REPORT IN SUPPORT OF RECOMMENDATION 73–4

THE ADMINISTRATION BY THE DEPARTMENT OF THE TREASURY OF THE LAWS AUTHORIZING THE IMPOSITION OF ANTIDUMPING DUTIES

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INTRODUCTION

In this report I will present my revised recommendations for changes in the administration of the antidumping laws.[1] Since I submitted my initial report I have had an opportunity to discuss my proposals at a meeting of the Committee on Ratemaking and Economic Regulation attended by representatives of the Departments of Treasury and Justice. I have received written comments[2] from the Customs Committee, Administrative Law Section of the American Bar Association, the Federal Trade Commission and George Bronz, an attorney with extensive experience in antidumping proceedings. I have also examined the amendments to the antidumping laws contained in the Trade Bill[3] submitted by the administration. Finally, and most significantly, I have had extended discussions concerning my proposals with Treasury officials who administer the antidumping laws.

I thought it would be desirable if I were to prepare the present report as a complete self contained examination of the issues rather than as a series of extensions and revisions which would have to be read in conjunction with my original draft. Thus with the exception of a few points as to which comparison of the two

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[1] In my original report (pp. 24–31) I also considered administration of the laws authorizing the imposition of countervailing duties. The proper treatment of this question turns upon the resolution of a threshold policy issue of considerable difficulty discussed in my original report. I have decided that it is inappropriate to try to formulate a recommendation on this issue within the confines of the present study. If the Committee takes a contrary view the discussion contained in the original report provides an adequate basis for further consideration of the matter.

[2] All of the comments are reproduced in the Appendix.

[3] "The Trade Reform Act of 1973," H.R. 6767, 93d Cong. 1st Sess., § 310 deals with antidumping. The bill will be cited Trade Bill § — .

versions may be enlightening or which are more fully developed in the earlier version because they then seemed more significant, the present report may be regarded as a complete superseding statement of my views.

Proposals

I recommend that:

(1) Tentative and Final Treasury Decisions (including Withholding of Appraisement) contain an explicit statement of reasons which makes manifest the issues presented and the disposition made of them.

(2) Counsel for interested parties be afforded an opportunity to confer with Customs' representatives prior to the completion of their verification of the data supplied by firms under investigation for suspected dumping in order to be apprised of the methods employed by the Customs' representative to verify the data and the information compiled by the Customs' representative (to the extent it is not confidential). Counsel should also have an opportunity to suggest additions to and refinements of the methods employed by the Customs' representative. Adoption of these suggestions would, however, be entirely discretionary with Customs.

(3) The memorandum containing Customs' recommendations for disposition of the case transmitted to the Office of Tariff and Trade Affairs (with the exception of portions disclosing confidential matter) be made available to the parties.

(4) A single agency, preferably Treasury, be assigned responsibility for both the Less than Fair Value (LTFV) issue now decided by Treasury and the "injury" issue now decided by the Tariff Commission.

(5) Present policy, which allows informal disposition of antidumping matters by agreement to discontinue the practice only when the relevant foreign price "exceeds the [American price] by an amount that is considered minimal in relation to the total volume of sales" be abandoned and informal disposition utilized whenever relief substantially equivalent to that obtainable in litigation can be secured by agreement.

(6) Dumping findings be limited to firms as to which there is evidence of a significant number of sales in contravention of the law.

(7) Review be available immediately after the completion of

the Tariff Commission* proceeding and extend to the question whether the determination is supported by substantial evidence contained in the "record" before Treasury when final action was taken.

An Overview of the Administration of the Antidumping Laws

The Department of the Treasury administers the laws authorizing the impositions of antidumping duties on goods imported into the United States.[4] These duties are designed to counteract the effects of international price discrimination, that is, the practice of foreign firms charging lower prices in the American market than they do abroad.[5]

Responsibility for administering these laws is shared by Treasury with the Tariff Commission. Treasury deals with the question of whether the goods are being sold at "less than . . . fair value" (LTFV) by which is usually meant at a lower price than the same goods are being sold in the country of manufacture.[6] If such a determination is made, the Tariff Commission then decides if the injury to domestic producers resulting from the sales required for the imposition of an antidumping duty has

* Or the single agency having responsibility for all determinations if proposal number (4) is adopted.

[4] 19 U.S.C. 160 et seq.

[5] For two recent studies of the antidumping laws reflecting the divergent views taken of them see Barcello, Antidumping Laws as Barriers to Trade—The United States and the International Dumping Code, 54 Corn. L. R. 491 (1972) (urging limited use to counteract predatory pricing) and Fisher, The Antidumping Law of the United States: A Legal and Economic Analysis, 5 Law and Policy in International Business 85 (1973) (urging extensive use against "continuous" dumping). For a collection of the earlier literature see Barcello, *supra*, 54 Corn. L. Rev. 494 n. 9.

[6] The term "fair value" is not explicitly defined in the statute. However, 19 U.S.C. 161, defining the amount of the antidumping duty, prescribes as the reference price "foreign market value (or in the absence of such value, then the constructed value)" and thus implicitly so defines "fair value." Foreign market value is in turn defined as

> "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 sale offered for sale in the principal markets of the country from which exported . . . or if not so sold or offered for sale for home consumption or if . . . the quantity sold for home consumption is so small . . . as to form an inadequate basis for comparison, then the price at which so sold or offered for sale . . . to countries other than the United States . . ."

(19 U.S.C. 164). Constructed value, essentially cost, is defined in 19 U.S.C. 165. The reference price in the United States is either the purchase price when imported for the account of a person other than the exporter (defined in 19 U.S.C. 162) or the exporter's sales price when the exporter imports for his own account and then sells (defined in 19 U.S.C. 163). The contest of the less than fair value ("LTFV") standard is further elaborated in Sections 153.2 through 153.8 of the Customs Regulations. These appear in 19 CFR and were recently repromulgated in toto. See 37 F. R. 26298 (December 9, 1972). References here will be to the regulations cited in Reg. and number.

occurred.[7] Review of the LTFV finding (to the Customs Court and Court of Customs and Patent Appeals) is available only after the Tariff Commission finds injury and an antidumping duty is imposed upon goods entering the United States.[8]

The Treasury stage of the proceeding is divided into two parts, an initial investigation by the Bureau of Customs and subsequent review by the Office of Tariff and Trade Affairs. The Customs phase is initiated by the submission, either by a district director of Customs (in fact rarely done) [9] or a private person, of information indicating that a violation has occurred.[10] A "summary investigation" is then conducted,[11] and if the requisite findings warranting further proceedings are made, a "full-scale investigation" is initiated by the publication of an Antidumping Proceeding Notice.[12]

A detailed questionnaire with respect to the sale of the goods in question in the relevant markets is then submitted to each of the firms included in the investigation. The information provided in response to the questionnaire is verified by a customs representative (usually located overseas) who examines the books and records from which the data is taken, interviews persons with knowledge of the practices in issue and submits a report to Customs in Washington.[13]

Throughout the Customs stage the person in Washington immediately in charge of the case is an official known as the case handler. The case handler prepares and transmits the questionnaire to the firms under investigation, instructs the Customs representative with respect to the verification of the data supplied and on occasion actually goes overseas to participate in the investigation.

After the case handler has examined the information supplied by the complainant and that supplied by the firms under investigation and verified by the customs representative he has a series of "disclosure conferences" with each of the interested

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[7] The Tariff Commission decides "whether an industry in the United States is being injured or is likely to be injured, or is prevented from being established by reason of the importation of such merchandise . . ." (19 U.S.C. 160(a)). I will refer to the three types of effect which warrant imposition of an antidumping duty as "the injury requirement."

[8] 19 U.S.C. 169.

[9] Reg. 153.25.

[10] Reg. 153.26. The information required in the notification is specified in Reg. 153.27.

[11] Reg. 153.29.

[12] Reg. 153.30.

[13] Reg. 153.31 gives only a very limited indication of how the full scale investigation is conducted. The description in the text is based on discussions with Treasury and Customs officials.

parties at which all of the accumulated data not classified as confidential are made available [14] and the tentative views of the case handler with respect to disposition of the case are communicated. Frequently a party, in response to what is learned at the disclosure conference, submits additional data and argument. There are then subsequent disclosure conferences presumably until all parties are fully informed as to the data which have been assembled and the questions which are presented, and provided an opportunity to submit facts and argument concerning all relevant issues.

All of the disclosure conferences are attended by only one of the parties. No transcript of what transpires is maintained. No rules of evidence are applied.

After the case handler has examined all the material which has been assembled, he drafts a detailed memorandum recommending disposition of the case. This is reviewed by supervisory personnel in customs and transmitted to the Office of Tariff and Trade Affairs in Treasury. (The memorandum is not available to the parties.) [15] The entire file accompanies the recommendation.

The officials in the Office of Tariff and Trade Affairs responsible for antidumping matters review the recommendation and a notice of tentative disposition of the case is issued.[16] Interested parties are then permitted to argue and present additional information at a hearing presided over by the Assistant Secretary for Tariff and Trade Affairs or his deputy. Briefs are submitted after the hearing. The case handler attends the hearing and prepares the initial draft of the final determination. This draft is then reviewed by the Assistant Secretary and his staff and a final determination issued. If LTFV sales are found the case is

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[14] In addition to the disclosure conference itself there is opportunity afforded to inspect and copy documents not treated as confidential. Provision is also made for disclosure in "generalized, summary or approximated form, without identifying details" of material granted confidential treatment. The question of access to documents is comprehensively treated in Reg. 153.23.

[15] I have been advised that it is now contemplated that a "non confidential summary" of the memorandum will be publicly available.

[16] This can take three forms. A tentative negative determination may be issued. (Reg. 153.33). If the firms under investigation agree to a six months period for withholding of appraisement then withholding of appraisement, in effect a tentative affirmative decision, will precede the final determination. (Reg. 153.34(b)). This is the usual practice. If no such agreement is made the withholding of appraisement and the final determination of dumping will be issued simultaneously. (Reg. 153.34(a)(3)). In this case what I have designated a tentative determination is in form final. However the issuance of the notice of withholding of appraisement triggers a right to a hearing before Treasury. (Reg. 153.37). Moreover since Treasury has power to revoke the "final" LTFV determination at any time prior to final Tariff Commission action (Reg. 153.3g) the action although nominally final, is really tentative in the sense of triggering a Treasury proceeding which could lead to the action not being taken.

referred to the Tariff Commission for consideration of the "injury" issue. If injury is found and a duty actually imposed review can be obtained in the Customs Court and Court of Customs and Patent Appeals.

I will first consider the procedures employed to develop the factual record and resolve the controlling legal questions. I will next evaluate the present division of responsibility between Treasury and the Tariff Commission, the method utilized for disposition without a formal determination, the coverage of the orders issued and finally the timing and scope of judicial review.

The Substantive Framework

Before addressing these issues, however, I believe it would lend clarity to my presentation if I were to outline my views as to the soundness of the substantive standard presently applied in antidumping cases and indicate how these views may bear on my conclusions with respect to the procedural issues considered. The LTFV requirement of the antidumping laws is satisfied solely by a showing of a disparity in the relationship of cost to price between goods sold abroad and in the United States.[17] No distinction is drawn among the reasons why such a disparity may exist.[18] Consequently if a higher price in relation to cost is realized

[17] I have somewhat simplified the problem in the text by assuming identity of the "goods" sold abroad and in the United States and that all costs incurred in the manufacture and distribution of the goods are in fact taken into account. Actually there are two additional complications, both of which are likely to increase the reach of the law. First the LTFV requirement is satisfied if the discrepancy is established with respect not only to identical but to "similar" goods sold abroad as well. Reg. 153.9. The term "similar" is not defined but explicit provision is made for reducing the price of the "similar" goods to make "allowance . . . for differences in the merchandise." The regulation further provides that in "making these adjustments . . . the Secretary will be guided primarily by the effect of such differences upon the market value of the merchandise but, when appropriate, he may also consider differences in cost of manufacture if it is established to his satisfaction that the amount of any price differential is wholly or partly due to such differences."

The second major complication is that of defining appropriate adjustments to the price of the goods sold abroad to reflect manufacturing and distribution costs attributable to those goods. (Reg. 153.8.) There are many questions of judgment subsumed under this issue. My examination of the documentary record and conversations with Customs' officials moreover indicate that at least some costs attributable in an economic sense to the goods sold abroad are not allowed. Thus, for example, although the regulations and Treasury practice would permit a deduction for "technical assistance," provided to a purchaser to aid him in selling or servicing the goods, no deduction will apparently be allowed for any portion of the salary of an employee who performs these duties along with others.

The reasoned elaboration of these two major issues would be perhaps the main substantive benefit of adopting formal hearings and decisions which reveal in meaningful detail the bases of the conclusions reached.

[18] It is generally agreed that there are a number of circumstances in which price discrimination is efficiency enhancing. See e.g., Alchian and Allen, Exchange and Production Theory in Use 416 (1969) and Lipsey and Steiner, Economics 258–63 (1972).

abroad, no matter what the reason, the LTFV requirement is satisfied. As construed by the Tariff Commission, the injury requirement is also satisfied solely upon a finding that domestic firms by reason of the LTFV sales have suffered a substantial loss of sales or realized significantly lower prices on a substantial number of sales.[19]

I believe, however, that at most only one type of price discrimination, that designed to eliminate competition so that monopoly pricing can then be used ("predatory pricing") might be appropriately banned.[20] My doubts as to whether even this practice should be made unlawful are essentially empirical. While it is theoretically correct that a firm could rationally incur losses in the short run to drive out competition and more than recoup in the long run by practicing monopoly pricing (until reentry induced by the high prices) the empirical evidence suggests that this tactic is not often likely to be successful.[21] Moreover in the case of international trade, where by definition the class of potential suppliers is very large, the chances of profitable predatory

[19] I have again simplified in the text. In addition to the nature of the impact which is required, discussed in the text, there is also the question of the requisite casual relationship between the LTFV sales and the deleterious happenings in the industry. Recent decisions have evidenced extreme liberality in finding the statute satisfied in both of these respects. See e.g., Northern Bleached Hardwood Kraft Pulp from Canada, T.C. Pub. 530 (1972) (finding of injury by equally divided commission); Bicycle Speedometers from Japan, T.C. Pub. 513 (1972); Large Power Transformers from France, Italy, Japan, Switzerland and the United Kingdom, T.C. Pub. 476 (1972) (imports small share of market, primary reliance on lower prices realized by domestic firms); and Instant Potato Granules from Canada, T.C. Pub. 509 (1972) (no injury but finding that domestic industry "likely to be injured".

[20] Barcello, note 2 supra and the Antitrust Division of the Department of Justice, (see Antitrust Division Submission to Treasury, June 19, 1972 p. 5), among others take a similar view. It is widely agreed that in any event the law as presently interpreted, which extends beyond the Antidumping Code negotiated under GATT auspices in 1967, (TIAS No. 6431) and any consumer oriented economic justification so far advanced, constitutes a significant barrier to international trade. See authorities cited note 2 supra. Congress has, however, expressly repudiated the GATT Antidumping Code agreed upon during the Kennedy Round of international trade negotiations in an effort to restrict enforcement of antidumping laws by the signatory countries. See Fulda and Schwartz, Cases and Materials on the Regulation of International Trade and Investment 435–444 (1970).

I have not examined the question of whether the injury requirement should be construed to embody only a predatory pricing theory. Barcello, who on policy grounds would prefer such a view, finds the original legislative history "confused and indecisive" (54 Corn. L. Rev. 559, see also 536–8, 551 n. 282). Obviously, problems of legislative acquiescence and the effect of Congressional rejection of the GATT code would have to be faced if the law were reinterpreted in this fashion. In any event there is no evidence of any intention to do so by the present Commission.

[21] I am unaware of a single documented instance in which the tactic was successfully employed by a firm to monopolize a market in another country. Of course, the antidumping laws have been on the books for some fifty years, and various antitrust laws before that, so it is impossible to rule out the possibility that but for these laws the tactic might have been used successfully. For recent studies casting doubt on the efficacy of predatory pricing see Posner, Natural Monopoly and Its Regulation, 21 Stan. L. Rev. 548, 587 (1969) and authorities cited therein.

pricing seem even more remote.[22] Despite these doubts, however, I do believe that a statute limited to predatory pricing would be theoretically unassailable, although perhaps not in fact worthwhile, given the improbability that the tactic could be successfully employed, and the costs of enforcement.

The antidumping statute, as presently construed, however, goes beyond this conception and reaches all instances of price discrimination having significant impact in the American market. Indeed it extends to cases where substantial benefits to American consumers result from the practice.

In one fundamental sense my substantive objections may be said to have procedural relevance. While the legislative history and contemporary decisions are ambiguous about the underlying purpose of the antidumping laws, the predatory pricing rationale was certainly an important one mentioned in the legislative history and in influential theoretical writing about international price discrimination.[23] If the statute is viewed as based on this

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[22] A second theory is that persistent price discrimination by obscuring the "true" costs of goods leads to a misallocation of resources in the long run. I will not examine this question at length and limit myself here to two comments. First, the earlier writing asserted that price discrimination would somehow induce inefficient exit and entry by firms competing in the market where the low price was charged. (Viner, Dumping: A Problem in International Trade 139 (1966)). There was however no real theoretical or empirical demonstration of why price discrimination would necessarily be short lived or why competing domestic firms would not accurately assess the likelihood of the practice continuing and adjust accordingly. Nor is there any consideration of how government intervention can be framed to be responsive to this type of inefficiency—if indeed it does exist. Secondly, to the extent that the price discrimination reflects a high price abroad resulting from government protection of the local industry, the harm, if it is so described, is suffered by the foreign consumers. This "harm" would result whatever prices were charged in the American markets. Moreover the protection by tariff may reflect a desire to encourage the local industry because of benefits it confers (such as training and innovation) for which it cannot charge in the market. These are termed in economic analysis "positive externalities." If this is so the protection may be "efficient." See generally Schwartz and Harper, The Regulation of Subsidies Affecting International Trade, 70 Mich. L. Rev. 831 (1972).

In any event all of this will be harmful to the American consumer of the country as a whole only in a very special case. Essentially, if prediction as to the pricing practices of the foreign firm engaging in price discrimination is particularly difficult for its American competitors so that inefficent exit and reentry from the industry result and the government could induce more efficient adjustment some form of intervention may be appropriate. The present law, of course, is not framed to do this. Nor, as is discussed in the text with respect to the predatory pricing theory, can the law be said to strike a good rough balance between the benefits of lower prices and the harm flowing from inefficient exit and reentry induced by price discrimination. See generally Barcello, note 2 supra 503-13, Anthony, The American Response to Dumping from Capitalist and Socialist Economics—Substantive Premises and Restructured Procedures After the 1967 GATT Code, 54 Corn. L. Rev. 159, 165–77 (1969).

I do not say, of course, that American firms may not be hurt in the sense of losing sales or having to charge lower prices. I only say that the consumer gain exceeds the producer loss and that I am unable to see why on grounds of "fairness" the producer loss is different than that suffered by any other firm which is unsuccessful in competing with domestic or foreign rivals.

[23] Viner, note 15 supra at 26.

theory but framed to pose the simpler questions of price discrimination and substantial impact because of the procedural judgment that a rule approaching per se illegality is desirable in light of the great likelihood of price discrimination being used for predatory purposes, the small loss of consumer benefits from a blanket condemnation and the high costs of applying a rule distinguishing predatory from beneficial price discrimination, I cannot embrace this judgment. I have concluded, however, that it is not my present charge to deal at length with this question. I do feel, however, that a fundamental reevaluation of the statute would be a very useful undertaking. If indeed it were concluded that predatory pricing were the only case worth proscribing then the question of whether other remedies against the practice might be sufficient or whether jurisdiction should be transferred to one of the agencies enforcing other price discrimination laws might also profitably be considered.[24]

The view I take of the governing law does seem to me, however, inevitably relevant, to some degree at least, in resolving various of the procedural issues I will examine. For example, since I have doubts about the substantive standard, I see particularly great benefit in procedural change facilitating evaluation of decisions interpreting the law. And when the question is one of dealing with uncertainty as to whether the statute has been violated, and it is possible to resolve doubts by imposing liability, withholding liability, or incurring the costs of gaining the data necessary to reduce uncertainty, my choice will necessarily be influenced by my appraisal of the gains and losses flowing from enforcement.

I. The Procedures Employed

A. THE PRESENT SYSTEM

The present procedures utilized to explore the factual and legal issues suffer from two basic and related defects.

First, the information supplied by one party is transmitted

[24] There is presently a criminal statute proscribing dumping which has virtually never been enforced. Revenue Act of 1916, ch. 463, §§ 800–01, 39 Stat. 798, 15 U.S.C. §§ 71–72 (1970). The Robinson-Patman Act (15 U.S.C. 13a) administered by the Department of Justice and Federal Trade Commission deals with price discrimination. Also various treaties ban "business practices which restrain competition" so that diplomatic means to induce the foreign government to move against the practice also exist. See Fulda and Schwartz, note 20 supra at 102. The Federal Trade Commission has, however, submitted comments indicating a lack of interest in undertaking administration of the antidumping laws.

informally without an opportunity provided to an adversary party to cross-examine persons having direct knowledge of the facts or examine relevant documents to verify the correctness of the data. Consequently principal reliance must be placed on the diligence and skill of Customs' personnel (prodded of course by the suggestions of adversary parties) in verifying the accuracy of the information upon which the determination is based.

Secondly, parties wishing to respond precisely to the issues upon which the case will turn are dependent upon the informal discussions at the disclosure conference. The published determinations are very general and do not really delineate the issues.[25] At no stage are the issues precisely stated and the tentative resolution of them explained in an authoritative formulation upon which counsel for the litigants can focus. Such a formulation would be useful in three ways: (1) in preparing argument and the presentation of data at the Treasury stage, (2) in pursuing judicial review and (3) in future decisionmaking by other firms seeking to ascertain the content of the law in order to comply with it.

B. THE ALTERNATIVE OF FORMAL ADJUDICATORY HEARINGS

My recommendation stresses improvement in the explicitness of the decisions rendered to facilitate responsive, informed pres-

[25] I thought it might be useful to quote the full text of the substantive portions of a decision in a case which I ascertained from examining the file and interviewing Custom's personnel to be an extremely complicated one:

"I hereby determine that for the reasons stated below, television receiving sets, monochrome and color, from Japan are being, or likely to be, sold at less than fair value within the meaning of section 201(a) of the Act.

Statement of Reasons On Which This Determination Is Based:

The information currently before the Bureau reveals that the appropriate basis of comparison is between purchase price or exporter's sales price and adjusted home market price.

Purchase price was calculated on the basis of f.o.b. or f.o.r. packed prices with deductions for freight, packing, and other charges as applicable. The applicable Japanese commodity tax was added to this price.

Exporter's sales prices was calculated by deducting from the resale prices of the related firms to distributors in the United States any applicable discounts to arrive at a net selling price. From the latter, appropriate deductions were made for inland freight in Japan, ocean freight and insurance, United States duty, brokerage charges, United States freight, warranty costs, packing, and commissions and other selling expenses incurred in the United States. To this additions were made for any applicable Japanese commodity tax refunded or not paid upon exportation of the merchandise.

Home market price was based on the delivered price to distributors in the home market. Appropriate deductions were made for discounts and rebates granted for cash, quantities, and certain sales promotions. From the net price adjustments were made for commissions, warranty and installation costs, inland freight, inland insurance, patent fees, bad debts, where applicable, and packing. Adjustment were also made for differences in the merchandise, and for differences in advertising and credit costs.

Purchase prices or exporter's sales prices were lower than home market prices by amounts that were more than minimal in relation to the total volume of sales."

(Television Receiving Sets, Monochrome and Color, from Japan 35 F.R. 18549 (1970).

entation by counsel for the parties. I do offer some suggestions for improving the procedures utilized to assemble the facts but stop short of proposing a formal adjudicatory hearing with the opportunity to cross examine and other attendant procedural safeguards. Before turning to my specific proposals I shall try to explain my reasons for rejecting a formal hearing procedure.

The increased costs of a formal hearing would fall largely on the foreign firms under investigation for suspected dumping. Their personnel would have to testify with respect to the relevant practices. They would have to assemble the books and records to be offered in evidence and made available for inspection by an adversary party. While these costs could be minimized by devices such as holding the hearings overseas where the knowledgeable personnel are located and regulating the discovery and inspection of documents to avoid harassment, a substantial increase in cost to the exporter above that incurred under existing procedures appears unavoidable.

There would in addition be large "psychic costs." Having a firm's books inspected and a firm's employees cross examined by an adverse party from another country (who is almost certainly a competitor) is likely to pose a very substantial threat of competitive injury. It is true that much of this danger can in fact be avoided by confidential treatment of material whose disclosure would cause competitive injury.[26] Nevertheless, the risks of injury from extended adversary proceedings as perceived by a foreign firm, unfamiliar with American methods of law enforcement and fearful of favoritism to American nationals, may be very great.

These various additional costs will have a deterrent effect on the decisions by foreign firms whether to engage in price discrimination. The more burdensome the procedure the greater will be the incidence of foreign firms foregoing the sales in the United States which they can make only by selling at a lower price here.

Such a deterrent impact can be justified only if it is outweighed by the value of the improvement in accuracy resulting from the added expenditure. Here whatever gain in accuracy does occur

[26] The close relationship of confidential and non-confidential information in proceedings of this kind would also render very costly the process of segregating the two classes and holding hearings limited to non-confidential matters. For example Reg. 153.23(c)(2) provides that "price information" will ordinarily be disclosed but that the "names of particular customers or the price or prices at which particular sales were made" will be kept confidential. A hearing dealing with the pricing practices of a firm suspected of dumping would be plagued with the necessity of appropriately categorizing evidence within these regulations.

will be manifested primarily in fewer instances of what was in fact dumping being improperly exonerated rather than in fewer instances of what was not in fact dumping being improperly held unlawful. For it is principally the data supplied by the foreign firm which is subjected to less searching verification under present procedures than would be the case in a formal adjudicatory hearing.[27]

How these costs and benefits are to be weighed cannot be wholly disassociated from the view taken of the merits. If one believes, as I do, that the benefits to American consumers in receiving goods they want at low prices are immediate and substantial and the detriment from price discrimination, in all but a very limited class of cases, uncertain and insubstantial, one will reject a procedure increasing the costliness to foreign concerns of antidumping proceedings unless the expected increase in accuracy is very great. If you believe that the harm flowing from price discrimination is greater or the benefits less, then a larger litigation expenditure is appropriate. I do believe, however, that even if a view essentially favorable to the present antidumping laws is taken that the benefits in increased accuracy which would result from formal adversary hearing procedures are not worth the costs involved. The present procedures offer substantial assurance of accuracy. The proposals I make will, at only slightly greater cost, further improve the process by providing additional opportunity for counsel to test the legal and factual premises upon which the determinations are based. The procedure as thus improved seems to me to strike a sensible balance in assuring accuracy at reasonable cost.[28]

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[27] To some degree data supplied by competitors seeking to establish that dumping has occurred would also be subject to more searching inquiry. For example evidence as to functional differences or consumer perception of goods when the issue is appropriate treatment when identical goods are not sold here and abroad could be more effectively challenged by firms under investigation for suspected dumping.

[28] I have also rejected the idea of requiring that all parties be permitted to attend disclosure conferences and a transcript made of the proceedings. It is true that there is a risk that factual and legal assertions made at the conference may be influential but still never manifest themselves in a way that allows an adversary party to refute them. The problem, however, is that to a considerable extent the disclosure conference is devoted to a consideration of confidential matters. If all parties were allowed to attend, the conference would have to be limited to non-confidential matters and a second conference held about confidential matters. Since it is often necessary to examine confidential and non-confidential information relating to the same issue the separate conferences would introduce substantial inefficiency. Moreover since some discussion out of the presence of adversary parties is unavoidable the risk of ex parte assertions not subject to prompt refutation cannot in any event be wholly eliminated. Finally if, as I suggest, the determinations are made more detailed the risk of *ex parte* assertions influencing the decision but not being subject to refutation is decreased.

C. PROPOSALS FOR CHANGE

1. *More Explicit Determinations*

The single most important proposal I make is that the tentative determinations which precede the adversary stage before the Office of Tariff and Trade Affairs and the final determinations be made explicit and detailed so as to reveal what matters are at issue and how they have been resolved.[29] As indicated above this change would be beneficial in three ways. Most significantly, parties seeking to persuade the Office of Tariff and Trade Affairs that the disposition of the case tentatively adopted after a preliminary review of the Customs recommendation is erroneous would be greatly aided if they could focus on a reasoned presentation of the proposed decision which revealed the factual and legal premises upon which it was based. In addition, judicial review would be facilitated by an explict statement of reasons in the final determination. Finally persons seeking to determine the content of the antidumping laws in order to comply with them would have the benefit of revealing precedent.

The two principal issues in antidumping cases are appropriate adjustments in the price charged for the goods in either market to reflect differences in "circumstances of sale" and in the nature of the goods sold in the respective markets when identical goods are not sold in both. These matters are covered in regulations which raise numerous difficult issues of interpretation. These issues are rendered even more difficult by the necessity of applying the regulations to the wide variety of circumstances encountered in dealing with practices occurring throughout the world.

At the present time the determinations are extremely general and give virtually no guidance as to how these issues have been resolved. Counsel are essentially dependent upon the informal explanations given at the disclosure conference. An appellate court has no authoritative document articulating the bases of the determination. Persons researching the antidumping laws are essentially unable to find useful precedent—except through in-

[29] As indicated above, the tentative determination would be either a tentative negative determination, a notice of withholding appraisement, or a notice of withholding appraisement accompanied by what is purportedly a final affirmative determination—but one subject to revocation prior to Tariff Commission action. (See n. 16, supra.) My recommendation extends to all of these. At the present time the Notice of Tentative Negative Determination (Reg. 153.33(a)), the final Affirmative Determination (Reg. 153.35) and tentative order revoking or modifying a final determination (Reg. 153.41) are required to include a statement of reasons. A similar requirement is imposed by statute upon final determinations. (19 U.S.C. 160(c)). Present practice may well not satisfy these requirements.

formal conversations with Customs' personnel as to what has in fact been done.

The change I propose would entail very little additional cost. The matters which would be included in the published determinations already exist in the Customs' memorandum of recommendation and other internal documents. The added expense is limited to the preparation of an explicit publicly available decision.

The Treasury officials to whom I have spoken indicate that the possibility of changing the present practice to provide more explicit decisions is under consideration at the present time.[30] They acknowledge the likelihood that beneficial changes can be adopted. As I have indicated above, this relatively simple and inexpensive proposal is in my judgment the most useful innovation in Treasury practice which can be introduced.

2. *Disclosure Conference with the Customs Representative*

It is the customs representative stationed overseas who verifies the data supplied by the exporter by examining the books and records from which the information is taken and interviewing knowledgeable personnel. Some gain in accuracy would no doubt be achieved if domestic competitors interested in having an antidumping duty imposed were afforded an opportunity to inspect the relevant records and cross examine the knowledgeable personnel of the exporter and the customs representative. Nevertheless, for the reasons indicated above I reject such procedures as unduly costly. It does seem, however that, in light of the great reliance which must be placed on the customs representative if adversary proceedings with respect to the data he assembles continue to be substantially curtailed, an opportunity should be afforded to interested parties to meet with the customs representative prior to the completion of his investigation. At that time he could informally disclose the methods he has employed to verify the data supplied and his tentative conclusions with respect to the facts. Counsel for the interested domestic firm could then propose extensions or refinements in the methods employed to verify the data. I see no way to avoid leaving to the unreview-

[30] The administration bill also reflects an acceptance of the need for more explicit determinations. The bill replaces the present "statement of reasons" requirement (19 U.S.C. 160(o)) with the apparently more demanding obligations to include in all final determinations "a statement of findings and conclusions and the reasons or bases therefor, on all the material issues of fact or law presented on the record" (Trade Bill § 310(b)(3)).

able discretion of the customs representative and the Customs personnel in Washington the question of adopting the additional methods of verification which are proposed. This is a question which turns inevitably on judgments as to the allocation of scarce enforcement resources and the benefits to be gained from the additional inquiry which cannot be policed by outside agencies.

I do not believe, however, that the fact that adoption of the propsals advanced by counsel for the domestic firm is discretionary with Customs will render the procedure unproductive. Customs is committed in principal to conducting an objective investigation rather than prosecuting or defending the claim of dumping. The customs representative if he is properly performing his job will be responsive to sound suggestions for improvement in the methods employed.

The occurrence of such disclosure conferences will not in any event be commonplace. The conferences will often be held overseas and involve substantial expense to the firm having a representative participate. They will be held presumably only in economically important cases where the large expense appears justified. And if, as I suspect, complexity and economic significance tend to be found together these will be "hard" cases in which the customs representatives are likely to be tentative in their own views and therefore receptive to suggestion.

3. *Access to Customs' Recommendations*

The memorandum setting forth the recommendation of Customs for disposition of the case contains a detailed discussion of the factual and legal issues. A party having access to this memorandum would obviously be in a better position to formulate his presentation to the Office of Tariff and Trade Affairs. Discrepancies between the tentative decision (which, as indicated above, is issued before the hearing conducted by the Office of Tariff and Trade Affairs) and the Customs' recommendation would be particularly revealing in indicating what issues are crucial to the determination.

As far as I know the only argument against this proposal is that a subordinate will be fearful of advancing a position contrary to one he anticipates will be taken by his superior if he knows that the disagreement will be known publicly. This result is supposed to arise in turn because the superior would be embarrassed by the disagreement and the subordinate desirous of avoiding unpleasantness for the superior—presumably because

of the influence the superior can exercise over his career, or for whatever other reasons may motivate the subordinate to spare his superior.

Although I claim no expertise as a psychologist or close observer of the behavior of government officials, my own view, for what it's worth, is that this argument is not based upon an accurate conception of how responsible officials behave—at least in the administration of the antidumping laws. The issues involved are complex and subject to different resolution by reasonable persons. I do not believe that a discrepancy between the Customs' recommendation and the final Treasury decision will cause the officials of the Office of Tariff and Trade Affairs any great concern. Nor do I believe, particularly when it is understood that the memorandum will be a public document expressing only the view of Customs, that the personnel in Customs will be inhibited in dealing with cases in accordance with their judgment of the merits by fear of displeasing their superiors.

There is, moreover, additional reason in this situation to favor disclosure. I have decided, on the basis of the practical considerations discussed above, not to recommend a great extension of the adversary nature of these proceedings at the stage at which the facts are being assembled and tentative legal views formulated. In doing so I have inevitably had to increase the reliance placed upon the ability of counsel to test, after the investigation is completed, the conclusions which have been drawn by the officials administering the law. For the information will continue to be gathered in a fashion substantially immune from the usual procedural safeguards of an adjudicatory hearing. Consequently a measure, such as public disclosure of the Customs' recommendation, which enhances the ability of counsel to assure that these conclusions are sound, is of particular value because of the great importance assigned to adversary presentation at the later stage when it becomes the predominant mode of procedure.[31]

II. The Division of Responsibility

The present division of responsibility between Treasury and the Tariff Commission was established in 1954.[32] Prior to that time Treasury had jurisdiction with respect to both the LTFV and injury issues. The reason for the change was the supposed ex-

[31] The Administration bill places great emphasis on the adversary proceeding before the Office of Tariff and Trade Affairs. It makes the holding of the hearing mandatory, grants standing of right to all domestic competitors, and to others on a showing of good cause and requires that a transcript be maintained. Trade Bill § 310(b).

[32] Customs Simplification Act of 1954, 68 Stat. 1138, 19 U.S.C. § 160 (1970).

pertise of the Tariff Commission in deciding injury questions.[33] Apparently no attention was given to the question of the inefficiency which might be introduced by the division of responsibility.

The principal thrust of my recommendation is not that I prefer either the Tariff Commission or Treasury as the competent agency but rather that greater efficiency would be achieved if a single agency had jurisdiction over all relevant questions. This is so for essentially two reasons. First, it may appear, either at the initial stage of consideration or during the full scale investigation, that there is a substantial doubt whether the requisite injury has occurred. If it also seems that the inquiry necessary to decide if such injury has in fact occurred is substantially less extensive than is required for the LTFV issue it would be efficient to concentrate initially on the injury issue. In the event that it is determined that there has been no injury the LTFV issue need not be litigated.

Two factors suggest that this may often be the case. First, instances in which Treasury has found sales at LTFV but the Tariff Commission determined that there has been no injury have been extremely common, even during the recent period in which Treasury has applied an extremely liberal standard of injury.[34] Secondly, the factual complexity of many of the recent

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[33] See S. Rep. No. 2326, 83d Cong., 2d Sess. 2 (1954), and Hearings on H.R. 9476 Before the House Ways and Means Committee, 83d Con., 2d Sess., 39–41 (1954).

[34] During the years 1972 and 1973 the following determinations of no injury by the Tariff Commission have been made:

Hand Pallet Trucks from France, TC Pub. No. 498, July 1972
Welded Wire Mesh from Belgium, TC Pub. No. 497, July 1972
Pentaerythritol from Japan, TC Pub. No. 508, September 1972
Cast-Iron Soil-Pipe Fittings from Poland, TC Pub. No. 515, September 1972
Wood and Polyester/Wool Worsted Fabrics from Japan, TC Pub. No. 523, November 1972
Base Metal Parts for Incandescent Illuminating Articles, Suitable for Residential Use, from Canada, TC Pub. No. 525, December 1972
Kraft Wrapping Paper from Canada, TC Pub. No. 527, December 1972
Perchlorethylene from Italy, Japan and France, TC Pub. No. 531, December 1972
Color Television Picture Tubes from Japan, TC Pub. No. 529, December 1972
Kanekalon Wigs from Hong Kong, TC Pub. No. 534, December 1972
Collapsible Baby Strollers from Japan, TC Pub. No. 556, March 1973
Manual Hoists from Luxembourg, TC Pub. No. 560, March 1973
Impression Fabric of Manmade Fiber from Japan, TC Pub. No. 577, May 1973
Ceramic Glazed Wall Tile from the Philippines, TC Pub. No. 599, August 1973
Aluminum Ingot from Canada, TC Pub. No. 602, August 1973
Deformed Concrete Reinforcing Bars of Non-Alloy Steel from Mexico, TC Pub. No. 605, August 1973.
Electronic Color Separating or Sorting Machines from the United Kingdom, TC Pub. No. 609, September 1973

Sixteen affirmative injury determinations were made during the same period. In one case, Fishnets and Netting of Manmade Fiber from Japan, TC Pub. 477, April 1972, the Commission reached an affirmative finding of injury as to fish netting but made a negative injury determination on fish nets.

Treasury determinations indicate that the litigation of the LTFV question may easily be as or more complicated and therefore costly than the injury determination. For under recent injury decisions all that needs to be decided is that there has been substantial loss of sales or decrease in the prices realized by domestic producers by reason of the LTFV sales. On the other hand, under the LTFV question two principal types of complex issues must be resolved. First, it must be decided which costs incurred by the foreign concern may be deducted from the price realized abroad in making the relevant comparison. This issue often leads to an extensive examination of the structure and prevailing distributional practices of the foreign and domestic markets. Moreover, complex issues as to the appropriate economic and accounting treatment or various expense items must also be resolved. The second principal type of question arises when identical goods are not sold abroad. It then becomes necessary to compare the goods sold abroad and those sold in the United States from the point of view of the value consumers place upon them and the cost of producing them. This too can raise extremely complicated questions.[35]

Under present law, Treasury has only very limited authority to dispose of a case on the ground that there has been no injury. At the preliminary stage there is a requirement that "some evidence" of injury be found. This is taken to be no more than data suggesting that some American firms have lost sales or realized lower prices. No real attention is apparently given to the question of how substantial these sales are when measured against the total output of the firms involved or the industry as a whole. Nor is there any exploration of the factors other than LTFV sales which may have resulted in the domestic firms suffering economic loss. At the conclusion of the proceeding, Treasury is required to make no greater finding of injury than was necessary in order to institute a full scale investigation. I am informally advised, moreover, by one of the customs' officials, that in fact no attention at all is paid to the injury question once the full investigation has begun. Thus many cases which would be efficiently disposed of by a prompt and reasonably complete inquiry into the injury question are instead extensively litigated before Treasury

[35] For example, in the transformer case all equipment was made to order. Ultimately the comparison was made essentially on the basis of dry weight. This is turn raised a host of subsidiary issues as to which features required an adjustment in applying the dry weight measure and which were already reflected in the relationship of weight to value.

See Brief of Westinghouse Electric Corporation filed with Treasury on November 23, 1971, p. 18.

on the LTFV issue only to be dismissed by the Tariff Commission on the ground that there has been no injury.

The second respect in which it would be efficient to have a single agency responsible for all issues relates to the substantial factual overlap between the two questions. To begin with, it is not possible to find whether there have been LTFV sales without gaining some idea of how extensive the practice has been. Beyond this, however, in the course of determining such questions as whether a price comparison is appropriate or whether certain items of cost should be allowed as deductions from the price charged abroad, it is necessary for Treasury to make an extensive inquiry into the structure and prevailing methods of doing business in the industry concerned. The fruits of this inquiry are obviously germane to the injury issue.

An additional benefit which would be derived from a unified procedure is that of avoiding the detriment of provisional relief in cases in which it is ultimately determined that there has been no unlawful dumping. Withholding of appraisement is the formal action which subjects all subsequent entries to antidumping duties if the requisite LTFV and injury findings are thereafter made. After the witholding of appraisement order issues the exporter must post a bond to cover subsequently imposed antidumping duties if he wishes to clear customs and sell the goods. The amount of the liability is, of course, uncertain. The effect of withholding appraisement then is to impose immediate substantial costs on the foreign firm. Treasury practice, in accordance with the international consensus stated in the GATT antidumping code,[36] requires a finding of injury before an order withholding appraisement can be issued. In fact, however, Treasury consideration of the injury isssue is extremely limited. This is partly a result of the present division of authority. Treasury, which does not have principal responsibility for the injury question, can be expected to devote fewer resources to its determination and bring lesser expertise to bear than if it did have primary responsibility. The unjustified deterrent consequence of frequent withholding of appraisement where no injury is in fact present can be of substantial importance.

The division of responsibility can only be justified if the benefits which can be derived by economizing the litigation effort by

[36] For a discussion of how Treasury procedures were altered to comply with the GATT code, in particular the requirement of an injury finding before the issuance of a withholding of appraisement order see Anthony, The American Response to Dumping from Capitalist and Socialist Economies—Substantive Premises and Restructured Procedures after the 1967 GATT Code, 54 Corn. L. Rev. 159, 188 (1969).

sometimes initially focusing on the injury issue and disposing of the case without passing on the LTFV issue, always avoiding the cost of twice presenting evidence relevant both to the LTFV and injury issue and avoiding unwarranted withholding of appraisement are outweighed by advantages offered by the present arrangement. These would have to be based on the conclusion that Treasury is so superior to the Tariff Commission in dealing with the LTFV question and the Tariff Commission so superior to the Treasury in dealing with the injury question that the loss from taking either function and transferring it to the other would exceed the gain of a single unified procedure. I do not believe that this is so.

I will not try to evaluate the quality of the two agencies. I do submit, however, that there is nothing about either the LTFV issue or the injury issue which requires an expertise that either Treasury or the Tariff Commission does not have or at least couldn't readily develop. The LTFV question is a technical one of price discrimination which is decided by the FTC and the Courts under various other laws. I know of no reason why a knowledge of customs practices or any of the other matters within the jurisdiction of the Treasury Department is required to decide if price discrimination has occurred. Thus the Tariff Commission is competent to deal with this question.

Nor do I believe that to any great degree special Tariff Commission expertise is required to decide the injury issue. The issue has become so simplified that matters such as the assessment of long range consequences to the competitive strength of domestic industry or the costliness of changing to alternative activities by firms displaced by foreign competition, as to which the Tariff Commission might claim some special competence, play no part in the decision. The one remaining area of arguable expertise may be in deciding which of several factors were responsible for the loss of sales or decrease in revenues. The Tariff Commission does decide similar questions in relief clause and adjustment assistance proceedings.[37]

I do not believe, in balance, that the benefits of specialization outweigh those of a unified proceeding. Although I have no really confident judgment, I am also inclined to believe that both issues should be assigned to Treasury. Treasury includes the existing customs agencies which generate much of the information re-

[37] See generally Fulda and Schwartz, Cases and Materials on the Regulation of International Trade and Investment 395-421 and Fulda, Adjustment to Hardship Caused by Imports: The New Decision of the Tariff Commission and the Need for Legislative Clarification, 70 Mich. L. Rev. 791 (1972).

quired in antidumping proceedings. Moreover, after the injury finding, the matter is returned to Treasury for implementation of the decision. Treasury must therefore in any case keep abreast of developments in the industry.

The reason why my judgment is tentative is that it is not obvious to me why, if all questions were assigned to the Tariff Commission, appropriate means of communuication between Customs and the Tariff Commission could not be devised. It does seem likely, however, that more efficiency can be achieved within a single department embracing all the agencies participating in the processing of the case. As indicated above, however, my principal recommendation is for a single agency dealing with all the relevant issues. No doubt the Tariff Commission, Treasury or indeed the Federal Trade Commission, which enforces similar price discrimination laws, could develop suitable machinery to assume exclusive responsibility for antidumping cases.

III. Other Procedural Issues Within Treasury

A. DISPOSITION BY EXPORTER'S PRICE ASSURANCE

One method commonly employed to dispose of dumping cases is to have the exporter agree to discontinue the practice and avoid litigation of the entire controversy.[38] In mid-1970 Treasury introduced a substantial change in policy with respect to disposing of cases in this fashion.[39] Purportedly to avoid "hit and run

[38] Reg. 153.15.

[39] The policy discussed in the text is not reflected in the regulations which require only a determination that "price revisions have been made which eliminate the likelihood of sales at less than fair value and that there is no likelihood of resumption . . . or . . . [s]ales to the United States have terminated and will not be resumed. . . ." I was informally advised by a customs' official that the reason why the policy with respect to the substantiality of the margins and sales was not included in the regulations was a desire to demonstrate dramatically the intensified level of enforcement and then gradually relax the policy as its impact resulted in a decreased incidence of dumping. The change in Treasury policy is discussed in Treasury Press Release May 26, 1970 (statement of Assistant Secretary Rossides) and T.D. 70–127. See also Hearings on Tariff and Trade Proposals Before House Comm. on Ways and Means, 91st Cong. 2d Sess. 522 (1970) (remarks of Eugene Rossides).

There has been much criticism in the comments submitted when the present rule was under consideration of the extensiveness and unlimited duration of the reporting requirements imposed on firms who give price assurances as well as the ability of Treasury to immediately withhold appraisement if the proceeding is reopened. If I assume that the antidumping laws are substantively sound I am unable to join this criticism. While the reporting requirements are ardous, all of the data called for appears to be relevant. Nor do I find an immediate withholding of appraisement unreasonable if Treasury believes that there are "reasonable grounds to believe or suspect" that the practice has been resumed. I do not know either any way to generalize about how long the reporting should continue. Reg. 153.15(h) does contemplate final termination in the discretion of the Secretary in which case no further reports would be required and the other provisions authorizing reopening would also cease to apply. It might be desirable to state with precision the criteria for final termination which are now only that the Secretary concludes that it is "appropriate" to do so.

dumping" it was decided that price assurances would be accepted only when the relevant foreign price "exceeds the [American price] by an amount that is considered minimal in relation to the total volume of sales." [40]

Treasury, in its announcement, does not spell out its theory of avoiding "hit and run" dumping. My conclusion is that the effect on such a practice and indeed on the amount of dumping generally of the policy adopted would be very small. Moreover I believe that the policy is, in balance, inefficient.

It should be appreciated that, in any event, goods "dumped" prior to the issuance of the notice of withholding appraisement will not be subject to a dumping duty.[41] Thus the only way that the present change can matter is if for some reason a notice of withholding appraisement can be issued more quickly than an agreement to discontinue the practice can be secured. But there is every indication that the opposite is true. The notice of withholding appraisement can only be issued after a preliminary finding of LTFV sales and injury.[42] The price assurance agreement can, of course, be obtained at any time. It is moreover questionable whether the hit and run dumping referred to is very likely in any case. Certainly it is the least deleterious to American interests. For once a proceeding is instituted, the foreign exporter and his domestic (and foreign) competitors know that there is a substantial likelihood that he will not be permitted to continue the practice—effectively from the time the withholding of appraisement order is issued. Predatory pricing or any other tactic premised upon competitors withdrawing from the field are thus precluded by the public knowledge that the tactic is likely to be short lived. Thus the maximum impact of such a practice is a short run diversion of sales from American producers and possible lowering of the prevailing price in the American market. This impact of course redounds directly to the benefit of American consumers. And none of the long run impairment of the vitality of the American industry, which provides much of the justification for the laws, will occur.

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[40] T.D. 70–127. This formula is explained as follows:

> "For example, in a situation in which home market price exceeded purchase price by a margin of 50 percent in only 1 or 2 sales out of a total of 1,000 sales to the United States, an offer of price assurances might well be accepted. On the other hand, in a situation in which home market price exceeded purchase price by 4 percent in 800 of 1,000 sales . . . an offer of price assurance might well be rejected." Id.

[41] Although the withholding of appraisement could be made retroactive to goods "entered not more than one hundred and twenty days before the question of dumping has been presented" (U.S.C. § 160(b)) this is not usually done. In any event a similar retroactivity could be included in the settlement arrangements if this were regarded as vital.

[42] Reg. 153.34.

Thus the beneficial consequences of the change seem to me much more modest than Treasury suggests. I have been able to isolate only two respects in which the new policy will have an impact on the decision whether to "dump." First, the issuance of a formal dumping order, which of course would include a finding of injury to an American industry, might serve to publicize the fact of wrongdoing and thus have an adverse impact on the reputation of the firms involved. Secondly, if subsequent dumping is contemplated, the law can be invoked somewhat more expeditiously if there has been a previous finding of dumping than if the firm has simply given price assurances. For if there has been a dumping finding and the practice is resumed, an antidumping duty can be imposed by customs on entry of the goods without further proceedings. If, however, price assurances have been given and are violated, the proceeding must be reopened and final LTFV and injury findings made before the duty can be imposed.

Under the regulations, however, the practical effect of this difference has been substantially diminished. First, the extensive reporting requirements imposed as a condition for the disposition of a case on the basis of price assurances facilitate monitoring the firm's activities to assure that it remains in compliance. Secondly, if it is determined that there are "reasonable grounds" to believe that the dumping has been resumed, a withholding of appraisement notice can immediately be issued and the proceeding reopened. As a result all goods entering after the reopening of the proceeding are subject to the duty ultimately imposed.

The question is whether the benefits in slightly increased deterrent effect and more expeditious proceedings if the practice is resumed outweigh the detriment of engaging in the remainder of the LTFV proceeding and the entire injury proceeding in circumstances where the exporter is prepared to agree to discontinue the practice.

I believe that, in balance, the change in policy is plainly detrimental. It will, moreover, constitute an even greater deterrent to price discrimination by foreign concerns which is beneficial to American consumers and indeed may provide the only means for the foreign concerns to enter the American market. Again, of course, the view taken of this matter is inevitably influenced by the assumed appraisal of the policy underlying the statute. But even if I were to endorse enthusiastically the full reach of the present law, I would conclude that the new severe policy with

respect to disposition of these cases by agreement of the exporter is plainly unwise.

B. COVERAGE OF ORDERS

The regulations provide that the proceeding may extend to "all shipments of the merchandise in question from an exporting country, or only to shipments by certain persons or firms." [43] A similar choice is specified for the notice of withholding of appraisement [44] and the final determination.[45] The regulations do not, however, indicate the criteria applied in deciding between a countrywide and individualized proceeding.

The practice, at the present time, is as follows: [46] Whether or not the complaint specifies a particular firm or particular firms the investigation will be countrywide.[47] The investigation extends to firms supplying at least 60% of imports from the country in question and the sample of sales extends to 60% of the items included within the class of goods included in the investigation. If sufficient sales to warrant a dumping finding are found the determination will extend to all sales from the country, including those of firms embraced by the investigation all of whose sales were not at LTFV and firms which were not investigated. This practice is, however, subject to the exception that any firm which demonstrates that all of its sales have not been at LTFV will be excluded.[48]

The obvious objections to this procedure are first that firms which have not been involved in the proceeding at all are subjected to a finding of dumping and, secondly, that firms whose sample of sales are all not at LTFV must incur the additional expense of showing that this is also true with respect to the remainder of its sales. These adverse consequences are, however, mitigated in two respects. First, when goods enter a duty is im-

[43] Reg. 153.30(a)(2).

[44] Reg. 153.34(a)(2).

[45] Reg. 153.35(c).

[46] The explanation of present and past policy was furnished by a Customs official. The present policy was adopted about three years ago and has recently been changed as indicated in n. 48.

[47] Under earlier practice if the complaint specified particular firms the investigation was limited to them.

[48] During a portion of the time this exception did not apply and a firm included within the investigation, all of whose sales were not at LTFV, would be subject to the determination. If the importers agree under 153.34(b) to a six month withholding of appraisement so that the withholding of appraisement precedes the affirmative determination the withholding of appraisement, which will in these circumstances be made before the investigation is completed, will extend to all sales from the country.

posed only if the particular shipment is being sold at LTFV.[49] Consequently before a duty is actually imposed an exporter, although theoretically subject to a dumping finding, will have an opportunity to litigate the LTFV issue. Secondly, the Tariff Commission, in assessing the injury question, presumably considers only the affect of the LTFV sales found by Treasury. Thus the sales of any firms not included within the Treasury finding do not influence the Tariff Commission determination.

In sum then the procedure employed is not objectionable on the ground that final adverse action is taken against a firm without an opportunity being provided to contest the merits.[50] What is questionable, however, is the additional litigation burden imposed by the 100% requirement and the need to demonstrate the absence of dumping at the time of entry. The appropriateness of imposing this burden turns upon certain empirical questions. It does appear likely that other firms will need to charge as low a price in the American market as the "dumping" firms in order to sell its products here. If the price charged abroad by the dumping firms is one prevailing in a market in which the other firms are also selling it would also be expected that their foreign prices would be the same as well. If both of these generalizations hold true there is a substantial likelihood that if the leading firms in a foreign country are "dumping" other firms are also doing it. Of course, for a variety of reasons, these general tendencies may not hold. The question then is whether the probability is high enough to warrant what amounts to a rebuttable presumption of dumping. I cannot answer this without an extensive empirical investigation. My own response, if the entire question of dumping were open, is that the adverse consequences of price discrimination are so slight it if is assumed a) that all of the sample sales were not LTFV or b) that the firm is not included within the group having at least 60% of the market, that there is in any event little justification for proscription. Again, this procedural judgment cannot be divorced from the view taken of the merits.

[49] Reg. 153.33. I am advised that this is done by customs securing informally information from firms subject to a dumping finding concerning their sales abroad. On the basis of this information and often after consultation with counsel for the firm, a price is determined as the controlling one for comparison with sales in the United States. These reference prices are then distributed to Customs officials at the ports who compare them with the relevant American prices and assess dumping duties accordingly. I am advised that informal review to the Customs officials is also available at the time of entry as well as the formal protests and review to the Customs Courts generally applicable to duty determination.

[50] This conclusion must be qualified in one respect. It is possible that injury has been found resulting from dumping by others but that for some reason the dumping by the firm not included in the original proceeding will not contribute to the injury.

It does seem, however, even accepting a view which would weigh more heavily the detrimental consequences of limited dumping by small firms that considerations of fairness and efficiency dictate that the finding be limited to firms as to which there is evidence of substantial dumping.

C. JUDICIAL REVIEW

Under the present system of review an appeal can be taken to the Customs Court and then to the Court of Customs and Patent Appeals only after both the LTFV and injury determinations are completed and an antidumping duty assessed.[51] I will consider first the timing and then the scope of review.

Although something can be said for having immediate review of the LTFV finding either while the injury issue is being litigated or in advance of its determination, in balance I reject the suggestion. Given the large number of instances in which the Tariff Commission finds no injury it would appear wasteful to subject the LTFV finding to a second determination until the injury issue is once decided. If, as proposed here, a unified proceeding were adopted then the case for review of one aspect before the other were decided would be even weaker.

I do, believe, however that there is no reason to await the assessment of an antidumping duty before allowing appeal. Review of both the LTFV and injury issue should be permitted following the Tariff Commission ruling. Under the present system determination of the basic issue can be delayed and protracted by the necessity of fixing the exact antidumping duty on the particular shipment[52] in order to have an action subject to review. The determination of the antidumping duty due on a particular shipment may raise complicated issues. Their resolution has no bearing, however, on the correctness of the basic LTFV and injury findings which are based upon earlier transactions.

I am advised by Treasury officials that in practice this procedure is more efficient than it appears to be. A party can enter a single shipment and customs will cooperate in accelerating the

[51] 19 U.S.C. 169. In J.C. Penney v. The United States Treasury Department, 439 F.2d 63 (2d Cir.), cert. denied, 404 U.S. 86g (1971), it was held that the statutory method of review was exclusive and therefore precluded a separate action seeking to enjoin further proceedings on the ground that the hearings utilized were not in accordance with constitutional due process requirements.

[52] Apparently in some circumstances the fixing of the duty can take a substantial time—reportedly as long as two years. See Report of the Ad Hoc Subcommittee on Antitrust and Antidumping of the American Bar Association International Trade Committee at 40 (Mimeographed July 27, 1973).

processing and administrative review of the assessment in order to facilitate prompt judicial review. Nevertheless there seems to be nothing to be said for whatever delay is encountered even assuming full cooperation by customs. Treasury officials agree that the assessment and subsequent administrative review add nothing significant to the prior consideration of the LTFV issue. The process is simply an empty formality which persists only because protest of assessment is the traditional way to review impositions of duty. The procedure should therefore be changed to allow review immediately after the Tariff Commission determination.

It is not possible to state confidently the present scope of review. The recent cases [53] recite as the controlling rule the extremely limited standard of review originally enunciated in the 1933 Kleberg decision [54] that

> . . . [I]f the Secretary . . . has proceeded in the method prescribed by the Congress, we may not judicially inquire into the correctness of his conclusions . . . [T]he judicial power extends only to a correction of his failure to proceed according to and within the law.

At the same time these cases do to a significant degree examine the correctness of the determinations (the latest cases have all involved the injury not the LTFV question) under the guise of deciding whether the action is within the power conferred by statute or, in the most recent case,[55] arbitrary. In light of the ambivalent attitude toward review manifested in the recent decisions and the cases in other areas extending the scope of review with respect to decisions of this kind which are not based upon records formally made in adjudicatory hearings,[56] it is

[53] Imbert Imports v. United States, 475 F.2d 1189 (CCPA 1973) and City Lumber Co. v. U.S. 457 F.2d 901 (CCPA 1972). See generally Metzger and Munsey, Judicial Review of Tariff Commission Action and Proceedings, 54 Corn. L. Rev. 285 (1971).

[54] Kleberg and Co. v. United States, 71 F.2d 332 (CCPA 1933). Kleberg itself involved the LTFV finding which then was decided along with the injury issue by Treasury. The case has been continued to be treated as controlling precedent on both issues after the division of responsibility between Treasury and the Tariff Commission.

[55] Imbert Imports, n. 53, supra. The opinion is difficult to interpret. First the court apparently adopts the Kleberg rule quoted in the text (475 F.2d 1191). Then, however, after considering whether the inferences drawn by the Tariff Commission followed from the facts stated in its opinion the Court concludes that "the Findings of the Commission are supported by substantial evidence, and the factors pointed out in the Chairman's dissent are not of sufficient moment to establish that the decision of the majority was arbitrary." The Court further holds that "the Commission . . . acted within its delegated authority and correctly interpreted and applied the law." Finally, it is asserted that, "the determination would pass the test as not being arbitrary, an abuse of discretion or contrary to law, even if the more extensive scope of review under the Administrative Procedure Act (the provision now 5 U.S.C. § 706) were appropriate, as appellant contends. As it is we make no express holding with regard to the applicability of the Act." (475 F.2d 1192).

[56] See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

conceivable that the Court of Customs and Patent Appeals will eventually adopt a more extensive standard of review.

In any event I would recommend that review be "on the record," in the sense of determining whether the data assembled in the file upon which the final Treasury action was based adequately supports the determination, and that a "substantial evidence" test be applied.

I make the first suggestion because of the enhanced need to make sure that the factual record is adequate which results both from the limited opportunity afforded to challenge the evidence included in the record when it is offered and the opportunity for *ex parte* presentations at the confrontation hearings.

Treasury is apparently prepared to base its determination solely upon this "record." The administration Trade Bill provides: "The transcript of the hearing [before the Office of Tariff and Trade Affairs], together with all papers filed in connection with the investigation (including any exhibits and papers to which the Secretary . . . shall have granted confidential or in camera treatment) constitutes the exclusive record for determination." [57]

Whether the review of this record is cast as a question of "substantial evidence" or arbitrariness may be of relatively little significance.[58] Particularly if my proposal for more explicit decisions is adopted it is unlikely that a Court examining the adequacy of the evidence to support the conclusions reached would reach a different result under one standard than under the other. Nevertheless the substantial evidence rule is often taken to imply a somewhat more searching inquiry. Since I want the review to entail a real examination of the adequacy of the evidence to support the conclusions reached I recommend that the substantial evidence test be explicitly made applicable.

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[57] Trade Bill § 310(b).

[58] See Scalia and Goodman, Procedural Aspects of the Consumer Products Safety Acts, 20 UCLA L. Rev. 899, 934 (1973).

APPENDIX

Comments of
The Customs Committee, Administrative Law Section
American Bar Association

On a Preliminary Report Submitted to the Administrative Conference of the United States Entitled:

"The Administration by the Department of the Treasury of the Laws Authorizing the Imposition of Antidumping and Countervailing Duties"

At the request of the Administrative Conference, the Customs Committee of the Section on Administrative Law, American Bar Association has reviewed a preliminary report submitted to the Administrative Conference of the United States by Professor Warren F. Schwartz entitled, "The Administration by the Department of the Treasury of the Laws Authorizing the Imposition of Antidumping and Countervailing Duties", dated March 30, 1973. Our Committee was asked to submit its comments to the Administrative Conference by April 20.

The report was distributed to the members of the Customs Committee for comment immediately after the report became available, and a meeting was held on April 12 to discuss the report. Present at that meeting were representatives of the Treasury Department who are responsible for the administration of the Antidumping and Countervailing Duty Acts.

In view of the limited time provided for comment and the lack of any opportunity to consult with Professor Schwartz before his report was submitted, the Customs Committee is unable to present a comprehensive analysis at this time. Instead, we have limited ourselves to comments on the specific recommendations set forth on pages 30 and 31 of the report.

The conduct of investigations under the Antidumping and Countervailing Duty Acts involves highly complex technical matters. Even a careful reading of the statutes, regulations and published decisions will not necessarily lead to a full understanding of the practical problems involved in administration of these Acts. Since a complete exposition of these problems is not possible within the confines of this report, the members of the Customs Committee would welcome the opportunity to present a fuller explanation to the Administrative Conference in person.

The following comments on the recommendations in the preliminary report represent the consensus of the majority of the Customs Committee. These comments are based upon extensive practical experience of the Committee members in representing clients involved in antidumping investigations.[1]

RECOMMENDATION 1: *A single procedure embracing the LTFV and injury issues should be adopted.*

COMMENT: A joint LTFV-injury proceeding would bring the United States into closer conformity with the International Antidumping Code which requires that both the issues of sales at less than fair value and injury be considered from the outset of the investigation. A joint procedure could also

[1] No comment is made concerning the aspects of the report dealing with the Countervailing Duty Act, since the report contained no specific recommendations for changes in the procedures for administering that Act.

save time and expense, since it could enable quick termination of investigations when there is obviously no reason for a finding of injury.

Nevertheless, the Committee believes that a single procedure of the type apparently contemplated by the report would be impractical and inadvisable. The author states that while either the Treasury Department or the Tariff Commission could conduct both aspects, the entire investigation should probably be assigned to the Treasury Department. But in our view the report unduly minimizes the importance of the degree of special expertise required to conduct both the LTFV and injury aspects of antidumping investigations.

The LTFV phase is conducted by officials of the Customs Bureau who have developed expertise in Customs valuation matters which involve similar issues. An important element of the investigation is the verification of information submitted by foreign producers and exporters. This function is performed by Treasury representatives in the U.S. embassies overseas. Considerable background and experience is needed to conduct verification in a foreign country. Obviously, the expertise of the Customs officials in Washington and the Treasury attachés overseas cannot readily be transferred to the Tariff Commission.

Furthermore, the Committee believes it would be impossible for the Bureau of Customs or the Treasury Department to adequately explore the complex issues involved in the injury phase of antidumping investigation. Treasury did have this responsibility for more than thirty years, and recognizing its lack of economic expertise in questions of injury recommended that the injury issue be transferred to the Tariff Commission. This recommendation was adopted by Congress in 1954.

While consolidation of the LTFV and injury issues in either the Treasury Department or the Tariff Commission would be inadvisable, the Committee believes that there is a need for greater coordination between the two agencies. The present dichotomy between the LTFV and injury investigations may prevent a full appreciation of the relationship between these issues. Thus a single official should have the ultimate responsibility to consider this relationship and should have discretion in determining the sanctions to be imposed. While the Tariff Commission should retain jurisdiction over injury investigations, its decision should not be final. Instead, the Commission should report to the Secretary of the Treasury its conclusions as to the economic effects of LTFV sales. The Secretary should consider the Commission's report together with the results of the LTFV investigation in determining the extent to which dumping duties should be imposed.

RECOMMENDATION 2: *Open adversary hearings should be used to explore the factual and legal issues.*

COMMENT: The Customs Committee disagrees with this recommendation because it mistakenly assumes that antidumping investigations are, or should be, adversary proceedings; and because it does not recognize the practical difficulties of dealing with confidential information in an "open adversary hearing."

Before deciding whether to hold "adversary" hearings in antidumping investigations, it must first be determined which parties are the adversaries. Under one view, the "adversaries" may be the complainant domestic industry and the respondent foreign producers, with the Treasury Department acting in a quasi-judicial manner, relying exclusively on the evidence developed by the parties.

Such a view is entirely inconsistent with the Antidumping Act. Under the Act, the Secretary of the Treasury is charged with the responsibility to conduct an investigation to determine whether a class or kind of foreign merchandise is being or is likely to be sold at less than fair value. The Secretary can initiate an investigation on his own motion without a complaint. The complaint only serves to bring to the attention of the Secretary allegations of sales of less than fair value. From that point on, the entire investigation is conducted independently by the Treasury Department, whether or not there is any participation by the complainant. Treasury does not, and cannot, base its findings solely upon evidence presented by the complainant domestic manufacturers and respondent foreign manufacturers. Its findings are based upon information developed through investigations conducted by Treasury officials in foreign countries and in the U.S. Much of this information is not available to complainants, and cannot be made available to them because of its highly confidential nature.

The concept that the Treasury Department and the foreign respondents and importers are the "adversaries" is equally mistaken. At no point in the investigation does any official in the Bureau of Customs or the Treasury Department act in the nature of a trial counsel or prosecutor with responsibility of establishing a case against the respondent. Throughout the proceedings all officials responsible for the conduct of the investigation act as independent investigators who attempt to develop *all* the facts in order that the Secretary may reach a proper determination. There is no prosecutor, and there are no adversaries as such.

The report apparently contemplates a formal hearing conducted pursuant to the rules of evidence with the right of cross examination, and testimony under oath. (Page 13). Such a hearing cannot practically be held in the course of the Treasury Department's investigation. This is particularly true if the "adversaries" are considered to be the domestic complainant and the foreign respondents. The problem of confidential information is far more serious than indicated in the report, since Treasury's decisions are based to a large extent on highly confidential business information which cannot properly be disclosed to third parties. The general standard for determining the confidentiality of information is set forth in 19 CFR, Sec. 153.23 which provides:

> "Information will ordinarily be considered to be confidential only if its disclosure would be of significant competitive advantage to a competitor, or would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information."

Sec. 153.23(c)(3) lists certain information which is ordinarily regarded as confidential. This includes information which would disclose production costs and the names of particular customers or the price or prices at which particular sales were made. Such data must be kept confidential since its disclosure could have serious anti-competitive effects. Yet Treasury's determinations in most cases are based on just such information. It is difficult to see how a formal "adversary" hearing with full rights of cross examination could be conducted when this vital information is withheld from disclosure by the Treasury Department.

A requirement for testimony under oath is obviously impractical since many of the key witnesses (both foreign company executives and Treasury attachés) and much of the voluminous documentation are located overseas.

Finally, the time limits imposed on Treasury investigations make such a hearing impractical. The Secretary is required under Sec. 153.32(c) of the regulations to publish his tentative findings within six months after the initiation of an investigation or within nine months in more complicated investigations. An additional three months can be taken only if the Secretary decides that the appropriate tentative decision cannot be made within the nine month period and publishes a notice of the reasons in the Federal Register. In any case, the final decision must be made no later than three months after the tentative decision. These time limits are severe in view of the complexities of antidumping cases, particularly the need to conduct investigations in foreign countries.

RECOMMENDATION 3: *The decisions should contain a statement of reasons that reveals the essential bases of the actions taken.*

COMMENT: The Customs Committee agrees with this recommendation.

The Committee took a similar position in comments submitted to the Treasury Department on proposed amendments to the Antidumping Regulations. However, we wish to point out that the statement of reasons should not include the actual price and cost calculations of the Bureau of Customs, since this would disclose confidential business information.

RECOMMENDATION 4: *The present severe policy with respect to disposition by acceptance of price assurances should be abandoned.*

COMMENT: The Customs Committee agrees with this recommendation.

RECOMMENDATION 5: *Antidumping orders should be limited to firms whose sales in a significant number of instances prove to be LTFV.*

COMMENT: This recommendation deals with the Treasury Department's practice of issuing LTFV determinations on a country-wide basis which covers all manufacturers of the product under investigation, including those who are investigated and found not to be selling at less than fair value. The Customs Committee objected to this practice, and urged the Treasury Department to specifically exclude those firms who are investigated and found not to be selling at less than fair value. Since adoption of the new regulations, Treasury has revised its former position and now specifically excludes such companies from antidumping orders.

But the report goes beyond the position taken by the Customs Committee, and could, in our view, have unjust results. In recommending that antidumping orders be limited to the specific firms whose sales were found to be at less than fair value, the report overlooks the fact that time limits often make it impossible for Treasury to investigate the prices of every firm which is selling the product under investigation. In such cases Treasury bases its conclusions on a sample investigation of firms whose sales account for the preponderance of the imports from the country under investigation. Under the new policy, any individual firm which is investigated and found not to be selling at less than fair value will be excluded from LTFV finding while firms which have not been investigated will not be excluded. However, the initiation of an antidumping investigation is a matter of public record, and any firm which does not receive a questionnaire from the Customs Bureau has the opportunity to voluntarily submit information and to be exempted if no dumping margins are found.

But if Recommendation 5 were adopted, any firm which has the good fortune of not being included in Treasury's investigative sample would automatically be excluded from an LTFV finding even if it were also selling

at less than fair value. The firm could continue to dump with impunity, while the other companies which were included in the investigative sample would be subject to dumping duties. Such a result would create an unfair competitive advantage for the uninvestigated firms, and would fail to give the domestic industry full relief from the injurious effect of LTFV sales.

The Customs Committee reached no conclusions concerning Recommendations 6, 7 and 8.

Lawrence R. Walders
Vice Chairman
Customs Committee

LAW OFFICES
GEORGE BRONZ
888 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

May 9, 1973

Nathan Ostroff, Esq.
Chairman Appeals Board
U. S. Department of Commerce
Washington, D.C. 20230

Dear Nate:

I have reviewed Professor Schwartz's preliminary report of March 30, 1973, on dumping and countervailing duties, which you were so kind as to send me with your note of April 10.

I prepared a comment on this paper, which you may find of interest or use. I enclose a copy of my comment.

Sincerely yours,
George Bronz

Encl.

GEORGE BRONZ

THE ADMINISTRATION OF THE ANTIDUMPING ACT:
A Comment on Professor Schwartz's Paper

Professor Schwartz has contributed an interesting and useful paper on the administration of the Antidumping Act. He has, however, been limited to published material, supplemented only by interviews with Treasury personnel. He has done a good job of critical analysis on the basis of material to which he has had access. However, without delving closely into the facts of individual cases, he has failed to appreciate fully how effective a trade barrier the current administration of the Antidumping Act is proving to be. I shall limit myself in this comment to a discussion of the Antidumping Act, because I have had more recent experience in that field than in the countervailing duty field.

Professor Schwartz has done a very useful service by raising the question at the outset of the wisdom of the policy of condemning price discrimination as such. I have long felt that there is need for basic reexamination of the rationale of the Antidumping Act. A few instances of predatory price cutting as a monopolistic weapon reached the courts about 60 years ago, and remain

the prime examples cited by economists for the dangers of discriminatory pricing. They have been seized upon by later economists to justify the "Fair Trade" kind of trade regulation. In other words, price discrimination calculated to lead to monopolistic gouging of the consumer 60 years ago is equated with price discrimination which serves to widen competition and thus keep prices down. Moreover, economists tend to become so infatuated with the elementary model of a simple market in which supply, demand and price interact, to tend to create a single price at any given time, that they seem to assume that any other pattern is immoral, if not illegal. In today's complex economic society pricing rarely follows this elementary pattern. *No serious effort is made to compel unitary pricing throughout our economic system. Whether we should continue to impose the Adam Smith norm on imports when we impose it on no other branch of commerce,* certainly merits a thorough examination by qualified economists.

Predatory price discrimination to destroy competitors as a prelude to monopoly is rarely even suggested in the dumping cases before the Treasury. In almost all cases, it is a smaller enterprise abroad seeking a toehold in the American market which is accused by a giant American competitor of "dumping." Usually, the complainant itself practices differential pricing. When differential pricing is probably more widespread than the practice of the Post Office in selling the 1¢ stamp for 1¢ to everyone, why assume it is evil, at least when practiced by a foreigner? Perhaps the seller knows where his financial interest lies when he sells a shipload of goods in one transaction at $X — $1, while he charges $X to some and $X +$1 to others at home. Is this evil? Is it unfair to American competitors?

For 30 years, the Antidumping Act was on the books and was applied only occasionally, in striking cases which, typically, seemed to be of a predatory character. There was no staff in the Treasury specializing in Antidumping Act enforcement. The occasional complaints were dealt with by personnel whose primary assignments were in other areas. About 20 years ago, the Treasury began encouraging dumping complaints, and has steadily built the enforcement of the Antidumping Act into a major administrative activity, with a large full-time staff. This development has been accelerated sharply in recent years. Today, I think it is fair to characterize *the Antidumping Act as the principal non-tariff barrier employed in the United States* to hamper import trade. Witness the fact that antidumping investigations now outnumber by far escape clause cases in the Tariff Commission.

Transformation of the Antidumping Act into a major trade barrier has been accomplished largely by procedural and substantive devices which enmesh more and more importers in its toils.

The Antidumping Act, in terms, does not call for complaint and adversary proceedings. Nevertheless, bureaucracies are rarely self-starting and, in practice, an antidumping investigation is almost always prompted by a complaint. The complainant is, of course, a domestic competitor. While the regulations specify information requisite for a complaint, these requisites are neither forcefully defined nor rigorously applied. Almost any piece of paper claiming that imports are probably being dumped is, in practice, enough to mobilize the very considerable resources of the Treasury Department in a far-flung fishing expedition to see whether the charge of dumping can be pinned on the accused imports. I have repeatedly proposed that the regulations require

that a complaint at least make out a prima facie case before the Treasury is mobilized, but this proposal has been consistently rejected.

The second purely procedural point is discussed by Professor Schwartz at pages 20–22, under the heading "Coverage of Orders." I would broaden the issue and call it "Coverage of Investigation and Orders." The question is quite simply this: assuming that a prima facie case is made out that Exporter X is dumping, why investigate Exporters Y and Z merely because they export from the same country, when there is no evidence suggesting dumping on their part? It seems to me that Professor Schwartz is too tolerant in finding a rationale for the Treasury practice of assuming that sin is contagious. Professor Schwartz's bland statement that a dumping order would not really hurt an innocent trader is quite naive. I can think of no greater obstacle to trade than the requirement that a large dumping duty be paid on every shipment. The issue then can be litigated in the Customs Court and, if the importer can there prove his virtue, in the face of the presumptions which favor the government in Customs litigation, he may get a refund of his dumping duties after about five years. The present procedure reverses the presumption of innocence. There is nothing in the Antidumping Act which prescribes guilt by association.

Contributing heavily to the proliferation of dumping activity on the part of the Treasury has been the development of a number of substantive-procedural rules apparently designed to increase the number of findings of dumping, with or without statutory justification. Some glaring examples will be discussed in the paragraphs which follow.

The statute explicitly provides that dumping consists of selling to the United States for less than the price in the home market or in third markets or, if neither of these comparisons are available, for less than the cost of producing the material in question. *When the dumping accusation involves a Communist country, Treasury has invented a fourth basis for comparison,* without a shred of justification in the statute. Home market and third market prices are dismissed from consideration on the ground that Communist countries can price goods as they please. No effort is made to ascertain production costs because it is anticipated that Communist countries would refuse to supply such information or, if they did, the figures would be considered unreliable. *Treasury's solution* of the problem was to decide, quite arbitrarily, *to compare the export prices from the Communist country with home market prices in some non-Communist country,* often picked quite at random. Since Customs duties are typically much higher on imports from Communist countries than from non-Communist countries, the result of this rule is that Communist shippers, to avoid dumping duties, must charge at least as much as shippers in non-Communist countries, and then be subjected to higher regular Customs duties. In short, the Communist countries are forbidden to be competitive on pain of being held to be dumping.

If a foreign company distributes its product at home by direct sale to large numbers of small retailers, Treasury will consider it to be dumping if it sells to the United States for any less than the price it charges to the retailers at home, even though the sale to the United States may be an enormous bulk quantity to a distributor in the United States who, in turn, sells to retail outlets here. The Customs regulations permit recognition of quantity discounts only if they are also offered in the home market and apply, in fact, to at least 20% of sales there. Thus, a company with its own distributing

organization in the home market is effectively barred from adopting a different plan of distribution for the United States market.

A foreign producer may have an elaborate selling organization in his home market, while he sells to a single distributor in the United States. Obviously, his costs are greater on the home market sales, and elementary business accounting would dictate that he charge enough at home to cover the costs of the sales organization, while charging less on the bulk sales to a faraway national distributor who bears the burden of reselling. Under the current regulations an "allowance for selling expense" is only made in the home market to the extent of the selling expense in the United States market. Somehow there is considered to be something illegitimate about diverse selling practices into different markets with pricing appropriate to such diversity.

The Treasury *treatment of credit costs* is another example of an arbitrary refusal to recognize normal business costs. It is common for sellers to offer credit in the home market, while making export sales only for cash. Obviously, the extension of credit is costly; equally obviously businessmen charge their credit customers enough to cover the cost of credit. Credit costs include the cost of the money itself (what the businessman must pay his own bank for a loan), the credit risk (the losses from non-payment), and the administrative cost of credit (billing, accounting, collection expense, delayed payments, etc.). Treasury is willing to recognize the first of these as a legitimate cost for which adjustments are made, but will not recognize the other two unless "a showing" is made. The "showing" is impossible until a sufficient period has gone by for these costs to be incurred. Thus, as a practical matter, they are disallowed. Here again, Treasury refuses to recognize perfectly ordinary justification for differential prices.

Quite often a company's pricing policy may follow no recognizable pattern. Through variable absorption of freight and other practices widely used in trade, there may be a wide spread of prices in the home market as well as in exports to the United States. One might assume that a rational method of comparing prices in such cases is to take the average price at which the commodity is sold at home and the average at which it is exported to the United States in a period, and thus see whether the product is being "dumped" into the United States. However this is not what the Treasury does. In deciding whether or not there is dumping in the initial investigation, Treasury will calculate a home market average, but then compare it individually with such separate sale to the United States. In the pricing pattern postulated, this will inevitably yield some transactions at dumping prices. After a dumping order is issued, and Treasury is appraising individual importations, it goes even further. It recognizes no averages on either side of the ledger. Each sale in the home market is considered to establish a "foreign value," which becomes the standard for each importation into the United States from that date until the next sale in the home market which, in turn, establishes a new standard. With this type of arithmetic it is inevitable that almost half of all importations will be found to be dumped, even when the average price of sales to the United States is higher than the average price of home market sales.

The examples discussed in the paragraphs above are largely drawn from my own experience in cases I have handled. I am confident that there are many more similar "rules" and practices employed by the Treasury, all of which

serve to "catch" the imports and label them as dumping whenever the pricing pattern diverges from the simplistic Adam Smith model. It is dffiicult to conceive of any other way of administering the Antidumping Act which would be as effective in labeling differential pricing practices as "dumping."

A word must be added about the effect of a dumping order. The obstacle to trade resulting from such an order can be indicated by the history of one case I have had. A final dumping order was issued in August, 1968. An entry made before that date, on which appraisement was withheld, was liquidated in December, 1971, and, at that time, the importer was compelled to deposit a large sum of money as dumping duties. A protest was duly filed asking for "further review" in Washington. The importer finally managed to arrange a conference on the subject in Washington in July, 1972. Following the conference, further documentation was submitted. To this date, no decision has been made on the protest. Thus, it is now more than five years after the date of the import, and almost five years after the date of the final dumping order, yet we have not yet succeeded in getting a final administrative ruling on the liability for dumping duties. If it is necessary to carry this case to court, it is a safe guess that the court proceedings would take at least another two years, and quite possibly longer. The time could be shortened but only by grace of the Treasury. There is no jurisdiction in the courts to review the Treasury decision until it has become final by way of liquidation. Even after that, the Treasury is given two years to consider any protest before the importer can force the question to the courts. How many importers can afford to continue importing under these conditions?

One more point of detail. In footnote 22, Professor Schwartz cites the fishnet case as one in which there was "no injury." He is incorrect. The Tariff Commission found injury.

May 9, 1973.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

Office of the Secretary

July 27, 1973

Mr. Antonin Scalia
Chairman
Administrative Conference of the
United States
New Executive Office Building
Washington, D.C. 20506

Dear Mr. Scalia:

This is in response to your letter dated March 30, 1973, in which you requested the views of the Federal Trade Commission with respect to Professor Warren Schwartz's Report entitled "The Administration by the Department of the Treasury of the Law Authorizing the Imposition of Antidumping and Countervailing Duties."

The remarks of the Commission are rendered solely on the basis of the analysis presented in the Schwartz Preliminary Report. Because the administration of countervailing duties is so closely intertwined with foreign policy considerations at the Presidential and Congressional levels, and because the law governing countervailing duties is outside the expertise of the Com-

mission, we shall decline to comment on that portion of the report. However, it is the view of this Commission that the basic purpose of these laws to protect domestic industries from injury due to certain unfair acts of foreign manufacturers does not require that domestic industries be insulated from legitimate price competition from foreign manufacturers. Because the Commission has not substantive expertise with respect to the antidumping duty laws, we will not attempt to comment upon certain policy conclusions cited at pages 30 and 31 of the Report.

Professor Schwartz, however, offers a number of recommendations which are essentially procedural. Specifically, he suggests that:

> "2) Open adversary hearings should be utilized to explore the factual and legal issues."
>
> "3) The decisions should contain a statement of reasons that reveals the essential bases of the actions taken."
>
> "7) If the present procedures are followed, so that the documents embodying the reasoning underlying the action taken are not available to the general public, some provision should be made for outside persons to be granted access to data required for an informed evaluation of the performance of the agency."

It appears that some action has already been initiated to remedy the problems which these recommendations addressed.

First, the Treasury Regulations relevant to this matter [37 Fed. Reg. 26248 (Dec. 9, 1972)] which have been in effect since January 8 of this year, provide for the availability of all information in antidumping proceedings (§ 153.23), a time limit on investigations (§ 153.32(c)) and the opportunity for the presentation of views by interested persons (§ 153.37).

Second, Section 3.10(b) of H.R. 6767, 93d Congress, 1st Session, the Administration's proposed "Trade Reform Act of 1973," would amend the Antidumping Act to require the Secretary of the Treasury and the Tariff Commission to conduct a hearing on the record. The "defendant" would have the right to appear by counsel or in person. Interested parties would be allowed to intervene and appear at the hearing either by counsel or in person. The transcript of the hearing, together with all papers filed in connection with the investigation would constitute the "exclusive record for determination" and would be available to all persons. The agencies would be required to publish in the Federal Register a statement of findings and conclusions and the reasons or bases therefor, on all material issues of fact or law presented on the record. Also, both the antidumping and countervailing duty laws would be amended to establish statutory time limits for reaching decisions in investigations. These amendments are supported by both the President of the United States [1] and the U.S. Special Representative for Trade Negotiations.[2] If enacted into law, this legislation would go a long way toward accomplishing what Professor Schwartz has recommended.

Finally, Professor Schwartz alludes to the possibility of the Federal Trade Commission assuming responsibility for the administration for the anti-

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[1] Trade Reform, Message from the President of the United States, H.R. Doc. No. 93–80 (April 10, 1973) at Page 7.

[2] Testimony of Ambassador William Eberle, U.S. Special Representative for Trade Negotiations, before the House of Representatives, Committee on Ways and Means (May 10, 1973) at page 48.

dumping and countervailing duty laws. However, the Commission has no special expertise in this area and would not view such a role as complementing its present responsibilities. Furthermore, assumption of such a role at this time would unduly strain the Commission's limited resources. For these reasons, the Federal Trade Commission would not recommend that the Commission assume responsibility for the administration of these statutes.

We have welcomed this opportunity to comment upon Professor Schwartz's study.

By direction of the Commission.

CHARLES A. TOBIN,
Secretary