

SUBCOMMITTEE ON TRADE
OF THE
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

UNFAIR TRADE PRACTICES

ADDENDUM TO
RECOMMENDATIONS SUBMITTED BY INTERESTED INDIVIDUALS
AND ORGANIZATIONS

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

[Addendum to WMCP: 95-99, September 5, 1978]



FEBRUARY 20, 1979

Printed for the use of the Committee on Ways and Means

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1979

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LETTER OF TRANSMITTAL

SUBCOMMITTEE ON TRADE,
COMMITTEE ON WAYS AND MEANS,
U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., February 1, 1979.

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

DEAR MR. CHAIRMAN: The Subcommittee on Trade has been 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.

On September 5, 1978, the Ways and Means Committee published the recommendations received by the Subcommittee in response to the February 6th press release. Unfortunately, the following material was not submitted in time for publication. I therefore request that this presentation of suggested amendments to unfair trade practice statutes be printed as an addendum to the September 5th print for the use of the Subcommittee on Trade and the Committee on Ways and Means, and so that the information be made available to all Members of Congress.

Sincerely yours,

CHARLES A. VANIK, *Chairman.*

(III)

FOREWORD

The "Fair Trade Enforcement Act of 1978" was submitted to the Subcommittee on Trade in connection with its legislative review activity on U.S. unfair import practice laws. The following organizations support the legislative review of the concepts contained in these draft proposals to amend the unfair trade statutes:

Business Organizations

American Iron and Steel Institute.
Northern Textile Association.
Scale Manufacturers Association, Inc.
National Outerwear and Sportswear Association.
Steel Plate Fabricators Association.
National Knitted Outerwear Association.
National Knitwear Association.
Cold Finished Steel Bar Institute.
Synthetic Organic Chemical Manufacturers Association.
Ferroalloys Association.
National Cotton Council.
National Association of Hosiery Manufacturers.
National Handbag Association.
Steel Service Center Institute.
American Apparel Manufacturers Association.
American Footwear Industries Association.
Valve Manufacturers Association.
American Textile Manufacturers Institute.

American Yarn Spinners Association.
American Pipe Fittings Association.
Cast Iron Soil Pipe Institute.
Clothing Manufacturers Association.
Copper and Brass Fabricators Council, Inc.
Bicycle Manufacturers Association.
Lead-Zinc Producers Committee.
Luggage and Leather Goods Manufacturers of America, Inc.
Cast Metals Federation.
Man-Man Fiber Producers Association.
American Institute of Steel Construction.
Metal Cookware Manufacturers Association.
Concrete Reinforcing Steel Institute.
National Association of Chain Manufacturers.
Welded Steel Tube Institute.
Textile Distributors Association.
American Iron Ore Association.
Work Glove Manufacturers Association.
Committee to Preserve American Color Television.

Labor Unions

International Leather Goods, Plastics, and Novelty Workers Union, AFL-CIO.
International Ladies Garment Workers Union, AFL-CIO.
Amalgamated Clothing and Textile Workers Union, AFL-CIO.

Industrial Union Department, AFL-CIO.
Retail Clerks International Union, AFL-CIO-CLC.
American Federation of Labor and Congress of Industrial Organizations.
United Steelworkers of America.

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TITLE I. AMENDMENTS TO THE ANTIDUMPING ACT, 1921

I. THE ANTIDUMPING ACT IS NOT "PROTECTIONIST"

Stated in simplified terms, dumping consists of the sale of merchandise in a foreign market at a price below that offered in the country of manufacture. The Antidumping Act of 1921, as amended, provides that where such sales (hereafter called sales at less than fair value (LTFV)) cause injury to an industry in the United States, the Secretary of the Treasury must levy a special dumping duty equal to the difference between the foreign market value and the purchase price or exporter's sales price (such difference is hereafter called the margin of dumping).¹ Until 1954, the Secretary was charged with responsibility for determining both the margin of dumping and question of injury. The Customs Simplification Act of 1954,² however, transferred the latter function to the U.S. Tariff Commission (now the International Trade Commission).

It should be recognized at the outset that the Antidumping Act is not "protectionist" in nature; rather, it is designed to nullify the unfair trade advantages accruing to the country engaged in dumping. As the Commission itself has observed:

The imposition of dumping duties as provided in the Antidumping Act is consistent with the liberal trade policy of the United States. When the sales at less than fair value have stopped, the dumping finding can be revoked. Thus, the domestic industry is not being protected against the ingenuity or the natural advantages of the foreign producer. Rather, it is being protected from the effects of a trade practice which Congress has found to be unfair and injurious.³

Indeed, the Antidumping Act has its analogue not in any "protectionist" legislation but in the fair trade laws prohibiting price discrimination. This parallel was observed by Senator Russell Long, chairman of the Senate Committee on Finance, who commented:

* * * Congress has declared price discrimination in domestic and foreign commerce to be unlawful; but since it is virtually impossible to prosecute producers guilty of dumping, Congress has provided an alternative remedy in the form of special dumping duties imposed on the offending goods under the Antidumping Act of 1921.⁴

Senator Long's observation was reconfirmed by the Senate Finance Committee in its report which accompanied the Trade Act of 1974:

(The Antidumping Act) is not a "protectionist" statute designed to bar or restrict U.S. imports, rather, it is a statute designed to free U.S. imports from unfair price discrimination practices."⁵

II. CONTINUED DUMPING REQUIRES THE EXPORTING NATION TO ERECT TRADE BARRIERS; ENFORCEMENT OF ANTIDUMPING REMEDIES FOSTERS FREE TRADE

Nevertheless, some critics suggest the restrictions on price discrimination imposed by the Antidumping Act serve as an impediment to freer world trade. The fallacy of this view lies in its failure to perceive the direct relationship between dumping and the trade barriers erected by the dumping nation. This relationship was correctly identified and defined in an article appearing in Law and Policy in International Business⁶ in which the author stated:

¹ 19 U.S.C. 160.

² *Ibid.*

³ *Cast Iron Soil Pipe from Poland*, 32 Fed. Reg. 12925, 12928 (1967).

⁴ Long, *United States Law and the International Dumping Code*, 3 International Lawyer 464, 467 (1969).

⁵ Senate Report 93-1298, 1974 U.S. Code, Congressional and Administrative News 7186, 7316.

⁶ Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 Law & Pol. Intl. Bus. 85 (1973). (Hereafter cited as "Fisher.")

The traditional view of continuous dumping overlooks its reliance upon barriers to reimportation.⁶ The issue raised by the vigorous enforcement of the antidumping laws is whether it is a successful means of securing the removal of such foreign trade walls. This issue is particularly germane to the case of Japan, which has consistently raised the prices of goods to its own consumers⁷ behind a wall of tariffs, quotas and nontariff barriers to trade.⁸ Does the enforcement of the antidumping law encourage the unilateral removal of these trade barriers? It would seem that the *nonenforcement of the dumping laws is an incentive to maintain trade barriers in dumping countries* (emphasis added). By not enforcing the dumping laws, the United States, in effect, is notifying the foreign country that it can continue to extort its own consumers behind trade walls while it dumps its goods abroad. The net result of not enforcing the antidumping laws, then, is that the allocating function of the free market mechanism is subverted and the world's economic resources misdirected.⁹ By moving to secure the reduction of distortions to international trade, the United States would be moving in a manner consonant with a policy of free trade. Nevertheless, some have argued that it is "only" the consumers in the dumping country that suffer, and that the antidumping laws of the country into which the goods are being dumped are "not responsive to the problem" of monopoly dumping. If the Japanese Government, for example, cares so little about its own people, the argument is made, why should we assist them by enforcing the antidumping laws in the United States, with a resulting increase in prices for our own consumers? This argument misstates the issue, which is: What actions taken by the United States will most likely lead to an open world economy, from which the United States can profit by sending out greater quantities of its exports and in turn permit its consumers to have the maximum amount of fairly priced imports? It would seem that enforcing U.S. dumping laws vigorously *would* have the effect of encouraging countries with monopoly exporters to reduce their trade barriers either unilaterally or in tandem with their trading partners, (emphasis that of the author).¹⁰

III. DISTORTIONS CAUSED BY DUMPING ADVERSELY AFFECT THIRD COUNTRIES

The foregoing section graphically describes how the practice of price discrimination through dumping actually fosters—indeed, mandates—the erection of trade barriers by the dumping nation. Such barriers are, of course, the very antithesis of free trade. Perhaps less obvious but equally important is the impact dumping has on other nations. Consider, for example, the response of Western Europe to an onslaught of low priced Japanese merchandise in the late 1960's, much of which was presumably sold at LTFV.¹¹ The EEC countries declared that in the interest of "orderly marketing," Japan must agree to voluntary export restraints. Rather than risk the imposition of more stringent trade

⁶ Such barriers to reimportation are critical to the success of any ongoing dumping policy. In the absence of barriers, goods from other countries would be drawn to the markets of the dumping nation by the artificially higher price level. This increased volume of available products would exert a downward pressure on prices, bringing them more into alignment with prevailing world prices and thereby narrowing or eliminating the margin of dumping.

⁷ As indicated by the author in a footnote at page 145, the impact of this policy can be quantified. Thus, from 1960 through 1971, there was a 77 percent increase in the consumer price index in Japan compared with a 31 percent increase in the United States. Source: UN Monthly Bulletin for Statistics.

⁸ Drawing on data presented in *United States-Japan Trade Council, Fact Sheet No. 6, U.S.-Japan Bilateral Nontariff Barriers: Part II: Japanese Barriers* (1971), the author cites, at page 146, the following key nontariff barriers: (1) 40 residual import quotas, (2) the licensing process through which imports come into Japan, (3) the practice of "administrative guidance" through which government officials manipulate regulations to discourage competing imports, and (4) excessively detailed customs requirements. Just how effective these barriers can be is indicated in the following summary of testimony given before the U.S. Tariff Commission at its hearings on *Television Receivers from Japan*, 36 Fed. Reg. 4576 (1971): *Television Receivers from Japan* demonstrated clearly the barriers to reentry of dumped goods (or imports of essentially identical goods) in Japan. Despite Japanese customs duties on television sets that are three times those of the United States . . . Japanese television sets could easily be undersold in the domestic (Japanese) market. Large-screen television receivers made in the United States can be delivered to a Japanese importer for a total cost of approximately \$500. Similar large-screen Matsushita (Panasonic) sets carried list prices from \$1,200 to \$1,600 in Japan. Efforts by U.S. television exporters to gain entry into the Japanese market were, however, frustrated, as the Japanese Government successively denied exchange licenses for imports of television sets, blocked free entry of necessary repair parts for television sets, and applied "administrative guidance" to persuade its internal distributors not to accept U.S. sets. Fisher at 121.

⁹ The continuing resistance of the Japanese against reducing the trade barriers which are essential to dumping was reflected in the almost total lack of success of the U.S. Special Trade Representative in persuading Japan to open its markets to imports from the U.S.

¹⁰ As noted by Fisher at page 147, this subversion of the free market mechanism has many manifestations including the lost market opportunities to U.S. industries, the harm to closely allied industries, the harm to those in third countries who would, in the absence of continuous dumping, be supplying the U.S. market, and resource misallocations within the domestic market of the dumping country.

¹¹ Fisher at 146. It should be noted that the principle articulated by the author has greater application to some sectors of the economy than to others. It is particularly relevant to the steel sector, for example, in which the steel producers of most foreign countries are owned or controlled by, or at the minimum enjoy a very close working relationship with, their respective governments. In the steel industry, therefore, as well as in many other industries, the foreign producer is either a monopolist or in a position tantamount to being a monopolist. In either case, the principles espoused by Fisher are applicable.

¹² Japan has consistently been proven to have sold merchandise at LTFV in Europe as well as the United States.

restrictions, Japan acquiesced.¹² It is reasonable to assume that this agreement, which substantially foreclosed the European market to Japan, caused a considerable volume of Japanese products to be diverted to the United States.¹³ Thus, as a result of Japan's policy of dumping and the EEC restrictions on Japan's exports, the United States was (1) deluged with unfairly priced imports, the impact of which was compounded by increased importations of Japanese goods deflected from Western Europe, and (2) foreclosed from exporting to Japan because of trade barriers erected to make the practice of dumping possible. The scenario of Japanese dumping followed by European import restrictions was repeated in the mid-1970's. A classic illustration is found in the steel sector. During the first half of 1975, steel exports from Japan to the European Community increased substantially. The European Commission became alarmed and promptly commenced negotiations with the Japanese Ministry of International Trade and Industry. At the first meeting which was held on June 18 and 19, 1975 in Tokyo the Europeans excoriated the Japanese for marketing steel not just below fair value but at "prices which generally did not even cover full unit costs".

The outgrowth of the negotiations was a bilateral agreement which placed a lid on Japanese shipments to Europe and which is still in effect today. It is interesting to note that after this cartel arrangement took effect in the summer of 1975, Japanese shipments to Europe plunged by one-third while shipments to the United States surged by one-third.^{13a}

The European shield against Japanese dumping was soon transformed into a sword which permitted European producers to dump in third countries. Effective January 1, 1977, the European Commission instituted its "Simonet Plan" which called for "voluntary" quotas on steel produced by European firms for distribution within the Common Market. To insure the Plan's effectiveness in raising domestic price levels, measures were required to limit steel shipments from third countries. This protection of Europe's home market was to be achieved through a series of bilateral agreements similar to the one negotiated between the European Commission and the government of Japan.

The United States responded to the European Plan in an *Aide Memoire* delivered in mid-January by the U.S. Mission to the European Communities. The American note said in part:

We are first concerned over the possible impact on trade flows of the measures presently in effect. Voluntary restrictions on domestic deliveries, combined with "reasonable" behavior by importers, may lead to diminished supply, and therefore to artificially increased prices in the EC domestic market as compared to the world market. *This in turn, creates the danger that there will be dumping of steel produced for export or diverted to export markets by the restrictions on domestic deliveries.*

We are also concerned that the measure now in effect may presage use of stronger measures. In the event domestic delivery controls prove insufficient, the policy provides for the use of indicative "minimum reference prices" or, in a situation of "manifest

¹² Such voluntary restraints were in addition to, not in lieu of, the less exotic forms of restrictions already in effect. According to *Studies in Trade Liberalization* by Bela Balassa & Associates, page 210, the already existing restrictions numbered "382 items of the Brussels Trade Nomenclature in Austria, 119 in Italy, 91 in France, 88 in Norway, 33 in Benelux, 28 in West Germany and 18 in the United Kingdom."

¹³ The comments of then Assistant Secretary of the Treasury Eugene T. Rossides on this point are enlightening:

"The Community's regulations have restricted Japanese imports to 6 percent of that country's overall exports—this in contrast to the 30 percent which Japan exports to the United States. By restrictions such as these, the Common Market has literally forced the Japanese to concentrate their export drive on the United States. Is this fair trade?" Excerpt from Remarks of the Honorable Eugene T. Rossides, Assistant Secretary of the Treasury (Enforcement, Tariff and Trade Affairs, and Operations) before the Town Hall of California, Biltmore Hotel, Los Angeles, Calif., on April 18, 1972.

^{13a} On October 6, 1976, the American Iron and Steel Institute filed a formal complaint against the European-Japanese cartel pursuant to Section 301 of the Trade Act of 1974. A hearing was held on December 9, 1976 before the 301 Committee of the Office of the Special Trade Representative at which details of the conspiracy were presented including the fact that representatives of the European Commission advised Japanese officials that:

"The Commission had great difficulty in reconciling the concept of normal competition with Japanese prices which generally did not even cover full unit costs. Prices like these, they asserted, would ultimately injure all steel suppliers in all their markets. Such prices could also jeopardize capital investments which are needed to meet the projected increase in world demand." (Transcript, pp. 39 and 40.)

After a delay of more than a year, the Special Trade Representative announced his finding that the Japanese and Europeans had in fact entered into the cartel arrangement. He declined to take remedial action, however, on the basis that U.S. commerce had not been burdened.

crisis", mandatory minimum prices under Article 61 of the Paris Treaty. *Use of these provisions would create a differential between internal EC and world prices in an even more direct and certain way.* (Emphasis added)

The warning of the United States was ignored. Two months after receipt of the American note, the European Commission presented the so-called "Davignon Plan" to the European Council in Rome. One of the fundamental goals of the Davignon Plan is to augment the Simonet Plan through the establishment of minimum price levels. To accomplish this aim, the Commission has already instituted compulsory price minima for reinforcing bars and recommended minima for most other steel products. These price floors apply to sales both within the European Community and in the European Free Trade Area (EFTA). As with the Simonet production quotas, an indispensable element of the Davignon price-fixing scheme is the throttling of low-priced imports from third countries through bilateral agreements. Press reports indicate that quota and minimum price arrangements have been or are currently being negotiated with South Africa, Korea, Brazil, Spain, Japan, Switzerland, Norway, Sweden, Austria, Finland, and Portugal. Without these non-tariff trade barriers, the European producers could not maintain the artificial spread between home market and export prices and hence could not dump in the United States or elsewhere.

In recognition of (1) the proclivity of this country's trading partners to practice dumping and other unfair forms of competition, and (2) the interrelationship between dumping and trade barriers, then Assistant Secretary of the Treasury Rossides concluded:

Amendments of our Antidumping Act and countervailing duty statute may be required to achieve freer and fairer competition in international trade. And, once the long-range adjustments of tariffs, quotas, and other barriers are accomplished, these same measures can serve to maintain the integrity of those agreements.¹⁴

Clearly, enactment and strict enforcement by *all* nations of viable legal measures against dumping would eliminate a major reason for trade barriers and would represent a quantum leap forward in the quest for truly free trade.

IV. DUMPING LEADS TO SHORTAGES AND INFLATION

In addition to promoting more liberal trade, a workable antidumping statute is essential to insure the United States adequate sources of supply at reasonable prices. The shortages of steel and other products during 1973 and 1974 were traceable in large part to the flood of imports in the late 1950's and the 1960's. Experience in the steel sector indicated there was no bottom to prices of many lines of imported steel. This phenomenon was apparently attributable to the policies of foreign firms and their governments of setting prices as low as necessary to maintain full production.¹⁵ The situation was exacerbated by the fact many nations deliberately built capacity far in excess of their national requirements. In the 1970's, however, a growing worldwide demand for virtually all steel products reached an unprecedented level. In a classic demonstration of the perils of relying on foreign sources of supply, foreign manufacturers withdrew from certain markets to sell their products in other nations offering greater returns. To the extent foreign producers remained in the American market, they extracted stiff premiums from U.S. buyers. It is estimated that in the aggregate, prices of imported steel during the shortage exceeded average prices of domestic concerns by an amount greater than all the so-called "savings" realized by American purchasers during the previous decade.

As foreign sources disappeared, United States customers turned to domestic producers for their requirements but, unfortunately, domestic producers were

¹⁴ *Ibid.*

¹⁵ By covering their fixed costs through sales in their home markets, such firms can profitably sell in other markets at any price in excess of variable costs. Moreover, variable costs for export tonnage tend to be minimal since export production permits the firms to operate at high volume where maximum efficiencies are realized.

not in a position to meet all of this sudden demand.¹⁶ Because of the flood of a myriad of steel products over an extended period of time, corporate profits were dangerously low. According to statistics published by First National City Bank of New York, the return on sales of the steel industry plummeted from 7.8 percent in 1955 to 2.7 percent in 1971. Without adequate profits, insufficient capital was available for new and expanded facilities. Under these conditions, it was difficult indeed to justify any expenditure for the purpose of supplying steel to any market which was so vulnerable to unfair competition from abroad.

During the shortage period the return on sales of the steel industry climbed to 6.3 percent—approximately the average for all industries. As worldwide demand weakened and dumped products returned in volume to the domestic market, the return on sales receded to 2.6 percent in 1977. Once again, insufficient capital is available for new and expanded facilities. When the next shortage occurs, American steel consumers will again face stiff premiums on whatever limited quantity of imported steel is available.¹⁷

V. UNEMPLOYMENT IS AGGRAVATED BY DUMPING

Still another reason exists for improving the Antidumping Act: Employment. Those who minimize the adverse effects of dumping on the recipient nation assume the displaced workers can be readily retrained and assimilated into other industries. Unfortunately, this assumption does not comport with reality. As stated in *Law and Policy in International Business*:

The traditional theory of dumping assumes that there is a frictionless, full employment economy in which workers displaced by dumped goods can move on to other industries with jobs appropriate for their skills. The record in the United States over the last four years, however, indicates that we do not have a full employment economy with a smooth internal adjustment process. Unemployment in the United States in fact has hovered uncomfortably close to the 6 percent mark in the last four years. It is reasonable to assume that labor is correct in asserting that dumping has caused some of this unemployment. . . . When dumping adds to the pool of the unemployed, the benefits for the consumer (many of whom may also be unemployed) may appear to be of smaller consequence than was originally anticipated.¹⁸

The rate of unemployment is even higher today than when the foregoing statement was published five years ago. The United States has not achieved a full employment economy and the nation is no closer to the theoretical frictionless economy envisioned by some economists. And, it might be added, labor continues to suffer the very real consequences of jobs lost because of low priced imports. In the steel sector, for instance, the Department of Labor has found that 78,000 steelworkers and related workers lost their jobs due to imports and were eligible for special trade adjustment benefits between April 3, 1975, and May 31, 1978.

¹⁶ Although the unprecedented boom of 1973-74 was not anticipated, the ramifications of such an occurrence were envisioned. In 1967, for example, the staff of the Senate Committee on Finance issued an in-depth report pursuant to the Committee's directive to undertake a comprehensive study of the problems caused by the sharp expansion of steel imports since 1959. One of the basic causes for the rising tide of net imports into the United States, said the report, was "excess world capacity, in comparison with world steel demand, combined with foreign price policies to sell at lower prices abroad than in the home market" (emphasis added).¹⁹ Prophetically, the report continued:

"If imports, especially in certain specific steel products, continue to expand and thereby to aggravate their adverse effect on U.S. steel industry profits, the industry may be forced to dismantle the capacity to produce certain kinds of steel products. If at a later date imports should cease, workers formerly employed in such finishing operations as well as the specialized equipment would then no longer be available. Such cessation of imports might be due to demand abroad reaching capacity, strikes, realignment (sic) of commercial relations; e.g., Japan with China or West Europe with the Red bloc, or interference with ocean traffic by hostile countries. In each case, an emergency would ensue until production could come on-stream with new capacity and newly trained workers." *Steel Imports*, Staff Study of the Committee on Finance, United States Senate, December 19, 1967, p. 17.

¹⁷ As Senator Long has stated, "The history of (the Antidumping Act's) origin indicates that Congress did not intend that an industry had to be 'flat on its back' before dumping duties could be assessed" (emphasis added). Long, *United States Law and the International Dumping Code*, 3 *International Lawyer* 464, 472-3 (1969).

¹⁸ Fisher at 146-147. In point of fact, the International Trade Commission has, on several occasions, concurred with labor's assertion that dumping created unemployment. In *Steel Wire Rope from Japan*, 38 Fed. Reg. 25724 (1973), for instance, the Commission found at page 25724:

"Since January 1, 1968, six plants producing wire rope in the United States have closed, and an estimated 1,300 workers have lost their jobs. . . . We believe these plant closures and resultant unemployment have been due in part to LTFV imports of steel wire rope from Japan."

Similarly, the Commission reached the following conclusion in *Synthetic Methionine from Japan*, 38 Fed. Reg. 13065 (1973) at page 13066:

"Operating at 100 percent of capacity, the U.S. producers could supply little more than half the domestic demand for methionine and its hydroxy analog. Yet, in 1972, the competition from Japanese and other imports was such that both U.S. producers operated considerably below capacity, and their sales were less than their production. Data from the producers indicate that if they had operated close to capacity, direct domestic employment would have been increased 15 to 20 percent."

VI. SALES BELOW FULL COST OF PRODUCTION

The primary focus of the preceding sections was on the damaging effects of price discrimination, i.e., export prices set below foreign home market prices. When export prices are also set below full cost of production, the adverse consequences are intensified.

Consider the recent testimony of Prof. Bela Gold, Director of the Research Program in Industrial Economics at Case Western University before the Trade Subcommittee of the House Ways and Means Committee. Citing "uneconomic pricing" as one of the most important factors accounting for the increase in steel exports to the United States, Professor Gold stated:

Steel exports are major sources of employment and foreign exchange in Western Europe and Japan and both are of great political importance in these countries. Indeed, increases in unemployment are regarded as threats to the very survival of incumbent governments in view of their tenuous political majorities. It is not at all surprising, therefore, that the normal industrial objectives of efficiency and profitability tend to be overridden under such conditions by governmental pressures to maintain and, if possible, to expand exports, even if this should entail losses, for such losses may be considered as less burdensome than the economic and political costs of increased unemployment.

One need only recognize that all of these countries regard the United States as the largest and most attractive market for steel exports to realize that import pressures are bound to be powerful and continuous. In the case of Japan, for example, major expansions of steel capacity are continuing and may well result in surpassing U.S. capacity before 1985, despite current below-capacity operations and despite complaints from both the U.S. and the European Community against the huge flow of Japanese steel exports into their markets. Such exports cannot be diverted in large measure to developing countries, because those which are somewhat more advanced (e.g., Brazil, South Korea, and Spain) are already constructing their own steel capacity with an emphasis on exports; and because the less-developed countries are generally unable to pay for the imports which they need. Nor can Japan absorb such enormous capacity increases at home. And Western Europe steel producers face the same discouraging prospects for profitable exports to markets other than the United States. This should be recognized to mean that even significant reductions in U.S. steel production costs and prices might not suffice to decrease steel imports so long as such levels are determined primarily by the political urgencies of exporting countries.

In short, the undermining of private industries in this country by uneconomically-priced exports from government-aided foreign producers can only be prevented if the U.S. Government makes a determined effort to restore fair competition in American markets.

It is sometimes argued that the United States should happily accept the savings offered by the below-costs pricing of foreign exporters and that such practices are bound to be short-lived in any case because of the crushing burden of cumulative deficits. But such views ignore three distinctive features of the real problem. First, unlike the small-firm in economic theory, nations need not declare bankruptcy even if loss-making operations continue for decades, as has been true of various nationalized industries abroad. Such losses are simply covered out of taxes and other governmental resources. Second, the continued creaming-off of markets by imports, along with attendant low prices, tends to ensure the progressive deterioration of the domestic industry's capacity and modernity, thus permitting imports to gain an increasing share of markets. But, thirdly, the benefits of lower import prices are likely to disappear with the decline of effective domestic competition. Hence, as in 1972-74, foreign steel prices may rise substantially above normal domestic levels, a contingency made even more likely by the readiness of foreign steel exporters to engage in cartel arrangements. Nor could the United States then quickly rebuild its domestic steel capacity for new plants take 6-8 years to build, thus allowing a long period of regrets for having sharply increased our dependence on foreign suppliers.¹⁹

During the 1960's and early 1970's, foreign producers and exporters engaged in such uneconomic pricing boldly asserted that their behavior was not actionable under the Antidumping Act if their home market prices were also below cost (i.e., if there was no price discrimination). Even a cursory review of the act's legislation history shows this claim to be without merit. The Senate debate on the 1921 legislation, for instance, makes it unmistakably clear that Congress considered sales below cost to be an example of sales at less than "fair value." Senator McCumber, a member of the Senate Finance Committee and the chief spokesman for the bill, stated on a number of occasions that dumping was essentially the selling of goods in a foreign country at a price less than the cost of production. Thus, in responding to a question about the types of goods being dumped in the United States, he said:

¹⁹ Hearings before the Subcommittee on Trade of the Committee on Ways and Means, House of Representatives, Ninety-Fifth Congress, p. 165 (September 20, 1977).

I should like to have the Senator state some things that were dumped into this country at figures lower than the cost of production, using the term "dumping" as we understand it—that is, *as referring to products sold in this country for a less price than the producing cost in the country of production.* 61 CONG. REC. 1099 (1921) (emphasis added).

And later in the debate Senator McCumber responded to a question about the meaning of fair value, as follows: "If the Senator from North Carolina will allow me, I think *when you use the word 'fair value' it practically means the cost of production in the foreign country*; that is, a fair cost."

In 1958, Congress explicitly recognized that there could be equally and unduly low sales in *both* the home market and the United States which would be actionable under the act. In discussing amendments to section 205 of the act and the coverage of the fair value test, the Senate Finance Committee²⁰ said:

The amended definition of "fair value" adopted in 1955 closed this gap (with respect to restricted sales) so as to make possible findings under the act, but the present amendment to the law (which cannot be accomplished by regulation) is needed to make possible assessment of dumping duties in such cases. This applies where the home consumption price is higher than the price to the United States. *The reverse situation, where a foreign cartel through its control of the market artificially lowers home consumption price to make possible an equally and unduly low price to the United States market can be handled with reference to the provision of the law and the regulations that no home consumption sale intended to establish a fictitious market shall be taken into account* (emphasis added).

Indeed, any other interpretation would seriously jeopardize free trade and the principle of comparative advantage on which it is based. In section II, the role of price discrimination in fostering the erection of nontariff trade barriers in the exporting country was described. Without such barriers, goods would reenter the exporting nation at lower world prices, thereby forcing a reduction in the higher home market price until the differential was eliminated. In the case where export and home market prices are both below cost, the home market price itself constitutes a nontariff trade barrier which prevents competition on the basis of comparative advantage and causes a misallocation of the world's resources.

The protective nature of home market sales below cost has long been recognized in the academic community. In commenting on the practice of the British steel industry, for example, Charles Rowley of the University of York stated:

The United Kingdom steel industry is protected from external competition at the present time both by tariffs levied on imported steel products and also by the ability of the British Steel Corporation to weather deficits which place a private enterprise counterpart in serious commercial difficulty.

There is no case for providing United Kingdom steel enterprise, public or private, with subsidy protection, even if increasing international competition should erode the present position of domestic steel suppliers. Indeed, comparative advantage considerations might well favor a relative decline in the United Kingdom steel industry during the next decade.²¹

Despite the legal and economic reasons which mandated assessment of special dumping duties where export and home market prices were below cost of production, the U.S. Treasury Department decided that such marketing behavior was not actionable under the Antidumping Act. Congress explicitly overruled this decision in the Trade Act of 1974 by providing generally that where home market prices fall below cost of production, such prices must be disregarded and if an insufficient volume of sales exist above the cost of production, then export prices must be compared with constructed value to ascertain the margin of dumping. In so amending the Antidumping Act, Congress ended a practice of Treasury which threatened the viability of the statute while simultaneously reducing one of the incentives for engaging in the trade distorting practice of selling below cost in the foreign home market. In addition, Congress brought U.S. legislation into conformity with the laws and practices of the United States' major trading partners, including those of Germany, France, Italy, the United Kingdom, Belgium, the Netherlands, Luxembourg, and Canada.

²⁰ S. Rep. No. 1619, 8th Cong., 2nd Sess. (1958); 1958 U.S. Code Cong. & Ad. News 3503.

²¹ Charles K. Rowley, *Steel and Public Policy* (McGraw-Hill—London, 1971), p. 286.

CHAPTER 1—ANTIDUMPING ACT AMENDMENTS

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>19 U.S.C. 160; Dumping investigation.—(c) (1) The Secretary shall, within 30 days of the receipt of information alleging that a particular class or kind of merchandise is being or is likely to be sold in the United States or elsewhere at less than its fair value and that 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, determine whether to initiate an investigation into the question of whether such merchandise in fact is being or is likely to be sold in the United States or elsewhere at less than its fair value. If his determination is affirmative he shall publish notice of the initiation of such an investigation in the Federal Register. If it is negative, the inquiry shall be closed.</p> <p>(b) (1) (B) If his determination is affirmative, publish a notice of that fact in the Federal Register, and require, under such regulations as he may prescribe, the withholding of appraisement as to such merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the Notice of Investigation relating to such merchandise, until the date of publication in the Federal Register of a Finding pursuant to subsection (c) (3), or, in the event no Finding is published, until all rights of appeal pursuant to section 516 of the Tariff Act of 1930 (19 U.S.C. 1516) and section 501 of the Tariff Act of 1930 (28 U.S.C. 2632) have been exhausted.</p> <p>(2) If the Secretary determines there is no information indicating sales or the likelihood of sales at less than fair value he shall publish a determination in the Federal Register that the class or kind of foreign merchandise is not being, nor is likely to be sold at less than fair value, along with a statement of reasons therefor.</p>	<p>Section 101.—Section 101. Section 201 of the Antidumping Act, 1921 (19 U.S.C. 160) is amended to read as follows:</p> <p>(a) (1) Whenever the Secretary of the Treasury (hereinafter “Secretary”), receives advice from any source, including personnel of the Federal Government, that a particular class or kind of merchandise is being or is likely to be sold in the United States or elsewhere at less than fair value, it shall be the duty of the Secretary to conduct a preliminary investigation. If such advice contains any information indicating that merchandise is being or is likely to be sold at less than fair value, the Secretary within 30 days of receipt of such information, shall :</p> <p>(A) initiate a formal investigation,</p> <p>(B) publish a Notice of Investigation in the Federal Register, and</p> <p>(C) require, under such regulations as he may prescribe, the withholding of appraisement as to such merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the Notice of Investigation relating to such merchandise, until the date of publication in the Federal Register of a Finding pursuant to subsection (c) (3), or, in the event no Finding is published, until all rights of appeal pursuant to section 516 of the Tariff Act of 1930 (19 U.S.C. 1516) and section 501 of the Tariff Act of 1930 (28 U.S.C. 2632) have been exhausted.</p> <p>(2) If the Secretary has made public a finding as provided for in subsection (a) of this section in regard to such merchandise.</p>	<p>Duty to investigate and information needed to initiate a formal investigation.—Existing law confers authority on the Secretary to initiate an antidumping investigation without waiting for the filing of a formal petition by a domestic company or industry. Despite this power, Treasury has not in recent years instituted even a single case on its own motion.¹</p> <p>The proposed legislation would require the Secretary to self-initiate an antidumping investigation whenever he receives information from any source, including personnel of the U.S. Government, that imports are being sold at less than fair value (LTFV). Had this provision been law in 1978, the disaster which subsequently occurred in the American steel industry might have been avoided. On August 25, 1976, the American embassy in Tokyo sent an airmail to the State Department in Washington concerning the Japanese steel industry. The airmail contained a series of charts which showed the Japanese were exporting plate, structural shapes, cold-rolled sheets and galvanized sheets to the U.S. at prices considerably below home market prices.² In short, they were dumping on the American market. The airmail also set forth information indicating Japanese home market prices were themselves below cost and hence the margin of dumping greater than the amount of price discrimination. It showed, for instance, that while Nippon Steel Corporation was reporting an “apparent profit” of more than \$10 million for the fiscal year ending March 31, 1976, Nippon actually lost more than a quarter of a billion dollars. Assuming the State Department conveyed this dramatic and unmistakable evidence of dumping to the Treasury Department, Treasury should have immediately instituted an antidumping investigation. Under the proposed legislation, it would be obliged to do so.</p> <p>In addition, the amendment would clarify the question of proof required to trigger a dumping investigation. As described in subsequent sections, the Secretary has placed a severe burden on the petitioner to present detailed information concerning foreign market value, purchase price, injury, etc., before he will accept a petition and begin an inquiry. In its recent memorandum to the House Ways and Means Committee,³ the International Trade Commission (ITC) noted that the legislative history of existing law is somewhat ambiguous as to the degree of discretion, if any, which has been conferred upon the Secretary to reject a petition. The proposed modification would resolve this question by requiring the Secretary to initiate a dumping</p>

investigation if there is "any information indicating that merchandise is being or is likely to be sold at less than fair value."

Timely withholding of appraisement.—Existing law provides that where the Secretary makes a tentative determination of sales at LTFV, he *must* issue a withholding of appraisement order. The effect of this order is to defer assessment of duties on all goods subject to the order until the antidumping proceeding is completed. If the Secretary ultimately makes a final determination of sales at LTFV and the ITC rules that such sales are causing injury to a domestic industry, the Secretary must assess special dumping duties on all goods entered into the United States subsequent to the effective date of the withholding of appraisement order. If either the Secretary or the ITC makes a negative determination, regular customs duties, if any, are assessed and the order is dissolved. In short, the withholding of appraisement order is the vehicle which enables the Secretary to "reach back," following the publication of a dumping finding, to assess special antidumping duties against goods entered during the latter phase of the proceeding, i.e., beginning with the date of the tentative determination.

Existing law *permits* the Secretary to make any withholding of appraisement order retroactive up to 120 days before the publication of a notice of initiation of investigation in the Federal Register. There is no indication of even one instance in recent years in which this authority was exercised. In point of fact, Treasury's regulations do not even purport to allow a withholding of appraisement order to be applied retroactively except in the case of an importer who has violated assurances given in return for the discontinuance of an antidumping proceeding.¹

Finally, current law provides that a withholding of appraisement order may be issued *only* if the Secretary makes an affirmative tentative determination of sales at LTFV. This means that in cases where he

¹ Recent statements by Treasury officials indicate the Department plans to self-initiate antidumping cases involving steel imported below trigger prices.

² It wasn't until more than a year later that U.S. Steel Corporation filed an antidumping petition involving these same products imported from Japan.

A Memorandum to the Committee on Ways and Means of the U.S. House of Representatives 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 (hereafter "ITC Memorandum")¹⁹ CFR 153.15(g). It is interesting to note that even in the extreme situation where an importer violates his commitment not to sell at LTFV, Treasury will not make its withholding order retroactive more than 90 days. This 90-day limit was apparently adopted to conform with the dictates of the International Dumping Code, despite the fact that existing law enacted long before execution of the Code, permits a longer period.

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initially finds no sales at LTFV but subsequently reverses himself in his final determination (e.g., pig iron from Canada, West Germany, and Finland), merchandise entered during the intervening months evade the imposition of special dumping duties. Even in those cases where a withholding of appraisement order is entered, existing practice provides for the termination of such order upon either a final negative determination by the Secretary or a determination of no injury by the ITC. This latter provision partly emasculates the right of judicial review previously granted to American producers.

It means that in cases where a petitioner is able to prove in court that the Secretary or the ITC erred—a process which can often consume years—imports dumped in the interim completely escape the imposition of special dumping duties. One approach toward solving, at least in part, some of the problems described above is to shorten significantly the time in which Treasury must conduct its LTFV investigation. Treasury officials have publicly stated, however, that it is extremely difficult to complete LTFV investigations within the time limits provided by existing law and any reduction in these times is simply not feasible. Accordingly, the proposed legislation is designed to deal with each of the points discussed above in a straight-forward and equitable fashion while at the same time accommodating the objections raised by Treasury against any "telescoping" of LTFV investigations.

The first change which the proposal would effect is the delegation from the statute books of the Secretary's authority to make a withholding of appraisement order retroactive 120 days prior to the issuance of a Notice of Investigation. In view of the Secretary's refusal to invoke this power, continuation of such authority would amount to nothing more than a charade.

Even if years of Treasury practice were suddenly reversed, however, the effectiveness of issuing a withholding of appraisement order on a retroactive basis is subject to serious doubt. In theory, withholding could be made retroactive 10 to 13 months prior to the date of issuance. In practice, the bulk of shipments made during this period would have already cleared Customs and would therefore escape the purview of the order. For all these reasons, the authority to issue withholding of appraisement orders retroactively should be abolished.

On the other hand, some recognition must be given to the plight of the domestic manufacturer. When an antidumping proceeding notice is filed, the foreign manufacturer who is dumping knows he has up

to 9 months before a tentative affirmative determination (and hence a withholding order) will be issued. It may therefore be prudent for him to continue shipping dumped products to the United States and, indeed, to increase his volume of sales to deplete his inventory before the withholding order is signed. Illustrations of this phenomenon abound.

"Recently, for example, in the month before the tentative determination was to be announced in a dumping case filed last summer by Monsanto Company against Japanese producers of sorbates, a chemical preservative, the amount of imported sorbates was three times the total for each of the previous months. Even if relief from dumping were to follow shortly thereafter, it is contended that recovery from such an onslaught of imports could take upwards of a year."⁵

To prevent this insidious practice, the proposed legislation provides that simultaneously with the issuance of a notice of investigation, the Secretary must issue a withholding of appraisement order effective on the date such notice is published in the Federal Register and continuing in effect until a Finding is published or, in the event no finding is published, until the petitioner's rights of appeal have been exhausted. Admittedly, this would impose a burden upon the importer to determine whether the foreign manufacturer or exporter was in fact dumping. Logic demands, however, that the onus be placed upon the one dealing with the foreign producer or exporter and profiting from such relationship rather than upon one who is the victim of the very abuse the Antidumping Act was intended to prevent.

Preliminary injury determination.—Subsection (c)(2) of section 201 of the Antidumping Act currently provides that where the Secretary concludes from information available to him that there is substantial doubt whether an industry in the United States is being injured by LTFV imports, he must refer the matter to the ITC which has 30 days to make a preliminary ruling. To implement this provision, the Secretary has adopted detailed and burdensome regulations requiring a petitioner to submit extensive data relating to the question of injury. The chilling effect of such regulations has been accurately described by at least one member of Congress:

"I recognize that under the Trade Act the Secretary must determine if there is substantial doubt whether an industry is being injured and, if so, refer the case to the International Trade Commission for

Subsection 160(c) (2) is repealed.

19 USC 160(c) —(2) If, in the course of making a determination under paragraph (1), the Secretary concludes, from the information available to him, that there is substantial doubt 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, he shall forward to the Commission the reasons for such substantial doubt and a preliminary indication, based upon whatever price information is available, concerning possible sales at less than fair value, including possible margins of dumping and the volume of trade. If within thirty days after receipt of such information from the Secretary, the Commission, after conducting such inquiry as it deems appropriate, determines there is no reasonable indication that 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, it shall advise the Secretary of its determination and any investigation under subsection (b) of this section then in progress shall be terminated.

⁵ Cong. Rec., vol. 124, No. 77, p. S 8047, (May 23, 1978). This same marketing strategy was reflected in the first months of 1978 when steel imports reached an all time record in anticipation of Treasury's new Trigger Price Mechanism which is intended to monitor for signs of dumping.

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>a preliminary determination. It would appear, however, that the proposed regulations demand more information at the pleading stage than the Commission does in connection with a full scale injury investigation. Some of the information sought is clearly irrelevant (e.g., unemployment and profit figures of industries other than that of the complainant). Other data probably could not be obtained by the complainant without violating Federal antitrust laws (e.g., capacity utilization of the firms represented by the petition). And still other statistics are readily available to the Department since they are derived from figures recorded by its Bureau of Customs (e.g., volume and value of imports of the merchandise in question). The net effect of these pleading requirements is to discourage or preclude domestic companies from obtaining relief from unfair foreign competition.”</p> <p>Earlier this year the Treasury Department attempted to increase further the burden placed on those seeking relief from dumping by proposing that each petitioner show the “causal link” between sales at LTFV and injury to a domestic industry. The Department’s proposal precipitated a flood of objections from Congress, the International Trade Commission and others. Treasury attempted to justify its action on the basis that such information is required “to enable us to discharge promptly and fairly our statutory responsibility for deciding ‘whether or not a ‘substantial doubt’ of injury exists.’” As an apparent result of the great number of protests, Treasury withdrew its proposed regulations—at least for the time being.</p> <p>It is particularly incongruous that a Federal agency should seek to adopt such burdensome pleading requirements when the Federal courts have gone to notice pleading. The basic premise of the judicial concept is that a person who possesses a right should not be denied that right. Under the Federal Rules of Civil Procedure, therefore, a complainant is merely required to give his adversary sufficient notice of the nature and substance of the claim to permit a response. In view of Treasury’s contrary position, however, the provision in existing law which was added in the Trade Act of 1974 and provides for preliminary determination of injury should be repealed. The question of injury would then be the sole concern of the ITC and the hardship placed on American petitioners by Treasury’s injury pleading requirements would be obviated.</p>		

19 USC 160(b).—(b) (1) 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 6 months after the publication under subsection (c) (1) of this section of a notice of initiation of an investigation:

(A) determine whether there is reason to believe or suspect, from the invoice or other papers or from information presented to him or to any other person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value); and

(B) if his determination is affirmative, publish a notice of that fact in the Federal Register, and require, under such regulations as he may prescribe, the withholding of appraisement as to such merchandise entered, or withdrawn from warehouse, for consumption or after the date of publication of that notice in the Federal Register (or such earlier date, not more than one hundred and twenty days before the date of publication under subsection (c) (1) of this section of notice of initiation of the investigation, as the Secretary may prescribe), until the further order of the Secretary, or until the Secretary has made a finding as provided for in subsection (a) of this section in regard to such merchandise; or

(C) if his determination is negative (or if he tentatively determines that the investigation should be discontinued), publish notice of that fact in the Federal Register.

(2) 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 6 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 9 months after the publication in the Federal Register of the notice of initiation of the investigation.

(3) Within 3 months after publication in the Federal Register of a determination under paragraph (1), the Secretary shall make a final determination, whether the foreign merchandise in question is being or is likely to be sold in the United States at less than its fair value (or a final discontinuance of the investigation).

(b) (1) The Secretary shall, within 6 months after publication of a Notice of Investigation, make a tentative determination as to whether there is reason to believe or suspect that the imported merchandise is being or is likely to be sold in the United States or elsewhere at less than fair value. Notice of such determination shall be published in the Federal Register. If his determination is affirmative, the Secretary shall so advise the International Trade Commission (hereafter "Commission").

(2) 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 6 months, he shall publish notice of this in the Federal Register, in which case the determination shall be made within 9 months after the publication in the Federal Register of the Notice of Investigation.

(3) Within 3 months after publication of notice of a tentative determination, the Secretary shall make a final determination as to whether the foreign merchandise in question is being or is likely to be sold in the United States at less than its fair value. Notice of such determination shall be published in the Federal Register. If his determination is affirmative or, if his tentative determination was affirmative, the Secretary shall advise the Commission of his final determination.

Timing of LTFV sales determination.—The proposed legislation continues the existing requirement of 9 months, with the final determination due 3 months after the publication of the tentative determination.

⁶ Statement of the Hon. Henry J. Nowak, Congressional Record, E 5516 (Oct. 22, 1975).
⁷ Letter dated May 1, 1978, from Secretary W. Michael Blumenthal to Senator Russell Long, Committee on Finance.

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>19 USC 160.—(a) 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 U.S. International Trade Commission (hereinafter called the "Commission"), and the Commission shall determine within 3 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. 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 a notice (hereinafter in sections 160 to 173 of this title called a "finding") of his determination and, if his determination and the determination of the Commission, for the purposes of this subsection, the Commission shall be deemed to have made an affirmative determination if the Commissioners of the Commission shall be deemed to have made an affirmative determination 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 deems necessary for the guidance of customs officers.</p>	<p>(c) (1) Within 4 months after publication of any notice of tentative affirmative determination which is followed by a final affirmative determination under subsection 201(b), (19 USC 160 (b)), the Commission shall determine whether an industry in the United States is being or is likely to be injured, or prevented from being established, by reason of the importation of such merchandise into the United States.</p> <p>(2) Within 3 months after publication of any notice of final affirmative determination which was preceded by a tentative negative determination under subsection 201(b), (19 USC 160 (b)), the Commission shall determine whether an industry in the United States is being or is likely to be injured, or prevented from being established, by reason of the importation of such merchandise into the United States.</p> <p>(3) The Commission, after such investigation as it deems necessary, shall publish notice of any determination under paragraph (c) (1) or (c) (2) and shall notify the Secretary of its determination. If that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160 to 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 made an affirmative determination if the Commissioners of the Commission voting are evenly divided as to whether its determination should be in the affirmative or 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 of customs officers. The Finding shall provide for the assessment and collection of special dumping duties on merchandise of foreign manufacturers and exporters found to have sold at less than fair value in the United States and may include merchandise of the same class or kind of other manufacturers or exporters in the same foreign country.</p>	<p><i>Timing of injury investigation.</i>—Current law provides that the U.S. Treasury Department may take up to 6 months (9 months in complex cases) to reach a tentative decision and up to an additional 3 months to make a final determination of sales at LTFV. If Treasury's final determination is in the affirmative, the case is sent to the International Trade Commission which has another 90 days in which to decide whether LTFV sales are causing injury to a domestic industry. Both Treasury and the ITC have indicated that it is not feasible to reduce these time limits.</p> <p>Compelling reasons exist, however, to expedite final resolution of an antidumping proceeding. American purchasers, importers and producers are all affected by the uncertainty created in the market place by the pendency of a dumping case. To minimize such uncertainty, the proposed legislation would require the Commission to issue its injury determination within 4 months of a <i>tentative</i> finding of sales at LTFV by Treasury. The partial overlapping of the periods of investigation by Treasury and the ITC would permit a reduction of 2 months from the total allowable time in current law without shortening the allowable time of either agency. In the event the margin of dumping found by Treasury in its final determination is significantly different from that indicated in its tentative decision, the Commission would still have an additional month to make whatever inquiries this change might dictate.⁸ In the event Treasury reversed its original affirmative finding and reached a final decision of no sales at LTFV, the Commission would immediately terminate its investigation.</p> <p><i>Discontinuance of investigation.</i>—Current law also authorizes the Secretary to make a "final discontinuance" of an antidumping investigation. No parameters are given to guide the Secretary and others (including the foreign manufacturers and exporters and U.S. importers and domestic producers and unions) as to the circumstances in which a discontinuance would be appropriate. The Secretary has promulgated the following regulation (19 CFR 153.33) which affords the Treasury unbounded discretion:</p> <p>"(a) <i>Price assurances, termination of sales or other circumstances.</i> Whenever the Secretary is satisfied during the course of an antidumping investigation that:</p> <p>"(1) The possible margins of dumping involved are minimal in relation to the volume of exports of the merchandise in question, price revisions have been made which eliminate any likelihood of present sales at less than fair</p>

value, and assurances have been received which eliminate any likelihood of sales at less than fair value in the future; or

"(2) Sales to the United States of the merchandise have terminated and will not be resumed and assurances have been received to this effect; or
"(3) There are other circumstances on the basis of which it may no longer be appropriate to continue an antidumping investigation, the Secretary may publish a 'Notice of Tentative Discontinuance of Antidumping Investigation' in the Federal Register."

With reference to subsection (3), no indication whatever is provided as to the nature of the "other circumstances" which might form the basis of a discontinuance. Such unfettered discretion inevitably leads to uncertainties and anomalies in the administration of any law. Even the more narrow circumstances articulated in subsections (1) and (2), however, do not justify a discontinuance. Whenever a foreign manufacturer, exporter, or U.S. importer sells at LTFV in the United States—even at small margins—it exhibits a propensity to dump which warrants close formal scrutiny in the future. If such scrutiny, which is only obtainable through the entry-by-entry monitoring process which follows a dumping "finding," reveals no sales at LTFV then no dumping duties are assessed. On the other hand, if the margins do increase, domestic producers and workers are protected through the application of offsetting duties. Accordingly, the proposed legislation repeals the Secretary's authority to discontinue a dumping investigation.

Scope of finding.—Under both existing law and the proposed legislation, special dumping duties are imposed on a company-by-company basis. Pursuant to present practice, the Secretary, as a matter of discretion, may require that U.S. bound shipments of producers and exporters of the like product who have not been found to have made sales at LTFV during the period investigated be included in the Finding. The suggested amendment codifies current practice. This discretionary power is essential to deal with various cartel arrangements in Japan, Europe, and elsewhere whereby export sales can be transferred from one company to another to circumvent a finding which is limited to only those firms who sold at LTFV during the time frame investigated.

(d) If a finding has been made, the Secretary shall assess a special dumping duty as defined at section 202 (19 USC 161).

⁸The Commission has stated that a 1-month lag between the Secretary's final determination of sales at LTFV and the due date for the Commission's decision on injury would be sufficient to "allow the Commission to consider the findings of the Secretary in his final determination of LTFV sales." (ITC Memorandum, p. 3.)

CHAPTER 1—ANTIDUMPING ACT AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
	<p>(e) Any foreign manufacturer or exporter or domestic importer subject to a Finding may petition the Secretary to terminate a final determination of sales at less than fair value. The Secretary may not grant any such petition unless he determines that no sales at less than fair value have occurred for at least 3 years since publication of the Finding, the foreign manufacturer, exporter and domestic importer provide the Secretary with written assurances that sales at less than fair value will not be resumed and the Secretary determines that sales at less than fair value are not likely to resume. If the Secretary decides to terminate a final determination of sales at less than fair value, he may thereafter terminate the applicable Finding in which event he shall monitor the importation of merchandise which had been subject to the finding for at least 3 years after its termination. In the event sales are made at less than fair value during the monitoring period, the Secretary shall immediately reinstate the Finding. The Secretary shall give notice of any determination to terminate a final determination of sales at less than fair value, to terminate a Finding or to reinstate a Finding in the Federal Register together with a statement or reasons as required in section 201(h).</p> <p>(f) Any foreign manufacturer or exporter or domestic importer subject to a Finding which has been in effect for 3 years or longer may petition the Commission to terminate its determination that a domestic 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 merchandise at less than fair value. The Commission, after such investigation as it deems necessary, shall notify the Secretary if it determines that an American industry is not being injured or is not likely to be injured or prevented from being established. The Secretary may thereafter terminate the applicable Finding. The Commission and the Secretary shall give notice of any determination made pursuant to this subsection in the Federal Register together with a statement of reasons as required in section 201(h).</p>	<p><i>Termination of a dumping finding.</i>—Existing law does not provide for the revocation of a dumping finding. While it makes sense for Congress to authorize the termination of cases which have become “stale,” any such authorization should contain safeguards to preclude premature terminations. Despite the current absence of <i>any</i> express grant of power from Congress, both the Secretary of the Treasury and the ITC have adopted procedures permitting the revocation of dumping findings.¹⁰ Unfortunately, these contain inadequate protection against termination of cases which are <i>not</i> stale.</p> <p>Consider the Treasury Department's current rules which permit the revocation of a dumping finding if (1) no sales at LTFV have occurred for 2 years and (2) assurances are provided that no sales at LTFV will occur in the future. While on the surface these two conditions might appear to constitute adequate safeguards against premature termination, they are in fact illusory. Assuming the Antidumping Act is being properly administered,¹¹ no rational person will engage in dumping for one very practical reason: any price advantage realized by dumping will be negated by the assessment of special dumping duties. The mere absence of sales at LTFV following a dumping finding, therefore, can in no way be construed as an indication that the importer will continue to refrain from dumping once the order is lifted.</p> <p>The second condition contained in Treasury's regulations—assurances of no future sales at LTFV—is equally meaningless.</p> <p>In the words of one Congressman: “* * * the requirement of assurances offers no comfort to the American business or labor unit being subjected to the onslaught of unfairly priced goods. What is the effect of such assurances? Unlike the situation in which the Department determines that dumping margins are minimal and accepts assurances in return for a discontinuance of the proceeding, there is no monitoring of future shipments. Neither is there a provision for reinstating the original dumping order if the assurances are violated. Under these circumstances, assurances represent little more than a charade. In essence, therefore, a dumping finding under the Treasury proposal is effective for only two years. I doubt if there is a company in the United States that can afford the very considerable time, effort and money required to prosecute a dumping action in return for such short term relief.”¹²</p> <p>The ITC has adopted analogous regulations which can result in the short-circuiting of a dumping finding. ITC regulations provide that the Commission</p>

may institute an investigation as to whether an injury determination should be revoked "upon receipt of an application from an interested person, upon its own motion, or upon receipt from the Secretary of the Treasury of appropriate advice concerning an application from an interested person specifying the changed circumstances forming the basis for review, except that, in the absence of good cause being shown, no investigation * * * shall be made unless 2 years have elapsed since the publication of the Finding of dumping by the Secretary of the Treasury."¹²

This section permits an importer or foreign exporter or producer to apply for review after only 2 years have expired *without having to show good cause*. In effect it is an invitation to litigate regardless of merit. The time and expense required to relitigate the injury issue and the possibility that the finding of injury might be revoked so soon after the original determination has a chilling effect on American industries which might otherwise seek relief from dumping.

To accommodate the legitimate concern of removing stale cases from the books while simultaneously safeguarding against premature terminations, the proposed legislation would authorize the revocation of Findings under two different sets of circumstances. Under the first, the Secretary could, upon motion by an affected foreign manufacturer or exporter or American importer, terminate a Finding if (1) there have been no sales at LTFV for at least 3 years, (2) he determines sales at LTFV are unlikely to resume, and (3) the foreign producer and exporter and U.S. importer sign written assurances that they will not sell at LTFV in the future. Compliance with the assurances would be monitored for 3 years and in the event of a violation the original finding would be immediately reinstated.

Under the second set of circumstances, the ITC could terminate an injury determination, which

¹² In its recent report on the administration of the anti-dumping act, the GAO found that seven Findings of dumping had been revoked from January 1970 to March 1978 and notices of intent to revoke five additional dumping Findings had been published. These findings, while significant in terms of the total number of Findings in effect, are understated in that they do not reflect partial revocations where one or more producers are released from a finding (e.g., Quebec Iron & Titanium Corp. was released from the finding dealing with pig iron from Canada.)

¹³ In the past, the act has not always been properly administered. Extended delays in collecting special dumping duties, for instance, sometimes made it worthwhile for the foreign exporter and American importer to continue dumping, even after a finding was entered. The amendments proposed in other sections should result in better enforcement and thereby remove the incentive for continued dumping.

¹⁴ Letter from Congressman Henry J. Nowak to Treasury Secretary William Simon as published in the Congressional Record, D. E5516-7 (Oct. 22, 1975).
¹⁵ 10 CFR 207.5(c).

CHAPTER 1—ANTIDUMPING ACT AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>19 USC 160.—(d) (1) Before making any determination under subsection (a) of this section, the Secretary or the Commission, as the case may be, shall, at the request of any foreign manufacturer or exporter, or any domestic importer, of the foreign merchandise in question, or of any domestic manufacturer, producer, or wholesaler of merchandise of the same class or kind, conduct a hearing at which—</p> <p>(A) any such person shall have the right to appear by counsel or in person; and</p> <p>(B) any other person, firm, or corporation may make application and, upon good cause shown, may be allowed by the Secretary or the Commission, as the case may be, to intervene and appear at such hearing by counsel or in person.</p>	<p>(g) (1) Before making or terminating any final determination under this section or under subsection 202(b), (19 USC 161 (b)), the Secretary or the Commission, as the case may be, shall, at the request of any foreign manufacturer or exporter, or any domestic importer, of the foreign merchandise in question, or of any domestic manufacturer, producer, or wholesaler of merchandise of the same class or kind, or of any entity including a trade association of domestic manufacturers, producers or wholesalers or a certified or recognized union or group of workers, involved in the production or sale of merchandise of the same class or kind, conduct a hearing at which:</p> <p>(A) any such person, firm, corporation or entity shall have the right to appear by counsel or in person; and</p> <p>(B) any other person, firm, corporation, or entity may make application and, upon good cause shown, be allowed by the Secretary or the Commission, as the case may be, to intervene and appear at such hearings by counsel or in person.</p> <p>(2) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the Commission, upon making its determination under subsection (a) of this section, shall publish in the Federal Register such determination, whether affirmative or negative, together with a complete statement of findings and conclusions, and the reasons or bases therefor, on all the material issues of fact or law presented (consistent with confidential treatment granted by the Secretary or the Commission, as the case may be, in the course of making its determination).</p>	<p>would permit a termination of a finding by the Secretary, if it decides that at least 3 years have elapsed since the finding was published and that a domestic industry is not being and is not likely to be injured and is not being prevented from being established by reason of imports sold at LTRV.</p> <p><i>Right to a hearing.</i>—Subsection (g) (1) would amend existing law (160(d) (1)) by extending the right of a public hearing to American unions and trade organizations involved in the production or sale of merchandise of the same class or kind as that being imported.</p> <p>The requirements of existing section 160(d) (2) are incorporated into new section 101(h).</p>
<p>19 USC 160.—(d) (3) is readopted without change as</p>	<p>Section 160(d) (3) is readopted without change as subsection (g) (2).</p>	<p>shall be exempt from sections 554, 555, 556, 557, and 702 of title 5. The transcript of any hearing, together with all information developed in connection with the investigation (other than items to which confidential treatment has been granted by the Secretary or the Commission, as the case may</p>

be), shall be made available in the manner and to the extent provided in section 552(b) of title 5.

(h) Any notice of a determination required under this title to be published by the Secretary or the Commission shall be accompanied by a complete statement of the conclusion, and the reasons therefore, on all material issues of fact or law presented (consistent with confidential treatment granted by either the Secretary or the Commission in the course of making this determination), including any majority or minority or concurring opinions written by the Commissioners.

Section 102.—Section 202 of the Antidumping Act, 1921 (19 USC 161) is amended to read as follows:

(a) (1) If the Secretary makes a tentative determination that imported merchandise is being or is likely to be sold at less than fair value, he shall, at the time of such determination, establish the margin of dumping and assess provisional dumping duties on all merchandise for which appraisement is withheld. These duties shall be paid on or before the entry of the merchandise into the United States and shall be placed in escrow and, in the event of a final determination of no sales at less than fair value or a determination that no industry in the United States is being or is likely to be injured or is prevented from being established, the provisional dumping duties shall be refunded together with the statutory rate of interest. In the event of a final determination of sales at less than fair value, the Secretary shall increase or decrease, if appropriate, the margin of dumping and provisional dumping duties. Any amount owed to or by the Secretary as the result of such increase or decrease shall be payable with interest, dating back to the date of payment.

(2) The dumping margin shall equal the difference between the purchase price or exporter's sales price and the foreign market value (or, in the absence of such value, the constructed value), as determined in the process of the investigation into sales at less than fair value under section 201 (19 USC 160). A separate dumping margin shall be determined for each foreign manufacturer or exporter investigated.

(a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than 120 days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement has been made before such finding has been so made public. If the purchase

(b) (1) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which a finding as provided in section 201 (19 USC 160) has been made, there shall be levied, collected, and paid on or before entry of the merchandise into the United States in addition to any other duties imposed by law, a special dumping duty.

(2) The special dumping duty on all merchandise entered on or after the date of publication of a Findings until the date of publication in the Federal Register of a final revised margin of dumping shall be

Publication of opinions.—Under existing practice, both the ITC and the Treasury Department issue statements of positions or opinions to accompany most significant decisions made in the course of a dumping investigation. This section would insure that a full statement of position on all material issues of fact and law are issued for all significant decisions in the course of a dumping investigation.

Provisional dumping duties.—Under current practice, Treasury does not require prompt payment of special dumping duties on merchandise entering the United States following a tentative determination of sales at LTFV. Rather, it permits the importer to obtain a bond as security for payment of such duties in the event a finding of dumping is ultimately made. Because of the availability of inexpensive bonds, coupled with extended delays in the actual collection of duties, the importer has little incentive to abide by the dictates of the Antidumping Act even *after* a withholding of appraisement order is entered.¹³

The United States' trading partners have long recognized this fact. To insure the effectiveness of *their* antidumping laws and regulations, therefore, countries such as Canada and the member nations of the European Community commonly assess and collect provisional dumping duties on merchandise entering their markets during the period between a tentative finding of sales at LTFV and a final determination. The proposed legislation would remedy a serious flaw in American law while simultaneously bringing U.S. practice into conformity with that of its major trading partners.

Estimated duties, annual revision.—Existing law provides for the assessment of special dumping duties on an entry-by-entry basis but contains no time limit for the actual collection of such duties. According to the General Accounting Office, Customs has fallen far behind with the average lag between entry and appraisal being approximately 3-3½ years.

¹³ See, for example, General Accounting Office Review of Antidumping Act, released on Apr. 20, 1978, by Senator John Heinz and other Senators.

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Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.</p> <p>(3) Within 12 months after such final determination of sales at less than fair value, and at maximum intervals of 12 months thereafter, the Secretary shall publish in the Federal Register a notice of tentative revised margin of dumping setting forth, in addition to any other information required by subsection 201(h) (19 USC 160(h)), any proposed revisions in the margin of dumping, including any changes in the foreign market value, the constructed value, the purchase price, the exporter's sales price or any adjustment or allowance permitted under this title, or a statement that no revisions are in order. There shall be an opportunity for public comment and a right to a hearing under section 201(g). (19 USC 160(g)). Within 3 months after publication of a notice or a tentative revised margin of dumping, the Secretary shall publish in the Federal Register a notice of final revised margin of dumping, accompanied by a statement of reason as required by section 201(h) (19 USC 160(h)).</p> <p>(4) The final revised margin of dumping shall be applied retroactively to the date of publication of the Secretary's final determination of sales at less than fair value or to the date of publication of the prior revised margin of dumping. Any amount owed to or by the Secretary as the result of a revision to the margin of dumping shall be payable with interest accruing from the date of payment of the special dumping duty.</p> <p>(5) The special dumping duty on all merchandise entered on or after the date of publication of a final revised margin of dumping shall be equal to such revised margin of dumping.</p>	<p>equal to the margin of dumping established by the Secretary in his final determination of sales at less than fair value under subsection 201(b) (2) (19 USC 160(b)(2)).</p> <p>(3) Within 12 months after such final determination of sales at less than fair value, and at maximum intervals of 12 months thereafter, the Secretary shall publish in the Federal Register a notice of tentative revised margin of dumping setting forth, in addition to any other information required by subsection 201(h) (19 USC 160(h)), any proposed revisions in the margin of dumping, including any changes in the foreign market value, the constructed value, the purchase price, the exporter's sales price or any adjustment or allowance permitted under this title, or a statement that no revisions are in order. There shall be an opportunity for public comment and a right to a hearing under section 201(g). (19 USC 160(g)). Within 3 months after publication of a notice or a tentative revised margin of dumping, the Secretary shall publish in the Federal Register a notice of final revised margin of dumping, accompanied by a statement of reason as required by section 201(h) (19 USC 160(h)).</p> <p>(4) The final revised margin of dumping shall be applied retroactively to the date of publication of the Secretary's final determination of sales at less than fair value or to the date of publication of the prior revised margin of dumping. Any amount owed to or by the Secretary as the result of a revision to the margin of dumping shall be payable with interest accruing from the date of payment of the special dumping duty.</p> <p>(5) The special dumping duty on all merchandise entered on or after the date of publication of a final revised margin of dumping shall be equal to such revised margin of dumping.</p>	<p>The lag between entry and payment is longer. As a result, the efficacy of the antidumping act is in serious jeopardy as illustrated by the following case history:</p> <p>"In 1971, Treasury issued a finding against televisions from Japan. For 6 years, while Admiral, Motorola, Magnavox, Philco, and other American television manufacturers were being forced out of business, the Treasury Department did nothing. It was not until March 1978 that Treasury, under heavy congressional pressure, finally assessed dumping duties of \$46 million on entries of sets imported into the United States in 1972 and the first 6 months of 1973. The \$46 million assessment represents a dumping margin of at least \$30 per set at wholesale, and \$50 at retail prices. Four more years of imports, on which dumping duties are believed to approximate \$350 million, remain unresolved, with no promise that the additional duties will be assessed expeditiously. No reason was offered for the continued delay, but the apparent purpose was to minimize the adverse impact on the importers and to provide time for a protest of the assessments, thus making the limited Treasury action essentially a trial run. Meanwhile, as this delay continues, merchandise under current procedures is permitted to enter under a bond which generally costs less than 1 percent of the estimated dumping duty liability, even though the final determination of dumping has been issued, and injury has been found."¹⁴</p> <p>One way to cure this problem is simply to mandate that special dumping duties be collected "up front," at the same time that regular duties are paid. Such an approach may not be feasible, however, in view of the fact that one of the elements needed to determine the margin of dumping, i.e., the foreign home market value, cannot generally be ascertained until sometime after entry is made. A practical solution is to provide for the prompt collection of the <i>approximate</i> dumping duties, based on the margin of dumping found by the Secretary in his final determination of sales at LTFV, and to adjust the margin annually to reflect the degree of price discrimination which <i>actually</i> occurred during the preceding months. Based on the adjusted margin, the importer would, if appropriate, receive a refund for any excess duties paid or would make payment of any balance owed. In addition, the adjusted margin would be used by Customs as the special dumping duty until the adjustment process is repeated 12 months later.</p> <p><i>Elimination of ex parte changes in margin.</i>—The proposed amendment would cure another defect in existing law—the absence of any public review of</p>

the Secretary's implementation of a Finding. In this connection, it is important to recall that the margin of dumping is computed by subtracting purchase price (or, where appropriate, exporter's sale price) from foreign home market value and then adjusting the difference to reflect differing circumstances of sale between home and export markets and differing levels of trade. Both the prices and allowances will vary over time. Whereas Treasury's original calculations are subject to at least as modicum of public scrutiny, its subsequent determinations are not. The net effect under current practice is that the margin of dumping tends to be relitigated, on an ex parte basis, each time a new shipment arrives at an American port. Even under the proposed procedure of assessing an approximate dumping duty subject to year-end adjustment, the potential exists for ex parte litigation *unless* the Treasury's annual determination is open to public review.

The dangers which the foregoing safeguards are intended to obviate are serious and real. Consider, for instance, the experience of the domestic producers of titanium sponge who successfully prosecuted an antidumping proceeding against Russian sponge, wherein the Treasury found sales at less than fair value; and the Commission found that such dumped Russian sponge was causing injury to the domestic industry. A final dumping order was entered by the Treasury Department on August 21, 1968. Subsequent to that dumping Finding, Russian sponge which was subject to the dumping duty continued to come into the United States from bonded warehouses or from foreign trade zones. The Russian sponge continued to be sold at such exceptionally low prices that it appeared to the domestic producers the antidumping duties were not being properly imposed. The selling price of Russian sponge in this country was below the cost of producing it in the United States, and it continued to sell for anywhere from 20 to 40 percent under domestic prices even after the imposition of antidumping duties. Repeated inquiries of the Treasury Department resulted in continuing assurances that antidumping duties were being assessed in accordance with the antidumping statute. At a meeting in Washington with representatives of the Customs Service who had worked on the titanium sponge antidumping investigation, the facts explaining the low price of the Russian sponge finally were disclosed.

In order to use titanium metal in rotary or moving parts of a jet engine or rocket engine, safety requirements have been established requiring that the engine manufacturer inspect the facilities of the producers of titanium sponge to assure that the facilities, production process, quality control, etc.,

¹⁴ Congressional Record, vol. 124, No. 77, p. S 8047 (May 23, 1978).

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Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>are adequate to assure a quality titanium product. These stringent safety requirements were established because of the critical application of the titanium metal in the high-speed rotary blades in jet engines and the catastrophic consequences of a failure of the metal while the aircraft is in flight. The three countries of the world producing and exporting titanium sponge to the United States were Japan, the United Kingdom and Russia.¹⁵ The producers of titanium sponge in Japan and the United Kingdom permitted inspection of their facilities and ultimately received certification of their product for production of titanium metal to be used in moving parts of aircraft and rocket engines. However, the Russians refused to permit any inspection of their facilities; consequently, it was not possible to certify their sponge for use in such engines. Only a small percentage of titanium metal is actually used in the moving parts of the jet and rocket engines.</p> <p>After the antidumping proceedings had been concluded and an apparently substantial dumping margin established, counsel for the importers of Russian sponge approached the Treasury on a unilateral basis to argue that the dumping margin should be significantly reduced since the Russian sponge did not meet the inspection requirements that would permit it to be used in the critical application involved in the rotary parts of such engines. The argument was advanced that even though it was the Russians' refusal to permit inspection of their facilities that precluded use of Russian sponge in production of titanium to be used in such rotary parts, the end result was tantamount to Russian sponge being an inferior or cheaper product than either Japanese or United Kingdom sponge. This argument was made despite the undisputed fact, confirmed by all technical people involved in government and industry, that the Russian sponge was of an exceptionally high quality and was at least the equal of any titanium sponge produced anywhere in the world. The limitation on use of Russian titanium sponge had nothing whatever to do with the quality or value of the product but was the sole result of the unilateral decision of the Russians to refuse to permit inspection of their facilities.</p> <p>Despite these facts, the Treasury Department, through the Secretary of Treasury, agreed with the contention of the Russian importers and made a "substantial" reduction in the constructed value of the Russian imports. The effect of this adjustment was to eliminate most of the dumping duty, and this explained why the Russian sponge continued</p>		

to sell at such exceptionally low prices. This act by the Treasury Department was taken without prior notice to, nor opportunity of the domestic producers to be heard on this matter. In point of fact, it was several years after the dumping finding that the domestic industry learned of this decision adjusting the value of the Russian sponge downward, and it occurred only as the result of the meeting with Customs officials in Washington.

To prevent such ex parte litigation in the future, the proposed amendment provides that the Secretary must hold a public hearing prior to a final determination of the adjusted margin of dumping—just as he must hold a public hearing prior to the final determination of sales at LTFV made during the original investigation. Similarly, he would be required to publish notice of his decision together with a complete statement of reasons, again, just as in the original investigation.

Adjustments to foreign market price.—The nominal measure of dumping is the difference between the foreign market value and the purchase price (or, where appropriate, the exporter's sale price). To obtain the actual measure of dumping, however, one must make certain adjustments to these figures to reflect differences in wholesale quantities or other circumstances of sale between the home market and the export market. For example, if a foreign producer offers technical assistance in its home market which can be quantified at \$5/unit and provides no such service in its export market, for sales under consideration, a reduction of \$5/unit should be made in its home market price. The margin of dumping will thus be reduced by \$.5/unit. On the other hand, if technical service is provided to export customers but not home market customers, an addition of \$.5/unit must be made to the home market price thereby increasing the margin of dumping. During the 1960's, Treasury allowed virtually every

- (c) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—
 (1) the fact that the wholesale quantities, in which such or similar merchandise is sold, or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption, (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),
 (2) differences in those credit terms, guarantees, warranties, technical assistance, servicing, advertising or seller's costs and commissions which bear a direct relationship to the sales which are under consideration,

19 USC 161.—(b) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—
 (1) the fact that the wholesale quantities, in which such or similar merchandise is sold, or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),
 (2) other differences in circumstances of sale, or
 (3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section

¹⁶ Since Russia is a controlled economy under the anti-dumping statute, it was necessary to use a constructed-value basis to determine dumping; the Treasury Department at first used the United Kingdom as the model but subsequently used Japan as the basis for the constructed value. Although the United Kingdom still exported titanium sponge, changed competitive circumstances in that market caused Treasury to look to Japan for the constructed value; since Japan was a lower cost country, the net result of such change was to necessarily narrow the margin of dumping.

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>170a(3) of this title is used in determining foreign market value, then due allowance shall be made therefor.</p> <p>(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 212(3) (19 USC 170(a)(3)) is used in determining foreign market value, then due allowance shall be made therefor.</p>	<p>(3) claim asserted by the foreign exporters and American importers for adjustments due to differing circumstances of sale and production costs. For example, allowances were granted for general advertising costs, bad debts and entertainment, among other costs.</p> <p>In the early 1970's, Treasury correctly revised its regulations to permit only those adjustments which bear a direct relationship to the sales under consideration. This marked a significant improvement in administration of the Antidumping Act, and resulted in much more realistic measurement of the degree of dumping. Unfortunately, indications exist that Treasury is now contemplating a return to its prior standard. In <i>Ice Hockey Sticks from Finland</i>, for example, Treasury acknowledged that it had considered certain adjustments to the foreign home market but felt compelled to disallow them based on current regulations:</p> <p>"Treasury is aware of, and sensitive to, the possibility that present regulations and Treasury policies regarding these two issues may not have in the past properly recognized all expenses which may warrant adjustments.</p> <p>"However, it has been determined that a review and possible alteration of regulations and policies with respect to such a fundamental area of the administration of the Antidumping Act, 1921, as amended (19 USC 160 et seq.) should not be implemented on a case-by-case basis. It would be inappropriate to make such changes in any case before the comprehensive review referred to is completed. Therefore, it has been decided that no further adjustments to home market price based on alleged differences in levels of trade, under 153.15, supra, will be made pending the completion of the more general review of this area presently underway."³⁶</p> <p>Although Treasury indicates that, at least for the time being, it will allow adjustments only for those differences in circumstances of sale which bear a direct relationship to the sale, it nevertheless appears to have begun an ad hoc implementation of its contemplated changes. In <i>Portland Hydraulic Cement from Canada</i>,³⁷ for instance, the Department reduced the Canadian home market price (and thus decreased the margin of dumping) by an amount equal to the dues paid by Canadian producers to the Portland Cement Association. The stated rationale for this adjustment was that the dues "were regarded as assumed advertising costs". If adjustments this remote to the sale of the product are permitted, foreign exporters and American importers will be able to understate signifi-</p>	24

cantly or even eliminate the actual margin of dumping. The proposed legislation is intended to preclude such adjustments which mask the true magnitude of dumping by requiring that all adjustments or allowances for differences in circumstances of sale between the home and export markets be limited to differences which bear a direct relationship to the sale. This amendment conforms with existing Treasury regulations and, until very recently, with Treasury practice over the past several years.

(c) In determining the foreign market value for the purpose of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value (or that sales price is the same as the foreign market value) is wholly or partly due to—

(1) the fact that the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 170a(3) of this title is used in determining foreign market value, then due allowance shall be made therefor. May 27, 1921, c. 14, 202, 42 Stat. 11; Sept. 1, 1954, c. 1218, Title III, 302, 68 Stat. 1139; Aug. 14, 1955, Pub. L. 85-630, 2, 4(b), 72 Stat. 583, 585.

(d) In determining the foreign market value for the purposes of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value (or that the exporter's sales price is the same as the foreign market value) is wholly or partly due to—

(1) the fact that the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) differences in those credit terms, guarantees, warranties, technical assistance, servicing, assumption by a seller or a purchaser's advertising or seller's costs and commissions which bear a direct relationship to the sales which are under consideration.

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 213(3) of this title is used in determining foreign market value,

then due allowance shall be made therefor.

¹⁶ 43 Fed. Reg. 9912 (Mar. 10, 1978).
¹⁷ 43 Fed. Reg. 28066 (June 28, 1978).

Section 162 readopted without change.

Purchase price.—162. For the purposes of sections 160 to 171 of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United

CHAPTER 1—ANTIDUMPING ACT AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1975	Analysis
<p>States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and less the amount, if included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and plus the amount of any taxes rebated or not collected, by reason of the exportation of the merchandise to the United States, which rebate or noncollection has been determined by the Secretary to be a bounty or grant, within the meaning of section 1303 of this title.</p> <p><i>Exporter's sales price</i>.—163. For the purposes of sections 160 and 171 of this title, the exporter's sale price of imported merchandise shall be the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less (1) the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, (2) the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration, (3) an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, (4) the amount of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States, and (5) the amount of any increased value, including additional material and labor, resulting from a process</p>	<p>Section 163 readopted without change.</p>	

of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise within the meaning of section 166 of this title; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and plus the amount of any taxes rebated, or not collected, by reason of the exportation of the merchandise to the United States, which rebate or non-collection has been determined by the Secretary to be a bounty or grant within the meaning of section 1303 of this title.

19 USC 164.—Foreign market value.—164(a) 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 (or, if not so sold or offered for sale for home consumption, or if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of sections 160 to 171 of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales

Subsection 164(a) readopted without change.

Existing law	Fair Trade Enforcement Act of 1975	Analysis
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agency or other organization related to the seller in any of the respects described in section 166 of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

Home market sales at less than cost of production.—(b) 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, to countries other than the United States, 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 were made at less than the 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.

Section 103.—Subsection 205(b) of the Anti-dumping Act, 1921 (19 U.S.C. 164(b)) is amended as follows:

(b) (1) 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 (not to exceed 12 months) 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.

(2) When determining the cost of production, the Secretary shall include the following (without excluding other costs):

(i) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, including the cost of labor, tools and supplies and fuels and utilities, at a time preceding the date of exportation of such merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(ii) an amount for general expenses, including office expenses, repair and maintenance,

Home market sales below full cost of production.—Section 205(b) of existing law was added in the Trade Act of 1974 to deal with the situation where no price discrimination exists because prices in both the foreign home market and export market are below full cost of production (C.O.P.). Home market prices below full C.O.P. are most common in government owned or controlled industries and have the effect of artificially depressing the computed home market value thereby allowing dumping to continue partly or wholly unremedied. As the Senate Report to the 1974 Trade Act pointed out:

“* * * in the absence of such a provision, sales uniformly made at less than the cost of production could escape the purview of the act, and thereby cause injury to United States industry with impunity.” 1974 U.S. Code, Congressional and Administrative News 7310.

The statute provides that where this occurs, home market prices below C.O.P. must be ignored in calculating the margin of dumping. If too few sales exist above C.O.P., the export price (purchase price or exporter's sales price) is compared with the constructed value (C.O.P. plus profit) to determine the degree of dumping. Other nations, including Canada and those in Europe, employ this same concept in the administration of their antidumping laws.

Recovery of costs within a reasonable period of time.—Section 205(b) contains two limitations. One is that foreign home market sales may not be disregarded unless made at prices which do not “permit recovery of all costs within a reasonable period of time in the normal course of trade.” Unfortunately, no definition of “reasonable period of time” is contained in the statute. The Treasury Department has defined the quoted phrase as meaning an entire business cycle. In the *Gilmore* case for instance, Treasury found the business cycle in the Japanese steel industry to be 4 years (1972-1976) and looked to this period to see whether all costs had been recovered.¹⁸ The inevitable result of Treasury's definition, of course, is to emasculate section 205(b). It means that if a foreign firm is profitable in its own

discounts, interest, and depreciation equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation in the usual wholesale quantities and in the ordinary course of trade, except that the amount for general expenses shall not be less than ten per centum of the cost as defined in paragraph (1); and

(iii) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition packed ready for shipment to the United States.

All costs shall be based on transactions between unrelated parties and shall be based on the average of all facilities operating during the previous 12-month period.

home market for 2 years and then sells at a loss for the next 2 years (during which time it is also selling at a loss in export markets), section 205(b) may not be invoked as long as no net occurs on home market sales over the entire 4-year span. It also means that American business can be decimated and American labor displaced from jobs because of an artificial and incorrect interpretation of the law. The legislative history of section 205(b) was recently examined in the ITC Memorandum. Based on its analysis, the Commission concluded "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 over a reasonable period of time." The Commission's interpretation, it is submitted, is the only reasonable one and should be codified. As a general rule, an examination of sales over a 6-month period will provide a sufficient volume to indicate whether the cost of producing merchandise is being recovered. To account for exceptional cases, however, the proposed amendment permits the Secretary to examine a period up to 12 months in length.

*Accounting system adopted by foreign exporter.*¹⁸ A second problem which has developed in the implementation of section 205(b) is the methodology to be employed in computing the "cost of production". Treasury has published *Informal Guidelines for Defining Terms in Section 205(b) of the Anti-dumping Act in the Case of Carbon Steel Plate From Japan*, which emphasize that consideration must be given to the accounting system of the producer being investigated. Treasury's guidelines fail to recognize that different accounting systems are designed to accomplish different purposes and are not necessarily intended to show the full economic cost of producing a given product. As a general rule, therefore, the accounting system of the foreign producer or exporter is of very limited value in calculating all the elements of cost which must be recovered in the selling price of a product. Proposed section 205(b)(2) enumerates some of the more important cost elements which must be reflected in the full cost of production *regardless* of how the manufacturer or exporter treat them in their accounting systems.

¹⁸ Under Treasury's interpretation, it would not be precluded from projecting into the future to determine that a foreign company had sold at a loss in its own home market for the past 2 years but that the current business cycle was expected to last another year during which time the firm anticipated recouping its losses.

CHAPTER 1—ANTIDUMPING ACT AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p><i>State-controlled economies in exporting countries.</i>—(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—</p> <ul style="list-style-type: none"> (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 nonstate-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 nonstate-controlled economy country or countries as determined under section 165 of this title. <p>(d) Whenever, in the course of an investigation under sections 160 to 171 of this title, the Secretary determines that—</p> <ul style="list-style-type: none"> (1) merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm, or corporation which also owns or controls, directly or indirectly, other facilities for the production of such or similar merchandise which are located in another country or countries; (2) the sales of such or similar merchandise by the company concerned in the home market of the exporting country are nonexistent or inadequate as a basis for comparison with the sales of the merchandise to the United States; and (3) the foreign market value of such or similar merchandise produced in one or more of the facilities outside the country of exportation is higher than the foreign market value, or, if there is no foreign market value, the constructed value, of such or similar merchandise produced in the facilities located in the country of exportation, he shall determine the foreign market value of such merchandise by reference to the foreign market value at which such or similar merchandise is sold in substantial quantities by one or more facilities 	Sections 164(c) and (d) adopted without amendment.	

outside the country of exportation. The Secretary in making any determination under this paragraph, shall make adjustments for the difference between the costs of production (including taxes, labor, materials, and overhead) of such or similar merchandise produced in facilities outside the country of exportation and costs of production of such or similar merchandise produced in the facilities in the country of exportation, if such differences are demonstrated to his satisfaction. For the purpose of this subsection, in determining foreign market value of such or similar merchandise produced in a country outside of the country of exportation, the Secretary shall determine its price at the time of exportation from the country of exportation and shall make any adjustments required by subsec. (a) of this section for the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States by reference to such costs in the country of exportation.

19 USC 165—165. Constructed value—Determination. (a) For the purposes of sections 160-171 of this title, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, except that (A) the amount for general expenses shall not be less than 10 per centum of the cost as defined in paragraph (1), and (B) the amount for profit shall not be less than 8 per centum of the sum of such general expenses and cost; and

Constructed value.—Changes similar to those made in the definition of "cost of production" were made to the definition of "constructed value" for the same reasons as were given under section 103 of the Fair Trade Enforcement Act of 1978.

Section 104.—Section 206 (a) of the Antidumping Act, 1921 (19 USC 165 (a)) is amended as follows:

SECTION 165. Constructed value—Determination.—(a) For the purposes of sections 160-171 of this title, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, including the cost of labor, tools and supplies and fuels and utilities, at a time preceding the date of exportation of such merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for profit and general expenses, including office expenses, repair and maintenance, discounts, interest, and depreciation, equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation in the usual wholesale quantities and in the ordinary course of trade, except that (A) the amount for general expenses shall not be less than 10 per centum of the cost as defined in paragraph (1), and (B) the amount for profit shall not be less than ten per centum of the cost as defined in paragraph (1), and (B) the amount for profit for profit

CHAPTER 1—ANTIDUMPING ACT AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.</p>	<p>shall not be less than 8 per centum of the sum of such general expenses and costs; and</p> <p>(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition packed ready for shipment to the United States.</p> <p>All costs shall be based on transactions between unrelated parties and shall be based on the average of all facilities operating during the previous 12-month period.</p>	<p>Subsection 165(b) readopted without change.</p>
<p><i>Transactions disregarded; best evidence.</i>—(b)</p> <p>For the purposes of this section, a transaction directly or indirectly between persons specified in any one of the paragraphs in subsection (c) of this section may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise of the same general class or kind as the merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the paragraphs in subsection (c) of this section.</p>	<p><i>Transactions disregarded; best evidence.</i>—(b)</p> <p>For the purposes of this section, a transaction directly or indirectly between persons specified in any one of the paragraphs in subsection (c) of this section may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise of the same general class or kind as the merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the paragraphs in subsection (c) of this section.</p>	<p>Subsection 165(c) readopted without change.</p>

Persons involved in disregarded transactions.—
(c) The persons referred to in subsection (b) of this section are:

- (1) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants;
- (2) Any officer or director of an organization and such organization;
- (3) Partners;
- (4) Employer and employee;

(5) Any person directly or indirectly owning, controlling or holding with power to vote, 5 per centum or more of the outstanding voting stock or shares of any organization and such organization; and

(6) Two or more persons directly or indirectly controlling, controlled by, or under common control with any person.

19 U.S.C. 166.—166. Exporter defined. For the purposes of sections 160–171 of this title, the exporter of imported merchandise shall be the person by whom or for whose account the merchandise is imported into the United States:

- (1) If such person is the agent or principal of the exporter, manufacturer, or producer; or
- (2) If such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer; or
- (3) If the exporter, manufacturer, or producer owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in any business conducted by such person; or
- (4) If any person or persons, jointly or severally, directly or indirectly, through stock ownership or control or otherwise, own or control in the aggregate 20 per centum or more of the voting power or control in the business carried on by the person by whom or for whose account the merchandise is imported into the United States, and also 20 per centum or more of such power or control in the business of the exporter, manufacturer, or producer.

Section 166 readopted without change.

19 U.S.C. 167. Oaths and bonds on entry.—167. Oath and bond of person for whose account merchandise is imported before delivery thereof. In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and delivery of which has not been made by the appropriate customs officer before such finding has been so made public, unless the person by whom or for whose account such merchandise is imported makes oath before such customs officer, under regulations prescribed by the Secretary, that he is not an exporter, or unless such person declares under oath at the time of entry, under regulations prescribed by the Secretary, the exporter's sales price of such merchandise, it shall be unlawful for such customs officer to deliver the merchandise until such person has made oath before such customs officer, under regulations prescribed by the said Secretary, that the merchandise has not been sold or agreed to be sold by such person, and has given bond to such customs officer, under regulations prescribed by the Secretary, with sureties approved by such customs officer,

Section 105.—Section 208 of the Antidumping Act, 1921 (19 U.S.C. 167) is amended by striking out the word "finding" wherever it appears and substituting for it the word "Finding".

This is a technical amendment to conform with the convention adopted in section 101.

CHAPTER 1—ANTIDUMPING ACT AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
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in an amount equal to the estimated value of the merchandise, conditions: (1) That he will report to such customs officer the exporter's sales price of the merchandise within 30 days after such merchandise has been sold or agreed to be sold in the United States; (2) that he will pay on demand from such customs officer the amount of special dumping duty, if any, imposed by sections 160 to 171 of this title, upon such merchandise; and (3) that he will furnish to such customs officer such information as may be in his possession and as may be necessary for the ascertainment of such duty, and will keep such records as to the sale of such merchandise as the Secretary may by regulation prescribe.

19 U.S.C. 1484.—1484. Entry of merchandise.—Requirement and time. (a) Except as provided in sections 1490, 1488, 1552, and 1553 and in subdivision (j) of section 1336 of this title, and in subdivisions (h) and (i) of this section, the consignee or imported merchandise shall make entry therefor either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the customhouse within 5 days, exclusive of Sundays and holidays, after the entry of the importing vessel or report of the vehicle, or after the arrival at the port of destination in the case of merchandise transported in bond, unless the collector authorizes in writing a longer time.

Section 106.—Section 106(a). Section 484 (a) of the Tariff Act of 1950 (19 USC 1484(a)) is amended to change all references to "subdivision h or subdivision i" to "subdivision i or subdivision j".

Production of certified invoice.—(b) The Secretary of the Treasury shall provide by regulation for the production of a certified invoice with respect to such merchandise as he deems advisable and for the terms and conditions under which such merchandise may be permitted entry under the provisions of this section without the production of a certified invoice.

Section 106(b). Section 484(b) of the Tariff Act of 1950, (19 U.S.C. 1484(b)) is amended to read as follows:

Production of certified invoice.—(b) The Secretary of the Treasury shall provide by regulation for the production of a certified invoice with respect to such merchandise as he deems advisable and for the terms and conditions under which such merchandise may be permitted under the provisions of this section without the production of a certified invoice. In addition to such other information as the Secretary may require, the certified invoice shall require a statement of the price at which such or similar merchandise is sold or, in the absence of sales, is offered for sale in the principal markets of the country from which it is exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption, to be called the home consumption price, and the purchase price of each item. In determining the merchandise to which the certified invoice is applicable, the Secretary shall

Treasury's pledge to monitor for dumping.—In the Customs Simplification Act of 1956, Congress directed the Secretary of the Treasury to "recommend to the Congress any amendment of such Antidumping Act which he considered desirable or necessary to provide for greater certainty, speed and efficiency in the enforcement of such Antidumping Act." The Secretary responded in early 1957 by submitting a report to Congress in which he recommended the use of a revised invoice form that would provide additional information designed to enable Customs officials more readily to spot imports sold at dumping prices. More specifically, the report stated:

"It is envisaged (the step will not require an amendment to the law) that a new invoice form will be adopted upon the entry into full effect, following publication of the final list, of the new valuation procedures under the Customs Simplification Act of 1956. This form would be designed to show sufficient information so that the Customs Appraiser will, in the ordinary case, be able more

make no distinction on the basis of whether merchandise is duty free or subject to an ad valorem specific rate duty.

Production of bill of lading.—(c) The consignee shall produce the bill of lading at the time of making entry, except that—
(1) If the appropriate customs officer is satisfied that no bill of lading has been issued, the shipping receipt or other evidence satisfactory to such customs officer may be accepted in lieu thereof;

(2) The appropriate customs officer is authorized to permit entry and to release merchandise from customs custody without the production of the bill of lading if the person making such entry gives a bond satisfactory to such customs officer, in a sum equal to not less than one and one-half times the invoice value of the merchandise to produce such bill of lading, to relieve such customs officer of all liability, to indemnify such customs officer against loss, to defend every action brought upon a claim for loss or damage, by reason of such release from customs custody or a failure to produce such bill of lading and to entitle any person injured by reason of such release from customs custody to sue on such bond in his own name, without making such customs officer a party thereto. Any person so injured by such release may sue on such bond to recover any damages so sustained by him; and

readily to tell whether there may be sales at less than fair value. The invoice is to be applicable in appropriate cases to the specific duty and duty-free merchandise as well as that subject to ad valorem duty. Penalties for false statements are to be printed on the invoice.

"This step is aimed at discovering possible dumping cases in minimum time."

In addition, Assistant Secretary Kendall appeared before the House Ways and Means Committee in support of the Treasury's recommendations and testified:

"We are going to use a new invoice form which right on the face of it, will have two figures, one the home consumption price and the other one the price to the United States. Those are both prices in the country of origin. If there is a price differential, it will be flagged down just like that and I think that that will go a long way toward improving the administration of the Act."¹⁹

Treasury thereafter did revise its customs invoice form; however, the predicted improvement in administration of the Act did not ensue. One of the basic reasons for the disparity between the promise and the performance can be found in regulations issued by the Bureau of Customs. Despite the Secretary's report to Congress declaring that the new invoice form would be applicable to "specific-duty and duty-free merchandise as well as that subject to ad valorem duty," section 8.15(a) of the Bureau's rules stipulates: "A special customs invoice is hereby required to be produced in connection with each entry of imported merchandise (see 8.9), if such merchandise . . . is . . . (2) Subject to a rate of duty in any manner dependent upon value or conditionally free and subject to a rate of duty dependent upon value. . . ."

By restricting use of its special customs invoice to merchandise subject to an ad valorem duty, Treasury has omitted all those products which are either duty free or subject to a specific rate of duty. Thus, with reference to the steel sector, imports of merchandise such as barbed wire, which have achieved a market penetration ranging from one-third to one-half of U.S. consumption during the past decade, are not monitored for violations of the Antidumping Act because they are duty free. Similarly, imports of wire rods, which have supplied 40% to 35% of the domestic market over the last ten years, are not monitored by Treasury since they are subject to a specific rate of duty.

¹⁹ Hearings on H.R. 6006, 6007, and 5120 before the House Committee on Ways and Means, 85th Cong., 1st Sess., p. 54 (1957).

CHAPTER 1—ANTIDUMPING ACT AMENDMENTS—Continued

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<p>(3) The provisions of this subdivision shall not apply in the case of an entry under subdivision (h) or (i) of this section (relating to entry on carrier's certificate and on duplicate bill of lading respectively).</p> <p><i>Signed and contents.</i>—(d) Such entry shall be signed by the consignee, or his agent, and shall set forth such facts in regard to the importation as the Secretary of the Treasury may require for the purpose of assessing duties and to secure a proper examination, inspection, appraisement, and liquidation, and shall be accompanied by such invoices, bills of lading, certificates, and documents as are required by law and regulations promulgated thereunder.</p>	<p>SECTION 108(c). Section 484(c) is amended to change the references to "subdivision (h) or (i)" to "subdivision (i) or (j)".</p>	<p>The Trigger Price Mechanism (TPM) recently adopted by the Treasury Department as a guideline for monitoring steel imports for signs of dumping does not solve the deficiency in current Treasury practice. First, the TPM is limited to only one sector—steel—and offers no assistance to other sectors. Second, even with respect to steel, the TPM is specifically intended as a short-term measure whereas dumping is a long-term problem. Third, the TPM does not monitor foreign home market prices but is based on the assumed costs of steel production in Japan. Thus, even if Treasury is able to develop accurate cost figures for Japanese producers, the Japanese can still engage in price discrimination without fear of detection. Steel firms in other countries which have higher costs of production are able to practice both price discrimination and sell below cost with impunity.</p>
<p>19 USC 1484. <i>Statistical enumeration.</i>—(e) The Secretary of the Treasury, the Secretary of Commerce, and the United States International Trade Commission are authorized and directed to establish from time to time for statistical purposes an enumeration of articles in such detail as in their judgment may be necessary, comprehending all merchandise imported into the United States and exported from the United States, and shall seek, in conjunction with statistical programs for domestic production, to establish the comparability thereof with such enumeration of articles. All import entries and export declarations shall include or have attached thereto an accurate statement specifying, in terms of such detailed enumeration, the kinds and quantities of all merchandise imported and the unit value and the value of the total quantity of each kind of article.</p>	<p>SECTION 106(d). Section 484(e) of the Tariff Act of 1930 (19 USC 1484(e)) is amended to read as follows:</p> <p><i>Statistical enumeration.</i>—(e) The Secretary of the Treasury, the Secretary of Commerce, and the Chairman of the International Trade Commission are authorized and directed to establish and publish at least every three months for statistical purposes an enumeration of articles in such detail as in their judgement may be necessary, comprehending all merchandise imported into the United States, and including purchase prices and home consumption prices, and as a part of the entry there shall be attached thereto or included therein an accurate statement specifying, in terms of such detailed enumeration, the kinds and quantities of all merchandise imported and the unit value and the value of the total quantity of each kind of article.</p>	<p>From the foregoing, it is clear two changes are essential to fulfill Treasury's 1967 pledge to Congress to promote early detection of dumping. First, as recognized in the Secretary's report, the home consumption price must be required for specific-duty and duty-free merchandise as well as for products subject to an ad valorem duty. Foreign market purchase price information should be required in greater detail with respect to those products which have achieved a significant penetration of American markets. Second, such data must be conveyed to the parties who are in a position to evaluate whether a complaint should be filed. This objective can be accomplished by requiring price information to be compiled and published on a quarterly basis. Since Treasury has declined to take these essential steps via the regulatory route, statutory changes are mandatory.</p>

Packages included.—(f) If any of the certificates or documents necessary to make entry of any part of merchandise arriving on one vessel or vehicle and consigned to one consignee have not arrived, such part may be entered subsequently, and notation of the packages or cases to be omitted from the original entry shall be made thereon. One or more packages arriving on one vessel or vehicle addressed for delivery to one person and imported in another package containing packages addressed for delivery to other persons may be separately entered, under such rules and regulations as the Secretary of the Treasury may prescribe. All other merchandise arriving on one vessel or vehicle and consigned to one consignee shall be included in one entry, unless the Secretary of the Treasury shall authorize the inclusion of portions of such merchandise in separate entries under such rules and regulations as he may prescribe; except that, in the case of articles not subject to a quantitative or tariff-rate quota, entry for the entire quantity covered by an entry for immediate transportation made under section 1552 of this title may be accepted at the port of entry designated by the consignee, or his agent, in such entry after the arrival of any part of such quantity at such designated port or at such other place of deposit as may be authorized in accordance with regulations prescribed by the Secretary of the Treasury.

Subsection 1484(f), readopted without change.

Statement of cost of production.—(g) Under such regulations as the Secretary of the Treasury may prescribe, the appropriate customs officer may require a verified statement from the manufacturer or producer showing the cost of production of the imported merchandise, when necessary to the appraisement of such merchandise.

Entry on carrier's certificate.—(h) Any person certified by the carrier bringing the merchandise to the port at which entry is to be made to be the owner or consignee of the merchandise, or an agent of such owner or consignee, may make entry thereof, either in person or by an authorized agent, in the manner and subject to the requirements prescribed in this section (or in regulations promulgated hereunder) in the case of a consignee within the meaning of paragraph (1) of section 1483 of this title.

Subsection 1484(g), readopted without change.

SECTION 106(e). Section 484(h) of the Tariff Act of 1930 (19 USC 1484) is amended by adding a new subsection (h) and redesignating existing subsections (h) through (j) accordingly.
Statement of price information.—(h) Where the imported merchandise is of a type which supplies ten percent or more of apparent United States consumption either by quantity or value, the collector or the appraiser shall require a verified statement from the manufacturer or producer showing the home market value and the purchase price or exporter's sales price, whichever is applicable, as defined in sections 161-164 of this title.

Entry on duplicate bill of lading.—(i) Any person may, upon the production of a duplicate bill of lading signed or certified to be genuine by the carrier bringing the merchandise to the port at which entry is to be made, make entry for the merchandise in respect of which such bill or lading is

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Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>issued, in the manner and subject to the requirements prescribed in this section (or in regulations promulgated hereunder) in the case of a consigner within the meaning of paragraph (1) of section 1488 of this title, except that such person shall make such entry in his own name.</p> <p><i>Release of merchandise.</i>—(j) Merchandise shall be released from customs custody only to (or) upon the order of the carrier by whom the merchandise is brought to port at which entry is made, except that merchandise in a bonded warehouse shall be released from customs custody only to or upon the order of the proprietor of the warehouse. The customs officer shall return the person making entry the bill of lading (if any is produced) with notation thereon to the effect that entry for such merchandise has been made. The customs officer shall not be liable to any person in respect to the delivery of merchandise released from customs custody in accordance with the provisions of this section. Where a recovery is had in any action or proceeding against a customs officer on account of the release of merchandise from customs custody, in the performance of his official duty, and the court certifies that there was probable cause for such release by such customs officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such customs officer, but the amount so recovered shall, upon final judgment, be paid out of moneys appropriated from the Treasury for that purpose.</p>	<p>Section 168 readopted without change.</p>	<p><i>Duties of appraisers.</i>—168. Appraisal. In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and as to which the appropriate customs officer has made no appraisal before such finding has been so made public, it shall be the duty of such customs officer, by all reasonable ways and means to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of constructed value to the contrary notwithstanding) the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and any other facts which the Secretary may deem necessary for the purposes of sections 160 to 171 of this title.</p>

Appeals and protests.—169. Protests from determinations of customs officers. For the purposes of sections 160 to 171 of this title, the determination of the appropriate customs officer as to the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and the action of such customs officer in assessing special dumping duty, shall have the same force and effect and be subject to the same right of protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of protests relating to customs duties under existing law.

Section 107. Section 210 of the Antidumping Act, 1921 (19 USC 169) is amended to read as follows:

Section 169. Protests from determination of customs officers. For purposes of sections 160 to 171 of this title, the determination of the Secretary of the Treasury as to the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and the action of the appropriate Customs officer in assessing special dumping duty, shall have the same force and effect and be subject to the same right of protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of protests relating to customs duties under existing law.

Drawbacks.—170. Special duties treated as regular duties. The special dumping duty imposed by sections 160–171 of this title shall be treated in all respects as regular customs duties within the meaning of all laws relating to the drawback of customs duties.

Definitions.—170a. Definitions. For the purposes of sections 160–171 of this title—

(1) The term "sold or in the absence of sales, offered for sale" means sold or in the absence of sales, offered—

(A) to all purchasers at wholesale, or
(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without regard to restrictions as to the disposition or use of the merchandise by the purchaser except that, where such restrictions are found to affect the market value of the merchandise, adjustment shall be made therefor in calculating the price at which the merchandise is sold or offered for sale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise under consideration, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise under consideration.

(3) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of sections 160 to 171 of this title can be satisfactorily made:

(A) The merchandise under consideration and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as the merchandise under consideration.

Section 107. Section 210 of the Antidumping Act, 1921 (19 USC 169) is amended to reflect the payment of estimated dumping duties which are to be determined by the Secretary and revised annually. (See section 102 of the Fair Trade Enforcement Act of 1978.)

This section is amended to reflect the payment of estimated dumping duties which are to be determined by the Secretary and revised annually. (See section 102 of the Fair Trade Enforcement Act of 1978.)

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(B) Merchandise (i) produced in the same country and by the same person as the merchandise under consideration, (ii) like the merchandise under consideration in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise under consideration.

(C) Merchandise (1) produced in the same country and by the same person and of the same general class or kind as the merchandise under consideration, (ii) like the merchandise under consideration in the purposes for which used, and (iii) which the Secretary or his delegate determine may reasonably be compared for the purposes of sections 160 to 171 of this title with the merchandise under consideration.

(D) Repealed. Pub. L. 93-618, Title III, 321(e), Jan. 3, 1975, Stat. 2048.

(E) Redesignated (C).

(F) Repealed. Pub. L. 93-618, Title III, 321(e), Jan. 3, 1975, Stat. 2048.

(4) The term "usual wholesale quantities", in any case in which the merchandise in respect of which value is being determined is sold in the market under consideration at different prices for different quantities, means the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity.

Section 108.—SECTION 108. Section 212 of the Anti-dumping Act, 1921 (USC 170a) is amended by adding at the end thereof the following:

Critical need for statutory definition.—Unlike the Department of the Treasury, the U.S. International Trade Commission appears to be fairly immune to external pressures. Any criticism of the Commission therefore, stems not from a susceptibility to political pressure, but rather from a lack of predictability in its decisions. This failure to adhere to the principle of stare decisis must be attributed, at least in part, to the absence of statutory guidance as to the specific matters which should be considered in antidumping proceedings. To prevent continuing hardship to both importers and domestic manufacturers, who have a pressing need to know the "rules of the game," Congress should provide objective standards to assist the Commission in fulfilling its responsibilities.

(5) The term "domestic industry" or "industry in the United States" means any subdivision or portion of the commercial organizations in any section of the United States manufacturing, assembling,

Definition of industry.—A threshold issue in any antidumping proceeding before the Commission is the scope of the industry claiming to be injured. Failure to properly define the domestic industry will

processing, extracting, growing, selling or otherwise producing, marketing, or handling articles or merchandise of the same class or kind as the merchandise or articles imported. In applying the preceding sentence, there shall be distinguished or separated the operations of such organizations involving merchandise or articles of the same class or kind as the merchandise or articles imported from the operations of such organizations involving other articles or merchandise.

result in a distortion of statistics relating to market penetration, loss of employment, impact on sales and profits and virtually all other indicia of injury which in turn may well subvert the outcome of the final decision. As noted, no statutory guidelines are presently available to assist the Commission on this pivotal question.

The first and most important aspect of ascertaining the relevant industry is the determination of the product involved. *Carbon Steel Bars and Shapes from Canada*,²⁰ decided in 1964, illustrates the type of conflicting interpretations which can arise in the absence of statutory criteria. In this case, the Treasury Department found that carbon steel bars, bar shapes under 3 inches and structural shapes 3 inches and over were being imported at less than fair value.²¹ The Tariff Commission, however, held a somewhat different view of the relevant product. On the one hand, Commissioners Sutton, Fenn, and Culliton, determining in the affirmative, narrowed the product line slightly with the following observation:

"It should be pointed out that the Canadian producer does not make or export structural shapes 5 inches and over. The larger structural shapes are typically separate and distinct from those products which are being imported at less than fair value. They are made on different machinery and serve different purposes. Consequently, structural shapes 5 inches and over are not germane to this determination."²²

The net result of the majority's definition, which was keyed to productive capabilities, was to increase the relative impact of LTFV imports from Canada, thereby enhancing the likelihood of an affirmative decision. On the other hand, the dissenting Commissioners,²³ ruling in the negative, thought the relevant product line to be considerably larger:

"In our view there is no domestic industry, either national or regional, that is coextensive solely with the production of "steel bars, bar shapes under 3 inches, and structural shapes 3 inches and over"—the articles which the Treasury Department identified as the LTFV imports from Canada. *No mill in the country confines its production to such articles* (emphasis added)."²⁴

Under the minority's test, all of the products produced by a large, integrated concern would seem to constitute the relevant product line. Such a standard would expand the limits of the industry to a point where the impact of LTFV sales would almost always be negligible.

²⁰ 29 Fed. Reg. 12599 (1964).

²¹ 29 Fed. Reg. 7294 (1964).

²² 29 Fed. Reg. 12599 (1964).

²³ Commissioners Dorrian and Talbot.

²⁴ The dissent was not published in the Federal Register. See Tariff Commission Publication 135, at p. 11.

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Existing law	Fair Trade Enforcement Act of 1978	Analysis
		<p>By 1968, membership of the Commission had changed considerably²⁸ but the dichotomy of views relating to definition of the relevant product line continued. In <i>Titanium Sponge from the USSR</i>,²⁹ for instance, the Commission found that essentially only two domestic companies produced titanium sponge and the bulk of such sponge was further processed by these firms into titanium ingots and mill products. Complainants claimed they were injured by LTFV imports from Russia when they attempted to market the portion of sponge unneeded in their own operations. Respondent countered by asserting, among other arguments, that the industry should be defined as the "titanium industry" in which event all sponge, ingot and mill products producers must be included. Vice-Chairman Sutton and Commissioner Clubb disagreed with this description, stating:</p> <p>"The commercial production of titanium metal in its various forms, ranging from the crude titanium sponge to finished mill products, whether in captive facilities or by independent producers, is now in its early formative stages of development. . . . In the industrial complex of integrated and independent producers of titanium and its products, the sponge-producing level of production is . . . the one which experiences the principal impact of imports of sponge. Such sponge-producing facilities generally constitute an industry in the United States within the meaning of the Antidumping Act."³⁰</p> <p>In a separate statement, Commissioner Clubb elaborated by defining the term "industry" as "that group of economic interests which might be destroyed by unabated dumping of the product involved."³¹ Chairman Metzger, however, did not concur in the definition advanced by Clubb. Although he sidestepped the issue vis-a-vis current injury by finding no harm regardless of how the industry is defined, Metzger did indicate, in his consideration of the claim that an industry was being prevented from being established, that the relevant industry was the facilities producing titanium products.³²</p> <p>In addition to defining the relevant industry along product lines, the Commission has, on occasion, further circumscribed the term by applying geographic parameters. A classic example is <i>Cast Iron Soil Pipe from the United Kingdom</i>.³³ In this case, the Commission determined that producers located in California constituted the relevant industry and that such industry was being injured. The importers appealed the decision,³⁴ claiming that the industry by law consisted of all manufacturers of cast iron soil</p>

pipe in the United States. Placing the issue in perspective, the Customs Court said:

"The argument advanced by appellant is that the meaning of 'industry' is so clear that no judicial construction is necessary or, indeed, permissible, because what Congress intended is self-evident; and this meaning . . . is that an industry comprises not less than all producers of a product throughout the United States."²⁵

The Court went on to reject this thesis unequivocally:

"While appellant argues that the congressional intent expressed in the word 'industry' is clear and unambiguous, we have found that it is not. If no other circumstance persuaded us to this conclusion (and there are others), we cannot fail to note that the Finance Committee of the Senate of the United States, in its report on the Customs Simplification Act of 1954 (3 U.S. Code Congressional and Administrative News, 1954, p. 3961), said of this very word 'industry' that its meaning should be clear, indicating that it was thought not to be entirely clear in the language of the statute.

"The committee recognizes that further substantive changes in the antidumping law may be desirable, particularly in relation to price and injury definitions. The Committee believes, for example, that *it should be clear that injury in a particular geographical area* may be sufficient for a finding of injury under the Antidumping Act (emphasis added by the Court)."²⁶

The Court then concluded, based on its analysis of legislative history, that the Commission had indeed acted properly in defining the industry on a regional basis.

Upon review, the Court of Customs and Patent Appeals affirmed the lower court's holding, stating:

"We cannot agree with appellant that the words 'an industry in the United States' (a) clearly and unambiguously mean 'all of the producers in the United States of a specific article or commodity' and (b) clearly and unambiguously do *not* mean 'just those (producers) in one geographical area.'

"We think that . . . the meaning of . . . section 201(a) is *not* clear. We therefore agree with the Customs Court that it is necessary to ascertain, if

²⁵ Exhibit I.

²⁶ 33 Fed. Reg. 10769 (1968).

²⁷ *Id.* at 10770.

²⁸ *Id.* at 10772.

²⁹ Chairman Metzger's dissent was not published in the Federal Register. See Tariff Commission Publication 255,

at p. 19.
³⁰ Tariff Commission Publication 5 (1955),
at *Orlitz v. United States*, 200 F. Supp. 302 (Cust. Ct. 1961).

³² *Id.* at 306.

³³ *Id.* at 307.

CHAPTER 1—ANTIDUMPING ACT AMENDMENTS—Continued

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possible, ‘what Congress did intend’ by these words (emphasis added by the Court).”⁴⁴

Inexplicably, the Court added a further statement which, rather than finally disposing of the issue, left the matter unresolved. Said the Court:

“We think it clear that the Tariff Commission considered the nationwide effect its determination would have... Accordingly, we do not think that the Commission intended to limit itself to the State of California when it determined broadly, essentially in the words of the statute, that a domestic industry in the United States is being, or is likely to be, injured.”⁴⁵

In 1964, a new method of defining impact upon “an industry” began to emerge in Commission decisions. The thrust of this new concept was that injury to a portion of a national industry may constitute injury to the entire industry. The first decision to espouse this doctrine was *Steel Reinforcing Bars from Canada*,⁴⁶ in which the Commission determined that the Northwest area of the United States (principally Oregon and Washington) comprised the only major competitive market in which LTFV rebars were sold. Although injury clearly existed in this competitive market, the argument was advanced that such injury did not measurably affect the national industry. This reasoning was emphatically rejected by the majority Commissioners who declared:

“The contention has been made during this investigation that the principle of *de minimis* should be applied in this case because the competitive market area consumes only about 5 percent of all rebars sold in the United States and as a consequence thereof there could be no injury or likelihood of injury if virtually all the imports at less than fair value are sold in such a limited market area. Such a bare contention is as untenable as the parallel argument that the loss of a hand, which weighs less than 1 percent of the weight of a man’s body, does not constitute material injury to that man.”⁴⁷

More recently, the current members of the Commission acknowledged that:

“The statute requires the Commission to make its determination based upon ‘an industry in the United States’. The industry may be considered ‘regional’ in character, particularly where: (1) domestic producers of an article are located in and serve a particular regional market predominantly or exclusively and (2) the LTFV imports are concentrated primarily in the regional market.”

Clearly, congressional action is imperative to clarify the meaning of the term "industry." It is therefore recommended Congress engraft onto the Antidumping Act a definition encompassing two key features. First, "industry" should be defined in terms of the facilities actually producing merchandise like or comparable to that being dumped. Such a provision would resolve an issue that has caused confusion for almost two decades. It would reject, once and for all, the notion that a manufacturer who lost considerable sales and profits in a given product line due to importation of dumped merchandise was not actually injured because his sales and profits in other lines were unimpaired. This view totally ignores the capital facilities and labor squandered as the result of curtailment, cessation, or modification of production facilities as the direct consequence of unfair foreign competition.

Second, the definition of "industry" must recognize that injury can occur in a particular region. The International Trade Commission has gone "full circle" in its approach to regional markets over the years. Absent statutory direction from Congress, there is no assurance the Commission's present position will remain in effect. Indeed, as the composition of membership changes in the future, changes in the Commission's method of treating regional markets are almost inevitable. The proposed amendment would codify the current interpretation and add stability to the administration of this country's dumping laws.

(6) The Commission shall find that an industry has been injured when the sales below fair value, or the likelihood thereof, contribute (whether or not as a primary, substantial, or major factor) toward causing or threatening to cause injury (if more than *de minimis*) to a domestic industry, or the prevention of the establishment of such an industry. In making its determination, the Commission, without excluding other factors, shall consider any past, present or potential adverse effects on prices, sales, production, employment, profits, or wages in the industry under consideration; any past, present, or potential loss of customers or customer participation to imports; any past, present or potential increase in imports either actual or relative compared with domestic production; or long-term domination by imports of the market for a product; or past, present or potential increase or growth in the level of inventories of such goods in the United States.

Definition of injury.—Prior to 1967, the Commission interpreted the injury requirement as necessitating a showing of *material* injury which in turn was construed as meaning significant or serious injury.³⁰ During the twelve-year period (1955-66) the Commission adhered to this definition, only 11 of the

³⁰ *Orlitz v. United States*, 50 C.C.P.A. (Customs) 36 (1963), 40. ³¹ *Id.* at 42. The decision of the Court of Customs and Patent Appeals was issued in 1963. It is interesting to note that from 1955 through 1963 the Tariff Commission determined the relevant industry to be regional in scope on at least six occasions. (See, in addition to *Cast Iron Soil Pipe from the United Kingdom; Portland Cement from Sweden*, 26 Fed. Reg. 3002 (1961); *Portland Cement from Belgium, Portugal*, 26 Fed. Reg. 5102 (1961); *Portland Gray Cement from Portugal*, 26 Fed. Reg. 10010 (1961); *Portland Cement from the Dominican Republic*, 27 Fed. Reg. 3872 (1962); and *Portland Cement from the Dominican Republic*, 28 Fed. Reg. 4047 (1963).
³² 29 Fed. Reg. 3840 (1964).
³³ Commissioners Crulliton, Schrieber, and Sutton.

³⁴ See, for example, *Plastic Sheet from the United Kingdom*, 29 Fed. Reg. 13854 (1964). It should be noted that there is no requirement of "material" injury contained in the Antidumping Act.

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Existing law	Fair Trade Enforcement Act of 1978	Analysis
		<p>49 cases it handled ended in affirmative decisions.⁴⁰ In the landmark decision of <i>Cast Iron Soil Pipe from Poland</i>,⁴¹ however, Commissioner Clubb traced the legislative history of the injury requirement and concluded that a lesser quantum of injury would justify an affirmative decision. His reasoning, in part, was as follows:</p> <p>"In 1921 a new antidumping bill was passed by the House and referred to the Senate Finance Committee.</p> <p>"The injury requirement was written into the bill in the Senate, and the proceedings before the Finance Committee and the Committee report indicate that it was included in order to facilitate administration of the Act, not to restrict its operation. The injury requirement was first suggested to the Finance Committee by a representative of the Legislative Drafting Service which submitted a draft provision containing the injury requirement. This provision was supported by a representative of the Customs Service who noted that it would be impossible to enforce the House Bill with their present staff, because it would require that every importation be checked for dumping, and this in turn would require that the home market value of every importation be checked in the exporting country. The Customs officer suggested that it would be more feasible for the Secretary of the Treasury to investigate only those cases where a domestic industry complained.</p> <p>"The subsequent history of the Act tends to confirm that dumping duties are to be applied in response to anything more than trifling injury. In 1951 the Administration sponsored a bill (H.R. 5505) which, if enacted, would have required a finding that a domestic industry was being 'materially injured.' This provision was stricken by the House Ways and Means Committee which noted in its report that,</p> <p>"'The Antidumping Act now provides for imposition of antidumping duties when American industries are being "injured" by certain imports; section 2 as introduced in H.R. 1535 (H.R. 5505 was introduced as a clean bill) would have changed "injured" to "materially injured." The Committee decided not to include this change in the pending bill in order to avoid the possibility that the addition of the word "materially" might be interpreted to require proof of a greater degree of injury than is required under existing law for imposition of antidumping duties. The committee decision is not intended to require imposition of antidumping duties upon a showing of frivolous, inconsequential or immaterial injury.'</p> <p>(H. Rept. No. 1089, 82d Cong., 1st sess. 7 (1951).)</p>

"The refusal to legislate in 1951 left intact the original injury standard developed 30 years earlier—frivolous, inconsequential or immaterial injury would not call for application of dumping duties, but anything greater would."⁴²

The return to the historical "more than de minimis" test effected a dramatic change in the rate of affirmative decisions. Beginning with *Cast Iron Soil Pipe* and continuing through *Elemental Sulfur from Mexico*,⁴³ a total of 43 cases, the Commission rendered 36 positive determinations, i.e., almost 84 percent. Subsequent to *Elemental Sulfur*, however, the test for injury was apparently modified. Although the Commission did not specifically revoke the "more than de minimis" rule, it clearly chose to avoid application of this historical standard. Not surprisingly, the percentage of affirmative determinations dropped substantially.

In its report which accompanied the Trade Act of 1974, the Senate Finance Committee noted the fact that the term "injury" in the antidumping act was unqualified by adjectives such as "material" or "serious" and observed:

"Obviously, the law will not recognize trifling, immaterial material, 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."⁴⁴

The proposed amendment would define the term "injury" by codifying the "more than de minimis"

standard previously used by the Commission and endorsed by the Congress.

The ITC must also consider whether the injury suffered was related to the dumping. The statute provides no guidance on this issue. Over the years the Commission has adopted or has been urged to adopt a variety of standards in this area. At one point the Commission held that a negative finding would be in order if the injury was "substantially" due to factors other than sales at less than fair value. The Commission sought to engage in a balancing test. Later the Commission held that an affirmative finding was in order if the dumping was a factor in causing injury, even if there were other

⁴² Of the 11 affirmative decisions, 3 were on the basis of likelihood of injury. Thus, in only 8 decisions out of 49 (approximately 16 percent) did the Commission actually determine a domestic industry was being injured. (During this same time span, Treasury closed approximately 280 cases on the basis of no sales at LTFV. The chance of a domestic industry ultimately prevailing in an antidumping proceeding, therefore, were substantially less than 1 in 25.)

⁴³ 32 Fed. Reg. 12925 (1967).

⁴⁴ *Id.* at 12927-12928.

⁴⁵ 37 Fed. Reg. 417 (1972). Note: during this period, several investigations were consolidated for hearing purposes by the Commission but are counted individually for the purpose of this discussion.

⁴⁶ Senate Report, No. 93-1298 (Committee on Finance), No. 26, 1974.

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reasons. The Senate report to the 1974 Trade Committee stated on this subject:

“...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.”⁴⁵

The amendments express the clear congressional intent that dumping need not be the principal or primary cause of injury to an industry in order for the Commission to find an industry eligible for relief under the antidumping statute.

Short title.—171. Citation. Sections 160–171 of this title may be cited as the “Antidumping Act, 1921.”

May 27, 1921, c. 14, 213, formerly 212, 42 Stat. 15, renumbered Aug. 14, 1958, Pub. L. 85-630, 5, 72 Stat. 585.

Additional definitions.—172. Additional definitions. When used in sections 160–171 of this title—The term “person” includes individuals, partnerships, corporations, and associations; and

The term “United States” includes all Territories and possessions subject to the jurisdiction of the United States, except the Virgin Islands, the islands of Guam and Tutuila, and the Canal Zone. May 27, 1921, c. 14, 406, 42 Stat. 18; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.

173. Rules and regulations. The Secretary shall make rules and regulations necessary for the enforcement of sections 160 to 172 of this title.

Annual report to Congress.—Existing law provides no clear assurance that the Treasury will regularly report the status of existing dumping. Investigations and Findings. It is, therefore, difficult to follow the course of the administration of the statute. Therefore, this section would require the Secretary of the Treasury to report to Congress annually the status of all dumping Findings and Investigations.

Section 109.—Section 407 of the Antidumping Act of 1921 (19 USC 173) is amended by designating the present paragraph as (a) and adding a new (b) to read as follows:

(b) The Secretary shall submit an annual report to Congress no later than February 1 of each calendar year, which shall specify each outstanding affirmative Finding under the Antidumping Act, as amended, the amount of duties collected under such Finding, each Finding for which proceedings were terminated, each negative determination under section 201, the margin in effect under each Finding, and any revisions made in the margins.

CHAPTER 2—JANUARY 1, 1980 AMENDMENTS

Section 110.—The amendments made by sections 111–116, inclusive shall become effective for all purposes following the transfer of jurisdiction.

Transfer of jurisdiction.—For more than three decades following passage of the Antidumping Act

poses on January 1, 1980. The Secretary of the Treasury and the International Trade Commission shall publish in the Federal Register prior to July 1, 1979, a notice of the procedures which will be employed to effect the transfer of duties and responsibilities made by such amendments. The Secretary and the International Trade Commission shall make such rules and regulations as may be necessary or appropriate for such purpose.

Section 111.—Section 201 of the Antidumping Act, 1921, as amended, (19 USC 160) is further amended to read as follows:

(a) (1) Whenever the International Trade Commission (hereinafter "Commission") receives advice from any source, including personnel of the Federal Government, that a particular class or kind of merchandise is being or is likely to be sold in the United States or elsewhere at less than fair value, it shall be the duty of the Commission to conduct a preliminary investigation to ascertain whether such merchandise is being or is likely to be sold in the United States or elsewhere at less than fair value. If such advice contains any information indicating that merchandise is being or is likely to be sold at less than fair value, the Commission within 30 days of receipt of such information shall:

(A) initiate a formal investigation.

(B) publish a Notice of Investigation in the Federal Register, and

(C) require, under such regulations as it may prescribe, the withholding of appraisement as to such merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the Notice of Investigation relating to such merchandise, until the date of publication in the Federal Register of a Finding pursuant to subsection (b) (3) or, in the event no Finding is published, until all rights of appeal pursuant to section 516 of the Tariff Act of 1930 (19 USC 1516) and section 501 if the Tariff Act of 1930 (28 USC 282) have been exhausted.

(2) If the Commission determines there is no information indicating sales or the likelihood of sales at less than fair value it shall publish a determination in the Federal Register that the class or kind of foreign merchandise is not being, nor is likely to be sold at less than fair value, along with a statement of reasons therefor.

(b)

(1) The Commission shall, within 6 months

of 1921, a single government agency (the U.S. Treasury Department) had full jurisdiction in antidumping proceedings. It was not until enactment of the Customs Simplification Act of 1964 that jurisdiction was bifurcated with Treasury retaining responsibility for investigation of sales at less than fair value and the U.S. Tariff Commission (now the U.S. International Trade Commission) being given responsibility for injury investigations.

The proposed legislation would again consolidate full jurisdiction in a single agency, this time the International Trade Commission. The reasons for this change are several. First, consolidation would permit dumping investigations to be accelerated since the price discrimination and injury inquiries could overlap to a greater extent than feasible where responsibilities are divided. Second, the International Trade Commission has developed the staff and expertise required to handle all facets of an antidumping investigation. Its responsibilities for reviewing the administration of U.S. tariff laws by the Customs Service, for conducting investigations of sales below cost and other unfair practices under section 337 of the Tariff Act of 1930, for reviewing the TSUS and recommending changes to Congress, etc., provide the experience necessary to assume responsibility for LTRFV investigations.

Third, transfer of all antidumping responsibilities to an agency which is independent of both the executive and legislative branches would tend to insulate dumping decisions from political influences which are not germane to the question of whether sales at LTRFV are causing injury to a domestic industry.

The chapter 2 amendments implementing the change in jurisdiction would not become effective until January 1, 1980. The delay in the effective date is intended to provide ample opportunity for an orderly transfer and also to permit completion of the multilateral trade negotiations in Geneva prior to any such transfer.

⁴⁵ *Id.*

CHAPTER 2—JANUARY 1, 1980 AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
	<p>(2) If in the course of an investigation under this subsection the Commission concludes that the tentative determination provided for in paragraph (1) cannot reasonably be made within 6 months, it shall publish notice of this in the Federal Register in which case the determination shall be made within nine months after the publication in the Federal Register of the Notice of Investigation.</p> <p>(3) Within 4 months after publication of notice of a tentative determination, the Commission shall make a final determination as to whether the foreign merchandise in question is being or is likely to be sold in the United States at less than fair value and if such final determination is affirmative, shall make a determination as to 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. Notice of such determinations shall be published in the Federal Register. If the Commission's determinations are both affirmative, the notice shall be referred to in this title as a "Finding". Each Finding shall include a description of the class or kind of merchandise to which it applies in such detail as the Commission shall deem necessary for the guidance of customs officers.</p> <p>(c) If the Commission publishes a Finding, the Secretary shall assess a special dumping duty as defined at section 202.</p> <p>(d) Any foreign manufacturer or exporter or domestic importer subject to a Finding may petition the Commission to terminate a final determination of sales at less than fair value. The Commission may not grant any such petition unless it determines that no sales at less than fair value have occurred for at least three years since publication of the Finding, the foreign manufacturer, exporter and domestic importer provide the Commission with written assurances that sales at less than fair value will not be resumed and the Commission determines that sales at less than fair value are not likely to resume. If the Commission decides to terminate a final determination of sales at less than fair value, it may thereafter terminate the applicable Finding in which event it shall monitor the importation of merchandise which had been subject to the Finding for at least three years after its termination. In the event sales are made at less than fair value during the monitoring period, the Commission shall immediately reinstate the Finding. The Commission shall give notice of any determination to terminate a final determination of sales at less than fair value, to terminate a Finding</p>	

or to reinstate a Finding in the Federal Register together with a statement of reasons as required in section 201 (g).

(e) Any foreign manufacturer or exporter or domestic importer subject to a Finding which has been in effect for three years or longer may petition the Commission to terminate its determination that a domestic 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 merchandise or articles at less than fair value. If the Commission, after such investigation as it deems necessary, decides to terminate such determination, it may thereafter terminate the applicable Finding. The Commission shall publish notice of any determination made pursuant to this subsection in the Federal Register together with a statement of reasons as required in section 201 (g).

(f) (1) Before making or terminating any final determination under this section or section 202(c), the Commission shall, at the request of any foreign manufacturer or exporter, or any domestic importer or foreign merchandise in question, or of any domestic manufacturer, producer, or wholesaler of merchandise of the same class or kind, or of any entity, including a trade association of domestic manufacturers, producers or wholesalers, or a certified or recognized union or group of workers, involved in the production or sale of merchandise of the same class or kind, conduct a hearing at which:

(A) any such person, firm, corporation or entity shall have the right to appear by counsel or in person; and

(B) any other person, firm, corporation, or entity may make application and, upon good cause shown, be allowed by the Commission to intervene and appear at such hearings by counsel or in person.

(2) The hearings provided for under this section shall be exempt from sections 554, 555, 556, 557, and 702 of title 5. The transcript of any hearing, together with all information developed in connection with the investigation (other than items to which confidential treatment has been granted by the Secretary or the Commission, as the case may be), shall be made available in the manner and to the extent provided in section 552 (b) of title 5.

(g) Any notice of a determination required under this title to be published by the Commission shall be accompanied by a complete statement of the conclusions, and the reasons therefor, on all material issues of fact or law presented (consistent with confidential treatment granted by the Commission in the course of making this determination), including any majority or minority or concurring opinions written by the Commissioners.

Section 112.—Section 112(a). Section 202 (a) (1) of the Antidumping Act, 1921, as amended (19

CHAPTER 2—JANUARY 1, 1980 AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1975	Analysis
<p>U.S.C. 161(a)(1) is further amended to read as follows:</p> <p>(a) (1) If the Commission makes a tentative determination of sales at less than fair value, it shall, at the time of such determination, establish the margin of dumping and notify the Secretary who shall assess provisional dumping duties on all merchandise for which appraisement is withheld. These duties shall be paid in escrow and, in the event of a final determination of no sales at less than fair value or a determination that no industry in the United States is being or is likely to be injured or is prevented from being established, shall be refunded together with interest from the date of payment. In the event of a final determination of sales at less than fair value, the Commission shall increase or decrease, if appropriate, the margin of dumping and the Secretary shall increase or decrease, if appropriate, the provisional dumping duties. Any amount owed to or by the Secretary as the result of such increase or decrease shall be payable with interest from the date of payment.</p> <p><i>Section 112.</i>—Sections 202 (b), (c) and (d) of the Antidumping Act, 1921, as amended (19 USC 161 (b), (c) and (d)) are amended by striking out the words "Secretary" and "his" each place they appear and inserting in place thereof the words "Commission" and "its", respectively.</p> <p><i>Section 113.</i>—Sections 203 and 204 of the Antidumping Act, 1921 (19 USC 162 and 163) are amended by striking out the words "Secretary" and "he" each place they appear and inserting in place thereof the words "Commission" and "it", respectively.</p> <p><i>Section 114.</i>—Section 205 of the Antidumping Act of 1921 (19 USC 164) is amended by striking the words "Secretary" and "he" each place they appear and inserting in place thereof the words "Commission" and "it", respectively.</p> <p><i>Section 115.</i>—Section 208 of the Antidumping Act, 1921 (19 USC 167) is amended by striking the words "as to" which the Secretary of the Treasury has made public a Finding" and inserting in place thereof the words "as to which the Commission has made public a Finding".</p> <p><i>Section 116.</i>—Section 407(b) of the Antidumping Act, 1921, as amended (19 USC 173(b)) is further amended by adding after the word "Secretary" each place it appears the words "or Commission".</p>		

TITLE II.—AMENDMENTS TO THE TARIFF ACT OF 1930

CHAPTER 1—COUNTERVAILING DUTY AMENDMENTS

Existing law

Fair Trade Enforcement Act of 1978

Analysis

SUBTITLE II.—SPECIAL PROVISIONS

Part I.—Miscellaneous.—**1303.** Countervaluing duties. (a) (1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a countervaluing duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b) (1) of this section; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

(3) In the case of any imported article or merchandise as to which the Secretary of the Treasury (hereinafter in this section referred to as the "Secretary") has not determined whether or not any bounty or grant is being paid or bestowed—

(A) upon the filing of a petition by any person setting forth his belief that a bounty or grant is being paid or bestowed, and the reasons therefor, or

(B) whenever the Secretary concludes, from information presented to him or to any person to whom authority under this section has been delegated, that a formal investigation is war-

Section 201.—**SECTION 201(a).** Section 303 (a) of the Tariff Act of 1930 (19 USC 1303 (a)) is amended to read as follows:

(a) (1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture, production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a countervaluing duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

(2) In the case of any imported article or merchandise which is free of duty, no countervaluing duties may be imposed under this section (other than provisional countervaluing duties as provided in subsection (c) (1) unless there is an affirmative determination by the International Trade Commission (hereinafter "Commission") under subsection (b) of this section; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

(3) In the case of any imported article or merchandise, first, the proposed legislation provides that

the insertion of the adjective "countervaluing"

within 30 days after the filing of a petition or the receipt of information indicating that bounties or grants are being paid or bestowed. Existing law

contains no time limits and therefore presents the possibility of indefinite delays in the commencement of a countervaluing duty proceeding. Such

delays are not theoretical but have in fact occurred.

To cite but one example: in 1968 U.S. Steel Corporation filed seven countervaluing duty petitions involving steel imports from the six original Com-

CHAPTER 1—COUNTERVAILING DUTY AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>granted into the question of whether a bounty or grant is being paid or bestowed, the Secretary shall initiate a formal investigation to determine whether or not any bounty or grant is being paid or bestowed and shall publish in the Federal Register notice of the initiation of such investigation.</p>	<p>ranted into the question of whether a bounty or grant is being paid or bestowed, the Secretary shall, within 30 days after the filing of such petition or the receipt of such information, conduct a preliminary investigation. If there is any information indicating that a bounty or grant is being paid or bestowed the Secretary shall within 30 days:</p> <ul style="list-style-type: none"> (A) initiate a formal investigation; (B) publish a Notice of Investigation in the <i>Federal Register</i>; and (C) require, under such regulations as he may prescribe, the withholding or appraisement as to such merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the Notice of Investigation relating to such merchandise, until the date of publication in the Federal Register of a Countervailing Duty Order pursuant to paragraph (5) or, in the event no Countervailing Duty Order is published, until all rights of appeal pursuant to section 516 of the Tariff Act of 1930 (19 USC 1516) and section 501 of the Tariff Act of 1980 (28 USC 2632) have been exhausted. <p>If the Secretary finds that there is no information indicating that a bounty or grant is being paid or bestowed he shall publish such a determination in the Federal Register.</p>	<p>mon Market countries and the United Kingdom. Treasury did not publish a proceeding notice until 1975.</p> <p>The second major change effected by the amendment is that the Secretary must require withholding of appraisement on all merchandise entered subsequent to the date of publication of a Notice of Investigation. This amendment is completely analogous to the amendment proposed to section 201 (a) of the Antidumping Act and is essential for the reasons described at that section (section 101 of the Fair Trade Enforcement Act of 1978).</p>
<p>(4) Within 6 months from the date on which a petition is filed under paragraph (3)(A) or on which notice is published of an investigation initiated under paragraph (3)(B), the Secretary shall make a preliminary determination, and within twelve months from such date shall make a final determination, as to whether or not any bounty or grant is being paid or bestowed.</p>	<p>(4) Within 6 months from the date on which a Notice of Investigation is published, the Secretary shall make a tentative determination, and within nine months from such date shall make a final determination, as to whether or not any bounty or grant is being paid or bestowed.</p>	<p>Paragraph (4) is modified to provide that the new paragraph (5) provides that in the event the Secretary makes a final determination of the existence of bounties or grants, he must publish a notice which is referred to throughout the amendment as a "Countervailing Duty Order." In the event the merchandise being subsidized is duty free, no Countervailing Duty Order could be issued unless the International Trade Commission first made an injury determination under subsection (b).</p>
<p>(5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.</p>	<p>(5) If the Secretary makes a final determination that a bounty or grant is being paid or bestowed and, with respect to duty free merchandise, the Commission makes a determination that an industry in the United States is being or is likely to be injured or is being prevented from being established after "Countervailing Duty Order" of his determination and, with respect to duty free merchandise, the determination of the Commission.</p>	<p>(6) Any foreign manufacturer or exporter or domestic importer of merchandise subject to a Counter-</p>
<p>(6) The Secretary shall make all regulations he deems necessary for the identification of articles</p>		<p>Amended paragraph section (6) provides a vehicle for a foreign manufacturer or exporter or do-</p>

and merchandise subject to duties under this section and for the assessment and collection of such duties. All determinations by the Secretary under this section, and all determinations by the Commission under subsection (b) (1) of this section, (whether affirmative or negative) shall be published in the Federal Register.

(7) Any foreign manufacturer or exporter or domestic importer of merchandise subject to a Countervailing Duty Order which has been in effect for three years or longer may petition the Commission to terminate its determination that a domestic 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. The Commission, after such investigation as it deems necessary, shall notify the Secretary if it decides to terminate such determination. The Secretary may thereafter terminate the applicable Countervailing Duty Order. The Commission and the Secretary shall give notice of any determination made pursuant to this subsection in the Federal Register together with a statement of reasons as required in paragraph (9).

(8) (A) Before making or terminating any final determination under this Section, the Secretary or the Commission, as the case may be, shall, at the request of any foreign manufacturer or exporter, or any domestic importer, of the merchandise in question, or of any domestic manufacturer, producer, or wholesaler or merchandise of the same class or kind, or of any entity including a trade association of domestic manufacturers, producers or wholesalers or a certified or recognized union or group of workers, involved in the production or sale of merchandise of the same class or kind, conduct a hearing at which:

- (i) any such person, firm, corporation, or entity shall have the right to appear by counsel or in person; and
- (ii) any other person, firm, corporation, or entity may make application, and, upon good cause shown, be allowed by the Secretary or the Commission, as the case may be, to intervene and appear at such hearings by counsel or in person.

(B) The hearings provided for under this section shall be exempt from sections 554, 555, 556, 557, and 702 of title 5. The transcript of any hearing, together with all information developed in connection with the investigation (other than items to which confidential treatment has been granted by the Secretary or the Commission, as the case may be), shall be made available in the manner and to the extent provided in section 552(b) of title 5.

valing Duty Order may petition the Secretary to terminate a final determination of bounties or grants. The Secretary may not grant any such petition unless he determines that the bounties or grants have been terminated and are unlikely to resume. The Secretary shall give notice of any determination to terminate a final determination of bounties or grants together with a statement of reasons as required in paragraph (9).

New paragraph (7) permits the revocation of a Countervailing Duty Order on the basis that a domestic industry is no longer being or likely to be injured or prevented from being established. The conditions on which an injury determination may be terminated are identical to those required for termination of an injury determination under the Antidumping Act. (See proposed section 201(f) of the Antidumping Act and the explanation thereof; section 101(f) of the Fair Trade Enforcement Act of 1978).

New paragraph (7) permits the revocation of a Countervailing Duty Order on the basis that a domestic industry is no longer being or likely to be injured or prevented from being established. The conditions on which an injury determination may be terminated are identical to those required for termination of an injury determination under the Antidumping Act. (See proposed section 201(f) of the Antidumping Act and the explanation thereof; section 101(f) of the Fair Trade Enforcement Act of 1978).

New paragraph (8) prescribes in detail the rights of interested parties and other parties to a public hearing.

(8) (A) Before making or terminating any final determination under this Section, the Secretary or the Commission, as the case may be, shall, at the request of any foreign manufacturer or exporter, or any domestic importer, of the merchandise in question, or of any domestic manufacturer, producer, or wholesaler or merchandise of the same class or kind, or of any entity including a trade association of domestic manufacturers, producers or wholesalers or a certified or recognized union or group of workers, involved in the production or sale of merchandise of the same class or kind, conduct a hearing at which:

- (i) any such person, firm, corporation, or entity shall have the right to appear by counsel or in person; and
- (ii) any other person, firm, corporation, or entity may make application, and, upon good cause shown, be allowed by the Secretary or the Commission, as the case may be, to intervene and appear at such hearings by counsel or in person.

(B) The hearings provided for under this section shall be exempt from sections 554, 555, 556, 557, and 702 of title 5. The transcript of any hearing, together with all information developed in connection with the investigation (other than items to which confidential treatment has been granted by the Secretary or the Commission, as the case may be), shall be made available in the manner and to the extent provided in section 552(b) of title 5.

Existing law	Fair Trade Enforcement Act of 1978	Analysis
	<p>(9) Any notice of a determination required under this title to be published by the Secretary or the Commission shall be accompanied by a complete statement of the conclusions, and the reasons therefor, on all material issues of fact or law presented (consistent with confidential treatment granted by either the Secretary or the Commission in the course of making this determination), including any majority or minority or concurring opinions written by the Commissioners.</p> <p>(b) (1) Whenever the Secretary makes a final determination under subsection (a) of this section that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty and a determination by the Commission is required under subsection (a) (2) of this section, he shall—</p> <p>(A) so advise the Commission, and the Commission shall determine within 3 months thereafter, and after such investigation as it deems necessary, 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 article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; and</p> <p>(B) require, under such regulations as he may prescribe, the suspension of liquidation as to such article or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the publication in the Federal Register of his final determination under subsection (a) of this section, and such suspension of liquidation shall continue until the further order of the Secretary or until he has made public an order as provided for in paragraph (3).</p> <p>(2) For the purposes of this subsection, the Commission shall be deemed to have made an affirmative determination if the commissioners voting are evenly divided as to whether its determination should be in the affirmative or in the negative.</p> <p>(3) If the determination of the Commission under paragraph (1) (A) is the affirmative, the Secretary shall make public an order directing the assessment and collection of duties in the amount of such bounty or grant as is from time to time ascertained and determined, or estimated, under subsection (a) of this section.</p>	<p>New paragraph (9) delineates the content of all notices required to be published pursuant to the Countervailing Duty statute.</p> <p><i>Timing of Injury Investigation.</i>—In addition to shortening the time for the Treasury's investigation, the total allowable time would be shortened by overlapping the latter part of Treasury's inquiry with the first part of the Commission's. This modification is identical to that suggested for the Antidumping Act and is required for the reasons cited under section 101(c) of the Fair Trade Enforcement Act of 1978.</p> <p>SECTION 201(b). Section 303(b) of the Tariff Act of 1930 (19 USC 1303(b)) is amended to read as follows:</p> <p>(b) (1) Whenever the Secretary makes a tentative determination under subsection (a) of this section that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty and a determination by the Commission is required under subsection (a) (2) of this section, he shall so advise the Commission, and the Commission shall determine within four months thereafter, and after such investigation as it deems necessary, 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 article or merchandise into the United States; and the Commission shall notify the Secretary of its determination.</p> <p>(2) Whenever the Secretary makes a final affirmative determination under subsection (a) which was preceded by a tentative negative determination, he shall so advise the Commission, and the Commission shall determine within 3 months thereafter, and after such investigation as it deems necessary, 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 article or merchandise into the United States; and the Commission shall notify the Secretary of its determination.</p> <p>(3) For the purposes of this subsection, the Commission shall be deemed to have made an affirmative determination if the commissioners voting are evenly divided as to whether its determination should be in the affirmative or in the negative.</p>

Application of affirmative determinations.—(c) An affirmative final determination by the Secretary under subsection (a) of this section with respect to any imported article or merchandise shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the date of the publication in the Federal Register of such determination. In the case of any imported article or merchandise which is free of duty, so long as a finding of injury is required by the international obligations of the United States, the preceding sentence shall apply only if the Commission makes an affirmative determination of injury under subsection (b) (1) of this section.

Section 201(c). Section 303(c) of the Tariff Act of 1930 (19 USC 1303 (c)) is amended to read as follows:

(1) If the Secretary makes a tentative determination that a bounty or grant is being paid or bestowed, he shall, at the time of such determination, establish the net amount of such bounty or grant and assess provisional countervailing duties on all merchandise for which appraisal is withheld. These duties shall be paid in escrow and in the event of a final determination of no bounty or grant, or, with respect to duty free merchandise, in the event of a determination that no industry in the United States is being, or is likely to be injured or is prevented from being established, shall be refunded together with the statutory rate of interest. In the event of a final determination of a bounty or grant, the Secretary shall increase or decrease, if appropriate, the provisional countervailing duty. Any amount owed to or by the Secretary as the result of such increase or decrease shall be payable with interest, dating back to the date of original payment.

(2) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which a Countervailing Duty Order as provided in section 303(a) (19 USC 1303(a)) has been made, there shall be levied, collected and paid on or before entry, in addition to any other duties imposed by law, a countervailing duty.

(3) The countervailing duty on all merchandise

entered on, or after, the date of publication of a Countervailing Duty Order until the date of publication of the Federal Register of a final revised bounty or grant shall be equal to the bounty or grant established by the Secretary in his final determination of bounty or grant under section 303(a).

(4) Within 12 months after such final determination of bounty or grant, and at maximum intervals of 12 months thereafter, the Secretary shall publish in the Federal Register a notice of tentative revised bounty or grant setting forth, in addition to any other information required by section 303(a)(9) any proposed revisions in the bounty or grant, or a statement that no revisions are in order. There shall be an opportunity for public comment and a right to a hearing under section 303(a)(8) (19 USC 1303(a)(8)). Within 3 months after publication of a notice of a tentative revised bounty or grant the Secretary shall publish in the Federal Register a notice of final revised bounty or grant, accompanied by a statement of reasons as required by section 303 (19 USC 1303).

(5) The final revised bounty or grant shall be applied retroactively to the date of publication of the Secretary's final determination of bounty or grant or to the date of publication of the prior revised bounty or grant. Any amount owed to or by the Secretary as the result of a revision to the

Provisional Countervailing Duties.—Paragraph (1) provides for the imposition of provisional countervailing duties following a tentative determination of bounties or grants. Such duties would immediately be assessed and collection on all merchandise entered from the date of publication of the Notice of Investigation to the date of publication of the Secretary's tentative determination and would be collected on a current basis on all shipments of the subsidized merchandise entering the U.S. thereafter. This provision is completely analogous to the proposed amendment to section 202(a) of the Antidumping Act and is required for the reasons stated in the commentary accompanying section 102 of the Fair Trade Enforcement Act of 1978.

Assessment and collection of countervailing duties.—Paragraphs (2)–(6) deal with the assessment and collection of final countervailing duties. Like the amendments proposed to the Antidumping Act (section 202(c)), this modification would provide for annual adjustments. It is recognized that in many cases, no revisions will be required. Where a subsidy is \$x/unit, for example, the subsidy remains constant and can be precisely offset by imposition of a countervailing duty in exactly the same amount. Under such circumstances, the Secretary would merely be required (in addition to collecting the duties) to publish a notice every 12 months stating that no revisions in the bounty or grant are in order and explaining why. In other cases, however, the bounty or grant will vary and can only be offset through the application of an approximate countervailing duty as adjusted annually. The rebate of the corporate income tax on export sales is an illustration of a case requiring annual adjustment.

Existing law	Fair Trade Enforcement Act of 1978	Analysis
	<p>bounty or grant shall be payable with interest accruing from the date of original payment.</p> <p>(6) The countervailing duty on all merchandise entered on or after the date of publication of a final revised bounty or grant shall be equal to such revised bounty or grant.</p> <p>Section 1303(d) readopted without change.</p> <p><i>Temporary provision while negotiations are in progress.</i>—(d) (1) It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and application of countervailing duties.</p> <p>(2) If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary of the Treasury determines, at any time during the four-year period beginning on January 3, 1975, that—</p> <p>(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;</p> <p>(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and</p> <p>(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;</p> <p>the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such four-year period. This paragraph shall not apply with respect to any case involving nonrubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of nonrubber footwear become effective.</p> <p>(3) The determination of the Secretary under paragraph (2) may be revoked by him, in his discretion, at any time, and any determination made under such paragraph shall be revoked whenever the basis supporting such determination no longer exists. The additional duty provided under this section shall apply with respect to any affected articles or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of any revocation under this subsection in the Federal Register.</p>	

Reports to Congress.—(e) (1) Whenever the Secretary makes a determination under subsection (d) (2) of this section with respect to any article or merchandise, he shall promptly transmit to the House of Representatives and the Senate a document setting forth the determination, together with his reasons therefor.

(2) If, at any time after the document referred to in paragraph (1) is delivered to the House of Representatives and the Senate, either the House or the Senate adopts, by an affirmative vote of a majority of those present and voting in that House, a resolution of disapproval under the procedures set forth in section 2102 of this title, then such determination under subsection (d) (2) of this section with respect to such article or merchandise shall have no force or effect beginning with the day after the date of the adoption of such resolution of disapproval, and the additional duty provided under this section with respect to such article or merchandise shall apply with respect to articles or merchandise entered, or withdrawn from warehouse, for consumption on or after such day.

Section 303(e) readopted without change.

SECTION 201(d). Section 303(f) of the Tariff Act of 1930 (19 USC 1303(f)) is amended by adding a new subsection (f) as follows:

(f) *Definitions.*—(1) Whenever in this chapter the term "bounty" is used, it should mean the bestowing or conferring of a benefit either directly, or indirectly, wherein something of value is bestowed or conferred by any manner, form, or means; whenever in this chapter the term "grant" is used, it shall mean the bestowing or conferring of any privilege, favor, gift or advantage, or the relieving from any duty, obligation, or requirement, whether by rebate or remission of any form or type of tax whatsoever or by any other means or methods of accomplishing any such type of benefit directly or indirectly; these terms are to be liberally construed as including any and all types of benefits, incentives, privileges, rewards, aids, or assistance of any type bestowed or conferred on any manufacturer or exporter.

(2) Whenever used in this act the term "industry" or "industry in the United States" means any subdivision or portion of the commercial organizations in any section of the United States, manufacturing, assembling, processing, extracting, growing, selling or otherwise producing, marketing, or handling articles or merchandise of the same class or kind as the merchandise or articles imported. In applying the preceding sentence, there shall be distinguished or separated the operations of such organizations involving articles or merchandise of the same class or kind as the merchandise or articles imported from the operations of such organizations involving other articles or merchandise.

(3) The Commission shall find that an industry has been injured when the sale of goods on which a

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Definitions.—The countervailing duty statute contains a number of key terms which are undefined. Clearly the most important of these is the phrase "bounty or grant". The United States Supreme Court has declared that this language must be given the broadest interpretation: " . . . Every new statute is individual and presents its own problems. That before us does, and, as we have said, looking at its words alone, has no uncertainty of purpose. Whenever any country shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise there shall be levied and paid upon it, upon importation, in addition to the regular duty, an additional one equal to the net amount of such bounty or grant, however the same may be paid or bestowed." The statute was addressed to a condition, and its words must be considered as intending to define it, and all of them—"grant" as well as "bounty"—must be given effect. If the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance than 'grant' could not have been used.⁴⁸

The definition of a bounty or grant has been, over the years, broadened by the Congress. For example, in 1922, Congress extended the definition of a bounty or grant to a subsidy made on the manufacture or production of merchandise as well as on the export of the article. The Treasury Department and the Court have found the remission of some domestic excise taxes, and the use of various currency manipulation schemes to constitute a "bounty or grant"

⁴⁸ *Nicholas & Co. v. United States*, 249 U.S. 34 (1919).

CHAPTER 1—COUNTERVAILING DUTY AMENDMENTS—Continued

Existing law	Analysis	Fair Trade Enforcement Act of 1978
<p>grant or bounty has been bestowed or paid contributes (whether or not as a primary, substantial, or a major factor) toward causing, or threatening to cause injury (if more than <i>de minimis</i>) to the domestic industry, or the prevention of the establishment of such an industry. In making its determination, the Commission, without excluding other factors, shall consider any past, present or potential adverse effects on prices, sales, production, employment, profits, or wages in the industry under consideration; any past, present or potential loss of customers or customer participation to imports; any past, present or potential increase in imports, either actual or relative compared with domestic production; any impact from sustained high levels of import penetration; and past, present or potential increase or growth in the level of inventories of such goods in the United States.</p>	<p>under the countervailing duty statute. In general, however, the Treasury Department has interpreted the statute narrowly. And the courts have chosen to consider this an administrative decision to which they will largely defer, giving the Treasury Department relatively unfettered discretion in this area. This is illustrated by the current controversy over whether the remission of value-added taxes or sales taxes on exported goods constitutes a bounty or grant on the grounds that the tax is an indirect tax and, therefore, not a tax which the producer pays but a tax the consumer pays. According to one theory the remission of an indirect tax does not benefit the producer and does not constitute a subsidy. This interpretation ignores modern economic thinking which finds the distinction between indirect and direct taxes to be arbitrary and irrational, as pointed out in a report of the Senate Finance Committee which stated:</p> <p style="padding-left: 2em;">“The distinction between direct and indirect taxes on the basis of their presumed difference in incidence, though generally accepted two generations ago, is now widely questioned. All taxes on business are increasingly thought of as costs, with varying effects and differential impacts depending on their form, but in one way or another constituting costs which must be recovered from customers or those who supply the resources if the enterprise is to survive.”⁴⁷</p>	<p style="text-align: center;">60</p>

“The distinction between direct and indirect taxes on the basis of their presumed difference in incidence, though generally accepted two generations ago, is now widely questioned. All taxes on business are increasingly thought of as costs, with varying effects and differential impacts depending on their form, but in one way or another constituting costs which must be recovered from customers or those who supply the resources if the enterprise is to survive.”⁴⁷

Congress, in the Trade Act of 1974, recognized the problem created by these taxes, calling on the President, in international negotiations, to seek “the revision of GATT articles with respect to the treatment of border adjustments for internal taxes to redress the disadvantages to countries primarily relying on direct rather than indirect taxes for revenue needs.”⁴⁸ Despite the widespread recognition of the export incentive inherent in the rebate of indirect taxes, Treasury has held to its views and the U.S. Supreme Court in *Zenith Radio v. United States*⁴⁹ recently upheld the Treasury’s stand on sales taxes largely on the grounds that it must defer in this area to long-standing Treasury practice.

In another area, the application of a countervailing duty in response to a subsidy on manufacture, the Treasury has also given the statute a strained construction. The Treasury has refused to countervail subsidies given upon the manufacture of a product unless the bulk of the product is exported. In effect, Treasury has engrafted a limitation onto the definition of “bounty or grant” which was never intended by Congress.

The proposed amendment would place in the statute a definition of "bounty or grant" to guide those entrusted with the enforcement of this act and to make clear that the terms are to be treated broadly. The amendment would also end for the purposes of this statute the distinction between the remission of direct and indirect taxes.

The definition of "industry" is identical to that proposed for the Antidumping Act. (See section 212(5) of the Antidumping Act and accompanying commentary; section 108 of the Fair Trade Enforcement Act of 1978).

The definition of "injury" is identical to that proposed for the Antidumping Act. (See section 212(6) of the Antidumping Act and accompanying commentary; section 108 of the Fair Trade Enforcement Act of 1978).

⁴⁷ Staff report of Senate Finance Committee "Summary and Analysis of H.R. 10710—The Trade Reform Act of 1973."

⁴⁸ 19 USC 2131(a)(5)

⁴⁹ U.S. Supreme Court No. 77-539, June 21, 1978.

Section 202.—The amendments made by section 201 shall become effective for all purposes on the 30th day following the date of enactment of this act.

CHAPTER 2—JANUARY 1, 1980, COUNTERVAILING DUTY AMENDMENTS

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>Section 203.—Section 203(a), Section 303(a) of the Tariff Act of 1930 (19 USC 1303) shall be amended by striking out paragraphs (3) through and including (9) and inserting in place thereof the following:</p> <p>(a) In subsection (a) strike out paragraphs (3), (4), (5), and (6) and insert in place thereof the following:</p> <p>(3) In the case of any imported articles of merchandise as to which the Commission has not determined whether or not a bounty or grant is being paid or bestowed—</p> <p>(A) upon the filing of a petition by any person setting forth his belief that a bounty or grant is being paid or bestowed, and the reasons therefor, or</p> <p>(B) whenever the Commission concludes, from information presented to the Commission, that a formal investigation is warranted into the question of whether a bounty or grant is being paid or bestowed.</p> <p>The Commission shall, within 30 days after the filing of such petition or the receipt of such information, conduct a preliminary investigation to ascertain whether there is a grant or bounty being paid or bestowed. If there is any information indicating that merchandise is being or is likely to be sold at less than fair value, the Commission shall within 30 days of receipt of such information :</p> <p>(A) initiate a formal investigation;</p> <p>(B) publish a Notice of Investigation in the Federal Register; and</p> <p>(C) require, under such regulations as it may prescribe, the withholding of appraisement as to such merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the Notice of Investigation relating to such merchandise, until the date of publication in the Federal Register of a Counter-vailing Duty Order pursuant to paragraph (5) or, in the event no Counter-vailing Duty Order is published, until all rights of appeal pursuant to section 516 of the Tariff Act of 1930 (19 USC 1516) and section 501 of the Tariff Act of 1930 (28 USC 2632) have been exhausted.</p> <p>If the Commission finds that there is no information indicating that a bounty or grant is being paid or bestowed it shall publish this determination in the Federal Register.</p> <p>(4) Within 6 months from the date on which a Notice of Investigation is published, the Commission shall make a tentative determination, and within</p>	<p><i>Transfer of jurisdiction.</i>—Subsidies constitute one of the most potent trade distorting factors at work in international trade. This Nation since before the turn of the century has concerned itself with the unfair trade impact caused by subsidized goods and has had in effect for over 75 years a statute designed to cope with this form of unfair trade practice. The statute has been expanded to reach private as well as public subsidies upon the manufacture or production as well as export of articles. The enforcement of the statute, however, has been less than vigorous, affected by political considerations arising out of international relations. The concern with the way the Treasury Department had enforced the statute led Congress to place time limits on the conduct of investigations under the countervailing statute. The Senate Finance Committee stated in its report on the 1974 Trade Act that :</p> <p>"The Committee has been concerned over the past years that the Treasury Department has used the absence of time limits to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law."⁵⁰</p> <p>Such extraneous considerations should not be permitted to impair effective enforcement of a statute designed to preserve the concept of comparative advantage on which free trade is predicated. Indeed if this world's limited resources are to be distributed on an efficient basis, all subsidies must be eliminated.</p> <p>To insulate subsidy determinations from irrelevant considerations the amendments would transfer jurisdiction over the countervailing duty statute from the Treasury Department to the International Trade Commission, an independent agency. This change has the advantage of consolidating by 1980 in one agency the responsibility for the enforcement of our three major international unfair trade statutes (Section 337 of the Tariff Act of 1930, antidumping and countervailing duty). Furthermore, the International Trade Commission is an agency which has long had responsibility in the area of unfair trade practices and, therefore, has a fund of expertise on which to call. The amendments continue the procedure introduced in section 201 of withholding appraisement or suspending liquidation upon the publication of a notice of investigation and the assessment of provisional countervailing duties in the event of an affirmative tentative determination. The amendments would be effective in 1980 to permit the completion of the current round of international trade negotiations and to allow a transition period.</p>	

9 months from such date shall make a final determination, as to whether or not any bounty or grant is being paid or bestowed.

(5) If the Commission makes a final determination that a bounty or grant is being paid or bestowed and, with respect to duty-free merchandise, the Commission makes a determination that an industry in the United States is being or is likely to be injured or is being prevented from being established, the Commission shall make public a notice (hereinafter "Countervailing Duty Order") of its determination.

(6) Any foreign manufacturer or exporter or domestic importer of merchandise subject to a Countervailing Duty Order may petition the Commission to terminate a final determination of bounties or grants. The Commission may not grant any such petition unless it determines that the bounties or grants have been terminated and are not likely to resume. The Commission shall give notice of any determination to terminate a final determination of bounties or grants together with a statement of reasons as required in paragraph (9).

(7) Any foreign manufacturer or exporter or domestic importer of merchandise subject to a Countervailing Duty Order which has been in effect for 3 years or longer may petition the Commission to terminate its determination that a domestic 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. The Commission, after such investigation as it deems necessary, may thereafter terminate the applicable Countervailing Duty Order. The Commission shall give notice of any determination made pursuant to this subsection in the Federal Register together with a statement of reasons as required in paragraph (9).

(8) (A) Before making or terminating any final determination under this Section, the Commission shall, at the request of any foreign manufacturer or exporter, or any domestic importer of the merchandise in question, or of any domestic manufacturer, producer, or wholesaler of merchandise of the same class or kind, or of any entity including a trade association of domestic manufacturers, producers or wholesalers or a certified or recognized union or group of workers, involved in the production or sale of merchandise of the same class or kind, conduct a hearing at which:

- (i) any such person, firm, corporation, or entity shall have the right to appear by counsel or in person; and
- (ii) any other person, firm, corporation, or entity may make application and, upon good cause shown, be allowed by the Secretary or the Commission, as the case may be, to intervene and appear at such hearings by counsel or in person.

CHAPTER 2—JANUARY 1, 1980, COUNTERVAILING DUTY AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
	<p>(B) The hearings provided for under this section shall be exempt from sections 554, 555, 556, 557, and 702 of title 5. The transcript of any hearing, together with all information developed in connection with the investigation (other than items to which confidential treatment has been granted by the Secretary or the Commission, as the case may be), shall be made available in the manner and to the extent provided in section 552(b) of title 5.</p> <p>(9) Any notice of a determination required under this title to be published by the Secretary or the Commission shall be accompanied by a complete statement of the conclusions, and the reasons therefor, on all material issues of fact or law presented (consistent with confidential treatment granted by either the Secretary or the Commission in the course of making this determination), including any majority or minority or concurring opinions written by the Commissioners.</p> <p>SECTION 203 (b). Section 303 (b) of the Tariff Act of 1930 (19 USC 1303(b)) shall be amended by striking out paragraph (b) and inserting in place thereof the following:</p> <p>(b) (1) Whenever the Commission makes a tentative determination under subsection (a) of this section that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty and a determination by the Commission is required under subsection (a) (2) of this section, the Commission shall determine within 4 months thereafter, and after such investigation as it deems necessary, 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 article or merchandise into the United States.</p> <p>(2) For the purposes of this subsection, the Commission shall be deemed to have made an affirmative determination if the commissioners voting are evenly divided as to whether its determination should be in the affirmative or in the negative.</p> <p>SECTION 203 (c). Section 303 (c) of the Tariff Act of 1930 (19 USC 1303(c)) shall be amended by striking out paragraph (c) and inserting in place thereof the following:</p> <p>(c) (1) If the Commission makes a tentative determination that a bounty or grant is being paid or bestowed, it shall, at the time of such determination, establish the net amount of such bounty or grant and notify the Secretary who shall assess provisional countervailing duties on all merchandise for which appraisement is withheld. These duties shall be paid in escrow and in the event of a final determination of no bounty or grant, or, with re-</p>	

spect to duty free merchandise, in the event or a determination that no industry in the United States is being, or is likely to be injured or is prevented from being established, shall be refunded together with the statutory rate of interest. In the event of a final determination of a bounty or grant, the Commission shall increase or decrease, if appropriate, the bounty or grant and provisional countervailing duties. Any amount owed to or by the Secretary as the result of such increase or decrease shall be payable with interest, dating back to the date of original payment.

(2) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which a Countervailing Duty Order as provided in section 303(a) (19 USC 1303(a)) has been made, there shall be levied, collected and paid on or before entry, in addition to any other duties imposed by law, a countervailing duty.

(3) The countervailing duty on all merchandise entered on or after the date of publication of a Countervailing Duty Order until the date of publication in the Federal Register of a final revised bounty or grant shall be equal to the bounty or grant established by the Commission in its final determination of bounty or grant under section 303(a).

(4) Within 12 months after such final determination of bounty or grant, and at maximum intervals of 12 months thereafter, the Commission shall publish in the Federal Register a notice of tentative revised bounty or grant setting forth, in addition to any other information required by section 303(a)(9) any proposed revisions in the bounty or grant, or a statement that no revisions are in order. There shall be an opportunity for public comment and a right to a hearing under section 303(a)(8) (19 USC 1303(a)(8)). Within 3 months after publication of a notice of a tentative revised bounty or grant the Commission shall publish in the Federal Register a notice of final revised bounty or grant, accompanied by a statement of reasons as required by section 303 (19 USC 1303).

(5) The final revised bounty or grant shall be applied retroactively to the date of publication of the Commission's final determination of bounty or grant or to the date of publication of the prior revised bounty or grant. Any amount owed to or by the Secretary as the result of a revision to the bounty or grant shall be payable with interest accruing from the date of payment.

(6) The countervailing duty on all merchandise entered on or after the date of publication of a final revised bounty or grant shall be equal to such revised bounty or grant.

Section 204.—The amendments made by section 203 shall be effective January 1, 1980.

CHAPTER 3—APPEAL PROCEEDINGS

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>19 USC 1516.—(a) The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, or additional duty described in section 1303 of this title (hereinafter in this section referred to as "countervailing duties"). If any, and the special duty described in section 161 of this title (hereinafter in this section referred to as "antidumping duties"), if any, imposed upon designated imported merchandise, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper, and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that countervailing duties or antidumping duties should be assessed.</p>	<p>Section 205.—Section 516 of the Tariff Act of 1930 (19 USC 1516) shall be amended to read as follows:</p> <p>(a) The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as "countervailing duty"), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as "antidumping duty"), if any, imposed upon designated imported merchandise, produced, or sold at wholesale by such concern. The classification, the rate of duty, the additional duty described in section 161 of this title (hereinafter in this section referred to as "antidumping duty"), if any, and the special duty described in section 1516 of this title (hereinafter in this section referred to as "antidumping duty"), if any, imposed upon designated imported merchandise, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct or that the proper rate or amount of duty, countervailing duty or antidumping duty is not being assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or amount of duty, countervailing duty or antidumping duty, and (3) the reasons for his belief proper, and (3) the reasons for his belief.</p>	<p><i>Judicial review in countervailing and antidumping cases manufacturer's protest.</i>—Subsections 1516 (a), (b), and (c) have historically provided the mechanism whereby any American manufacturer, producer or wholesaler could seek judicial review of the appraised value, tariff classification or rate of customs duty determined by Treasury for imported merchandise of a class manufactured, produced or sold at wholesale by such concern. The complex and time consuming procedure incorporated in these three subsections was necessitated—at least in part—by the fact that American producers usually possessed neither the knowledge nor the ability to acquire the knowledge of how such imports were being appraised, classified or assessed. Accordingly, subsection 1516 (a) provided a vehicle whereby a domestic manufacturer could obtain information from the Secretary as to the appraised value, classification or rate of duty of designated merchandise. If the manufacturer believed the appraised value, tariff classification or rate of duty determined by the Secretary was incorrect, he could petition for review. In the event the Secretary concurred with the position of the petitioner (1516 (b)) he was obliged to determine the correct value, classification or rate of duty and publish his decision in the weekly Customs Bulletin. All merchandise entered more than 30 days after such publication was subject to this decision. On the other hand, if the Secretary denied the petition (1516 (c)) the American manufacturer had to file a notice of desire to contest which the Secretary would publish. Thereafter, the Secretary would furnish the petitioner with sufficient information to enable it to contest the appraised value, classification or rate of duty of a specific entry. Only then could the petitioner seek judicial review.</p> <p>The Trade Act of 1974 kept the foregoing procedure intact but expanded the scope of the manufacturer's protest to include the Secretary's "failure to assess countervailing duties or antidumping duties" or "failure to determine the proper appraised value or classification, rate or amount of duty, countervailing duty or antidumping duty and shall notify the petitioner of his determination. All such merchandise entered for consumption or withdrawn from warehouse for consumption more than 30 days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate or amount of duty, countervailing duty or antidumping duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes the procedures set forth in section 160 of this title shall apply.</p> <p>(b) If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low or that the classification of the article or rate or amount of duty, countervailing duty or antidumping duty assessed thereon is not correct, he shall determine the proper appraised value or classification, rate or amount of duty, countervailing duty or antidumping duty and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than 30 days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes the procedures set forth in section 160 of this title shall apply.</p> <p>(c) If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, or</p>

that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than 30 days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate or amount of duty, countervailing duty or antidumping duty and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate or amount of duty, countervailing duty or antidumping duty imposed upon such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

filed pursuant to subsection (a) of this section is correct, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than 30 days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate or amount of duty, countervailing duty or antidumping duty and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate or amount of duty, countervailing duty or antidumping duty imposed upon such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

manufacturer's protest procedure did encompass injury determinations by the ITC. By interpreting the statute in light of the purpose of the Customs Court, the court concluded:

"The interpretation that judicial review of negative injury interpretations by the ITC is available in the United States Customs Court under section 516 fulfills the intent of Congress, and effectuates the national policy of fostering expertise and uniformity in the interpretation and application of the customs laws." (*SCM v. United States*).

The decision of the Customs Court is clearly well founded in logic. Section 1516 should nevertheless be amended for two cogent reasons. First, the re-availability of injury determination has not been considered by the Court of Customs and Patent Appeals. In *United States v. Hammond Lead Products*, 440 Fd. 2, 1024 (1971), the Court of Customs and Patent Appeals (CCPA) reversed the Customs Court and ruled that although importers possessed the right of judicial review in countervailing duty cases, American manufacturers did not. It was this decision that prompted Congress to amend section 1516 as part of the Trade Act of 1974 to overrule *Hammond Lead*. In view of the CCPA's propensity to restrict the domestic producers' right of appeal, a degree of uncertainty continues despite the lower court's holding in *SCM*.

Perhaps even more important, the manufacturer's protest mechanism of subsection 1515 (a), (b), and (c) is unsuitable for appealing either a determination of no injury by the ITC or a determination of no sales at LTFV or "no bounty or grants by the Secretary. There is no reason in such appeals to ask the Secretary for information regarding the rate of countervailing duty or antidumping duty being assessed. Indeed, the very fact that the Secretary or the Commission has ruled in the negative dictates that the rate is zero or that the rate is irrelevant because of a finding of no injury. Similarly, there is no need or reason to protest a specific entry. Unlike appraisal or classification cases which often involve particular shipments, a challenge of the Secretary's or Commission's decision in antidumping and countervailing duty cases goes to all shipments. In short, the complex and time-consuming procedures of subsections 1516 (a), (b), and (c) serve no useful purpose in such antidumping and countervailing duty cases; rather, they unnecessarily delay presentation of the issues to the court and therefore should not be utilized.

This is not to say that the manufacturer's protest mechanism should not have a role in antidumping and countervailing duty cases. To the contrary, the general procedure already in place is uniquely suited for the review of the assessment of antidumping and countervailing duties once a Finding or Countervailing Duty Order has been entered (i.e., following affirmative determinations by the Secretary and

CHAPTER 3—APPEAL PROCEEDINGS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
		<p>the ITC). Currently, the American manufacturer or industry which is successful in prosecuting an antidumping or countervailing duty case has no way to ascertain whether a determination in its favor is being properly implemented. As documented elsewhere, it is not uncommon to win the case but then lose to unfair competition in the marketplace because of Treasury's failure to assess properly countervailing or antidumping duties. Amendment of subsections 1516 (a), (b), and (c) to encompass the assessment of such duties will enable American companies to obtain information from Treasury as to the rate of duty being assessed and permit them to challenge assessments which they believe are incorrect.</p> <p style="text-align: right;">68</p> <p><i>Review of antidumping or countervailing duty determination.</i>—As explained above, the review of ITC injury determinations requires different procedures from those prescribed in the manufacturer's protest mechanism (subsections 1516 (a), (b), and (c)). In the Trade Act of 1974, Congress provided under subsection 1516 (d) that within 30 days after a finding by the Secretary of no sales at LMFV or no bounty or grant, a domestic manufacturer could file a notice of a desire to contest any such determination. The Secretary was directed to have such notice published "upon receipt" and within 30 days after publication the petitioner could appeal to the U.S. Customs Court. This relatively simple procedure is equally suitable for appeals of a negative injury ruling by the ITC. Accordingly, the proposed legislation would amend subsection 1516(d) to specifically provide for judicial review of determinations of no injury by the Commission in antidumping and countervailing duty cases. In addition, it would permit a domestic manufacturer to appeal a decision by the Secretary not to initiate a formal antidumping or countervailing duty investigation.</p> <p>(d) Within 30 days after a determination by the Secretary—</p> <p>(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be sold in the United States at less than its fair value, or</p> <p>(2) under section 1303 of this title that a bounty or grant is not being paid or bestowed.</p> <p>(d) (1) Within 30 days after a determination by the Secretary—</p> <p>(i) under section 160(a) (2) of this title that there is no information indicating sales or a likelihood of sales at less than fair value,</p> <p>(ii) under section 160(b) (3) of this title that a class or kind of foreign merchandise is not being, or is likely to be sold in the United States at less than its fair value,</p> <p>(iii) under section 1303(a) (3) of this title that there is no information indicating that a bounty or grant is being paid or bestowed, or</p> <p>(iv) under section 1303(a) (4) that no bounty or grant is being paid or bestowed,</p> <p>an American manufacturer, producer or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.</p> <p>(2) Within 30 days after a determination by the Commission—</p> <p>(i) under section 160(c) of this title that an industry in the United States is not being and is not likely to be injured and is not prevented from being established by sales at less than fair value, or</p> <p>(ii) under section 1303(b) of this title that an industry in the United States is not being and is not likely to be injured and is not pre-</p>

vented from being established by the importation of duty free merchandise on which a bounty or grant is being paid or bestowed, an American manufacturer, producer or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Commission a written notice of a desire to contest such determination. Upon receipt of such notice the Commission shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

(e) Notwithstanding the filing of an action pursuant to section 2632 of title 28, articles or merchandise of the character covered by the published decision of the Secretary and not subject to a withholding of appraisement order pursuant to section 160 or 1303 of this title (when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary and, except as otherwise provided in this chapter, the final liquidations of these entries shall be conclusive upon all parties.

(e) Notwithstanding the filing of an action pursuant to section 2632 of title 28, articles or merchandise of the character covered by the published decision of the Secretary and not subject to a withholding of appraisement order pursuant to section 160 or 1303 of this title (when entered for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary and, except as otherwise provided in this chapter, the final liquidations of these entries shall be conclusive upon all parties.

(f) The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Customs Court.

(g) If the cause of action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

Liquidation of entries during appeal.—Subsection (e) of existing law provides that the filing of an appeal will not result in a suspension of liquidation. This provision is inappropriate with respect to challenges of the appraised value, tariff classification, customs duty or rate of countervailing duty or antidumping duty. It is inconsistent, however, with earlier sections of the proposed legislation which provide that upon initiation of a formal antidumping or countervailing duty investigation (i.e., after receipt of information indicating sales at LTFV or the payment or bestowal of a bounty or grant), the Secretary must require withholding of appraisement until a finding is entered or appeal rights have been exhausted. The proposed amendment to subsection 1516(d) would harmonize these various provisions.

Liquidation of entries subject to a court decision.—Existing subsection 1516(g) provides that if a lower or intermediate court rules in favor of the petitioner, liquidation of entries of the merchandise in question must be suspended. If the case is ultimately decided in favor of the petitioner, then all shipments from the date of suspension of liquidation to the date of final determination (as well as all subsequent shipments) will be subject to the final ruling. As with subsection 1516(e), subsection 1516(g) is not entirely consistent with other sections of the proposed legislation providing for earlier withholding of appraisement in certain instances. The proposed amendment to subsection 1516(g) would reconcile these various sections by providing that where appraisement was withheld at an earlier date, all merchandise entering the United States subsequent to that date would be subject to antidumping or countervailing duties in accordance with the final decision of the court.

(f) The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Customs Court.

(g) If the cause of action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

CHAPTER 3—APPEAL PROCEEDINGS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>praisement order pursuant to section 160 or 1303 of this title, then all such articles or merchandise which are entered for consumption or withdrawn from warehouse for consumption after the date of publication of the withholding of appraisement notice shall be subject to assessment of antidumping or countervailing duties in accordance with the final judicial decision in the action.</p> <p><i>Regulations implementing required procedures.</i>—(h) Regulations shall be prescribed by the Secretary to implement the procedures required under this section.</p>	<p><i>Regulations implementing required procedures.</i>—(h) Regulations shall be prescribed by the Secretary and the Commission to implement the procedures required under this section.</p>	<p><i>Jurisdictional amendment.</i>—Section 2632 is amended by the proposed legislation to conform with the changes in judicial review made in subsection 1516(d).</p>
<p>2632. Customs Court procedure and fees. (a) A party may contest (1) denial of a protest under section 515 of the Tariff Act of 1930, as amended; (2) a decision of the Secretary of the Treasury made under section 516 of the Tariff Act as amended; or (3) a determination by the Secretary of the Treasury under section 201 of the Anti-dumping Act, 1921, as amended, that a class or kind of merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or under section 303 of the Tariff Act of 1930 that a bounty or grant is not being paid or bestowed; by bringing a civil action in the Customs Court. A civil action shall be commenced by filing a summons in the form, manner, and style and with the content prescribed in rules adopted by the court.</p>	<p><i>Section 206.</i>—Section 2632(a) of Title 28 (28 USC 2632(a)), is amended to read as follows:</p> <p>(a) A party may contest (1) denial of a protest under section 515 of the Tariff Act of 1930, as amended; (2) a decision of the Secretary of the Treasury made under section 516 of the Tariff Act of 1930, as amended; (3) a determination by the Secretary of the Treasury under section 201 of the Anti-dumping Act, 1921, as amended, that there is no information indicating the existence of sales or a likelihood of sales at less than fair value or that a class or kind of merchandise is not being, nor is likely to be sold in the United States at less than fair value, or under section 303 of the Tariff Act of 1930 that there is no information indicating that a bounty or grant is being paid or bestowed or that a bounty or grant is not being paid or bestowed; or (4) a determination by the International Trade Commission under section 201 of the Antidumping Act, 1921, that an industry in the United States is not being and is not likely to be injured and is not prevented from being established by sales at less than fair value or under section 303 of the Tariff Act of 1930 that an industry in the United States is not being, and is not likely to be injured and is not prevented from being established by the importation of duty free merchandise on which is paid or bestowed a bounty or grant; by bringing a civil action in the Customs Court. A civil action shall be commenced by filing a summons in the form, manner and style and with the content prescribed in rules adopted by the court.</p>	<p><i>Section 207.</i>—The amendments made by sections 205 and 206 shall be effective on the 30th day after enactment of this act.</p>

CHAPTER 4—1980 AMENDMENTS

Existing law	Fair Trade Enforcement Act of 1978	Analysis
	<p>Section 208—Section 516 of the Tariff Act of 1930, as amended (19 USC 1516) is further amended to read as follows:</p> <p>SECTION 516. Petitions by American Manufacturers, Producers, or Wholesalers. (a) The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as "countervailing duty"), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as "antidumping duty"). If any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct or that the proper rate of duty is not being assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper, and (3) the reasons for his belief. If such manufacturer, producer or wholesaler believes that the proper rate or amount of countervailing or antidumping duty is not being assessed, he may file a petition with the International Trade Commission ("Commission") setting forth (1) a description of the merchandise and (2) the reasons for his belief.</p> <p>(b) If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low or that the classification of the article or rate of duty assessed thereon is not correct, he shall determine the proper appraised value or classification, or rate of duty, and shall notify the petitioner of his determination. All such merchandise entered for consumption or withdrawn from warehouse for consumption more than thirty days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination.</p> <p>(c) If, after receipt and consideration of a petition filed by an American manufacturer, producer or wholesaler, the Commission decides that the proper rate or amount of countervailing duty or antidumping duty is not being assessed, it shall determine the proper rate and amount of countervailing duty or antidumping duty and shall direct</p>	<p>The amendments made in section 208 conform the judicial review section to the change in jurisdiction over the antidumping and countervailing duty statutes.</p>

CHAPTER 4—1980 AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
	<p>the Secretary to assess such duty in accordance with its decision.</p> <p>(d) If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than 30 days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.</p> <p>(e) If the Commission determines that countervailing or antidumping duties are being assessed correctly the Commission shall inform the petitioner. If dissatisfied with the decision of the Commission the petitioner may file with the Commission, not later than 30 days after the date of the decision, notice that he desires to contest the rate or amount of countervailing duty or antidumping duty assessed upon the merchandise. Upon receipt of notice from the petitioner, the Commission shall cause publication to be made of its decision as to the proper rate or amount of countervailing duty or antidumping duty and of the petitioner's desire to contest, and shall thereafter direct the Secretary to furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Commission at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the rate or amount of countervailing duty or antidumping duty imposed upon such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner</p>	

by mail immediately when the first of such entries is liquidated.

(f) Within 30 days after a determination by the Commission—

(1) under section 160(a)(2) of this title that there is no information indicating sales or a likelihood of sales at less than fair value,

(2) under section 160(b)(3) of this title that a class or kind of foreign merchandise is not being, nor is likely to be sold in the United States at less than its fair value,

(3) under section 160(c) of this title that an industry in the United States is not being and is not likely to be injured and is not prevented from being established by sales at less than fair value,

(4) under section 1303(a)(3) of this title that there is no information indicating that a bounty or grant is being paid or bestowed,

(5) under section 1303(a)(4) that no bounty or grant is being paid or bestowed, or

(6) under section 1303(b) of this title that an industry in the United States is not being and is not likely to be injured and is not prevented from being established by the importation of duty free merchandise on which is paid or bestowed a bounty or grant, an American manufacturer, producer or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Commission a written notice of a desire to contest such determination. Upon receipt of such notice the Commission shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

(g) Notwithstanding the filing of an action pursuant to section 2632 of title 28, articles or merchandise of the character covered by the published decision of the Secretary or the Commission and not subject to a withholding of appraisement order pursuant to section 160 or 1303 of this title (when entered for consumption or withdraw from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary or the Commission) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary or the Commission and, except as otherwise provided in this Chapter, the final liquidations of these entries shall be conclusive upon all parties.

CHAPTER 4—1980 AMENDMENTS—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
	<p>(h) The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Customs Court.</p> <p>(1) If the cause of action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, articles or merchandise of the character covered by the published decision of the Secretary or the Commission but which are not subject to a withholding of appraisement order and which are entered for consumption or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the articles or merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision. If articles or merchandise of the character covered by the published decision of the Secretary of the Commission are subject to a withholding of appraisement order pursuant to section 160 or 1303 of this title, then all such articles or merchandise which are entered for consumption or withdrawn from warehouse for consumption after the date of publication of the withholding of appraisement notice shall be subject to assessment of antidumping or countervailing duties in accordance with the final judicial decision in the action.</p> <p><i>Regulations implementing required procedures.—</i></p> <p>(h) Regulations shall be prescribed by the Secretary and the Commission to implement the procedures required under this section.</p> <p><i>Section 209.—</i>Section 2632(a) of title 28 (28 USC 2632(a)) is further amended to read as follows:</p> <p>(a) A party may contest (1) denial of a protest under section 515 of the Tariff Act of 1930, as amended; (2) a decision of the Secretary of the Treasury or the International Trade Commission made under section 516 of the Tariff Act of 1930, as amended; (3) a determination by the International Trade Commission under section 201 of the Anti-dumping Act of 1921, as amended, that there is no information indicating the existence of sales or a likelihood of sales at less than fair value or that a class or kind of merchandise is not being nor is likely to be sold in the United States at less than fair value, or that an industry in the United States is not being and is not likely to be injured and is not prevented from being established by sales at less than fair value; or (4) a determina-</p>	74

tion by the International Trade Commission under section 303 of the Tariff Act of 1930 that there is no information indicating that a bounty or grant is being paid or bestowed or that a bounty or grant is not being paid or bestowed, or that an industry in the United States is not being and is not likely to be injured and is not prevented from being established by the importation of duty free merchandise on which is paid or bestowed a bounty or grant; by bringing a civil action in the Customs Court. A civil action shall be commenced by filing a summons in the form, manner and style and with the content prescribed in rules adopted by the court.

Section 210.—The amendments made by sections 208 and 209 shall be effective January 1, 1980.

CHAPTER 5—AMENDMENTS TO SECTION 337 OF THE TARIFF ACT OF 1930

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p>1337. (a) Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which 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, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.</p> <p><i>Investigation of violations by commission; time limits.</i>—(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than 1 year (18 months in more complicated cases) after the date of publication of notice of such investigation. The Commission shall publish in the Federal Register its reasons for designating any investigation as a more complicated investigation. For purposes of the 1-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.</p> <p>(2) During the course of each investigation under this section, the Commission shall consult with, and seek advice and information from, the Department of Health, Education, and Welfare, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate.</p> <p>(3) Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that the matter may come within the purview of section 1303 of this title or of the Antidumping Act, 1921, it shall promptly notify the Secretary of the Treasury so that such action may be taken as is otherwise authorized by such section and such act.</p> <p><i>Determinations; review.</i>—(c) The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) of this section shall</p>	<p>Section 1337(a)–(f) is readopted without change.</p>	

be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d) or (e) of this section may appeal such determination to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court.

Exclusion of articles from entry.—(d) If the Commission determines as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusions from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

Exclusion of articles from entry during investigation except under bond.—(e) If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.

Case and desist orders.—(f) In lieu of taking action under subsection (d) or (e) of this section, the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless

CHAPTER 5—AMENDMENTS TO SECTION 337 OF THE TARIFF ACT OF 1930—Continued

Existing law	Fair Trade Enforcement Act of 1978	Analysis
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after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued. The Commission may at any time, upon such notice and in such manner as it deems proper, modify or revoke any such order, and, in the case of a revocation, may take action under subsection (d) or (e) of this section, as the case may be.

Referral to President.—(g) (1) If the Commission determines that there is a violation of this section, or that, for purposes of subsection (e) of this section, there is reason to believe that there is such a violation, it shall—

(A) publish such determination in the Federal Register, and
 (B) transmit to the President a copy of such determination and the action taken under subsection (d), (e), or (f) of this section, with respect thereto, together with the record upon which such determination is based.

(2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall have no force or effect.

(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c) of this section, be effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall be effective as

Congressional approval of Presidential veto of relief under section 337.—Under section 337, the International Trade Commission is given the responsibility for the investigation of allegations of the use of unfair trade practices by importers or foreign producers which have the effect or tendency to injure or prevent the establishment of domestic industry or to restrain or monopolize trade. The statute parallels in many important respects domestic statutes which are designed to bar the use of unfair trade methods which have the tendency to restrain trade.

Under the statute the President, for policy reasons, may disapprove a Commission decision under section 337 and suspend the relief granted. While there may be reason for some Presidential power in this area, there is little justification for the arbitrary and unchecked power of the President to deny relief to industries which have successfully carried the burden of proving both the existence of the unfair trade practice and of the tendency to cause injury to a domestic industry or restrain trade. This is illustrated most recently in the Presidential action taken in regard to the decision of the International Trade Commission in the *Welded Seamless Steel Pipe and Tube*¹¹ case. The International Trade Commission found that certain Japanese stainless steel pipe and tube products were being sold below the average variable cost of the product without commercial justification and with the tendency to restrain competition. The Commission

Section 211—Section 211(a), Section 337(g) (2) of the Tariff Act of 1930 (19 USC 1337 (g) (2)) is amended as follows:

(2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and transmits to Congress and the Commission a document setting forth his determination and the policy reasons for such determination, then effective on the date of the notice to Congress and the Commission, the determination by the Commission and the action taken under subsection (d), (e) or (f) with respect thereto shall have no force or effect for a period of 90 days. If both Houses of Congress adopt by an affirmative vote of a majority of the Members of each House, present and voting, a concurrent resolution approving the determination of the President within the 90-day period following the date on which the document referred to above is transmitted by the President to the Congress, the determination of the Commission and the action taken under subsection (d), (e) or (f) shall be suspended indefinitely.

(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c) of this section, be effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall be effective as

provided in such subsections, except that articles directed to be excluded from entry under subsection (d) of this section or subject to a cease and desist order under subsection (f) of this section shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary until such determination becomes final.

(4) If the President does not disapprove such determination within such 60-day period, or if he notifies the Commission before the close of such period that he approves such determination, then, for purposes of paragraph (3) and subsection (c) of this section such determination shall become final on the day after the close of such period or the day on which the President notifies the Commission of his approval as the case may be.

Period of effectiveness.—(h) Except as provided in subsections (f) and (g) of this section, any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

Importation by or for United States.—(i) Any exclusion from entry or order under subsection (d), (e), or (f) of this section, in cases based on claims of United States letters patent, shall not apply to any articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization of consent of the Government. Whenever any article would have been excluded from entry or would not have been entered pursuant to the provisions of such subsection but for the operation of this subsection, a patent owner adversely affected shall be entitled to reasonable and entire compensation in an action before the Court of Claims pursuant to the procedures of section 1498 of title 28.

Definition of United States.—(j) For purposes of this section and sections 1338 and 1340 of this title, the term "United States" means the customs territory of the United States as defined in general headnote 2 of the Tariff Schedules of the United States.

found that the products were being sold at prices which not only did not cover the full cost of producing them but did not cover the variable costs of production. The Commission determined that these sales had taken an increasing share of the market for imported welded stainless steel pipe and tube products and caused the exclusion from the market of products from other countries. The President chose to veto the relief ordered by the Commission despite the overwhelming evidence of the use of unfair trade methods. The importer, thus, lost in the trial but won in the political arena, a result which would not be tolerated if a domestic firm was proven to have violated our domestic fair trade laws.

The proposed amendment would permit a Presidential suspension of the remedy under section 337 if the President could persuade Congress to approve his action. If the President can make a case before Congress for what should be an extraordinary action, there may be reason to suspend relief.

SECTION 211(b). Section 337 of the Tariff Act of 1930 (19 USC 1337) is amended by adding a new subsection (k) to read as follows:

Private damage remedy for section 337.—In subsection (b), the addition of a private damage remedy to section 337 is proposed. One of the problems

Existing law	Fair Trade Enforcement Act of 1978	Analysis
	<p>(k) Private Damage Remedy. Any person, firm or corporation who has imported articles into the United States in violation of section 337 (a) shall be liable to any domestic manufacturer, producer or seller of a product of the same kind or directly competitive with the foreign merchandise imported in violation of section 337(a), for threefold the damages suffered as a result of the use of unfair methods as defined in section 337 (a). Any manufacturer, producer or seller of goods of the same kind or directly competitive with, articles imported in violation of section 337(a) may bring suit in the United States District Court in the District in which the goods were imported, or the District Court in which the Petitioner has its principal place of business. This subsection shall be effective despite a suspension of the Commission's determination under subsection (g). An affirmative determination of the Commission under subsection (a) shall create a rebuttable presumption of liability under this section.</p> <p><i>Section 212.</i>—The amendments made by section 211 shall become effective for all purposes on the 30th day following the enactment of this act.</p>	<p>with our current fair trade laws is the absence of a remedy which makes restitution for damages suffered before the invocation of the remedies provided. The damage remedy would make restitution for past loss and act as a deterrent against future use of unfair trade methods, working in much the same way as our domestic fair trade laws. This amendment would provide treble damages for a domestic producer, manufacturer, or wholesaler who has suffered injury as a result of the use of an unfair trade method in violation of section 337. A Commission determination under section 337 would create a rebuttable presumption of liability under this section, thus eliminating the need for the complainant to relitigate the case already presented to the Commission.</p>

TITLE III.—AMENDMENTS TO THE REVENUE ACT OF 1916

Existing law	Fair Trade Enforcement Act of 1978	Analysis
<p><i>Unfair competition.</i>—72. Importation or sale of articles at less than market value or wholesale price. It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: <i>Provided</i>, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.</p> <p>Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.</p> <p>Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.</p> <p>The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.</p>	<p><i>Section 301.</i>—Section 301 of the Revenue Act of 1916 (15 USC 72) is amended to read as follows:</p> <p>It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: <i>Provided</i>, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.</p> <p>Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.</p> <p>Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.</p> <p>The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.</p>	<p>Section 301 of the Revenue Act of 1916 has, for more than 60 years, been the damage section under the international fair trade laws. The statute provides damages for a person injured in his business or property because of the systematic importation of goods into this country at prices substantially less than home market value with the intent to injure domestic industry. The statute also provides criminal sanctions. The statute has never, in the more than 60 years of its existence, been successfully invoked. Indeed it has only been used in a few cases. The difficulty with the statute lies in the requirement that the intent to injure or prevent the establishment of an industry in the United States be proved. This has never been successfully accomplished. The issue does not lend itself to proof by means of objective evidence, and it is unlikely that subjective evidence will ever be available. Therefore, it is proposed that the statute be revised to remove the intent requirement and, at the same time remove the criminal penalty. (Without the criminal sanctions, the intent requirement is completely unnecessary.) The statute would then become a viable damage remedy.</p> <p>Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee. The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.</p> <p><i>Section 302.</i>—The amendment made by section 301 shall be effective for all purposes on the 30th day following the date of enactment of this act.</p>