7(a), 65 STAT. 72, 74, as amended, 19 U.S.C. §§ 1360(a), 1364(a) (Supp. IV, 1957).

100. All sides of the tariff question vigorously supported such an amendment at the 1957 hearings. See, *e.g.*, statements of Richard H. Anthony, Executive Secretary of the American Tariff League; Harry S. Radcliffe, Executive Vice-President of the National Council of American Importers, and John S. Rode of the Association of the Customs Bar, in *Hearings*, *supra* note 15, at 121, 150, 223. Importers favored the notice provision, as it would enable them to plan their business without fearing the imposition of extended retroactive antidumping duties. Domestic producers favored the disclosure as offering publicity to potential sources of injury.

101. 19 C.F.R. § 14.6(c) (Supp. 1956).

that permit them to make pertinent information available to the Commissioner of Customs. There would seem to be no good reason for not providing, at least to the interested parties, the opportunity to be heard. The Tariff Commission's regulations,[102] authorizing public hearings on the issue of "injury" under the act, if and when the Commission considers them necessary, are a step in the right direction. But a provision in the act itself, requiring both the Treasury Department and the Tariff Commission to hold hearings on the issues within their respective jurisdictions, would have virtually universal support.[103]

B. *The Meaning of "Merchandise"*

The Antidumping Act speaks only of "foreign merchandise" being sold in the United States. The words are undefined, and thus two problems are immediately presented: (1) how similar must two specific imports be to be classified as "similar merchandise," subject to the duty and available for value comparison purposes; and (2) what must be the relation of this merchandise to the potentially injured domestic industry?

The problem of what is to be covered by "such" or "similar" merchandise is, of course, inherent in most economic regulatory legislation. It is a problem common to the Tariff Act[104] and it has confounded the administration of that relative of antidumping—the Robinson-Patman Act.[105] H.R. 6006 attempts to sharpen the definitions of "merchandise" and to bring them into conformity with those of the Customs Simplification Act of 1956. The House report on the bill reiterated a classic illustration of the problem: if a foreign producer sells long handled shovels to the United States, and sells only short handled shovels in his home market, may the short handled shovels be considered "similar merchandise" for the purpose of comparing the fairness of the former's export price?[106] Under the definitions of the Customs Simplification Act, the answer would be "yes," and in the context of antidumping, it should be. But on this point the Court of Customs and Patent Appeals has held that merchandise must be defined by the Secretary with sufficient precision so that the customs appraisers need exercise no discretion in determining whether or not a particular item is subject to the antidumping duty.[107] Classifying long and short handled

102. 19 C.F.R. § 208.4 (Supp. 1956).

103. See note 100 *supra*.

104. See Tariff Act of 1930, § 402(f)(4), 46 STAT. 709, as amended by the Customs Simplification Act of 1956, 70 STAT. 945, 19 U.S.C. § 1402(f)(4) (Supp. IV, 1957).

105. See Rowe, *supra* note 5.

106. H.R. REP. No. 1261, 85th Cong., 1st Sess. 7 (1957).

107. United States v. Tower & Sons, 14 C.C.P.A. (Customs) 421 (1927). Here "rugs from Canada" was held too vague. The appraiser was left to determine whether this phrase meant all rugs, and if carpets were to be included. This was a delegation of the discretionary power vested in the Secretary personally, and the statute authorized no redelegation.

shovels as "shovels" would probably pass this test, but on the other hand use of the term "digging equipment" would most likely be inadequate.

The second issue raised here is whether the Antidumping Act authorizes imposition of an antidumping duty on merchandise *X* because of its injurious effects on an industry producing commodity *Y*. For example, who has standing to protest the alleged dumping of residual oil in this country? A spokesman for the United Mine Workers suggested to a congressional committee that such dumping was injuring the coal industry.[108] A "plain meaning" approach to the statute would seem to allow the imposition of an extra duty on the oil in such a case if the union's charges could be substantiated. On the other hand, injury to importers, due to imposition of antidumping duties, is not a valid "injury" consideration under the act. Nor may an American exporter consider himself injured, within the meaning of the act, by the dumping of foreign merchandise in third countries, when similar merchandise is shipped for sale at its "fair value" to this country. Dumping in third countries becomes cognizable under the act only when the identical merchandise once dumped abroad is then shipped for resale to the United States.[109]

C. *The Fairness of "Fair Value"*

If and when the Secretary of the Treasury finds that merchandise is being imported into the United States for sale at less than its "fair value," the Antidumping Act directs him to issue a finding of dumping.[110] It is thus apparent from the face of the statute that what the Secretary considers to be the fair value of merchandise may virtually determine the extent to which the entire act is enforced. But although the bulk of the Antidumping Act is devoted to detailed definitions of various operative terms, the words "fair value" are left undefined. They are, in fact, used but once in the entire act—in this single crucial section.

Divergent interpretations of the term have been offered:

(1) The official position of the Treasury Department is that the determination of "dumping" is nothing more than "an exercise in arithmetic."[111] Treasury Regulations adopted in 1955 have therefore created a mathematical definition of "fair value" to which the price of imports is compared:[112] if their price is lower than this "fair value," then a finding of dumping issues. Essentially the regulations base the fair value of merchandise on the price at which it is sold for home consumption in the country of export. However,

108. *Hearings, supra* note 20, at 286.
109. See note 90 *supra*.
110. 68 STAT. 1138 (1954), 19 U.S.C. § 160(a) (Supp. IV, 1957).
111. See 1957 TREASURY REPORT 22, 23.
112. 19 C.F.R. 14.7 (Supp. 1956).

if sales volume at home is too small to form an adequate basis for comparison with sales in the United States market, the benchmark is to be all sales except those for export to the United States—in other words, home consumption plus third country sales. If these figures are unavailable, then reference is made to cost of production.

Defining "fair value" in this way was a novel departure in the administration of the act, and has created enforcement difficulties. The principal problem that arose was what the Treasury Department called the "anomalous situation" of its finding sales to be at a dumping price (under the Treasury definition), but at the same time lacking statutory authority to assess antidumping duties.[113] This self-created anomaly arose because antidumping duties were, and still are, to be assessed by a method spelled out by the statute itself, *viz.*, by measuring the difference between the import price of the merchandise and its "foreign market value."[114] The latter term is defined by the statute as the price at which goods are "freely offered for sale."[115] When home sales are encumbered by any restrictions (*e.g.*, on resale or use of replacement parts), however insignificant, no "foreign market value" is ascertainable there for antidumping purposes.[116] Instead, a comparison must be made with markets in which the goods are freely offered for sale—usually in third countries in which the offending producer may be dumping as well as in the United States. In such a case there would be no United States sale at a price less than "foreign market value," although that price *was* less than the Treasury Department's "fair value" (the latter being unaffected by restrictions in the terms of sale on the home market).

The Treasury's "anomalous situation" is sought to be corrected by H.R. 6006, which redefines the term "foreign market value" in the act in terms consistent with the Treasury Regulations' definition of "fair value." The virtue of consistency in this is apparent. And in so far as it permits consideration of some restricted sales in finding "foreign market value," it also brings the act closer to commercial reality. There are few foreign markets today in which goods may truly be considered "freely offered" for sale. But whether these Treasury sponsored definitions are consistent either with the legislative history or the purpose of the Antidumping Act is another matter.[117] Amending the definition of "foreign market value" to facilitate uniform administration of the act may have eclouded the true issues in-

113. 1957 TREASURY REPORT 18.
114. Section 302(a), 68 STAT. 1139 (1954), 19 U.S.C. § 161(a) (Supp. IV, 1957).
115. Section 205, 42 STAT. 13 (1921), as amended, 19 U.S.C. § 164 (1952).
116. See J. H. Cottman & Co. v. United States, 20 C.C.P.A. (Customs) 344, 354-57 (1932).
117. See text at notes 127-31 *infra*.

volved—particularly the very desirability of the "fair value" standard created by the Treasury Regulations.[118]

(2) The older Treasury practice, prior to the issuance of the 1955 Regulations,[119] seems to have been a direct application of the statute's definitions of "foreign market value" or "cost of production" to the term "fair value." The Court of Customs and Patent Appeals went so far as to suggest that such application was the most reasonable means for determining fair value,[120] and that a sale, mathematically less than at the figure reached by using the statute's method for calculating foreign market value or cost of production, was automatically a sale at less than fair value.[121] This method of determining fair value was held sufficiently precise to answer constitutional objections to the *ex parte* and *in camera* methods by which the Secretary determined dumping.[122]

However, because this method is patently impractical under existing law, it has been abandoned. While the present statutory definition of foreign market value is often a meaningless standard for determining fair value,[123] the alternative of determining foreign costs of production in every case of suspected dumping would be too onerous a task for efficient administration of the act.[124] Of course, if the new definition of foreign market value in H.R. 6006 is written into law, the Secretary of the Treasury will once again, in effect, be determining fair value on the basis of the statutory foreign market value.

(3) Persuasive arguments, however, have been presented for the proposition that the entire approach of the Treasury Department in seeking a mathematical formula for the determination of "fair value" (and hence "dumping") is incorrect from both policy and legislative history viewpoints.[125]

The aim of any sound antidumping legislation must be to curb pred-

118. See remarks of Representative Eberharter, 103 CONG. REC. 14920-21 (daily ed. August 29, 1957).

119. In 1954 the Treasury had first attempted defining "fair value" as the price at which "a significant majority" of the goods in question was being sold, regardless of how or where they were sold. See statement of Assistant Secretary of the Treasury Rose, *Hearings Before the House Committee on Ways and Means on the Customs Simplification Act*, 83d Cong., 2d Sess. 44 (1954). Objections to this approach from "all sides" resulted in revision to, and promulgation of, the present form. See 1957 TREASURY REPORT 23.

120. Kleburg v. United States, 21 C.C.P.A. (Customs) 110, 114, 71 F.2d 332, 335 (1933).

121. United States v. European Trading Co., 27 C.C.P.A. (Customs) 289 (1940). The court pointed out that the two tests could not be combined so as to find an artificially high foreign value, and held that antidumping duties could be imposed only where domestic (United States) sales were below one or the other standard.

122. Kreutz v. Durning, 69 F.2d 802, 804 (2d Cir. 1934).

123. See text at note 115 *supra*.

124. The use of a constructed foreign cost of production is rarely utilized even in the area expressly contemplated by the statute. See 1957 TREASURY REPORT 7.

125. See, generally, statement of William Barnhard of the National Anti-Dumping Committee, *Hearings*, *supra* note 15, at 340-45.

atory price discrimination and thereby protect free competition, rather than to maintain high prices and prevent competition.[126] But it is difficult to see how a mere exercise in arithmetic can suffice to determine whether dumping, in its predatory sense, exists. Before the Secretary of the Treasury issues a "finding of dumping" he should be convinced that he is condemning a trade evil rather than a bargain. It would seem strange if Congress had required a cabinet level officer to do nothing but check the arithmetic of his subordinates before taking so important a step as issuing the finding.[127] It would seem equally odd for Congress to use the term "fair value" to describe the Secretary's role, if it meant him to substitute therefor the very words ("foreign market value") used in every other part of the statute and extensively defined by the act itself.

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The act's legislative history shows that although the House had at first adopted a mathematical test, the Senate insisted upon some high level consideration of such a step, and thus had the clause providing for intervention of the Secretary himself added as an amendment.[128] Further, the debates in Congress and the reports accompanying the act stress the point that the act was designed to combat "unfair competition,"[129] making safe the assumption that this was the context in which the term "fair value" was used.[130] The present arithmetical exercise would seem directly to contradict the intention of the act's draftsmen, and the very policy the Secretary claims to follow.[131] Consequently, any prospective revision of the

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126. As previously indicated, and as recognized by the Treasury Department itself, price discrimination both in domestic and foreign commerce is a common experience and may, in fact, have beneficial results. See 1957 TREASURY REPORT 20.

127. *Compare* the majority opinion in United States v. Central Vermont Ry., 17 C.C.P.A. (Customs) 166, 172 (1929), stating that the Secretary could do no more than the appraisers in mechanically applying the standards of "foreign market value" to the price facts of the import before him, *with* the dissenting opinion, *id.* at 179, which emphasized the contrary legislative history and a contrary opinion of the Attorney General.

128. H.R. REP. No. 79, 67th Cong., 1st Sess. 11 (1921).

129. See Remarks of Representative Fordney and Senator McCumber, respective floor managers of the bill, 61 CONG. REC. 262, 1022 (1921); H.R. REP. No. 1, 67th Cong., 1st Sess. 23 (1921).

130. The Secretary of the Treasury has specifically rejected this interpretation of the words "fair value." His report states that the words mean "fair market value," *i.e.*, what a willing buyer will pay a willing seller, rather than "equitable value." 1957 TREASURY REPORT 19. While the Secretary may be partially right, he fails to indicate of which market he is speaking. If he means the market in the United States, and that "fair value" means what a willing buyer will pay a willing seller in the country, then obviously fewer findings of dumping will be issued than presently. Adoption of such a definition would be tantamount to permitting the importer to raise the time honored Robinson-Patman Act defense, viz., "meeting competition." This would probably be a desirable development.

But it seems clear that the United States is not the market the Secretary had in mind, and that he did not intend the interpretation offered above. The Treasury Regulations point specifically to prices of sales for "home consumption" in the exporter's country. But these may, of course, also be "unfair" because over-priced. When reduced to, and not below, the competitive level of the American market, they are "dumping" under the Treasury Regulations, although manifestly not "unfair" to American competition. Their importation should not automatically be branded as "dumping."

131. The Secretary may, of course, claim that the act vests absolute discretion with

antidumping laws should include a statement of policy and an indication of just what it is the Secretary is expected to do.

D. *The Requisite Degree of "Injury"*

Once the Secretary has issued his finding that merchandise is being dumped, he is directed to transmit this information to the Tariff Commission so that the latter may determine whether "an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States."[132] Until 1954 such injury investigations had been made by the Secretary of the Treasury. But Congress, acting on a recommendation of the Randall Commission,[133] shifted this task to the Tariff Commission. As the Tariff Commission is regularly engaged in similar inquiries under the peril point[134] and escape clause[135] provisions of the Trade Agreements Acts and the unfair practices section of the Tariff Act,[136] it was felt that this change would enhance the efficient administration of the Antidumping Act by placing the injury determination in the hands of experts on the subject.[137]

The injury test is quite naturally one of the most controversial sections of the Antidumping Act. While it reiterates the purpose of the act (that dumping be prevented when injurious to American producers), it is a very real limitation on the act's applicability to certain merchandise.[138]

It has been urged that as dumping is an unfair trade practice, it ought to be made illegal per se, thereby eliminating the need for any injury test.[139] Bills designed to eliminate the required consideration of injury were introduced in the 1957 session of Congress but were not reported out of committee.[140] A similar bill had the approval of the Ways and Means Committee

him in determining "fair value," and that in the absence of statutory guidance, he may adopt any reasonable standard for determining fair value, arithmetical or otherwise.

132. 68 STAT. 1138 (1954), 19 U.S.C. § 160(a) (Supp. IV, 1957).

133. RANDALL REPORT 48

134. 65 STAT. 72 (1951), 19 U.S.C. § 1360(a) (1952).

135. 65 STAT. 73 (1951), as amended, 19 U.S.C. § 1364(a) (Supp. IV, 1957).

136. 46 STAT. 703, 704 (1930), 19 U.S.C. § 1337(b)-(d) (1952).

137. See, *e.g.*, statement of Assistant Secretary of the Treasury Rose, in *Hearings*, *supra* note 119, at 14; 1957 TREASURY REPORT 12.

138. Only a single import has been found threatening injury to a domestic industry by the Tariff Commission since the latter has begun making these inquiries: "Cast Iron Soil Pipe from the United Kingdom," T.D. 53934, 90 TREAS. DEC. 354 (1955). The *Code of Federal Regulations*, 19 C.F.R. § 14.13(b) (Supp. 1956), lists one other finding of dumping currently outstanding: "Hardboard from Sweden," T.D. 53567, 89 TREAS. DEC. 197 (1954). The injury determination for the latter finding was conducted by the Treasury Department prior to the effective date of the 1954 amendments to the Antidumping Act.

139. See, *e.g.*, statements of Richard Anthony, Executive Secretary, American Tariff League, and Robert N. Hawes, Counsel for Hardwood Plywood Manufacturers, in *Hearings*, *supra* note 15, at 13[illegible], 15[illegible]; remarks of Representative Bailey, 103 CONG. REC. 5925 (daily ed. May 8, 1957).

140. See the Forand Bill, H.R. 5120, and the Bailey Bill, H.R. 5102, 85th Cong., 1st Sess. (1957).

in 1953,[141] but it failed in the House. Those favoring this latter bill analogized dumping to the unfair competitive practices prohibited by the Federal Trade Commission Act and the price-fixing doctrine evolved by the Supreme Court. The report accompanying the bill also suggested that the injury test was both too time consuming and too cumbersome for the purposes of the Antidumping Act.[142]

Nevertheless, in view of the economic theory behind antidumping, it seems clear that some injury test is not only desirable but mandatory. Without proof of injury to at least one existing or potential domestic concern there is no reason for depriving American consumers of merchandise at low prices.[143] The real question is whether the word "injury" requires some statutory qualification, such as "material," "substantial," or "serious,"[144] or whether the act should include more precise standards by which injury would be determined.

The Secretary of the Treasury's argument against enumeration of factors to be considered by the Tariff Commission in determining injury was simple: "Definitions are limitations."[145] But this is precisely why a definition or an exposition of matters to be weighed ought to be included in the act. The Tariff Commission found "injury" to exist in one case. On this decision the Joint Committee on the Economic Report commented:

> A recent decision on cast-iron soil pipe . . . has followed a line of reasoning which if applied universally could negate much of our reciprocal program of trade liberalization. In this remarkable case, the challenged imports constituted no more than four-tenths of one percent of domestic production of cast-iron soil pipe, and the domestic industry during the period of this importation had expanded its production, sales, capacity and prices. The Tariff Commission reached its conclusion regarding injury by deciding that the approximately 8 percent of national production located in California constituted a separate industry. But only one California producer who was represented at the hearings had shown losses during the period of imports, and these losses apparently were not the first he had experienced.[146]

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141. Simpson Bill, H.R. 5894, 83d Cong., 1st Sess. (1953).

142. H.R. REP. No. 777, 83d Cong., 1st Sess. 6 (1953).

143. See 1957 TREASURY REPORT 19, where it is suggested that even if "fair value" were given a layman's definition, an injury test should nevertheless be included in the act, although it would naturally be less vital. *Cf.* BOGGS REPORT 96.

144. See statement of Professor Viner in *Hearings*, *supra* note 20, at 606. An attempt to include a "material injury" standard was reportedly made, but rejected by Congress, in 1953. Statement of Paul Kaplowitz, General Counsel, United States Tariff Commission, in *Hearings*, *supra* note 119, at 38; *cf.* GATT, art. VI, para. 6, which uses the words "material injury." A State Department memorandum has pointed out that, although the variation in GATT language was explicitly brought to the attention of Congress, that body did nothing about it. This inaction, the memorandum suggests, may perhaps be interpreted as congressional acquiescence in the "material injury" test. Memorandum from the Office of the Legal Advisor, in *Hearings Before the House Committee on Ways and Means on the Organization for Trade Cooperation*, 84th Cong., 2d Sess. 79 (1956).

145. 1957 TREASURY REPORT 22.

146. S. REP. No. 1312, 84th Cong., 2d Sess. 27 (1956).

In the very first case which the Commission considered after passage of the 1954 amendments, a finding of injury was avoided only by virtue of a tie vote of the Commissioners.[147] That case concerned potash imported from East Germany. Potash imported from western European countries had been sold in this country at the same Treasury certified dumping price, but these imports escaped the imposition of antidumping duties by the unanimous vote of the Commission.[148] It seems clear that there were some Commissioners who felt imports from Communist countries were ipso facto injurious.[149] It is equally clear that at present there is no one who may gainsay the Commission's politico-economic theories, whether or not these theories coincide with the ostensible purposes of this legislation. As the Commission's determinations are apparently unreviewable,[150] it appears vital that some statutory "limitations" on the Commission's discretion be written into the act.

Congress has included just such a set of standards in the escape clause procedure.[151] That provision requires the Commission to take into consideration a downward trend in production, employment, prices, profits, or wages, or a decline in sales, an increase in imports, or a decline in the proportion of the domestic market supplied by domestic producers. One may seriously question whether the Commission could have justified its *Soil Pipe* decision[152] under similar standards. It is true that the escape clause procedure probably contemplates a more serious type of injury than that required by the Antidumping Act, since a finding under the former may then result in the modification of an international agreement to which the United States is a party. However, the difference might be clearly indicated by congressional statement, or implied from the omission of the word "serious" before injury (which word does appear in the escape clause). Particularly in view of past experience, this difference would not seem to justify leaving the determination of injury entirely to the Commission's whim.[153]

147. UNITED STATES TARIFF COMMISSION, INJURY DETERMINATIONS UNDER THE ANTI-DUMPING ACT 2 (1955).

148. *Id.* at 3.

149. *But cf.* BOGGS REPORT 17, citing a 1933 Tariff Commission ruling "that the fact that certain imported goods produced in a Communist country might cause substantial injury to American industry did not, ipso facto, result in unfair competition in violation of section 337" of the Tariff Act of 1930.

150. See text at note 179 *infra*.

151. Trade Agreements Extension Act of 1951, § 7(b), 65 STAT. 74 (1951), as amended, 19 U.S.C. § 1364(b) (Supp. IV, 1957).

Section 337 of the Tariff Act, prohibiting methods of unfair competition in the import trade, permits findings only when these methods "substantially injure" an industry "efficiently and economically operated." 46 STAT. 703 (1930), 19 U.S.C. § 1337(a) (1952). Although the result of a finding is more drastic (total exclusion of the import), thus perhaps justifying more rigorous standards, a similar test would not be inappropriate in the Antidumping Act.

152. See note 138 *supra*.

153. H.R. 6006 would at least require the Commission to make public the reasons for

E. *The Scope of the Word "Industry"*

Closely related to the problem of indeterminate "injury" is the question of undefined "industry." Since giant corporations today produce an endless variety of related and unrelated products, is the "industry" here to be considered one of entire corporations, or only those parts of their operations producing goods in competition with those dumped? Or does "industry" consist of the totality of all domestic producers of competitive products, or only those within a specified geographic or economic proximity to the goods dumped? The *Soil Pipe* case, discussed above,[154] points up another difficulty, namely, is "an industry" injured when only certain producers of the same commodity within the same geographic community are adversely affected by the imports dumped? The same reasons for suggesting a more precise definition of the term "injury" would apply to the word "industry." The escape clause realistically considers an "industry" to mean portions or subdivisions of producing organizations manufacturing products, in commercial quantities, in competition with the imports in question.[155] And the Senate Finance Committee at one time suggested that injury in a specific geographic area may in some cases be sufficient for a finding of injury to "an industry" in the United States under the Antidumping Act.[156] Some such guide seems reasonable, although use of a standard gauged to a percentage of domestic producers or domestic production may be preferable. Mathematical precision cannot be achieved, but the *Soil Pipe* determination presents a strong argument for adopting at least some limitation on the Commission's absolute discretion.

F. *Antidumping Assessment*

Upon a finding of injury by the Tariff Commission, the Secretary of the Treasury is directed to make public the Commission's and his own findings[157] and then levy an antidumping duty on the imported merchandise.[158] Once the fair value and injury tests have been passed, discretion ceases.[159] No extenuating or national security considerations (*e.g.*, stockpiling of strategic materials) may be interposed.[160]

its findings, be they affirmative or negative. Heretofore purely formal statements have been issued, indicating only the results of the Commission's investigations. But as the Commission is not required to follow its own precedents, this is not an adequate substitute for statutory standards. Even with a set of standards, escape clause procedure has not been free of uncertainty—largely because there is no indication of the relative weight the Commission is to give the various factors it must consider. BOGGS REPORT 72.

154. See note 138 *supra*.

155. Trade Agreements Extension Act of 1951, § 7(e), 69 STAT. 166 (1955), as amended, 19 U.S.C. § 1364(e) (Supp. IV, 1957).

156. S. REP. No. 2326, 83d Cong., 2d Sess. 3 (1954).

157. 68 STAT. 1138 (1954), 19 U.S.C. § 160(a) (Supp. IV, 1957).

158. 42 STAT. 11 (1921), as amended, 19 U.S.C. § 161(a) (Supp. IV, 1957).

159. See United States v. Central Vermont Ry., 17 C.C.P.A. (Customs) 166, 172 (1929). See also statement of Assistant Secretary of the Treasury Rose, *Hearings*, *supra* note 119, at 40.

160. Compare the well-used provision in the escape clause authorizing presidential

Antidumping duties are then assessed on all imports of the type specified in the Secretary's finding, "entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary. . . ."[161] In effect, this applies the duty to all imports of the type found dumped, retroactively to a date four months before the Secretary *began* his investigation. While this date may, of course, be years before the duty is declared applicable, such retroactive application has been upheld against constitutional objections.[162] In one opinion, Judge Learned Hand suggested that the possibility of retroactive application was apparent from the face of the statute and that importers, therefore, brought goods into the country at their own risk.[163] However, a recent unanimous opinion of a three-judge district court in the District of Columbia noted that "this seems rather unrealistic in the light of the fact that importers must usually fix prices and sell their goods as promptly as they can."[164] The latter court recognized that hardship to the importer was "apparent" but held that the customs courts have exclusive jurisdiction to pass on the constitutionality of the provision and so ordered dismissal of the importer's complaint.

Prior to 1954, antidumping duties were assessed against all goods of the type found dumped that had not been appraised by the Customs Bureau on the date the Secretary of the Treasury began his investigation into alleged dumping. This practice permitted retroactive assessment to an indefinite date, and duties were often imposed on goods imported many months or even years before the declared imposition, although their appraisal had been withheld for any number of reasons entirely unconnected with dumping.[165] The obvious injustice of this provision prompted the

review, or even veto, of the Tariff Commission's recommendation. Trade Agreements Extension Act of 1951, § 7(c), 65 STAT. 74 (1951), 19 U.S.C. § 1364(c) (1952).

161. 68 STAT. 1139 (1954), 19 U.S.C. § 161(a) (Supp. IV, 1957), amending Antidumping Act of 1921, § 202(a), 42 STAT. 11.

162. Kreutz v. Durning, 69 F.2d 802 (2d Cir. 1934); Kleberg & Co. v. United States, 21 C.C.P.A. (Customs) 110, 71 F.2d 332 (1933); see Horton v. Humphrey, 146 F. Supp. 819, 821 (D.D.C.), aff'd per curiam, 352 U.S. 41 (1956).

163. Kreutz v. Durning, 69 F.2d 802, 803 (2d Cir. 1934).

164. Horton v. Humphrey, 146 F. Supp. 819, 820 n.2 (D.D.C. 1956). The provision of H.R. 6006, 85th Cong., 1st Sess. § 1 (1957), requiring the Secretary to publish notice of impending dumping investigations would, at least, put importers on notice that antidumping duties may be payable on goods imported up to, but not more than, 120 days prior thereto.

165. Indeed, the most common reason was mere delay in the work of appraisement for collection of ordinary duties. Prior to the adoption of simplified customs valuation procedures in 1956, the Bell Report found that on December 30, 1952, for example, there were some 723,077 unliquidated entries at customs collectors' offices—an amount equal to an entire year's imports. PUBLIC ADVISORY BOARD FOR MUTUAL SECURITY, A TRADE AND TARIFF POLICY IN THE NATIONAL INTEREST 47 (1953). The new procedures will undoubtedly speed appraisement, but many goods may still be fortuitously unappraised on the date of an antidumping imposition, and become subject to the special duty because of mere chance.

Treasury Department to suggest to Congress that it place a sixty day limit on the retroactive applicability of the duties. The Senate Finance Committee wrote into the act the present 120 day period.[166] But as was suggested at the 1957 hearings on H.R. 6006, "there is nothing sacrosanct about the period of 120 days."[167] The danger of retroactive application of antidumping duties would seem to be a greater threat to orderly trade than is the threat of spot dumping that may exist if retroactivity were entirely eliminated or limited to, say, sixty days.

The bulk of the remaining sections of the Antidumping Act are concerned with definitions of the operative terms by which the customs appraisers determine the exact dollar amount of the antidumping duty payable. These are technical details, by and large adequate to the task. However, two problems do arise here.

First, the antidumping duty to be assessed is generally the difference between the foreign exporter's sale price (or the United States importer's purchase price) and the product's "foreign market value," as that term is defined in the act.[168] As has been previously pointed out,[169] the present act requires that goods be "freely offered for sale" if their price in the exporter's home market is to constitute "foreign market value." H.R. 6006 would remedy this unrealistic standard by substituting for the present definition the Treasury Department's "fair value" measure. Essentially, this change would permit the Secretary to use the price at which the commodity is offered for sale in the exporter's home country in determining foreign market value, despite restrictions on its sale. In so doing, however, he would have to adjust the value to take into account the price-depressing effect of the restrictions. By leaving the value to be assigned to any given restrictions up to the absolute discretion of the Secretary or the Customs appraisers, this provision is one further invitation to the uncertainty with which the act is already sufficiently plagued.

A second problem arises from the fact that when foreign market value cannot be adequately determined (*e.g.*, where the foreign producer has no home market for his wares), the antidumping duty is measured by the difference between the importer's purchase price and the foreign producer's "cost of production." Although economists have suggested that this may be the most accurate method of determining whether or not a particular producer is engaging in predatory dumping,[170] the difficulties in gathering

166. S. REP. No. 2326, 83d Cong., 2d Sess. 4 (1954).
167. Statement of John D. Rode, on behalf of the Association of the Customs Bar, in *Hearings*, *supra* note 15, at 225.
168. 42 STAT. 13 (1921), 19 U.S.C. § 164 (1952).
169. See text at notes 114-17 *supra*.
170. See, *e.g.*, VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 11 (1923).

adequate statistics for this purpose render the method impracticable, save as a last resort.[171] Nevertheless, when it is used, the law directs that additions to material, labor, and packing costs of ten per cent for "general expenses" and eight per cent for "profit" be made in arriving at the "cost of production." But some foreign manufacturers may fairly be seeking dollar markets, and therefore may be willing to accept lower profit margins. If their goods are produced exclusively for the American market (thus necessitating the use of the "cost of production" test) the mandatory eighteen per cent addition for "expenses" and "profit" may suggest an unwarranted imposition of antidumping duties.

G. *Review of Administration*

One of the most universal criticisms of the present Antidumping Act, and one which H.R. 6006 does nothing to correct, is its paucity of provisions either for "internal" or "external" review of administration. By internal review is meant a method whereby the administrators of the act themselves are directed periodically to consider the validity of outstanding orders. By external review is meant opportunity for recourse to executive or judicial agencies not engaged in the actual administration of the act.

Once an antidumping duty has been assessed, the act makes no provision for its revocation. Neither the Secretary of the Treasury nor the Tariff Commission is directed to consider existing duties in the light of new developments. Treasury Regulations permit persons to submit "detailed information concerning any change in circumstances or practice which has obtained for a substantial period of time" to the Commissioner of Customs, and the Commissioner is to give "due consideration" to such petitions.[172] However, since it is often difficult for private persons or firms to acquire the requisite "detailed information," it seems preferable to include a provision in the act for mandatory periodic review, similar to that which has been instituted by executive order for the escape clause.[173]

More important than such a system of self policing is, however, an adequate provision for Presidential or judicial review. The Joint Committee on the Economic Report soundly recommended that "at the very least, the President should be given authority to override Tariff Commission decisions when the national interest requires this."[174]

Judicial review presents a more serious problem. The present Antidumping Act includes a section authorizing review by the customs courts of

171. 1957 TREASURY REPORT 7.
172. 19 C.F.R. § 14.12 (Supp. 1956).
173. Exec. Order No. 10401, 3 C.F.R. 105 (Supp. 1952).
174. S. REP. No. 1312, 84th Cong., 2d Sess. 31 (1956).

"the determination of the appraiser . . . as to the foreign market value . . . and the action of the collector in assessing [the] special dumping duty."[175] Furthermore, the Judicial Code gives the customs courts exclusive jurisdiction to review "the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury."[176] Lastly, Treasury Regulations permit suspension of liquidation of antidumping duties until a final decision has been reached on an importer's appeal for reappraisement.[177] While the Supreme Court has in the recent *Horton* case[178] affirmed a decision holding this to be both an adequate and exclusive remedy, the true "adequacy" of this system of review must nevertheless be questioned. The aforementioned provisions contain no language indicating that the determinations of injury by the Tariff Commission are subject to judicial review, even in the customs courts. Although the holding of the *Horton* case seems to suggest that an importer could challenge the Commission's finding before the customs courts through an appeal for reappraisement, a precise statement to that effect would do much to quiet fears of untrammeled administrative caprice.[179] The discretionary power of the Commission to hold public hearings[180] and the provision of H.R. 6006 requiring publication of the reasons for its decisions are inadequate substitutes. (for jud. rev.)

A similar problem exists with respect to the Secretary of the Treasury's finding of dumping. Although on its face the Judicial Code seems to authorize customs court review of the Secretary's order, that court has consistently held this to be a matter of secretarial discretion;[181] review is generally

175. 42 STAT. 15 (1921), 19 U.S.C. § 169 (1952).

176. 28 U.S.C. § 1583 (1952).

177. 19 C.F.R. § 16.21(b) (1953).

178. Horton v. Humphrey, 352 U.S. 21 (1956), *affirming* 146 F. Supp. 819 (D.D.C. 1956). The decision was consistent with earlier lower court holdings to the same effect. Cottman Co. v. Dailey, 94 F.2d 85 (4th Cir. 1938); Kreutz v. Durning, 69 F.2d 802 (2d Cir. 1934); *cf.* Morgantown Glassware Guild v. Humphrey, 236 F.2d 670 (D.C. Cir.), *cert. denied*, 352 U.S. 896 (1956).

179. See recommendation number 4 of the Standing Committee on Customs Law of the American Bar Association, to appear in 82 A.B.A. REP. (1957). It has been suggested that as Congress has the power to bar all imports, there is no constitutional right to have exclusionary determinations of the Tariff Commission or the other administrators of the customs laws reviewed by any court. *Cf.* Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933); T. M. Duche & Sons v. United States, 36 C.C.P.A. (Customs) 19 (1948), *cert. denied*, 336 U.S. 931 (1949); T. M. Duche & Sons v. United States, 39 C.C.P.A. (Customs) 186 (1952), *cert. denied*, 344 U.S. 830 (1952). The theory that an antidumping duty is a penalty, rather than a tax, and thus constitutionally requires the "due process" of exaction by a court of general jurisdiction, has also been rejected. C. J. Tower & Sons v. United States, 21 C.C.P.A. (Customs) 417, 71 F.2d 438 (1934).

180. 19 C.F.R. § 208.4 (Supp. 1956).

181. See, *e.g.*, Kleberg & Co. v. United States, 21 C.C.P.A. (Customs) 110, 71 F.2d 332 (1933); United States v. Central Vermont Ry., 17 C.C.P.A. (Customs) 166 (1929); *cf.* Butterfield v. Stranahan, 192 U.S. 470 (1904).

limited to the correctness of the actual appraisement of the particular commodity on which an antidumping duty has been imposed.[182] A congressional statement that a finding of the Secretary unreasonably contrary to the policies of the act, may be challenged in the customs court would be helpful.

which way would this cut?

IV. Conclusion

Identical issues of compatability with the obligation of GATT, and of "most favored nation" clauses of other commercial agreements to which the United States is a party, arise under the Antidumping Act as with the countervailing duty section of the Tariff Act.[183] Both GATT[184] and the American Antidumping Act[185] limit the size of antidumping duties to the margin of difference between the export and home consumption prices. In that limited sense the act may be considered remedial rather than punitive in operation. Nevertheless, it has been suggested that a margin of difference, say five per cent, be allowed between foreign home consumption and export prices before an imposition of the duties becomes mandatory.[186] This would render the act more flexible and would recognize the fact that many countries must export to the United States to maintain their economic stability. So small a margin would probably have at most slight effect on domestic producers, while contributing, on the other hand, to closing the ever expanding dollar gap.[187]

too bad...

what's this?

Because of the economic preeminence in which the United States finds itself today, it has both the opportunity and the obligation to provide leadership in the development of enlightened trade policy. Such a policy must recognize both the necessary interdependence of national economies and the fact that national wealth is created by production, not protection.[188] Orderly competition is the proven stimulus to increased productivity. Consistent tariff laws are the precondition for expanding trade. In general,

!!

182. See United States v. European Trading Co., 27 C.C.P.A. (Customs) 289 (1940); *cf.* United States v. Tower & Sons, 14 Ct. Cust. App. 421 (1927).

183. See text at note 79 *supra*.

184. GATT, art. VI(1).

185. Section 202, 42 Stat. 11 (1921), 19 U.S.C. § 161 (Supp. IV, 1957).

186. Viner, Dumping: A Problem in International Trade 264 (1923). Viner also urges limiting the maximum possible duty, and exempting from antidumping assessment [illegible] already subject to a high import duty. Such provisions, and others existing in the antidumping legislation of some other countries, and of interest for comparative purposes, are set out, *id.* c. XIV. The two suggestions above do not seem consistent with an Antidumping Act designed primarily as a weapon against predatory price discrimination, and are therefore not suggested as desirable for inclusion in the American act.

187. See Boggs Report 44.

188. See S. Rep. No. 1312, 84th Cong., 2d Sess. 13 (1956). In this connection it is interesting to note that in 1919, when the Tariff Commission sent inquiries to American businessmen regarding the necessity for antidumping legislation, only 23 of 146 complaints of dumping received concerned price discrimination, and 97 were directed exclusively at mere heavy foreign competition. See Haberler, *op. cit. supra* note 14, at 298.

who cares?

United States trade laws (domestic and foreign) are built on these premises. But the two statutes here considered, as presently drafted and administered, often seem to face in a direction contrary to this country's basic economic policy. In so far as they are so oriented, they derogate from the national interest. The relative desuetude of their provisions in recent years does not justify their retention as the potential hatchets of rear guard protectionism. It is to be hoped that 1958, heralded as the year for congressional review of American trade legislation, will see antidumping and countervailing duties assigned proper places in the legislative scheme.[189]

!!

10. lesser place!!

189. See Gardner, *Organizing World Trade—A Challenge for American Lawyers*, 12 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 202 (1957).

COLUMBIA LAW REVIEW

Vol. 58 JANUARY, 1958 No. 1

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RELIANCE SHEET AND STRIP CO.,
Berkeley, Calif., July 6, 1978.

Mr. CHARLES VANIK,
House of Representatives,
Washington, D.C.

DEAR MR. VANIK: Observing your interest in the Organization for Economic Cooperation and Development and the need to finding ways and means of dealing internationally with unfair trade practices insofar as they effect the steel industry, I would like to submit to you some correspondence that I have had with the International Trade Commission wherein I submit a plan which I think will accomplish the aims you espouse.

You might like to consider applying the principle of the plan to international steel distribution.

Very truly yours,

CHARLES J. FOX.

Enclosure.

RELIANCE SHEET AND STRIP CO.,
Berkeley, Calif., June 21, 1978.

Re. Investigation No. 332-87.

Mr. DANIEL MINCHEW,
Chairman, U.S. International Trade Commission,
Washington, D.C.

DEAR MR. MINCHEW: I have been involved in the West Coast steel market for forty years. Having observed the role that imports have played in the West Coast market since they began in the late 1950's, I have been interested in the above investigation. I have attended two of the meetings and read most of the testimony offered at the other two meetings.

We are a steel sheet distributor and processor with about 60 employees. We are independently owned and due to ESOP, all employees are now stockholders. Our market area is Northern California and Western Nevada. Our steel sources are 60 percent domestic and 40 percent foreign. These ratios reflect roughly the capacity of the domestic steel mills on the West Coast and the need to import about ⅓ of the market requirements. Having lost a business in the early 60's to foreign imports we began to handle imported material in the late 60's in order to maintain a competitive position in the market.

My observation of the hearings to date leads to the conclusion that West Coast mills, fabricators and labor have been adversely effected while importers, distributors, foreign fabricators and some manufacturers have benefitted. There is a trend to increased foreign investment in the distribution, fabrication and manufacturing businesses. Much of the criticism of the domestic mills by distributors and manufacturers who testified goes back to 1973 and 1974, a period of extreme domestic shortage created by the dislocation of steel sources throughout the world because of the devaluation of the dollar and the introduction of price controls on the domestic steel mills which made their products cost under the higher prices offered by foreign mills who fled to other markets. Such criticism should be discounted. On the other hand, there is no question that imported steel is needed on the West Coast and has aided in the development of the market.

It is also obvious that some controls will have to be exercised if we are to avoid an increased share of the market going to foreign related entities that are currently exempt from the reference price regulations. The inauguration of the Trigger Price Mechanism has had little effect on the West Coast as yet because of the very large amount of steel brought in prior to April 30th by foreign related distributors and some independents. It will take the balance of the year to get rid of the surplus. Only then will we be able to determine the effect that TPM will have. Unless the Reference Price Regulations are changed to bring foreign related distributors and manufacturers into the system, they constitute a grave threat to the independents. Any restraints exercised by the Japanese is rapidly being replaced by European and Asian interests.

I, as well as others, feel that TPM is of a temporary nature and that a better way must be found to inject some stability into steel distribution world wide or the United States as the only open market will find itself the recipient of increasing amounts of steel from well established sources and those new mills in the developing countries. To this end, I have tried to address the problems as I see it by making the enclosed study, "A Basing Port System As Applied To International Steel Distribution".

The legalities of the plan may be subject to question because when related to steel marketing in the United States the Basing Point Systems, after which my plan is patterned, was declared illegal. However it worked because producers agreed to make it work. It was a competitive method of selling suited to the requirements of the steel industry and the protection of their markets. International Trade Agreements would likewise have to come to this conclusion.

The study is only intended to serve as a suggested plan. Having no staff, all of the figures relating to markets and production are taken from various sources which varied considerably and should not be relied upon as they are only intended to convey an idea.

The plan would have the effect of channelling production into more natural markets, reducing crosshauling thereby saving many million barrels of fuel it would reduce over production and its subsequent pressure to export. It would reduce motivation to export for political purpose which may cause distress in other markets. It would reduce selling below cost. It would channel imports to areas of need. It would protect existing investments, allow for future expansion. It would provide for new production from developing countries and the protection of their markets. It would provide a profitable rate of operation with provision for depressed situations. It would pinpoint dumping situations.

Working on the study, many questions were raised that remain to be resolved but given some staff input I would venture to say that most of them could be worked out. With so many benefits to be derived from the plan, I would hope that it would receive some consideration from the commission.

Very truly yours,

RELIANCE SHEET & STRIP CO.
CHARLES J. FOX.

The Basing Port System As Applied to International Steel Distribution

The purpose of this study is to determine the suitability of establishing a basing port method of quoting delivered prices for steel products internationally.

A similar method was used to quote delivered prices in the United States in the 1920's and prevailed until the 1940's when the Federal Trade Commission ordered the mills to price their products on an F.O.B mill basis in order to promote more open competition in the steel industry.

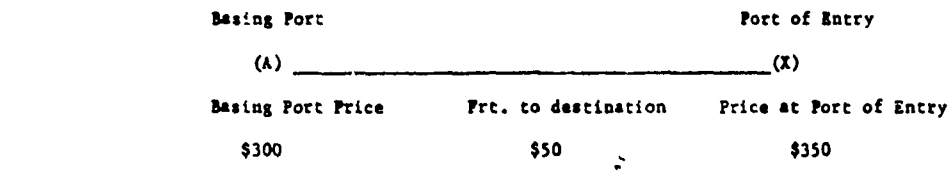
In the years since the 1950's we have seen competition develope outside the United States to the point that domestic producers under the open market policy practiced by the United States are threatened by a flood of imported steel into markets that formerly constituted the basis for establishing the steel plants in those markets.

The Basing Port method of pricing steel products would provide an orderly way of marketing steel products throughout the world. It would require that prices be established for various products at various ports throughout the world. The prices established at a basing port would include cost of production, overhead, profit and freight to the Basing Port if the mills are not located at seaboard.

The Basing Port method is a method of quoting delivered prices on steel products from ports near production centers to other international ports near consuming centers which also may be Basing Ports.

Figure 1

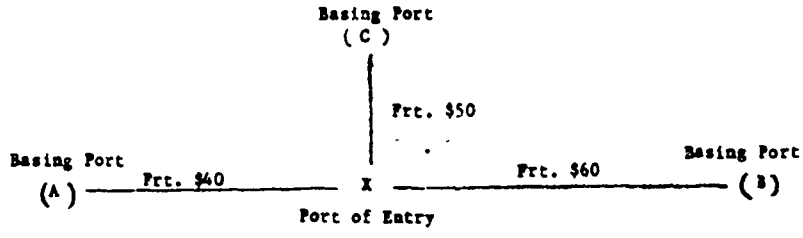
How a delivered price would be computed.



The base price at Basing Port A is $300, the freight from Basing Port A to Port of Entry is $50, making a delivered price at the Port of Entry $350.

Figure 2

Should there be three Basing Ports, each with a base price of $300



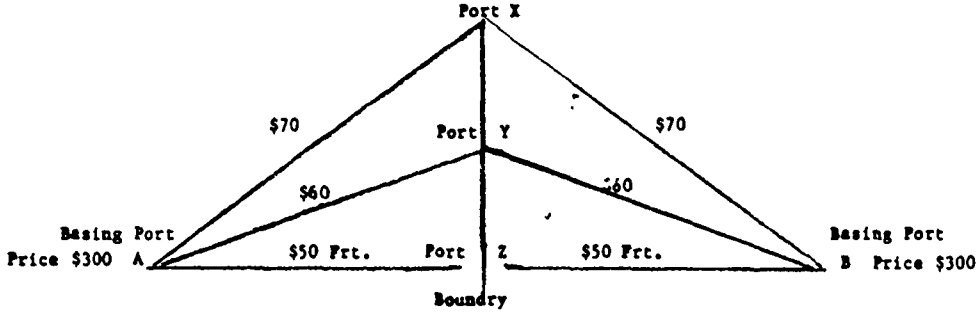
If the Basing Port Price at A, B and C is $300 there would be three prices at the Port of Entry, from A $340, from B $360 and from C $350. Therefore the applicable Basing Port would be A for sales to the Port of Entry.

If producers supplying Basing Port A establish a price of $300, other producers will know that A will sell to the Port of Entry for $340. If producers using Basing Ports B and C want to sell in competition with A they will quote the same as A and absorb the higher freight costs. If the Port of Entry is a Basing Port, prices at the Port of Entry would apply. If shipment at lower than 6% of the Basing Port price or Port of Entry price, then losses to the shipper would be involved and subject to investigation for dumping. If prices are uniform at the Port of Entry and the business goes to C because of some preference due to quality or superior service, C will use only $40 freight but will have to pay $50 or a return of $290 at the producers Basing Port, $10 less than its basing port price. If the producers at Basing Port B receive the business they would have to absorb $60 freight with the result that they would have a return of only $280. This freight absorption results from freight disadvantage because producers at B and C are further away from the Port of Entry than the producers at the applicable Base in Port A.

Steel is sold on a competitive basis. An economical steel mill is so large and expensive that it requires distribution in markets that are nearer to other mills. In areas where a mill has a freight advantage, it naturally quotes prices that will realize that advantage. When it sells in areas near to some other markets, it has to accept a delivered price which will yield a lower return.

For a number of years there has been a tendency on the part of some mills located in the industrial areas of the world to ignore natural markets and ship beyond economic boundries for reasons including political such as, make work. When this happens, the delivered prices generally fall and the freight charges are more costly resulting in a reduced net return and losses.

Figure 3



Natural market territory is an area in which each producing area can sell at a delivered price calculated on the basis of its own Basing Port price plus the actual freight to the port of delivery and are equal for both mills at Basing Ports A and B. This means that both producers can sell at

Ports X Y and Z without absorbing freight. It is desireable to operate production facilities at a high rate and thus obtain a low unit cost and of maintaining an even flow of orders. Producers at Basing Port A and at Basing Port B do not limit sales to their side of the boundary line but attempt to reach markets when the demand exists for their products with the result that they must accept a lower rate of return if they ship over the boundry line.

For purposes of this study the following ports are considered basing ports by reason of their capacity to produce finished steel products and or their proximity to consuming areas.

See Map

BASING PORTS

Ports - No. America	Asia	European	Australian	Indian	So.America
New York	Tokyo	Barcelona	Melburne	Calcutta	Rio De Janiero
Philadelphia	Osaka	Balboa	Brisbane	Bombay	Sao Paulo
Baltimore	Yokahama	Dusseldorf	Perth	Karachi	Buenos Aires
Boston	Kobe	Hamburg	Adelaide		
Mobile	Pusan	Stockholm	Auckland		
Houston	Manila	London	Sidney		
New Orleans	Shanghai	Rotterdam			
Chicago	Canton	LaHavre			
Detroit	Okayama	Mirseille			
Buffalo		Genoa			
Cleveland		Napoli			
Seattle		Pareus			
Portland		Lisbon			
San Francisco		Odessa			
Los Angeles		Antwerp			
		Istanbul			
		Leningrad			
		Ossaka			

Canadian	Africa
Vancouver	Capetown
Montreal	Durban
Toronto	

All the Basing Ports within a country have been given the same base price assuming that most producers are located with access to ports and aqualize with other producers to such Basing Ports for export purposes except the United States, Canada and any other country which have widely separated coasts. Tariffs and dock charges have not been included.

Figure 4 shows the hypothetical freight rates applicable from one basing port to another basing port. These rates are based on distance and relate to rates used in the reference price regulation as applied to Japanese shipments to United States Ports. No attempt has been made to differentiate between

heavily travelled routes, inbound and outbound rates. It is recommended that conference rates be used rather than charter rates in arriving at Basing Port prices.

Figure 5 shows the amount of freight absorption or advantage involved in shipments between Basing Ports using the hypothetical freight rates used in Figure 4. This chart is used to determine the economic markets from each Basing Port by relating the freight absorption to the 6% profit margin built into the Basing Port prices. If the freight absorption is more than the 6% profit it is not an economic market for that Basing Port as losses will be incurred.

Figure 6 shows the economic markets for each Basing Port. These were determined utilizing the information shown in Figures 4 and 5.

Figure 7 intends to relate capacity to markets, deficient markets to markets with a surplus and exports to imports, the purpose of which is to show where controls should be imposed. Obviously there is a surplus of capacity even when related to the 80% utilization rate. However if exports were limited to economic markets the surplus would tend to be self correcting.

Any change from the 80% utilization rate to a lesser rate would tend to effect profits and lessen the ability to export, unless it is done for political reasons.

International trade agreements should be directed to channelling excess production into areas of steel deficiency. If this is done, it leaves only 13 million tons to be subject to controls. Controls would only apply if mills in the importing area were operating at less than the 80% utilization rate.

Exports and imports could be directed in such a way as to provide a measure of economic trade balance between Basing Ports and at the same time minimize cross hauling between production centers thereby conserving fuel.

As with the reference price system, it would automatically indicate whether a shipment was made that would lead to losses to the exporting producer. It would serve to control exports made for political purposes that involve deliberate losses in order to create or maintain employment at the expense of increased unemployment in the importing area.

Such a system would have the effect of channelling exports to areas that need them rather than to markets which have sufficient or excess capacity.

With the rapid rise in steel capacity by the developing countries it would serve as a basis for establishing trade agreements based on the capacity to absorb imports without causing an undue lowering from the 80% operating rate of mills in the importing area.

If the rate of operations in a producing area falls below 80% because of a depressed economic condition, imports could be restricted based on a quarterly or semi annual review thereby preventing increased unemployment in the market area for any extended period of time.

A survey such as this could be made product by product thereby channelling the import and exports to areas of greatest need rather than to areas having surplus capacity of certain products.

Since the 80% operation rate would tend to be profitable, capital would be generated that would provide for modernization, environmental protection and growth.

Dumping and subsidies by exporting countries are generally disruptive in the importing market area and would be discouraged as shipments involving losses would be apparent.

Currency fluctuations and the influence of inflation could be reviewed periodically and adjustments made accordingly.

New steel sources will require the establishment of new basing ports which would be subject to the same analysis.

All the rates and figures used in this study were arrived at by consulting various sources both old and new, and where not available, made with a good deal of extrapolation. It is not intended that the figures be used except to convey an idea.

Steel Bearing Port Areas of World

Hypothetical Transportation Costs between World Ports - Steel Products

Figure 4

FROM \ TO	East USA	Lake USA	Gulf USA	Pac NW	Mont Can	Lake Can	Vanc Can	Japan	Korea	Philipp	China	Spain	Italy	Germ	Fran	Belg	Dutch	Greek	Turkey	India	Africa	Sy	Argen	Brazil	Aust	West Aust	Lev Port	Stock holm
East USA	-	15	50	50	10	15	50	50	70	75	70	45	50	40	40	40	40	40	50	50	70	65	65	70	50	60	50	50
Lake USA	15	-	40	60	10	5	60	53	50	63	53	55	60	50	50	50	50	50	65	60	100	85	75	75	75	65	60	60
Gulf USA	50	20	-	50	50	20	55	44	45	40	40	60	60	55	55	55	55	55	65	65	85	70	60	60	70	45	55	60
Pacific USA	50	15	50	-	50	50	35	40	50	45	40	70	70	65	65	65	65	65	75	75	100	95	75	75	80	45	65	70
Montreal	10	10	20	50	-	40	35	50	50	55	40	65	65	60	60	60	60	60	70	70	75	55	70	70	75	60	50	55
Lake Can	15	20	40	60	5	-	60	53	50	53	50	60	65	60	60	60	60	60	70	70	100	85	75	75	75	60	60	60
Vancouver	50	50	50	10	50	50	-	40	40	45	40	70	70	65	65	65	65	65	75	75	100	85	75	75	75	45	65	70
Japan	44	53	44	39	44	53	39	-	5	7	7	55	55	55	55	55	55	55	60	60	65	70	80	80	60	20	20	90
Korea	50	50	45	40	44	54	40	5	-	7	7	55	55	55	55	55	55	55	60	60	65	70	80	80	60	20	20	90
[illegible]	50	40	50	45	54	54	45	7	7	-	7	60	60	60	60	60	60	60	65	65	50	40	80	80	65	25	25	90
[illegible]	50	50	50	45	54	54	45	5	5	5	-	60	60	60	60	60	60	60	65	65	50	40	80	80	65	25	25	90
[illegible]	20	65	60	70	65	65	70	40	40	40	40	-	5	20	10	10	10	10	15	15	20	25	65	65	20	20	80	20
[illegible]	20	65	60	70	65	65	70	40	40	40	40	10	-	15	15	15	15	15	10	10	20	25	65	65	20	10	40	20
[illegible]	50	40	60	70	55	60	70	40	40	40	40	15	15	-	10	10	0	10	20	20	30	35	60	60	20	5	20	15
Germany	50	40	60	70	55	60	70	40	40	40	40	15	15	15	-	10	10	10	20	20	70	55	60	60	25	20	40	15
[illegible]	50	40	60	70	55	60	70	40	40	40	40	15	15	15	0	-	10	10	20	20	50	55	60	60	25	60	80	15
Belgium	50	40	60	70	55	60	70	40	40	40	40	15	15	0	0	0	-	10	20	20	30	25	60	60	25	10	50	15
Italy	50	40	60	70	55	60	70	40	40	40	40	15	15	15	10	10	10	-	20	20	30	35	60	60	25	40	80	15
Greece	65	70	65	75	70	70	75	55	55	55	55	20	20	20	20	20	20	20	-	5	25	30	65	65	10	85	85	25
Turkey	65	70	65	75	70	70	75	55	55	55	55	20	20	20	20	20	20	20	5	-	25	30	65	65	5	85	85	25
India	90	100	85	100	85	100	90	50	50	50	50	35	30	30	30	30	30	30	30	30	-	75	85	85	15	30	30	35
S. Africa	70	85	70	85	85	75	85	60	60	60	60	65	65	65	65	65	65	65	35	35	25	-	25	60	30	20	30	40
Argentina	65	75	60	75	70	75	75	80	60	60	60	65	65	60	60	60	60	60	65	65	25	25	-	25	70	70	80	40
Brazil	65	75	60	75	70	75	75	70	60	60	60	65	65	60	60	60	60	60	65	65	25	5	-	-	65	45	70	65
Argentina	65	75	60	75	70	75	75	70	60	60	60	65	65	60	60	60	60	60	65	65	25	5	-	25	65	45	70	65
Odessa	70	75	70	80	75	75	75	95	95	95	95	25	25	25	25	25	25	25	5	15	30	70	70	-	50	60	30	30
E. Aust	50	60	45	45	60	60	45	30	30	20	30	50	50	60	60	60	60	60	55	25	25	60	60	65	-	15	65	65
W. Aust	50	60	50	50	65	60	50	25	25	20	25	45	45	55	55	55	55	55	40	50	30	30	30	30	15	-	55	55
Leningrad	50	60	50	50	55	60	50	90	90	90	90	20	20	15	15	15	15	15	25	30	35	40	60	60	30	80	85	-
Stockholm	50	60	50	50	55	60	70	90	90	90	90	50	50	15	15	15	15	15	25	30	35	40	60	60	30	50	85	5

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AMOUNT OF FREIGHT ABSORPTION BETWEEN BASING PORTS
BASED ON HYPOTHETICAL RATES USED IN FIGURE 4
IN DOLLARS PER TON

FIGURE 5

FROM \ TO BASE	USA East 310	USA Lake 350	USA Gulf 350	USA Pac. 360	Can Mont 360	Can Lake 350	Can Van. 360	Alaska 360	Korea 320	Phil 320	China 340	Spain 340	Italy 330	Eng. 330	Germ 330	France 335	Belg 330	Dutch 330	Greek 330	Turky 330	India 340	S Africa 360	Braz 360	Argen 360	Chile 330	S Aust 340	N Aust. 340	Iran 320	Sweden 330
East USA 350	5	15	40	40	10	15	50	100	100	85	80	85	70	60	60	60	60	60	60	30	80	80	55	55	120	80	70	80	70
Lake USA 350	15	—	30	50	10	5	50	100	80	80	60	65	80	70	70	70	0	70	45	45	90	85	65	65	105	70	75	70	80
Gulf USA 360	30	30	—	50	30	30	35	100	100	80	60	80	90	85	85	5	85	55	55	55	85	90	60	60	110	65	65	100	90
Pacific USA 360	60	60	50	—	60	60	20	100	70	75	60	90	100	85	85	5	85	55	55	100	105	75	75	120	65	65	110	100	90
Montreal Can 350	0	10	10	40	—	10	35	100	90	75	50	75	85	80	60	40	40	20	20	5	85	60	60	60	85	70	60	70	70
Lake Can 350	15	10	10	50	5	—	50	100	80	70	65	75	85	80	50	50	50	50	50	50	85	65	65	65	70	60	70	80	80
Vancouver Can 360	40	60	50	10	60	50	—	100	80	75	60	90	100	85	85	85	85	55	65	60	95	75	75	115	65	65	110	100	90
Japan 360	40	3	+16	+21	+2	3	+25	—	+15	+23	+33	10	25	25	45	55	55	35	+10	+0	5	30	30	30	40	+20	+30	70	60
Korea 310	15	24	5	0	15	24	0	5	—	3	13	35	—	45	45	45	45	45	10	0	25	50	40	40	60	0	0	60	80
Philippines 310	20	39	30	15	34	34	15	37	13	—	+3	50	60	60	60	60	60	60	25	25	20	30	50	50	75	15	15	100	90
China 340	40	49	30	15	44	49	25	45	25	15	—	60	70	70	0	70	70	70	35	35	30	40	60	60	50	25	25	100	90
Spain 340	50	55	40	40	55	55	50	130	60	100	90	—	15	30	2	50	30	30	+15	+15	0	65	45	45	40	25	25	40	50
Italy 330	40	45	50	40	45	45	50	120	100	100	80	5	—	15	15	15	15	15	+30	+30	+10	40	45	35	30	20	15	30	20
England 330	30	40	30	40	25	40	50	120	100	100	80	5	15	—	10	10	2	10	+20	+20	+10	65	45	30	30	70	70	25	15
Germany 330	30	30	30	40	25	40	50	60	100	100	80	5	15	15	—	10	2	10	+20	+20	+10	25	40	30	30	70	70	25	15
France 330	30	40	30	40	35	40	50	120	100	100	80	5	15	15	10	—	10	10	+20	+20	+10	25	40	30	35	70	70	25	15
Belgium 330	30	40	30	40	35	40	50	120	100	100	80	5	15	15	10	10	10	—	+20	+20	+10	25	40	30	35	70	70	25	15
Dutch 330	30	40	30	40	35	40	50	120	100	100	80	5	15	15	10	10	10	—	—	5	35	60	45	45	60	15	115	25	65
Greek 330	85	90	75	85	90	90	85	165	135	90	125	50	60	60	60	60	60	60	—	—	35	60	75	75	60	15	115	—	70
Turkey 330	85	90	75	85	90	90	85	165	135	135	125	50	70	60	60	60	60	60	20	—	35	60	75	75	60	15	115	—	70
India 340	100	110	85	100	95	110	100	110	90	135	70	45	50	60	60	60	60	60	10	10	—	45	85	85	55	50	50	75	45
S Africa 360	60	75	50	85	75	75	85	100	90	90	60	60	75	75	75	75	75	75	0	5	5	—	5	40	60	25	70	60	50
Brazil 360	70	85	80	55	80	55	75	140	100	90	100	—	95	90	100	100	100	100	50	55	65	45	—	35	110	40	110	100	95
Argentina 360	75	85	80	55	80	55	75	140	100	90	100	55	95	90	90	90	90	90	50	55	55	45	5	—	115	65	90	100	85
Odessa 320	40	25	30	40	35	35	25	115	85	85	75	5	15	15	15	15	15	15	+30	+45	+25	10	30	30	—	30	40	30	15
E Australia 360	40	50	25	35	50	50	85	70	55	30	35	50	60	70	70	70	70	70	20	25	5	15	40	40	85	—	15	65	75
W Australia 340	45	50	30	30	55	50	85	65	45	30	35	45	55	65	65	65	65	65	10	20	10	30	10	30	65	15	—	65	75
Northwest 320	20	50	30	30	35	30	85	110	50	80	15	0	10	5	5	5	5	5	25	+10	+15	20	25	25	30	60	65	—	65
Siberia 320	30	40	30	30	30	30	85	110	100	90	95	10	20	15	15	15	15	15	+15	+10	5	30	35	35	30	75	75	15	—

FIGURE 6

ECONOMIC MARKES USING PROFIT LEEWAY OF 6%

TO \ FROM	USA East	USA Lakes	USA Gulf	USA Pac	Can Mont	Can Lakes	Can Van	Japan	Korea	Phil	China	Spain	Italy	Eng	Germ	Norway	Belg	Den	France	Dutch	Indian	S Africa	Bras	Arg	Chile	West Aus	West Aus	Hong Kong	Aus
1 East USA	x	x	x		x	x																							
2 Lakes USA	x	x			x	x																							
3 Gulf			x																										
4 Pac				x			x																						
5 Mont Can	x	x	x		x	x																							
6 Lakes	x	x	x		x	x																							
7 Van				x			x																						
8 Japan	x	x	x	x	x	x	x	x	x	x	x	x							x		x		x	x		x	x		
9 Korea	x		x	x				x		x	x								x		x					x	x		
10 Phil			x	x			x		x	x	x															x	x		
11 China				x						x																x	x		
12 Spain												x	x		x	x	x	x	x	x	x								
13 Italy												x	x	x	x	x	x	x			x							x	
14 England												x	x	x	x	x	x	x			x							x	
15 Germany												x	x	x	x	x	x	x	x	x	x	x						x	
16 France												x	x	x	x	x	x	x	x	x	x							x	
17 Belgium												x	x	x	x	x	x	x	x	x	x							x	
18 Dutch												x	x	x	x	x	x	x	x	x	x							x	
19 Greece																			x		x								
20 Turkey																			x		x								
21 Indian																			x		x	x							
22 S Africa																			x		x	x	x						
23 Brit I																							x						
24 Argentina																							x						
25 O Tessa												x	x	x	x	x	x	x				x						x	
26 E Aust																			x		x	x							
27 W Aust																			x		x	x	x						
28 Newcastle												x	x	x	x	x	x	x			x								
29 Sydney												x	x	x	x	x	x	x	x		x							x	
30																													
31																													
32																													
33																													
34																													
35																													
36																													
37																													
38																													
39																													
40																													

CAPACITY vs MARKET
IMPORTS vs EXPORTS
DEFICIENT MARKETS vs SURPLUS MARKETS

Figure 1
In Millions of Tons

Basins Sources	Capacity	80% Utilization	Market	80% Util Deficiency	80% Util Surplus	Exports	Imports
East USA	45	36	38	2		2	4
Lake USA	65	52	56		6	1	7
Gulf USA	10	8	12	4			5
Pac USA	9	6	9	3			3
Black Sea	5	4	5	1		1	1
Lake Can	6	5	6	1		1	
Vanc Can	2	2	2				1
Japan	151	120	70		50	93	1
Korea	6	5	3		2	2	
Philippines	3	2	3		1	1	1
China	26	21	25		4		7
Spain	1	9	10	1		2	1
Italy	24	20	19		1	3	2
England	25	24	21	1		3	1
Germany	49	40	37		3	5	2
France	24	20	18		2	4	2
Belgium	13	10	9		1	4	1
Holland	6	5	4		1	3	1
Greece	2	2	2			2	
Turkey	2	2	2			1	
India	10	8	9	1		2	3
So Africa	7	6	6			1	
Brazil	10	8	10	2		1	2
Argentina	23	18	24		6	2	3
Ottawa	70	69	60			10	10
E Antolin	4	3	4	1		2	1
W Antolin	4	3	3			1	1
Lexington	70	60	60			10	10
Buckeye	7	6	7	1	1	2	1
Other	67	45	40		5	10	20
	753	606	575	17	83	169	90

STATEMENT OF SERVCO PACIFIC INC., HONOLULU, HAWAII

INTRODUCTION

These comments, filed on behalf of Servco Pacific Inc., of Honolulu, Hawaii, are intended to call the Subcommittee's attention to the unconscionable and illegal manner in which the Treasury Department and the U.S. Customs Service are enforcing the Antidumping Act, 1921, as amended, with regard to importations of television receivers from Japan.

Servco Pacific Inc., is the independent, unrelated, exclusive distributor of Sanyo manufactured television receivers in the state of Hawaii. It also has the exclusive distribution rights for Zenith television receivers in the state of Hawaii and has successfully marketed the television receivers of both manufacturers in Hawaii for many years. As a distributor of Sanyo television receivers Servco has acted as importer of recorder on importations of Sanyo manufactured television receivers for at least the past five years. Accordingly, Servco is responsible for any dumping duties that may be due on entries of televisions.

On March 31, 1978, the U.S. Customs Service, without any prior notice, liquidated thousands of entries of television receivers from Japan which were subject to the dumping finding published in TD 71-76. These liquidations were based upon the Treasury Department's new "fixed rate" commodity tax formula and resulted in the assessment of millions of dollars of dumping duties. Since the Customs Service only liquidated entries made during 1972 and 1973 Servco was not assessed with any significant dumping duties. However, if this new formula is applied to entries of television receivers made since 1973, the resulting dumping duties could easily drive Servco into bankruptcy. For the reasons set forth below such a result would be entirely inequitable and unjustified.

In importing Sanyo manufactured television receivers, Servco reasonably relied on Sanyo's assurances it was not dumping, and in making these assurances Sanyo reasonably relied on the prior determinations of the Customs Service that the methodology it used in preparing its dumping submissions was acceptable and that based upon such methodology Sanyo was not selling television receivers to the United States at less than fair value.

Liquidations of entries of Sanyo television receivers that utilize a determination of foreign market value which is not permitted either under section 205 of the act or under section 202 of the act are illegal, null and void.

The Antidumping Act, 1921, as amended, provides two definitions of foreign market value. These definitions are found in section 205 of the Act and section 202 of the Act. For the purposes of this submission, only the definition in section 202 which provides for a foreign market value with specified statutory adjustments applied, since section 202 is the statutory authorization for assessment of special dumping duties.

In the March 31, 1978 liquidations of entries of Sanyo television receivers, foreign market value was uniformly determined by apply-

ing a factor of .5391 percent to the suggested retail price of the home market model selected as the basis of comparison (suggested retail price times 62 percent times 100/115) ("fixed rate formula"). Such appraisements are *per se* illegal, null and void since:

1. The appraisements fail to use verified or verifiable data as to the actual prices and costs submitted by Sanyo in timely fashion, but rather use an estimated basis for calculating foreign market value. Appraisements of foreign market value on the basis of estimation under the facts and circumstances of this case are not permitted by either the statute or regulations.

2. Even assuming, *arguendo*, that estimation is appropriate under the facts and circumstances of this case, the "fixed rate formula" applied by Customs is not a lawful determination of foreign market value as defined in section 205 of the Act.

3. Even assuming, *arguendo*, that the application of the "fixed rate formula" is a lawful estimation of foreign market value under section 205 of the Act, it is not a lawful estimation of foreign market value under section 202 of the Act.

4. Even assuming, *arguendo*, that the application of the "fixed rate formula" is a lawful estimation of foreign market value under section 202 of the Act, it is unlawful to apply it retroactively.

A. There is no legal justification for estimating the foreign market value of Sanyo television receivers.

Section 205 of the Act defines foreign market value as a "price" at which merchandise "is sold" for home market consumption. Section 202 of the Act defines foreign market value as the "price" at which merchandise "is sold" for home market consumption with adjustments for differences in wholesale quantities, differences in circumstances of sale and differences in merchandise.

Section 209 of the Act requires Customs to utilize "all reasonable ways and means to ascertain, estimate, and appraise . . . the foreign market value" (the *price* at which the merchandise is sold, with adjustments, for home market consumption).

Section 153.54 of the Customs Regulations establishes how Customs is to ascertain the foreign market value and provides that it shall be ascertained on the basis of information submitted in timely fashion. Pursuant to section 153.54, assessment of foreign market value may be based upon the estimation of the best information available only where "adequate information is not submitted in timely fashion".

Sanyo has uniformly filed dumping submissions containing verified or verifiable data sufficient to appraise all Sanyo television receivers under the Act. The adequacy of such submissions is confirmed by promulgation of two master lists, the first being issued in or about January 1973 and covering all merchandise imported through April 1971, and the second being issued on March 8, 1973.

Since these submissions were filed in timely fashion, contain all of the information requested by Customs and are in the form prescribed by Customs, the substitution of a foreign market value on an estimated basis as distinguished from foreign market value on an actual basis, supported by submissions timely filed, is illegal and renders the liquidations void as a matter of law.

B. Assuming, arguendo, that estimation of foreign market value by all reasonable ways and means were appropriate under the facts and circumstances of this proceeding, the utilization of the "fixed rate formula" is not a reasonable estimate of foreign market value under section 205 of the act

Section 205 of the Act defines foreign market value as follows:

> For the purposes of sections 160 to 171 of this title the *foreign market value* of imported merchandise *shall be the price*, at the time of exportation of such merchandise to the United States, *at which such or similar merchandise is sold* or, in the absence of sales, offered for sale in the principal markets of the country from which exported, *in the usual wholesale quantities and in the ordinary course of trade for home consumption.*

Thus, the statute requires that the Customs Service determine "the price" at which such or similar television receivers are sold in Japan. It is well established that this price must be an actual price and not a constructed or estimated price.

For example, in *C.B.S. Imports Corp.* v. *United States*, 80 Cust. Ct. ---, C.D. 4739 (1978), the Customs Court reviewed an appraisement wherein export value had been determined by adding to the invoice price a factor equal to the fluctuation in the Japanese yen between the date the order was placed, and the date the merchandise was exported. In rejecting this method of determining export value, the Court noted that:

> The statutory language speaks with crystal clarity that "the export value of imported merchandise shall be the *price*, at the time of exportation to the United States." (Emphasis added). Congress intended that "export value" be based on actual prices, as determined by sales or offers for sale, rather than on any abstract notion of "value",

and that:

> The defendant's determination of value appears to be based more on theory than on actual facts having evidentiary value. A mathematical computation is not evidence of sales or offers for sale in the country of exportation. Under the statutory language, export value cannot be ascertained or estimated in this manner.

Similary, in *F.W. Myers & Co.* v. *United States*, 72 Cust. Ct. 219, C.D. 4544 (1974), the Court held that plaintiff had failed to establish proper allowances for differences in circumstances of sale pursuant to section 202(b), Antidumping Act, 1921, as amended, for the following reason:

> The proofs required to establish a value under the Antidumping Act must meet the same standards of competency and substantiality required in all cases involving valuation of merchandise for customs purposes. They must be based upon proof of *actual* costs or prices—*not* estimates, approximates or averages.

The aforementioned decisions establish beyond dispute that, when there is a statutory requirement under the Antidumping Act that merchandise be appraised at an actual price, a reconstructed or estimated price is not an acceptable price for appraisement purposes.

Accordingly, the Customs Service may not determine foreign market value as required by Section 205 of the Act by making uniform deductions from published suggested retail prices, since such a calculation of foreign market value is nothing more than an approximation or attempted reconstruction of the *price* at which television re-

ceivers are sold in Japan. This is especially true in view of the fact that the suggested retail prices are in fact only *suggested* prices. The Customs Service has not sought evidence establishing that suggested retail prices are consistently followed by retail outlets in Japan. Nor could it obtain such evidence, since retail outlets in Japan pay no more attention to suggested retail prices than do their counterparts in the United States.

Since the application of the "fixed rate formula" to suggested retail prices of television receivers sold in Japan neither arrives at a price at which television receivers are actually sold at wholesale, for home consumption, nor arrives at a figure derived from actual prices at which television receivers are sold, the result does not constitute a foreign market value under section 205 of the Act.

The application of the "fixed rate formula" to suggested retail prices likewise does not constitute a permissible estimate of foreign market value under section 209 of the Act of (19 U.S.C. 1680). While Section 209 of the Act provides that the appropriate Customs official may ascertain the foreign market value, constructed value, purchase price and exporter's sales price by all reasonable ways and means, it is well established by numerous court decisions that if the Customs Service refuses to follow the statutory framework in ascertaining the value of the merchandise subject to a dumping finding, the resulting appraisement is *per se* unreasonable and prohibited by law.[1]

In the most recent case regarding this subject, *Given International, supra*, the merchandise in question was appraised under the cost of production (19 U.S.C. 1402(f)) basis of appraisement. The Customs import specialist determined the appraised cost of production by making a series of deductions from a resale price. The court held that this method of determining cost of production was an unreasonable method of appraisement, stating:

> This appraisement procedure bears no resemblance to statutory cost of production and the resulting appraised value was erroneous. Arriving at a "cost of production" by making a series of deductions from a resale price is not a *reasonable* way to ascertain cost of production within the generally broad powers granted the appraising official in section 500 of the Tariff Act of 1930 . . . . Even assuming an unwillingness on the part of the manufacturer involved to reveal its cost of production, I have no doubt that ways and means exist to estimate the elements of cost of production in a manner more in accordance with section 402 (a)(f) and section 500 of the Tariff Act of 1930. The method of reasoning backward from a resale price ignores the statute entirely and is unreasonable.

In the present situation, Treasury has decided that it will determine foreign market value by making uniform deductions from the suggested retail prices of Sanyo's television receivers. Neither the Act nor the Customs Regulations permit the utilization of a suggested retail price in establishing a foreign market value. Appraisements of foreign market value, based on a suggested retail price, are, therefore, as a matter of law "unreasonable," illegal, null and void.

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[1] *Given International* v. *United States*, 75 Cust. Ct. 164, C.D. 4624 (1975); *Ellis Silver Co., Inc. v. United States*, 63 Cust. Ct. 647, 656, R.D. 11688, 308 F. Supp. 764 (1969), *aff'd*, 67 Cust. Ct. 564, A.R.D. 293 (1971), *aff'd*, 60 CCPA 143, C.A.D. 1100, 477 F. 2nd 946 (1973); *United States* v. *A.N. Deringer, Inc.* 46 Cust. Ct. 762, 767–68, A.R.D. 127 (1961), *appeal dismissed*, 48 CCPA 169 (1961); *Casey & Skinner* v. *United States*, 12 Cust. Ct. 352, R.D. 5975 (1944); *United States* v. *European Trading Co.*, 27 CCPA 289, C.A.D. 103 (1940); *United States* v. *Jose A. Montemayos y Hijos*, 68 Treas. Dec. 1243, R.D. 3649 (1935), *aff'd*, 69 Treas. Dec. 759, T.D. 48288 (1936); *James S. Kean* v. *United States*, 63 Treas. Dec. 328, 20 CCPA 388, T.D. 46186 (1933); *Old Masters Paper & Pulp Co.* v. *United States*, 62 Treas. Dec. 613, T.D. 46024 (1932); *Protest 280378 of A.S. Lascelles*, 16 Treas. Dec. 15, T.D. 29141 (1908).

C. Assuming, arguendo, that the utilization of the "fixed rate formula" is a reasonable estimate of foreign market value under section 205 of the act, it is not a reasonable estimate of foreign market value under section 202 of the act

Section 202 of the Act defines foreign market value for dumping appraisement purposes and provides that, in determining foreign market value, due allowance shall be made for differences in wholesale quantities, other differences in circumstances of sale and differences resulting from the use of "similar" as contrasted with "identical" merchandise, where it is established to the satisfication of the Secretary or his delegate that such differences contribute to the differentials between purchase price or exporter's sales price and foreign market value. Since the "fixed rate formula" does not make allowance for such differences, it is not a "reasonable" estimate of foreign market value under section 202 of the Act.

In no instance does the formula make adjustment for cash discounts/credit costs, volume discounts (rose bonus), sales promotional expenses and advertising costs assumed by Sanyo on behalf of its purchasers, warranty and servicing costs. Since these are other differences in circumstances of sales for which adjustments are required under section 202 of the Act and section 153.10 of the regulations, and since the utilization of the "fixed rate formula" makes no adjustment for such costs, it is not a "reasonable" estimate of foreign market value under section 202 of the Act.

By letter of November 26, 1975, after a review of *all* Sanyo schematic diagrams by the technical services division, the Customs Service concluded that "similar" television receivers were being used for comparison purposes and, therefore, that, as "a matter of law," adjustments were required for differences in costs of production resulting from differences in:

Cabinet features (slide rule controls, fancy shapes);
Antennas supplied;
Additional IF or RF states;
Additional or higher quality (e.g., push-pull) sound amplification stages;
Automatic features, such as:
- Active power filter (APF);
- Automatic gain control (AGC);
- Automatic frequency control (AFC);
- Automatic fine tuning (AFT);
- Automatic color control (ACC);
- Instant-on;

Use of transistors and/or diodes in place of tubes; and
Earphone and sound detector jacks.

Despite this ruling requiring cost of production adjustments "as a matter of law", despite the fact that in each comparison the home market model differed from the export model in one or more of the above enumerated examples, no adjustment is made in the "fixed rate formula" for cost of production differences as required by law.

In its March 31, 1978 liquidations, Customs made comparisons in total ignorance of quantities sold. In the case of Sanyo, some home market models selected for comparison purposes were not sold at all during the relevant period. In a number of other cases, the home market

models selected for comparison purposes were sold in quantities of less than 100 units during the relevant period. The calculations of foreign market value do not, therefore, make adjustments as required in section 202 of the Act for differences in wholesale quantities and most certainly do not predicate the comparisons on sales of comparable quantities as required by section 153.9 of the regulations.

D. Even assuming, arguendo, that the application of the "fixed rate formula" were a lawful estimation of foreign market value under section 202 of the act, it is unlawful to apply it retroactively

The implications of the retroactive application of the "fixed rate formula" for Servco make it clear that even if the Treasury Department and Customs Service were justified in adopting their new "fixed rate formula" for determining foreign market value (and as has been established above, they definitely are not) they still can not apply such a formula retroactively to determine that Servco owes dumping duties for any period prior to the adoption of this new formula.

It is well established that acts and omissions of agents lawfully authorized to bind the United States government and acting within the scope of their authority will work estoppel against the government. (*Smale & Robinson* v. *United States*, 123 F. Supp. 457 (1954); *United States* v. *Certain Parcels of Land*, 131 F. Supp. 65 (1955); *Semaan* v. *Mumford* 335 F. 2d 704 (1964); *Le Savoy Foundation* v. *Commissioner of Internal Revenue* 238 F. 2d 589 (3d Cir. 1956).

The Treasury Department and Customs officials who reviewed the dumping submissions for the years 1971–1972 were authorized to bind the United States government and were acting within the scope of their employment when they approved the methodology utilized to determine whether or not dumping duties were due for the years 1971 and 1972. After review of Sanyo's submissions, and verification thereof, the appropriate Customs officers directed that entries be liquidated in accordance with published master lists. Sanyo's entries were liquidated in accordance with these instructions and no dumping duties were assessed on entries made during this period. Accordingly, Sanyo justifiably made crucial commercial decisions with regard to pricing and sales policies for televison receivers sold to the United States in reliance on Treasury and Customs approval of the methodology utilized in its dumping submissions for 1971 and 1972 and advised its customers, including Servco, that it was not selling its television receivers at less than fair value.

Sanyo's overriding concern in making these decisions was to be sure that its sales were not made at less than fair value, so that it and its customers would not be faced at some later date with a massive bill from the U.S. Government for alleged dumpting duties. Naturally, Sanyo, therefore, carefully adhered to Treasury's and Customs' established guidelines and past decisions concerning whether or not sales had been made at less than fair value.

Since the Treasury Department and Customs Service did in fact determine that, under its guidelines and past decisions, Sanyo had not sold television receivers at less than fair value, Sanyo reasonably continued to scrupulously comply with such established guidelines and past decisions as interpreted and as actually applied.

Therefore, the government is now estopped from abitrarily and unilaterally determining, without even attempting verification, that subsequent dumping submissions are not sufficient for determining whether dumping duties are due for the time preiods covered thereby. The government is further estopped from abitrarily and capriciously utilizing its new methodology for calculating whether or not dumping duties are due on all entries made since May 1972.

Since the government in *Le Savoy* was properly prevented from assessing taxes retroactively based on an entirely valid reinterpretation of the appropriate tax law, the Treasury Department and Customs Service may not assess dumping duties retroactively based on their incorrect and illegal reinterpretation of the Antidumping Act, 1921, as amended.

The Treasury Department and Customs Service are further estopped from applying their new "Fixed Rate Formula" by Reason of their failure to provide adequate notice of its implementation as required by the Administrative Procedure Act.

The Administrative Procedure Act (5 U.S.C. 551, et. seq.) expressly requires an agency to publish "general notice of proposed rule making" in the Federal Register not less than 30 days before that rule's effective date. (5 U.S.C. 553(b), (d).) The APA requirement that an agency must provide notice, *before* implementing new rules, or modifying existing rules, is *mandatory* and the right of an interested party to petition for the repeal of a rule "is neither a substitute for, nor an alternative to, compliance with the (APA's) mandatory notice requirements." *Wagner Electric Corporation* v. *Volpe*, 466, F. 2d 1013 (3d Cir. 1972).

While "interpretative rules and general statements of policy" are exempt from the APA notice requirement, an examination of judicial interpretations of the APA regulatory scheme conclusively establishes that the government's adoption of its new "fixed rate" method of calculating foreign market value is a rule making procedure in which notice is required.

Inasmuch as the Treasury dumping regulations are clearly "substantive rules of general applicability" and the "fixed rate" commodity tax formula method of appraisement in effect repeals these regulations, or in the alternative constitutes an amendment or revision of the antidumping regulations, Treasury was required to publish the commodity tax rule, prior to its implementation.

The application of a commodity tax formula first established in 1978 to entries of television receivers made in 1972, is entirely improper and illegal as it violates the mandatory requirements of the Administrative Procedure Act.

For the reasons set forth above Servco urges that this Subcommittee contact the Treasury Department and Customs Service and urge them to abandon their new and erroneous interpretation of the Antidumping Act, 1921, as amended, and return to enforcing the Act, as they have in the past, in accordance with both the letter and spirit of the law.

Thank you for this opportunity to present our views.

Please note that we have no objection to the publication of this statement by the Subcommittee along with other comments received in this matter.

32-760—78——16

SHARRETTS, PALEY, CARTER & BLAUVELT,
New York, N.Y., April 14, 1978.

Hon. CHARLES A. VANIK,
Subcommittee on Trade, Committee on Ways and Means,
Washington, D.C.

DEAR MR. CHAIRMAN: On February 6, 1978, the Subcommittee on Trade of the Committee on Ways and Means invited interested parties to submit recommendations on how the U.S. statutes [1] concerned with providing relief to domestic industries from "unfair practices affecting import competition" might be amended or more effectively administered to provide "more expeditious, effective and equitable relief."

This is a topic of increasing importance, in this period of economic malaise, as an ever-growing number of domestic producers seek to take advantage of these statutes as revised by the Trade Act of 1974, and the administrative mechanisms of the U.S. Government struggle to conform to the new statutory procedures.

We have closely followed the attempts by the agencies responsible for administering these statutes to deal with the new procedures mandated by the Trade Act, and have observed the effects of these procedures on domestic and foreign producers and on the commercial relations of the United States. We have attempted to reflect those observations in the comments submitted with this letter.

We do not believe that significant amendment to the trade laws of the United States or to the administrative procedures which have evolved under them should be undertaken at this time. The multilateral trade negotiations in Geneva are in a critical stage and must be concluded by January 1980. Any initiative of this kind now would undoubtedly be interpreted by our trading partners as an abandonment of our commitment to work toward multilateral reduction of trade barriers, and could encourage increased protectionism at home and abroad to the net advantage of no one. Amendments and regulatory modifications should await the completion of the MTN and be considered in light of any agreements reached in Geneva. We do believe that major revisions to our laws should then be considered, and our comments are intended to give a general indication of what those revisions should seek to achieve.

Respectfully submitted.

PETER O. SUCHMAN.

GENERAL ISSUES

REVISION OF U.S. TRADE LAW

A reorganization and consolidation of the statutes dealing with import relief is greatly needed. Included should be both those statutes generally characterized as dealing with "unfair" trade practices, as well as Sec. 201 of the Trade Act of 1974, the so-called "escape clause". The interests of domestic producers, importers, exporters and the American consumer would be better served by the radical revision of present procedures and remedies. We would suggest that all petitions for relief from injurious imports, regardless of the alleged cause of the problem, be subject to a preliminary determination of injury by

[1] The Antidumping Act of 1921, as amended; Section 303, as amended and Section 337, as amended, of the Tariff Act of 1930; Section 201 of the Trade Act of 1974.

the ITC. The Commission would report the facts and its conclusions as to the effect of imports on domestic producers, and the U.S. economy, without any recommendation for action. The single executive branch agency charged with the responsibility would then conduct an inquiry into what, if any remedy, would be appropriate given the facts and the economic interests of the United States. Remedies available should include all of those presently provided by Sec. 201 and 406 of the Trade Act of 1974; Sec. 303, as amended and Sec. 337, as amended, of the Tariff Act of 1930; and the Antidumping Act of 1921, as amended.

Such a major departure from present statutory provisions would of course necessitate entirely new procedures, and could address the alleged weaknesses in present law. Many of these problems would disappear with the elimination of the necessity to demonstrate discriminatory pricing, subsidization, or other unfair acts. Assuming however that the "unfair trade practice" statutes are to endure, listed below are responses to the specific issues which have been raised.

Sec. 337 should be amended to clarify the intent of Congress, as expressed in the legislative history of the Trade Act of 1974 (Senate Finance Committee Report on H.R. 10710, Report No. 93–1298, page 195.) that complaints involving factual situations falling within the scope of the Antidumping Act or the countervailing duty law should be referred to the Treasury Department for action, and further ITC consideration terminated. The Treasury has long experience in administering these statutes and precedent exists to assist interested parties in understanding the substantive and procedural aspects of that administration. ITC attempts to expand unfair acts under the rubric of Sec. 337 to include "predatory pricing practices" and subsidization by foreign governments have caused a chaotic situation. No statutory or administrative guidance exists to define these practices and importers and foreign manufacturers are faced with duplicitous and extremely burdensome investigatory procedures on the barest evidence of wrongdoing. We have recently witnessed instances where these businessmen have been almost simultaneously forced to defend themselves against procedures under the Antidumping Act, Sec. 337 and Sec. 201 of the Trade Act. While the legal costs in initiating these actions are minimal the burden of multiple defenses can itself drive efficient producers from our markets. In the interests of simple justice as well as economic rationality Congress must clarify this jurisdictional issue.

Beginning the *ITC injury inquiry* at an earlier stage of the antidumping investigation would place an unreasonable burden on importers and exporters who would be required to defend themselves on the questions of price and injury, before different agencies simultaneously. On the other hand, in order to eliminate unwarranted and wasteful procedures, which drain the resources of both interested parties and government agencies, the Commission should be required within the first 60 days following Treasury initiation of all investigations to determine whether sufficient evidence of injury exists to warrant continuation of the proceedings. If this standard is not met Treasury should terminate its inquiry. While currently the law does provide for such a procedure in instances where the Secretary determines "substantial doubt" of injury to exist logically all cases should be subject to preliminary scrutiny so that unnecessary and dis-

ruptive inquiries can be quickly ended. We believe that extending the present 30 day period to 60 days would allow the Commission to make a more meaningful analysis of the facts than is presently possible.

Congress should under no circumstances further restrict the overall time limits in these investigations. The necessity of conducting inquiries into complex fact situations both domestically and outside the United States puts a severe burden on investigating agencies and requires time for communication with foreign and domestic producers, translation of documents, trips abroad and across the country to verify facts and, in many cases, government to government negotiations. Shortening these periods would simply require U.S. authorities to make arbitrary decisions, which would not be in our overall interest. interest. Furthermore, U.S. importers and businessmen who sell imported products are entitled to the same due process as all other citizens. Additional taxes or government regulation of their activities should not be imposed until they have had an adequate opportunity to understand and respond to the allegations made by their competitors. It should be kept in mind that the remedies under discussion here can be easily utilized by prospering American businesses as a means to harass competitors, monopolize U.S. markets and gain access to the trade secrets of other producers, all of the disadvantage of the American consumer and to the health of our economy. The U.S. Congress and Government should not aid and abet such efforts.

Discretion now rests with the Secretary of the Treasury to initiate dumping and countervailing duty investigations. As a practical matter Treasury has rarely done so, depending upon domestic industry, which knows best whether imports are effecting its markets, to complain when the circumstances seem appropriate. The threshold level of evidence necessary to precipitate an investigation is not high and Treasury and Customs staff work with businessmen in perfecting their petitions. Generally a lesser degree of preliminary evidence is required from small businessmen, without recourse to legal specialists, than from large industries with access to Washington-based lobbyists and trade associations. This system works fairly well—as the high level of initiations over the past several years amply demonstrates. Congress ought not *insist* that the U.S. Government on its own initiative, decide when to intervene in the marketplace, creating the attendant uncertainties of an investigation, when the industry most concerned has not felt sufficiently discomforted to raise a complaint. The government's limited resources should better be expended on those matters where there is more likely to be a real problem—that is where help has been sought by those claiming injury.

The *judicial review procedures* contained in the Trade Act of 1974 have already led to a series of cases, now pending in the courts, which could redefine the term "bounty or grant" in the countervailing duty law as it has been understood for the past eighty years. Further expansion of those review provisions ought not be undertaken lightly. An Administration supported proposal has recently been introduced (S. 2857) which recommends far reaching modifications in the jurisdiction and procedures of the Customs Court. We trust those provisions will be fully dissected and analyzed as this bill is considered. In general we believe that a basic principal of such legislation should be to assure that access to the courts for review of administrative deter-

minations whether positive or negative, will be available equally, both as to timing and substance, to the domestic petitioners and to the importers and foreign producers.

ANTIDUMPING ACT

In addition to the comments above which deal with the Antidumping Act we have again responded to the specific issues raised by Chairman Vanik's Press Release of February 6. One general comment seems appropriate. It has been accepted heretofore that the objective of this act is remedial not punitive, and in fact the courts have so interpreted the law. The law should seek to prevent future injurious sales at less than fair value, not to penalize for past practices. Any proposed amendments to this act should therefore be viewed from that perspective.

The *threshold of evidence* which must be provided by petitioners to cause the initiation of an inquiry is a most difficult line to draw. Investigations disrupt normal trade flows from their onset and thus should not be commenced without a showing of good cause. On the other hand too high a threshold may effectively preclude relief, especially to small businessmen without the resources to obtain detailed foreign market information. As imperfect as it may be, the discretion and good judgment of the official charged with administering the law is the only effective means of avoiding these pitfalls. Alleged abuse of that discretion is of course subject to judicial review.

Cost comparison—as opposed to price comparison—is not originally a dumping concept but was added to the law by the Trade Act of 1974. The Congress provided little guidance in that statute and in the legislative history as to how "cost of production" is to be calculated. As a result there has been confusion and uncertainty in administering the provision and a significantly expanded burden on the limited resources of the Customs Service in conducting these extremely complex inquiries in foreign countries. All petitioners seek to turn antidumping investigations to cost of production calculations. Foreign producers have been reluctant to turn over their most closely held industrial secrets to U.S. authorities who are subject to the Freedom of Information Act and the discovery procedures of the U.S. Courts. No producer wants to give up this kind of data. Recently U.S. petitioners have refused to give *their* C.O.P. to Treasury upon request to aid in determining what foreign C.O.P. might be!

Rather than amend the provision to provide more precision to its terms it would make more sense to delete if from the act altogether, returning the law to its pre-Trade Act form which defined sales at less than fair value in terms of price. This is a complicated enough calculation, but one with which U.S. authorities have some experience, and a concept which has been internationally sanctioned. The cost of production analysis is really unnecessary. No producer can sell in all markets below production cost for anything more than the briefest of periods—unless he is being subsidized. The problem therefore is best dealt with by either 1) extending the period for price comparisons in appropriate cases, or; 2) initiating countervailing duty investigations to determine whether subsidies exist.

32-760—78——17

The proposal for the *retroactive withholding of appraisement, and deposit of estimated duties* in lieu of bonding following preliminary determinations are suggestions which seek to convert the act into a punitive statute. These are financial sanctions not intended to prevent future sales at less than fair value, but to impose a crushing burden on importers and foreign producers so as to discourage them from competing in the U.S. market. Holding importers liable for the payment of additional duties on products already physically imported and introduced into the commerce of the United States cannot in any way affect future pricing practices—except by bankrupting the businessmen concerned, thereby precluding any future competition. Similarly, requiring the deposit of estimated duties, rather than the production of bonds, while the investigatory process goes on, would put many importers in such a precarious financial position as to drive them out of business. There can be no justification for such a requirement. The revenue is adequately protected by the bonding procedure and the potential liability will in most cases cause immediate price adjustments. Anything further smacks of rank protectionism.

Neither the Antidumping Act nor countervailing duty law ought to be applied in cases of *imports from so-called "state controlled-economy countries."* These laws are based on market concepts of pricing and the distinction between the private and public sectors. Neither concept has meaning in non-market economies where prices are set administratively and do not reflect real costs, where currencies are not convertible, and the government is indistinguishable from enterprises engaged in the production of goods and services. As a result fictitious price and cost comparisons of one sort or another must be resorted to in order to fit the square peg of the Socialist economies into the round hole of U.S. "unfair trade practice" statutes. Alternatives should be explored, including vesting discretion in the Secretary of the Treasury to refer all petitions under these statutes to the ITC for consideration under Sec. 406 of the Trade Act of 1974, whenever he finds it appropriate to do so.

The present long delays in *the assessment process* following a dumping findings are frustrating and burdensome to all concerned, and lead to complaints that the Treasury and Customs are not administering the law as it was intended. In reality the statutory scheme breaks down when there are a high number of dumping findings, as there have been since 1970. Assessment, if thoroughly performed, entails in effect a new fair value investigation for each time period under scrutiny. Since present Treasury policy requires a period of two years following a finding with no sales at less than fair value, Customs is being asked to perform at a minimum a task four times greater than the normal SLTFV inquiry—which typically covers a six-month sales period and takes nine months to complete. By analogy the assessment process for the first two years following a finding should be completed only 36 months later—*five* years after the finding! At the end of 1976 there were 61 dumping findings in effect. Eight findings were added in 1977. Many of these cases include large numbers of individual foreign producers each of whose sales must be, in theory, analyzed. It has been estimated that at present Customs must prepare on a continuing basis master lists for approximately 500 different producers. Until recently this task had to be performed by the same small group of about a

dozen operations officers charged with carrying on current dumping and countervailing duty investigations (which must be completed within statutory time limits).

If this assessment process is to be conducted in a serious and timely fashion Congress and the Executive Branch must be prepared to vastly increase the resources devoted to the effort. Legislating time limits will only exacerbate the problem and result in inaccurate and arbitrary analyses.

It is interesting to note that of the some 70 findings outstanding at the end of 1977, only 14 pre-date 1970. Of course many older findings have been revoked, but it is also true that previously a much more flexible "*price assurance*" *policy* was in effect. If SLTFV were found producers were encouraged to adjust prices, give assurances of no future sales below fair value, and the antidumping procedure was terminated (on the theory that the statutory objective had been accomplished). Under pressure from those who believed this procedure was too lenient to foreign producers, and provided no monitoring of their future price behavior, the Treasury radically revised its price assurance policy. In May 1970 two changes were made. First, investigations would no longer be terminated with a negative SLTFV determination when price assurances were received, but only discontinued with a requirement for continued prices monitoring by Customs. Second, price assurances would only be accepted when margins of sales at less than fair value were "minimal." Minimal margins were interpreted as no more than about one percent on a weighted average basis (that is, for example, margins of 50 percent on 2 percent of sales, or margins of 1 percent on 100 percent of sales). While this definition has been expanded slightly over time, it is basically still the benchmark used to determine whether a discontinuance is appropriate.

With the benefit of hindsight, it is clear that while the former modification made sense, the standard adopted in the latter was far too inflexible. Those familiar with fair value investigations know that the mathematical margin for error alone far exceeds 1 percent—5 to 10 percent is closer to the mark. Furthermore, keeping in mind the remedial objectives of the statute, why impose any numerical limitation on the acceptance of price assurances? The only test ought to be the Secretary's satisfaction that foreign producers intend to abide by a commitment on future pricing. Such a commitment, coupled with reasonably thorough monitoring of those prices by Customs, should accomplish the statutory objectives without requiring the assignment of hundreds of officers or the adoption of a so-called "across-the-board" assessment procedure to keep the assessment process current. A flexible price assurance policy would also greatly reduce the pressure on the Secretary to discontinue cases because of "special circumstances," although that option should still be available to him in those rare instances where conditions change radically following the initiation of an investigation, making its continuation inappropriate. The reasonableness of that determination is of course subject to judicial scrutiny.

COUNTERVAILING DUTY LAW

The substantive portion of what is now Sec. 303 of the Tariff Act of 1930, as amended—the so-called countervailing duty law—was en-

acted in 1896, in a far less-complex world. The concept was simple: The U.S. was adopting high tariffs to protect American industry from European competition. The Congress enacted this provision to prevent foreign governments from offsetting those tariffs through subsidies ("bounties or grants") to their export industries. For this reason no proof of injury was required before additional duties, to in turn offset the subsidy and presumably return the competitors to the status quo ante, could be imposed. However, the law was only applicable to dutiable imports.

In the intervening years there have been a number of developments which have made this statute a major source of conflict between the U.S. and its trading partners, and of questionable validity as a means of insuring equity in international trade.

First, U.S. tariff rates have declined greatly as the result of successive rounds of multilateral trade negotiations, under GATT auspices, in the past three decades. The original statutory concept is therefore called into question.

Second, the world's trading nations, including the U.S., have agreed that countervailing duties ought to be applied only after proof of injury. The U.S. is excused from abiding by this agreement since our law pre-dates the agreement.

Third, the Congress by amendments to the law in the Trade Act of 1974, severely limited the discretion of the Secretary of the Treasury by imposing strict limitations on procedures under the statute. As a result all allegations of contravention must now be the subject of a determination, which is in turn subject to judicial review. The basic economic and fiscal programs of foreign governments have thus come under scrutiny by U.S. Courts.

Finally, the distinction between the private and public sectors which may have seemed quite clear 80 years ago, becomes less discernible day by day. All governments including the United States, engage in activities which can be interpreted as constituting "bounties or grants" under the plain meaning of the statute. To cite a few examples DISC, EX-IM Bank lending, CCC sales of agricultural commodities, Commerce Department export promoton activities, Research and Development assistance to defense-related industries, CONRAIL operations, and the various industrial development programs operated by the Federal government, the fifty states, and Puerto Rico all would be countervailable under U.S. law, without any showing of injury to domestic industry, if engaged in by a foreign government. Fortunately no foreign government applies their law as we apply ours.

Any attempt by the U.S. to unilaterally define the meaning of "bounty or grant" or otherwise modify the law at this time would fatally undermine the attempt now underway in Geneva to reach a new international understanding on the use of subsidies, and the measures importing countries can legitimately take to protect their industries from them. Should this exercise fail it will then be incumbent upon the U.S. Congress and Executive Branch to examine the law and make whatever modification seem appropriate. We would recommend against any attempt to statutorily define "bounty or grant" as being a rather futile exercise. Experience has shown that governments have unbounded imagination in devising ways to assist their citizens. Any definitional attempt would be almost certainly either too broad, or

too narrow. The addition of an injury provision to the law would greatly simplify this problem, and bring our procedures into conformity with the international standards, while making a great deal of economic sense. The nature of that provision should await the outcome of a detailed analysis of ITC determinations of injury under the Antidumping Act, the escape clause and Sec. 337 with a view toward making all these provisions more objective and their administration predictable.

SPECIALTY TOOLS & FASTENERS DISTRIBUTORS ASSOCIATION,
Elm Grove, Wis., May 11, 1978.

Mr. JOHN M. MARTIN, Jr.,
Chief Counsel, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. MARTIN: Congressman Vanik has called for interested parties to submit recommendations on how U.S. laws and regulations should be amended to provide relief for domestic industries from unfair practices affecting import competition. The competitive situation our industry faces on imports is so complex and bizarre that it nearly defies understanding. We certainly can't propose a solution but we can very clearly state the problem and hope someone on the Committee can determine the most appropriate action.

STAFDA is a relatively new national trade association representing distributors and manufacturers/suppliers of specialty tools and fastening systems for the construction industry. These products include portable electric tools, powder-actuated tools (PAT), concrete anchors, diamond drilling, carbide bits, power nailers and related lines. STAFDA presently has 150 distributor and 73 manufacturer members. Distributors are mostly small independent businessmen with average annual sales in the $1–1½ million range. However, our manufacturer members include some large firms like Black & Decker, Skil, Rockwell and others. Traditionally, our members have served the construction industry in supplying the products I've mentioned.

Beginning in the early 1970's, a new competitor began to flex his marketing muscle using a direct sales force to call on jobsites and sell products similar to ours. That company, Hilti Inc., built their sales programs around PAT. The Hilti U.S. headquarters is in Stamford, CT. However, they are a subsidiary of a multi-national corporation headquartered in Schaan, Liechtenstein where corporate income taxes are reportedly 2 percent of profits. Hilti is that "nation's" largest employer and was recently featured prominently in a film NBC–TV Week-end did on Liechtenstein.

Operating from this enormous tax shelter, Hilti developed a very formidable game plan. They manufactured PAT products in Liechtenstein and sold them through some "arrangement" with Switzerland to overseas subsidiaries. The parent would charge the subsidiary as much as the market would bear to maximize the flow of money back to Liechtenstein where it was virtually tax-free! Since it would be self-defeating for the U.S. subsidiary to produce a profit subject to 50 percent tax, Hilti U.S. could be happy to run a break-even operation. That strategy could probably be confirmed by a check of IRS records.

With the leverage gained in PAT sales, Hilti then began feeding related construction products into their marketing system. This included rotary hammers, carbide bits, anchors, diamond drilling, threaded fasteners and air nailers—all products competitive to our members. Some of these products were obtained through U.S. acquisitions or private label but the backbone of the business continues to be the products brought in from Liechtenstein.

As you might suppose, Hilti's impact on the relatively small market for specialty construction products was devastating. Their U.S. sales in 1977 were reportedly $82 million. Knowledgeable industry sources place their market share at 44 percent on PAT; 30 percent on anchors; 50 percent on rotary hammers and significant penetration on other lines as well. And their share of market keeps climbing.

This diluting of the market has raised havoc with U.S. distributors and manufacturers. Companies have closed and jobs have been lost. Among the four most active U.S. manufacturers of PAT, two have been sold, one is negotiating to sell and the other has discontinued domestic manufacturing in favor of imports.

Perhaps the crowning indignation is that Hilti's largest contractor customers build power plants, waste treatment plants, water treatment plants and other projects financed by U.S. taxpayers! One final and cruel twist of the knife is that duty rates on PAT products have actually declined the past ten years while Hilti has been gobbling the market. Here are the numbers:

6747500—Power actuated hand tools and parts . . . duty rate now 4.5 percent (was 8 percent in 1968). Imports from Switzerland in 1976 were $3,720,000; in 1975 $3,727,000 and in 1974 $4,079,000.

67461500—Unthreaded drive pins for power actuated tools . . . duty rate is 0 percent. Imports from Switzerland for 1976 were $4,442,000; in 1975 $3,622,000 and, in 1974, $4,079,000.

6461700—Threaded drive pins for power actuated tools . . . duty now 7.5 percent (13 percent in 1968). Imports from Switzerland totalled $899,000 in 1976; $701,000 in 1975; and, in 1974, $787,000.

They also brought in .25 and .27 caliber products but the FT-246 book had the 7309000 control number broken into 8 sub-categories for rifles, shotguns and pistols and I could not determine the correct category for the Hilti items. But there is no reason to believe the horror story doesn't continue on powder, carbide and anchors. Consider tools:

6832020—Hand-controlled tools with a self-contained electric motor (power tools) . . . duty rate 5.5 percent. In 1976 there were 67,632 units imported from Switzerland with a value of $8,628,000. In 1975 the figures were 35,405 for $5,807,000 and in 1974 it was 38,174 units worth $4,351,000. That is literally 50 percent of the market for Rotary Hammers!

So that's the story. You tell us what to do about it because our little association doesn't have anybody clever enough to even understand the slick deal put together by Swiss bankers and Liechtenstein attorneys . . . or how our hired representatives in Washington let it all happen. Polish golf carts? Here's an entire U.S. industry ravaged by a "nation" out of a Victor Herbert operetta!

And if you wonder how something like this could get so out of hand before someone cried "foul," it's because the free traders in Washington have made businessmen feel like 'cry-babies' when they com-

plain. There must be a generation of legislators who no longer give a damn about who pays the bills in this country.

If you want expert testimony, we have an industry full of volunteer witnesses.

Sincerely,

MORRIE E. HALVORSEN,
Executive Director.

STEEL SERVICE CENTER INSTITUTE,
Cleveland, Ohio, May 8, 1978.

Mr. JOHN M. MARTIN, Jr.,
Chief Counsel, House Committee on Ways and Means,
Washington, D.C.

DEAR MR. MARTIN: The Steel Service Center Institute, which is a trade association of nearly five hundred active members which are located in virtually all sections of the United States and which handle nearly 20 percent of all steel used in this country, is seriously concerned about the ability of our trade laws to adequately meet the many problems which continue to rise in international trade relations.

Let me assure you we do not speak as an organization which lacks an interest in or which is unaware of the vital importance of international trade to the well-being of our economy. Our members sell a very substantial amount of foreign-produced steel and many will and must continue to do so for their continued vitality. We have foreign members in our organization, and a number of our service centers are owned by foreign interests, although the majority of service centers are privately owned small businesses.

We have been in consultation with officials of the Department of the Treasury and related agencies of the government, and we have expressed to them our serious reservations not only about the trigger-pricing program, but about the ability of the government to effectively administer the terms of our trade laws so as to assure protection against *unfair foreign competition.* We have consistently stated, however, that despite our reservations about the trigger-pricing program we will do all in our power to help it succeed.

If indeed the Trade Act of 1974 and its earlier related legislation were designed to establish fairness and equity in our international trading relationships and to safeguard American industry and labor against unfair and injurious import competition, the plain fact is, that in these days of instantaneous communications and accelerated transport, the cumbersome procedures which must be followed under present laws do not enable one to obtain timely relief.

It is our view that a number of basic revisions of the current laws should be considered which would give the Executive Branch agencies, such as Treasury and the International Trade Commission, a greater degree of latitude and administrative discretion in the handling of complaints and requests for relief, while still affording protection to the rights of our trading partners and avoiding unfounded allegations of outright trade protectionism.

To achieve the objectives we believe are needed, we urge the Administration and the Congress to consider seriously certain revisions of our Trade Laws which would, in our view, modernize our trade relations. Such revisions should include:

(1) Changes which would enable Treasury to speed up the final decision in antidumping cases:

For example, Congress might be asked to consider requiring the Treasury to assess a bond on the item(s) being imported at allegedly unfair prices as soon as the Secretary has determined affirmatively that he will initiate an investigation as to whether the material in question is being sold in the United States at less than its fair value (within 30 days after the filing of an antidumping petition).

If after a full investigation the dumping charge is found to be groundless, the government should reimburse the importer of record for the costs incurred in securing the bond plus a reasonable rate of interest on the money expended for the bonding process.

The antidumping petition filed with Treasury need contain only the minimum data to make a prima facie case of dumping and should not subject the petitioner to a lengthy and exorbitantly expensive data-collection process. The responsibility and costs for all further action after the petition is filed and the affirmative determination is made by Treasury should be borne by the government.

(2) Considerations which relate to the importation into the United States of materials as products produced of manufactured abroad by industrial entities owned by a foreign government, or by a quasi-government entity either wholly or substantially:

For example, Congress might be asked to consider denial of access of such materials or products to the U.S. market unless it can be proven to the U.S. Government's satisfaction that such public ownership has not per se created unfair competition vis-a-vis items produced in the United States under our free enterprise system. The use of the countervailing duty technique under Section 303 (Tariff Act of 1930), with the imposition time foreshortened as in item 1 above, would result in an effective deterrent.

If the action proposed above might be considered internationally infeasible or administratively unworkable, restrictions such as quantitative limitations in the nature of orderly marketing agreements might be negotiated between the United States and the foreign government, so as to restore equitability in the market.

(3) Considerations adding penalty provisions to the Trade Act:

We believe that the Trade Act should provide for penalities to be imposed on the importer of record if dumping is proved, as well as upon the exporter of the material to the United States of his guilt is proven. Such penalities should include not only monetary fines, but also the denial of access to U.S. markets for specified periods. The absence of penalty provisions in the current law invites continued unfair trade practices.

It is our view that sufficient authority exists under the present law, or, if deemed not currently available, should be made available by the Congress to permit immediate response by the President and the Special Trade Representative to unfair practices of foreign governments such as foreign import restrictions, nontariff barriers, export subsidies, and the like. The imposition of additional duties, the withdrawal of trade concessions or the establishment of trade barriers similar to those imposed by the foreign government would, in our judgment, result in a fairer movement of goods between nations.

Finally, we support an expansion of the Buy American provisions of existing law to those procurements by state and local governments whenever such purchases are made with Federal funds. While this expansion of the Act might evoke a threat of retaliation by our trading partners, we understand that every major world trading partner which might retaliate has buy-national practices and procedures more restrictive than our Buy American Act. Additionally, nearly one-third of out states, includng a number of major exporting states, have enacted domestic preference laws or regulations. We believe the threat of retaliation to be unfounded.

In conclusion, let me once again emphasize our interest in the maintenance of a high level of international commerce and in the prompt and effective enforcement of U.S. trade laws. It is our view that these goals are not mutually inconsistent, but, on the contrary, are in accord with the views of Congress and this Administration.

Sincerely yours,

ROBERT G. WELCH, *President.*

TANAKA WALDERS & RITGER,
Washington, D.C., May 12, 1978.

JOHN M. MARTIN, Jr., Esq.,
Chief Counsel, Committee on Ways and Means,
U.S. House of Representatives, Washington, D.C.

DEAR MR. MARTIN: This letter responds to the invitation of Representative Charles A. Vanik, Chairman of the Subcommittee on Trade of the Committee on Ways and Means, in PR No. 37, dated February 6, 1978, to submit recommendation on how U.S. laws and regulation should be amended "to provide more expeditious, effective, and equitable relief for domestic industries from unfair practices affecting import competition."

This letter is not submitted on behalf of any particular client, but rather by this firm in its capacity as a practitioner in the international trade field.

GENERAL OBSERVATIONS

We believe the interests of the United States are served best by international trade laws which take into balanced account the concerns of the American producer who uses American raw or semi-finished materials; the American producer who uses foreign raw or semi-finished materials; the employees of such producers; and the American consumer. That those producers seek export markets for their products cannot be overlooked.

There must be rules for conducting international trade and those rules must be fair to all.

We shall comment first on the items which PR No. 37 identifies as issues which have come to the Subcommittee's attention and, second, additional topics which we recommend to the Subcommittee's attention. The additional topics are offered as part of our comments on the Subcommittee's issues and summarized at the end of this letter.

I.

GENERAL ISSUES

1. Possible replacement of existing laws by a single statute and/or administrative procedure for petitions dealing with all unfair trade practices whatever their cause—

We assume that "existing laws" refers to the Antidumping Act, 1921, as amended; the countervailing duty law, section 303 of the Tariff Act of 1930, as amended; the "unfair methods of competition in importation law," section 337 of the Tariff Act of 1930, as amended; and the "responses of foreign export subsidies" statute, section 301 of the Trade Act of 1974.

Conclusion

As we attempt to show in the ensuing discussion, the diverse nature and purpose of the four statutes cited demonstrates that a single statute to replace all of them would be unnecessary and improper.

Antidumping Act

The Treasury phase of an antidumping proceeding is essentially an exercise in applying technical rules to complex factual situations. The rules are not unlike those applicable to the valuation of imported merchandise for ordinary duty purposes which the U.S. Customs Service employs in literally millions of cases each year. As the Subcommittee knows, in 1958 Congress expressly conformed the Antidumping Act and section 402 to the extent appropriate to the purposes of each law.

The ITC's injury determinations in dumping cases appear to be the product of the economic judgment of individual commissioners, with a quasi-legislative hearing held in the process.

The purpose of the Antidumping Act is to neutralize injurious price discriminations by the imposition of antidumping duties. And it is not *per se* "unfair" to sell goods to the United States at "less than their fair value." Situations can easily be imagined when the practice of selling at LTFV should be encouraged. *E.g.*, domestic shortages; virtual monopoly in U.S. held by domestic manufacturers and consumers are paying prices which are far too high.

The impact of policy factors is minimal or nonexistent in the LTFV phase of the typical dumping case, although there are exceptions, the automobile investigations of 1976 being the outstanding example.

Countervailing duty law

Matters arising under the countervailing duty law nearly always involve questions of whether a foreign government has bestowed a bounty or grant on products exported to the United States. This contrasts sharply with the antidumping law and section 337 under which the activities of private parties are challenged. Therefore, it would be inappropriate to circumscribe the decision-making process in countervailing duty cases with the same types of proceedings which may be otherwise proper (though different from each other) in antidumping or section 337 investigations. Moreover, because of the nature of the decision itself, the scope of judicial review of countervailing duty decisions of the Secretary of the Treasury or the ITC is much broader than it is in antidumping or in section 337 matters.

Section 337

The Trade Act of 1974 converted section 337 cases into full hearing proceedings to be conducted under the minimum requirements of the Administrative Procedure Act. (See *infra* for comments directed at details of section 337.) Changes in section 337 clearly seem in order but the types of issues with which the statute is (or should be) concerned are narrow and policy concerns should not enter the process at the ITC level.

Section 301

Section 301 is in aid of the exercise by the President of his constitutional power to conduct foreign affairs and is of a different order than the other statutes in question. It is a "policy" statute in contrast to statutes having the "technical" characteristics common to the antidumping act, section 337 and, to a somewhat lesser degree, the countervailing duty law.

2. Resolution of overlapping or conflicting jurisdictions between the Department of the Treasury and the International Trade Commission, particularly in antidumping and section 337 cases—

The law should be amended forthwith to reflect positively the Congressional intent in the Trade Act of 1974 in enacting section 337(b)(3) that the broad authority of 337 would not be exercised by the ITC in matters involving antidumping and countervailing duties (19 U.S.C. 1337(b)(3)).

A draft of a language is attached (Attachment A). It is designed to eradicate all perceived technical impediments to carrying out fully the plain Congressional intent. It would not divest the ITC of jurisdiction; it would prescribe standards for the exercise of statutory authority.

3. Coordination of unfair import practices provision with other statutes dealing with prevention of unfair methods of competition, such as antitrust laws—

We respectfully suggest that the section 337 function should be transferred to the Federal Trade Commission, as proposed by H.R.——.

This would free the ITC from encumbrances of the quasijudicial process of the APA and permit it to concentrate its resources on the enormous task for which it was established and for which it, among all agencies, is best equipped—independent advice and recommendations about a myriad of economic matters affecting international trade and its economic impact on domestic industry.

The FTC on the other hand is the independent agency with the greatest experience in addressing unfair methods of competition and doing so in the atmosphere of the quasi-judicial hearing process.

In the alternative, if the section 337 responsibility is to remain with the ITC, we should suggest consideration of the following changes in the statute:

(*a*) Give the ITC discretion to refrain from opening an investigation and to close one after it has been opened without reaching a final decision.

(*b*) Provide that interested persons may file petitions alleging violations, but once the ITC decides to initiate a proceeding, the petitioner no longer plays a role. Section 337 should not be a vehicle for resolving private disputes; if the ITC initiates a proceeding it should

prosecute the matter and be vested with the usual "prosecutorial discretion."

(*c*) The ITC's jurisdiction should be limited as under (2) above and its proceedings should be coordinated with FTC and the Department of Justice, as appropriate, under formal interagency agreements like those under which the latter agencies operate today.

(*d*) The statutory time limits for completion of investigations under 337 should be eliminated because they are incompatible with traditional notions of due process and with quasi-judicial proceedings.

4. More expeditious time periods for reaching determinations including possible concurrent rather than consecutive 3 month final treasury dumping and ITC injury determinations and the inclusion of time limits for making determinations in section 301 cases—

(*a*) In 1972 Treasury for the first time adopted formal time limits for actions in antidumping proceedings. Less than two years later, the Trade Act of 1974 reduced those time limits by some three months.

The pendency of an antidumping proceeding does not improve the business position of the foreign companies and U.S. importers concerned. And, typically, they have no desire to prolong the investigations. Naturally, they strive for a result which absolves them of dumping charges.

One hears much about speedy relief for domestic industires, but the fact is the very existence of the dumping investigation itself can, and often does, disrupt trade in the product affected, or stop it entirely. On the other hand, principles of fair play and the inherent complexities of making the necessary "apples with apples" comparisons demand that the true facts be obtained (they are rarely, if ever, available to the complaining domestic industry) by the Customs Service, verified by Customs, analyzed and appropriate decisions made.

Quite simply, all this takes time. The facts are abroad and they are not in precisely the form that Customs wishes to have them, so they must be extrapolated from records, etc.

We doubt that there has been enough experience with the time limits of the 1974 Trade Act to judge whether they always or usually provide enough time for a reasoned decision, or not time enough. We suspect that the limits generally are adequate. We note, however, that a recent change of procedure by Treasury of affording "disclosure conferences" to domestic producers and foreign exporters *only after* a decision has been made whether to withhold appraisement probably will cause problems.

The problems could arise because not until the disclosure conferences will either the domestic producers or the exporters know how the Treasury arrived at its tentative determination. Once the tentative determination is made, Treasury must make its final decision within three months; precious little time in a complex case when it is learned in the disclosure conference that additional data must or should be obtained, verified, and analyzed. However, the Treasury's statutory authority to extend the time for making decisions for up to three months is unavailable after the tentative determination has been made. We believe the law should be amended to give Treasury the option of extending the investigative period by up to a total of three months, by published action taken any time before the final LTFV determination has been made.

(*b*) Although the concept of simultaneous injury and LTFV investigations is embodied in the International Antidumping Code, it has not been implemented fully by U.S. legislation for a number of reasons, some presumably having to do with efficient use of ITC resources, others grounded on the severely limiting substantive effect which the absence of a Treasury LTFV determination would have on the ITC's ability to make its statutory determination as to whether injury is "by reason of the importation" of merchandise sold at LTFV. The Subcommittee knows the magnitude of the margins themselves is often crucial in this connection. The ITC cannot determine the competitive effect of LTFV sales until it receives advice from Treasury as to which products were sold at LTFV, which exporters are selling at LTFV and which were not, the percentage of imports that were sold at LTFV and the extent of the dumping margins. Therefore, we would recommend against fully concurrent injury and LTFV investigations.

(*c*) As stated earlier in this letter, section 301 appears to be a "policy" statute, augmenting the President's constitutional foreign affairs powers. Accordingly, we believe that no additional time limits should be imposed on proceedings under that section.

5. Initiation of dumping and countervailing duty investigations by the Secretary of the Treasury—

The Secretary of the Treasury has all the statutory authority he needs to initiate antidumping or countervailing duty investigations without a petition from domestic interests. We would respectfully suggest that the reasons why the Secretary ordinarily does not initiate such investigations again were reviewed and accepted by the substantive committees of the Congress during consideration of the Trade Act of 1974.

6. Judicial review procedures, including review of negative ITC injury determinations in dumping and countervailing duty cases—

The appropriate statutes should be amended to remove any doubt as to whether the Customs Courts have authority to review negative ITC injury determinations in antidumping and countervailing duty cases. Congress apparently has decided that the Courts should have that authority. In respect of dumping, the issue is raised in a case presently before the United States Customs Court. *SCM* v. *United States*.[1]

In addition, the appropriate statutes should be amended to permit foreign exporters and importers of merchandise of the class or kind covered by a "finding" of dumping to obtain judicial review of the finding without waiting for many months or years to file a protest against the assessment of dumping duties or individual entries. The amendment should provide that the United States Customs Court shall review such findings on questions of law only, upon notice filed with the Secretary of the Treasury within 30 days after the finding is published in the Federal Register and upon summons filed with the Customs Court within 30 days after the Secretary publishes notice of such desire to contest in the Federal Register. In essence, the procedure would be patterned after the judicial review of negative dump-

[1] On May 11, 1978 the Customs Court decided that it had jurisdiction to review negative ITC injury determinations. *SCM* v. *United States*, CRD 78-02. Still the law should be amended to make these important jurisdictional matters clear and precise.

ing determinations allowed by the addition of new subsection (d) to section 516 of the Tariff Act of 1930, as amended, by the Trade Act of 1974 and should be adopted in keeping with the Congressional desire to give domestic producers rights to judicial review equivalent to those given importers as reflected in 516(d), *supra*.

Like judicial review of negatives, these cases should be given precedence by the statute. After all, it is possible that invalidating errors of law were committed by Treasury or the ITC in their determinations leading to a finding. Examples of such potential errors can be supplied. The opportunity to seek a prompt decision by the Court as to whether such errors were committed would not only bring fair results more quickly and remove burdens on trade adopted without compliance with the law, but also would avoid unnecessary further expense to the government and the parties.

II.

ANTIDUMPING ACT

Before offering any comments on the Antidumping Act issues, we wish to call the Subcommittee's attention to excerpts from a 1957 report by the then Secretary of the Treasury, George H. Humphrey. Secretary Humphrey, we might add, was not known as an ardent free trader or a foe of domestic business.

After reviewing experiences of the early post World War II years, the Secretary's report explained the philosophy underlying amendments to the dumping law which the Treasury proposed:

> With regard to decisions as to dumping price, the Treasury sees no justification for regarding these as anything more than an exercise in arithmetic. The comparison to be made is between the price the exporter sells in the United States market and the price he sells, not for export, in his own country. These prices must be adjusted so that they are properly comparable—which typically means a comparison f.o.b. factory. If the price in the United States market is lower, then as a simple matter of arithmetic, there is a sale at less than fair value. The word "fair market" value—what a willing buyer will pay a willing seller. There is no connotation of "equitable" in this use of the word. For this reason, the effect on American industry is not an element to be considered in connection with determinations as to fair value.
>
> * * * * * * *
>
> The discussion of "fair value," above, brings out what is believed are cogent reasons for not construing this term as used in the Antidumping Act to mean that selling at less than fair value was to be considered in and of itself "unfair."
>
> The legislative history shows contemporary temporary realization of the fact that international price discrimination was regarded as usual at the time the Antidumping Act first became law. In a report of the Tariff Commission prepared in connection with Congressional consideration of the question of the statement is made:
>
> Ordinary price cutting and underselling are so universal, both in domestic and foreign fields, that it is taken for granted that restrictions are contemplated only when their practice is accompanied by unfair circumstances or by unfortunate public consequences.
>
> It is thus clear that Congress did not adopt a concept of price fixing in 1921, whereby shipments to the United States were to be "fair traded."

There is wisdom in the Secretary's statement which has not diminished in the 20 years since it was made.

We think it important when amendments to the Antidumping Act are being reviewed to consider that sales which are technically below

fair value are neither "unfair" in themselves nor always to be discouraged and that the interests of the American consumer, the need for fair competition and the position of American companies which depend on imported goods and which export, must not be overlooked.

1. Amount and type of evidence of dumping and injury required by Treasury from petitioners in relation to capability of petitioner to provide such information—

Although we are unaware of any specific problems encountered by domestic industry in preparing and submitting an antidumping petition in proper form with the Commissioner of Customs, we certainly agree that petitioning domestic interests should not be required to submit more data to the Treasury than is reasonably available to them to support their allegations of sales below fair value.

The Treasury regulations are, and should be, drawn to permit easy identification of frivolous petitions or those which proceed on erroneous legal approaches (*e.g.*, a claim that foreign goods are being sold below fair value because they are being sold at less than the petitioner's prices).

A prospective petitioner would have data to support his allegation of dumping or he should not be contemplating the filing of a petition. Such data should be made available to Customs. On the other hand, the petitioner should not be expected to make Customs' investigation for it. Neither should Customs be expected to devote its overburdened resources to making fruitless inquiries.

There is some indication that the detailed requirements of the existing regulations, while placing no small responsibility on petitioners to develop LTFV information, have resulted in a greater reliance by Customs on information developed by petitioners and preliminary investigations conducted by Customs might have become perfunctory in some cases.

Ideally, reasonably supported allegations of sales below FV should be investigated preliminarily without publicity of any kind by Customs and no formal investigation should be initiated, unless there is some evidence to support the notion that there is some probability that sales below fair value may be taking place. One reason for this, of course, is the mere initiation of a formal investigation can deter and disrupt normal trade, often severely. Therefore, such investigations should not be opened without sufficient advance inquiry.

Since the domestic petitioner may be presumed to have "injury" data readily available (but it is not readily available to Customs), there is no apparent reason why he should not be required to submit it.

2. Cost of production concept and calculation, including the definition of a reasonable period of time" for recovery of all costs—

As conceived, the Trade Act of 1974 provision requiring that home market sales below cost be ignored in determining fair value when certain standards are met is quite appropriate if the statute is applied strictly to the narrow situation it was apparently intended to address. It appears that the amendment was aimed at aberrational situations where goods are sold in the home market in the ordinary course of trade at prices which are below the cost of producting the goods. We say "aberrational" because companies normally cannot long survive if they sell goods below cost nor can companies in a free economy be forced by law to make a profit, although profit surely is their goal.

One example of the kind of case at which the amendment appears to have been directed is one in which a company is in the business of producing product "A" and in the process of manufacturing "A," commodity "B" results as a by-product. By-product "B" is sold at very low prices in the home market where supply exceeds demand. There is, however, heavy demand for by-product "B" in the U.S. It is sold in the U.S. at prices which yield good profits and which are well above the foreign home market price of "B." The U.S. price of "B," however, is substantially below the price at which competitive goods can be sold profitably in the United States by U.S. domestic industry.

Using the home market price as the basis of fair value of "B" would produce no margin of dumping. Yet, if the true cost of producing the by-product in the same market were constructed, it might show that the home market sales were below cost, and, therefore, they all should be ignored. Ultimately, "constructed value" would be employed to determine fair value of "B" and with the add-ons for profit of "B" and "A," a dumping margin might be shown.

Treasury appears to have taken an arbitrary, even capricious, approach to the statute, concluding that 1 percent or 2 percent of volume are "in substantial quantities" and the first one or two months of a six-month investigative period are an "extended period of time," even though the home market prices of the goods increase significantly during the remainder of the investigative period. Moreover, although the average prices over the investigative period are more than enough to recover all costs (and, therefore, the prices during the latter part of the period also were far more than sufficient), the Treasury would disregard the sales made below cost at the beginning of the period. This kind of interpretation, we believe, is at odds with the Congressional intent and unsupported by the statutory language.

In summary, we believe that the statutory language is not deficient and Congress should not define such terms as "extended period of time," "substantial quantities" and "reasonable period of time," because those conditions may vary case by case. The resolution of the problem lies with the administrative interpretation. Some reiteration of the Congressional intent may be in order.

3. Price comparisons and verification of data, particularly in cases involving state-controlled-economy countries—

All data should be verified to the extent that Treasury believes necessary. Every effort should be made (and resources provided to Customs) to make thorough verifications, so that comparisons are made on the basis of the facts.

4. Retroactive withholding of appraisement and possible deposit of estimated duties in lieu of bond posting deposit of estimated duties in lieu of bond posting following a preliminary affirmative dumping determination—

Ever since the Antidumping Act was enacted in 1921, the Secretary has had authority to order appraisement withheld up to 120 days before allegations of dumping were made known to him. Standards for the exercise of that authority are contained in the Treasury antidumping regulations (19 FR 153.35(d)).

To *require* retroactive withholding in all cases would be manifestly unfair. Such action would fall unevenly among importers because some

ports would have liquidated entries at the time of withholding, others would not. Companies not investigated (Customs rarely, if ever, investigates all the companies exporting the product to the U.S.) would be affected whether or not they are selling below fair value. Moreover, many firms make a conscious and sincere effort to be assured that their sales to the United States are not below "fair value" and do so routinely without any known threat of dumping allegations being filed against them. Despite careful advance preparation, the technical morass of the regulations can result in tentative or final LTFV determinations. The cause of the margins can be an honest difference of opinion between the exported and Treasury as to how the regulations or law should be interpreted—yet the company has done all it could have done to assure that it was not selling below fair value.

To require deposit of estimated dumping duties in lieu of a bond would be even more unfair. In addition to the reasons why *required* retroactive withholding would be unfair, it must be recognized that the tentative affirmative is only that—tentative. The Company which has not been investigated presumably would have to deposit estimated dumping duties based on some other companies' margins. This disregards the 1974 change in the definition of "such or similar" which mandates that dumping margins, if any, be determined from each company's own transactions, not someone else's sales. (If an "across-the-board" approach were adopted, "dumping duties" would be converted to "penalties." See *infra.*)

5. Discontinuance of investigations on the basis of price assurances or special circumstances.

As the Subcommittee is aware, in May 1970, the Treasury discarded a liberal price assurance policy and replaced it by a regulation which was intended to allow the discontinuance of antidumping investigation upon the acceptance of price assurances, if the possible dumping margins are minimal in relation to the volume of exports of the merchandise in question. (19 C.F.R. 153.33).

The change was designed to provide reasonable and flexible guidelines for the exercise of discretion and judgment in an area which, for many years, had enjoyed international acceptance (it is expressly recognized in the International Antidumping Code) and may be said to have been ratified or approved by the Congress in the Trade Act of 1974 (viz. amended section 201 of the Antidumping Act, 1921, providing for discontinuances of investigations).

The problem is in the administration of the amended regulations. It appears to have deteriorated into a "numbers game" and weighted average margins of more than 1.6% are considered to be *per se* more than minimal. Thus, the Treasury had abdicated its responsibility to exercise direction and judgment to determine whether margins are "minimal" in the circumstances of the particular case. *Compare*, the 1976 automobile cases.

The Treasury should determine whether margins are "minimal" under all the facts of a case, and Treasury should be willing to take other factors into account, such as the situation already described, in which a foreign exporter makes a conscious effort to consider the antidumping law in its pricing strategy and can demonstrate that its prices were set in order to avoid selling below fair value. However, a petition is filed later and a difference of opinion develops between the exporter

and the Treasury on a debatable technical point and the Treasury opinion on the point (it is likely that Treasury will admit it is not always right and occasionally uncertain when novel questions are encountered) results in a dumping margin. The exporter agrees to revise its prices to eliminate margins which result when the Treasury position is applied. It would seem only fair for Treasury to discontinue the investigation in that type of case.

6. Assessment of dumping duties, including a possible statutory time limit for liquidating entries following a final dumping finding, and assessment of dumping duties across-the-board based upon price comparisons made during the fair value investigation rather than entry-by-entry based upon revised post-investigation data—

Time limits for liquidations were recently approved by the House in adopting HR 8149, the "Customs Procedural Reform Act of 1978."

H.R. 8149, "The Customs Procedural Reform and Simplification Act" passed the Senate on June 7, 1978.

Importers have the greatest stake in the certainty provided by prompt liquidations. It is essential that the liquidations be made on the basis of the verified facts and this takes time and resources. Systematic approaches are imperative, but rigid time limits are not the answer.

Assessment of dumping duties on across-the-board price comparisons made during the fair value investigation would convert the statute from an antidumping law to a penalty statute. The amount assessed on entries made after the investigation would bear little or no resemblance to the actual margins, if any, high, low, or non-existent. Typically, exporters revise their prices to eliminate dumping margins once they have been tentatively determined, for it is only then that the exporter has some idea of what he must do to get rid of margins. Thus, the across-the-board notion would mean assessing dumping duties on entries which in fact and law produced no margins—in short, a penalty.

The foregoing comments apply to the companies which have been investigated. What about those which have not been investigated and which would be faced with dumping assessments based on information totally unrelated to its own performance? Moreover, this would be a complete reversal of the Congressional policy made in the 1974 Trade Act and referred to earlier in this letter of making each company's transactions stand on their own (the amended definition of "such or similar").

III.

COUNTERVAILING DUTY LAW

As the underlying philosophy to any review of the substantive countervailing duty law, we would suggest that the Committee consider that foreign programs which are like programs which the United States endorses and implements as a matter of domestic law should not be regarded as countervailable bounties.

As one example, United States law since the earliest days of the Republic has permitted drawback of customs duties imposed on imported foreign goods upon the exportation of merchandise manufactured in the United States with the use of the foreign goods. See *Zenith Radio Corporation* v. *United States*, (S. Ct. No. 77-539) decided June 21, 1978, —— U.S. ——; slip opinion by the unanimous Court at

page 13: "This intuitively appealing principle regarding double taxation has been widely accepted both in this country and abroad for many years prior to the enactment of the 1897 statute. See, *e.g.*, Act of July 4, 1789, § 3, 1 Stat. 26 (remission of import duties upon exportation of products).

Later, specific types of domestic goods of the same kind or quality were permitted to be substituted for the imported foreign goods and drawback allowed on the exportation of products manufactured by using those domestic goods. In 1958, the substitution principle was given general application.

If a foreign country has a like program and forgives duties in the manner in which the United States does so under our drawback law, such forgiveness is not considered a bounty or grant which is subject to countervailing duties. And, the Treasury has never countervailed a foreign drawback system like ours. Nevertheless, such broad notions as those which hold that any program which has, or can have, the effect of stimulating exports, or affording an incentive to export, constitutes a bounty, would seem to embrace the United States drawback system.

We would respectfully suggest that any review of the substantive countervailing duty law should await developments in the Multilateral Trade Negotiations of an international subsidy/countervailing duty code.

IV.

SUMMARY OF ADDITIONAL TOPICS WE WOULD RECOMMEND TO THE COMMITTEE'S ATTENTION

1. Section 337

Consider amending section 337 as proposed in I 2 and 3 above by eliminating the perceived "overlapping" jurisdiction of ITC and Treasury restructuring the statute by transferring the decision-making authority to the FTC.

2. Antidumping

Harmonize the judicial review provisions as proposed in I 6 above by eliminating uncertainties and allowing exporters and importers to challenge immediately the legal sufficiency of dumping findings without awaiting a liquidations.

Give Treasury discretion to extend the period for making determinations for a total of up to three months and exercise that authority at anytime before final determination is made as proposed in I 4 above.

Sincerely yours,

H. WILLIAM TANAKA.

Enclosures.

TECHNICAL ANALYSIS

A Bill to amend section 337 of the Tariff Act of 1930, as amended, to clarify the authority of the International Trade Commission and the Secretary of the Treasury with respect to matters arising under the Antidumping Act, 1921, as amended, and section 303 of the Tariff Act of 1930, as amended, and for other purposes

The amendments made by the first section of the bill make clear the [Congressional] intent in including subsection 337(b)(3) in the amendments to section 337 of the Tariff Act of 1930 by the Trade Act of 1974, namely, that the International Trade Commission shall not investigate under section 337 any matter which is within the purview of the countervailing duty law (section 303 of the Tariff

Act of 1930, as amended, 19 USC 1303) or the Antidumping Act, 1921 (19 USC 160 *et seq.*). Such matters are intended to have been left for appropriate action by the Secretary of the Treasury in accordance with the terms of those statutes.

The amendments would cover information coming before the ITC prior to, as well as after, an investigation under section 337 is formally commenced. If the Commission has reason to believe that such information may come within the purview of either the countervailing duty law or the Antidumping Act, it is required to notify the Secretary so that the Secretary may take appropriate action under the applicable statute.

Because the Secretary has exclusive administrative jurisdiction to determine whether a matter comes within the purview of the countervailing duty law or the Antidumping Act, the ITC is instructed to suspend further action in respect of the information referred to the Secretary. If the Secretary decides that the matter comes within the purview of the countervailing duty law or the Antidumping Act, any action pending before the ITC with respect to that information is terminated by operation of law upon publication in the *Federal Register* of the Secretary's affirmative notification. If the Secretary decides that the information does not come within the purview of the countervailing duty law or the Antidumping Act, the ITC will take whatever action is required by law after it has received the Secretary's negative notification.

Section 2 of the bill provides that the first sentence of subsection (c) of section 337 of the Tariff Act of 1930, as amended, is amended to read, "The Commission shall determine, with respect to each investigation conducted by it under this section except an investigation suspended and terminated pursuant to subdivision (3), whether or not there is a violation of this section." This amendment assures that there is no technical requirement that the ITC decide whether there is a violation of section 337 in a case in which a matter has been referred to the Secretary under 337(b)(3). If the Secretary determines the matter is within the purview of either the countervailing law or the Antidumping Act, the investigation is terminated by operation by law.

Section 3(a) of the bill first provides that its amendments are effective on and after the date of enactment. This is merely a restatement of the general rule. Section 3(a) also provides that the amendments apply to any pending 337 investigation in which the ITC has not made, before the date of enactment of this Act, a final decision under 337(c) as to whether the section has been violated. The effect of this provision is to require the ITC to refer matters (if it has not already complied with existing section 337(b)(3) and done so), which may come within the purview of the Antidumping Act, 1921, or the countervailing duty law, section 303 of the Tariff Act, to the Secretary of the Treasury in any section 337 investigation which is pending on the date of enactment. Such investigations would be suspended in accordance with section 337 as proposed to be amended by this bill and would be subject to its provisions in the same manner as a new matter arising on or after the date of enactment and as information before the Commission on the date of enactment with respect to which it has not initiated an investigation.

Section 3(b) of the bill excepts from any possible application of the amendments any investigation under section 337 which has been terminated by the Commission pursuant to a consent order.

The Committee intends that the enactment of this bill with this effective date provision is not to be interpreted as approving the exercise of jurisdiction by the ITC under section 337 with respect to any matter which may come within the purview of the Antidumping Act, 1921, or the countervailing duty law.

H.R. ———

A BILL To amend section 337 of the Tariff Act of 1930, as amended, to clarify the authority of the International Trade Commission and the Secretary of the Treasury with respect to matters arising under the Antidumping Act, 1921, as amended, and section 303 of the Tariff Act of 1930, as amended, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 337(b)(3) of the Tariff Act of 1930, as amended (19 USC 1337(b)(3)) is amended to read as follows:

"Whenever, before or during the course of an investigation under this section, the Commission has reason to believe, based on information before it, that a

matter may come within the purview of section 303 of the Tariff Act of 1930, as amended, of the Antidumping Act, 1921, as amended, the Commission shall

(*i*) promptly notify the Secretary of the Treasury so that the Secretary may take such action as is otherwise authorized by such section and such Act; and

(*ii*) upon such notification, refrain from commencing any investigation, or suspend any investigation which has been commenced, in respect of such matter.

The Secretary shall promptly notify the Commission whether the matter comes within the purview of either such section or such Act. Upon publication in the *Federal Register* of affirmative notification by the Secretary, no investigation shall be commenced, and any investigation suspended under this subdivision in respect of such matter shall be closed. Upon negative notification by the Secretary, the Commission shall take such action in respect of such matter as is otherwise required by this section. Notifications by the International Trade Commission and the Secretary under this subdivision shall be published in the *Federal Register*."

Section 2

The first sentence of subsection (c) of the section 337 of the Tariff Act of 1930, as amended, is amended to read, "The Commission shall determine with respect to each investigation conducted by it under this section, except an investigation suspended and terminated pursuant to subdivision (3), whether or not there is a violation of this section."

Section 3

(*a*) The amendments made by this Act shall be effective on and after the date of its enactment and shall apply with respect to investigations under section 337 of the Tariff Act of 1930, as amended, in which the International Tariff Commission has not made a final determination under section 337(c) before the date of enactment of this Act.

(*b*) The amendments made by this Act shall not apply with respect to any investigations under section 337 which have been terminated by the Commission pursuant to a consent order before the date of enactment of this Act.

3M COMPANY,
TRANSPORTATION DEPARTMENT,
St. Paul, Minn., April 7, 1978.

JOHN M. MARTIN, Jr.,
Chief Counsel, House Committee on Ways and Means, Washington, D.C.

DEAR MR. MARTIN: In response to your solicitation for opinons or suggested amendments to the U.S. law to provide relief from unfair trade practices, Subcommittee on Trade PR #37. Our recommendations are based upon actual experience in a recent case decided involving Box Sealing Tape. The case was decided in August 1977 on a complaint filed in April 1976. Our comments relate only the Anti-Dumping provisions because we have no experience whatsoever with other types of trade relief. In making our comments in response to your press release of February 6, 1978 we have number your paragraphs under General Issues 1–6 and Anti-Dumping Comments 7–12.

Paragraph 1: Having no experience with other provisions relating to unfair trade practices other than dumping we feel that it would be inapropriate for us to comment on this, however, it may be helpful to have all of these statutes updated under and implemented by a single agency.

Paragraph 2: While Treasury addresses their investigation to violation to the Anti-Dumping provisions and the International Trade Commission to injury we have found that the most time consuming part of the overlap is educating the personnel investigating the case

as to the nature of the problem, the product and problems of the industry.

Paragraph 3: No comment.

Paragraph 4: 3M believes that the maximum time periods for each stage of an antidumping proceeding is currently excessive. While there is due diligence on the part of each person involved, it is only human nature that if one is extremely busy and the statute allows six or nine months to complete a determination, the full time will be used.

As a result, considering the time needed to collect the original data, draft the petition, process it through Customs, Treasury and the ITC, our anticipated relief is anywhere from 18 to 24 months away from the date such a need first arises.

It would be our recommendation that either shorter time periods be established or concurrent consideration by Treasury and ITC be adopted, or both.

Paragraph 5: While the concept is still new on the surface, we feel that it will be a workable procedure.

Paragraph 6: The concept is broad and far reaching but expressed a definite need for a review procedure.

ANTI-DUMPING ACT

Paragraph 7: As a multi-national company we have not found these requirements to be a problem.

Paragraph 8: Until the standards are established to find exactly how cost of production figures are to be calculated, the various accounting systems presently being used make it virtually impossible to arrive at acceptable and accurate cost of production determinations.

Paragraph 9: While in our case, different systems were used to develop data the current investigators involved in Treasury have taken steps to establish uniform procedures for the development of data. We do not believe that this is a problem at this time.

Paragraph 10: 3M strongly supports the concept of the collection of temporary dumping duties at the time there is a determination of LTFV margins (currently the withholding of appraisement notice). This would facilitate the purpose of the Anti-Dumping Act without adversely affecting the rights of the parties involved.

3M's experience indicates that the withholding of appraisement and the use of a bond is not a sufficient deterrent, since substantial gains can be made in the U.S. by foreign manufacturers in actual sales and market share from the time LTFV sales are found and dumping is finally determined. This is compounded by delays in the preparation of the master list and the actual collection of dumping duties.

Paragraph 11: Since the primary purpose of any petitioner filing an anti-dumping action is to insure that the prices of foreign products sold in the U.S. are at fair value, it would seem to make sense that investigations could be discontinued upon assurances by foreign manufacturers that prices would be equal to those found in the home market for similar levels of trade.

However, 3M would be concerned about this procedure gaining widespread use unless: (a) there was immediate and ongoing monitoring of the home market prices and the U.S. prices; (b) upon discovery

of any breach of these assurances, petitioner's original complaint would be reinstigated without the petitioner having to update the facts contained in the petition; and (c) there would be some sort of right of compensation to the petitioner for damages caused due to the delay of the investigation and the collection of the dumping duties.

Without these safeguards, it is feared that price assurances would be merely a delaying tactic and used at the expense of domestic U.S. petitioners.

Paragraph 12: The deposit of estimated duties as outlined in paragraph 10 would eliminate the need for a "shot-gun" approach. Each case could then be analyzed on its own facts.

If you wish additional information of our opinions or clarifications of our comments, please let me know.

Yours truly,

KENNETH A. KUMM,
Manager, Customs/Purchased Commodities.

UNITED GROWERS AND SHIPPERS ASSOCIATION, INC.,
Orlando, Fla., April 12, 1978.

Mr. JOHN M. MARTIN, Jr.,
Chief Counsel, House Committee on Ways and Means,
Washington, D.C.

DEAR MR. MARTIN: United Growers and Shippers Association, Inc., is a non-profit, no capital stock organization of independent Florida citrus growers and shippers of fresh citrus incorporated under Florida law.

Our membership ranges from "Mom and Pop" operations of 30 acres or less to members who produce up to a million boxes (1⅗th bu) of citrus annually. Some of our member are among the largest exporters of citrus—particularly grapefruit-) Japan and Europe.

When first formed in 1937, United Growers primary object was to represent the Florida citrus industry in any problems arising and to aid in the solution of those problems at industry, state, national and international levels. That is still our primary function today. Internally, United Growers' members elect a 12-man board each of whom must be a producer. The board in turn elects the President and other officers. Our current President is J. J. Parrish Jr. of Titusville, Fl., a lawyer, grower, banker, cattleman and railroad director who is a former chairman of the Florida Citrus Commission, governing head of the state agency, the Florida Department of Citrus.

Fresh citrus as you know is price sensitive and our growing season coincides with that of major competitors such as Mexico, Israel, Spain, Morocco. It will also be faced with importation of oranges and grapefruit from Cuba when the current trade embargo is lifted as the signs inevitably point in that direction from the White House and some of the major members of the Congress. The world's largest grapefruit grove is currently coming into bearing on the Isle of Pines in a Cuban economy controlled by the state and grown and harvested with the help of little children.

Processed citrus products are also price sensitive. And Florida which was once the leading world exporter of citrus juices now must

take a back seat to Brazil, to Mexico, Israel, South Africa, Belize, Venezuela, Panama and (probably soon) Japan. The Brazilian and Mexican processors particularly now have almost unlimited access to our markets, domestic, hemispheric and world. And both were built and largely financed by United States business capital and our finest technological aid.

The tariff at present gives us no protection against processed product and from the amounts of Mexican and Israeli produce in our fresh markets the fresh tariffs are inadequate. Under drawback tariff provisions, U.S. importers can bring in foreign processed product, utilize it in our prime domestic and Canadian markets and, within a three year period (some say as many as eight years) recover almost 100 percent of the tariff through exports of cheaply priced Florida juice whose value has been destroyed by the import.

Obviously, the Subcommittee should examine these tariffs and the drawback provision carefully as to protection of perishables.

While it may be beyond the Subcommittee's scope, the U.S. consumer also needs protection against foreign juice of inferior quality not subject to USDA inspection at point of manufacture as is Florida juice processed to the highest standard in the world and for which the consumer has learned to depend as to assurance of purity as well. This foreign juice is now examined only cursorily by the health people and the USDA at port of entry or importer warehouse and the checks admittedly done cannot tell if it has been adulterated by cane sugar, food coloring or what have you. As one Florida citrus commissioner remarked in a public meeting: "If you don't watch them (the Brazilian) they'll put machine oil in it". He should know. His firm is among the largest of the importers of this product and helped create the Frankensteinian monster it has now become to the Florida citrus growers.

United is also concerned with the Florida citrus industry's future under the Trade Act of 1974 which has caused us nothing but problems. We recommend this for Subcommittee study as well.

If you will pardon this personal experience. Yesterday while driving in the rural areas of east Lake County, Fla., checking on the condition of the trees and the new bloom after two disasterously cold winters, I saw a rather large fruit and vegetable stand and stopped to buy some local produce, particularly tomatoes.

The tomatoes were fresh out of the cooler from Mexico via Nogales. So was the squash. And the cantalopes and the peppers and the beans. The only thing I could find from Florida was sweet corn and some sorry looking grapefruit. This shortage of Florida winter produce was caused by exceptional cold and wet which has plagued Florida fruit and vegetable crops this winter.

The Mexican tomatoes were priced at $12.00 a box, purely because the usual Florida tomatoes were not on the market in volume although Mexico is at peak. Now I think this is a perfect example of the exhorbitant tribute the U.S. consumer will have to pay for Mexican produce if foreign competition (rather than cold) drives the Florida tomato producer out of the market place for all time. When the U.S. producer has vanished, Mexico and Cuba or any other foreign exporter will be able to charge all the tariff will bear.

Florida citrus and vegetable producers need protection if we are to retain even a fair share of our own markets. We are not getting it now from the current tariffs. We are not getting it through the clumsy, time-consuming ridiculous process that involves Treasury, the International Trade Commission and the Presidency.

Just in recent weeks, we have seen the ITC overrule Treasury's dumping decision on Finnish hockey sticks while the world of our national economy crumbles around us. And yesterday, the Wall Street Journal reported the President would overrule ITC on a question of an ITC ban on Japanese stainless steel pipe.

Sir, Gilbert and Sullivan in their most deliciously mad moments of contemporary satire never conceived lyrics or music such as this for our foreign competition's complete enjoyment.

United Growers therefore recommends the Subcommittee declare necessity of an oversight hearing to determine that present U.S. law and its procedures are totally inadequate to assure Florida citrus and vegetable producers a fair access to, and a fair share of, markets here, in Canada and abroad.

Respectfully submitted.

WILSON C. MCGEE,
General Manager.

VALVE MANUFACTURERS ASSOCIATION,
McLean, Va., April 14, 1978.

Mr. JOHN M. MARTIN, JR.,
Chief Counsel, House Committee on Ways and Means,
Washington, D.C.

DEAR MR. CHAIRMAN: As a member of the Board of Directors and Past President of the Valve Manufacturers Association, I am pleased to submit the enclosed recommended amendments to the Anti-Dumping Act of 1921, in response to your press release of February 6, 1978. The membership of VMA includes 70 valve manufacturers accounting for approximately 80 percent of the total United States industrial valve capacity. The valve manufacturing industry has total annual sales of about $1.7 billion.

My position as Past President and Director is voluntary and recommendations made in this letter are in behalf of this organization. My principal occupation is that of President of Conval, a subsidiary of Condec Corporation. This subsidiary which is located in Chicago, Illinois is a major U.S. valve producer and supplier and the bulk of its sales relate to energy markets, primarily electric power, oil and gas, as well as commercial, residential, and industrial construction.

Domestic manufacturers of valves have been severely damaged by imports, and we firmly believe that our anti-dumping laws are in need of strengthening. Our suggested amendments would accomplish this as follows:

(1) The final determination of less than fair value sales would be required within five months after the initiation of the investigation, thereby limiting the total time period for anti-dumping cases to six months rather than the present thirteen months.

(2) Referral of cases to the International Trade Commission where there is an ostensible "substantial doubt" of injury would be elimi-

nated. The acceptance by Treasury of a petition in proper form would constitute a "prima facie" case of injury.

(3) The Treasury investigation of less than fair value sales and the ITC investigation of injury would be conducted concurrently, rather than sequentially, thus saving valuable time.

We hope these amendments will be useful to you in your efforts to develop much-needed improvements to this nation's trade laws.

Sincerely,

MORRIS R. BESCHLOSS,
Director and Past President.

THE FINAL DETERMINATION OF LTFV SALES MUST OCCUR WITHIN FIVE MONTHS AFTER INITIATION OF INVESTIGATION

Purpose of amendments

To amend section 201(b)(1) (19 U.S.C. 160(b)(1)) to provide for a final determination within five months, or six months under section 201(b)(2) (19 U.S.C. 160(b)(2)) for more complicated cases.

Text of amendments

(1) Amend section 201(b)(1) (19 U.S.C. 160(b)(1)) to read as follows: In the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, he shall, within five months after the publication under subsection (c)(1) of a notice of initiation of an investigation—

(A) make a final determination whether the purchase price is less, or the exporter's sales price is less, than the foreign market value of the merchandise in question; and

(2) Amend section 201(b)(2) (19 U.S.C. 160(b)(2)) to read as follows: If in the course of an investigation under this subsection, the Secretary concludes that the determination provided for in paragraph (1) cannot reasonably be made within five months, he shall publish notice of this in the *Federal Register* together with a statement of reasons therefor, in which case the determination shall be made within six months after the publication in the *Federal Register* of the notice of initiation of the investigation.

(3) Repeal section 201(b)(3) (19 U.S.C. 160(b)(3)).

Reasons for amendments

The mandatory deadlines added by the Trade Act of 1974 helped speed the processing of antidumping complaints by requiring the Treasury Department to issue a decision within twelve months. However, the current one-year period which may now elapse between the initiation of an investigation and the final determination of less than fair value sales is unnecessarily long. We recommend that the period be shortened to five months, or six months in more complex cases. With adequate staff, there is no reason why antidumping cases should require a full year to complete. The thirty days for initiation of investigation would remain unchanged, thereby placing a six-month deadline on the entire proceeding. (Under another amendment, the ITC injury investigation and the Treasury LTFV investigation would be conducted concurrently, with the ITC being required to report within six months, i.e., one month after the Treasury determination of LTFV sales.)

REFERRAL TO THE ITC WHERE THERE IS "SUBSTANTIAL DOUBT" OF INJURY SHOULD BE ELIMINATED

Purpose of amendment

To repeal section 201(c)(2) (19 U.S.C. 160(c)(2)), which provides for referral to the ITC where a substantial doubt exists as to whether an industry is being or is likely to be injured as a result of dumping.

Reasons for amendment

The amendments to the Antidumping Act contained in the Trade Act of 1974 added a section which allowed the Secretary of the Treasury to refer the case to the U.S. International Trade Commission for a preliminary determination of injury. If, prior to the initiation of an investigation, Treasury concludes that there is "substantial doubt" that the domestic industry is being injured, the case is referred to the ITC. If the ITC finds no likelihood of injury, Treasury can terminate the case. We recommend that this procedure be eliminated. If an industry provides prima facie evidence of dumping in its complaint, it should be allowed to have a finding made as to whether dumping has occurred prior to the injury determination. A finding of LTFV sales can discourage dumping, whether or not injury is later found.

THE TREASURY INVESTIGATION OF LESS THAN FAIR VALUE SALES AND ITC INJURY INVESTIGATION SHOULD BEGIN AT THE SAME TIME

Purpose of amendments

To require the Treasury Department and the International Trade Commission to begin their respective investigations at the same time in order to expedite the antidumping process.

Text of amendments

(1) Strike present section 201(c)(2) (19 U.S.C. 160(c)(2)) and insert the following: If the determination of the Secretary under section 201(c)(1) is affirmative, he shall promptly forward a copy of the complaint to the Commission which shall within six months, or within seven months when the Secretary makes his determination within six months under section 201(b)(2), determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. If the complaint alleges sales below cost, there shall be no referral to the Commission.

(2) Amend section 201(a) (19 U.S.C. 160(a)) by deleting the following language from the first sentence:

and the Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

(3) Amend section 201(a) to read as follows:

Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States International Trade Commission (hereinafter called the "commission"). The Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public notice (hereinafter in sec-

tions 160 and 173 of this title called a "finding") of his determination and the determination of the Commission. For the purposes of this subsection, the Commission shall be deemed to have an affirmative determination of the Commissioners of the Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance or customs officers.

Reasons for amendments

(1) By requiring Treasury and the ITC to begin their investigations at the same time, the period for a final determination will be shortened to no longer than seven months. Relief can be provided promptly for the injured American industry.

(2) The amendments give the ITC one month to make its injury finding after the LTFV finding by Treasury. It is necessary to provide this additional period because the Commission must find the industry has been, or is likely to be injured as a result of dumping. Treasury must, therefore, determine whether LTFV sales have occurred before the ITC will be in a position to make its final determination of injury.

NATIONAL ASSOCIATION OF CHAIN MANUFACTURERS,
Washington, D.C., April 19, 1978.

Mr. JOHN M. MARTIN,
Chief Counsel, House Committee on Ways and Means,
Washington, D.C.

DEAR MR. MARTIN: With reference to your Subcommittee on Trade's February request for information, advice and recommendations concerning the statutes pertaining to unfair trade practices, I am submitting the following as an example of how the Treasury Department has handled one countervailing duty case.

I am Counsel for the National Association of Chain Manufacturers, whose members manufacture most of the steel link chain made in the United States. On September 29, 1976, I submitted on behalf of our Association a petition for the imposition of countervailing duties on imports of steel chain and parts thereof from Italy. The petition was accepted as being in satisfactory form on October 1, 1976, and Treasury was required to issue a preliminary finding no later than April 1, 1977. Treasury's preliminary determination was that the Government of Italy had given benefits to exporters of chain which were considered to be bounties or grants under the countervailing duty statute. A final determination was to be made by October 1, 1977. Effective October 11, 1977. Treasury announced the imposition of countervailing duties and the suspension of liquidation of all entries of the subject Italian chain and parts thereof. The announcement stated, however, that information *recently* (emphasis added) supplied by the principal Italian exporter of this product to the United States indicated that he may not receive a bounty or grant and that further investigation would be required to determine the validity of this claim.

This circumstance came as a complete surprise to me and I wrote to Mr. Robert Mundheim, General Counsel of Treasury, on October 19, 1977, asking why I was not previously informed as to the exporter's claim, pointing out that we had already waited for over a year to find

out what Treasury's *final* (emphasis added) might be and that at no time was anything said about the exporter's contention. I asked for an estimate as to how long the further investigation might take and I also asked for a citation as to the statute or regulation that provided for such a further investigation.

A reply to my letter was not received until December 8, 1977. It was signed by Peter D. Ehrenhaft, Deputy Assistant Secretary and Special Counsel (Tariff Affairs). In this letter it was stated that the principal Italian exporter of chain to the United States provided information in *July 1977* (emphasis added) indicating that he paid a variety of customs duties and indirect taxes which are not included in the value-added tax which is rebated upon export and the customs duties are not eligible for drawback. It was stated further: "Treasury policy has been not to consider the rebate of indirect taxes which are directly related to the manufacture of a product and normal customs duty drawback as constituting the bestowal of bounties or grants. If a firm or domestic industry does not receive rebates of such allowable taxes or customs duties upon exportation, Treasury has allowed their use as offsets to the effective amount of any export subsidy otherwise received. This policy was most recently also applied in the countervailing duty case involving leather wearing apparel from Uruguay."

Mr. Ehrenhaft stated further that the Italian manufacturer alleged that the customs duties paid and not rebated exceed the size of the Italian Government rebate and that therefore no net bounty or grant could be said to exist. Treasury required verification of the exporter's claim, but regretted the fact that the verification process could not be completed in time for the "Final Determination." No answer was given to my question as to how long the further investigation might take, and the only authority cited was "Treasury policy."

On January 4, 1978, I wrote to Mr. Ehrenhaft noting that information regarding possible offsets was provided by the principal Italian exporter in July 1977, but that after nearly six months (now nine months) had elapsed the verification process had not been completed. I asked again if there was any limitation on the length of time such proceedings may take. I pointed out that the Trade Act of 1974 specifically states that the Secretary of the Treasury shall make a *final* (emphasis added) determination within 12 months from the date on which a petition is filed and I again asked for a citation as to what specific provisions of the statutes permit the Treasury Department to continue an investigation after a final determination has been made. The last paragraph of my letter was as follows:

> In the event that Treasury should determine that in its opinion the Italian exporter rather than the domestic manufacturers is entitled to relief, what procedures are available to us to contest such a determination?

No reply being forthcoming, our Washington representative contacted the Treasury Department on March 2, 1978, and located a person who just happened to have my letter in his basket He was very apologetic and promised to have a reply out within a week. I later received a letter from Mr. Ehrenhaft, dated March 17, 1978, stating that my January 4 letter had been misplaced, which occasioned the delay. Among other things, he referred me to the countervailing determination involving leather wearing apparel from Uruguay pub-

lished in the Federal Register of January 30, 1978 (43FR3974) as being an example of the application of offsets. I quote below an excerpt from that determination as an example of strained economic reasoning:

> Subsequent investigation lead to the conclusion that the subsidy granted to the tanners upon exportation of the finished leather wearing apparel constitute a bounty or grant within the meaning of the Act. Based on present information available, however, the tanners' subsidy serves to make Uruguayan tannery prices equal with neighboring country competition, which is readily available to leather wearing apparel manufacturers in Uruguay. Thus the net effect of the bounty or grant is zero since the cost of producing leather wearing apparel absent the subsidy would not be increased due to lower prices available from neighboring countries. In addition, the effect of the export subsidy is offset by certain fiscal charges which are indirect taxes that are directly related to the exported leather wearing apparel. These taxes are not rebated on export, and under the Act would be eligible for rebate and thus act to reduce the effective export benefit.

Mr. Ehrenhaft closed his letter with the following:

> My staff informs me that counsel for Weissenfels is preparing a submission in conjunction with the Italian Government and as soon as it is filed it will receive our *prompt* (emphasis added) attention.

That is where the matter stands as of today. My question remains unanswered and apparently the Treasury Department is more concerned with servicing the needs of foreign manufacturers to the detriment of our own domestic producers. My recommendation would be that "final" should mean "final" and that the Treasury Department be barred from conducting open-end investigations in contravention of the statutes.

Sincerely yours,

HAROLD T. HALFPENNY, *Counsel.*

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