



## **Recommendation 73-4**

### **Administration of the Antidumping Law by the Department of the Treasury**

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(Adopted December 18, 1973)

The antidumping law (19 U.S.C. § 160 et seq. (1971)) is designed to prevent foreign manufacturers from selling their products in the United States market at prices less than those charged abroad—at "less than fair value" (LTFV)—if such price discrimination "injures" domestic competitors. Whenever LTFV sales and resulting injury appear, the antidumping law requires the imposition of a duty equal to the amount of the price discrimination.

#### *1. The Decisional Process.*

(a) *Field investigation.* When Treasury receives credible information that a foreign manufacturer is engaged in LTFV sales injuring domestic industry, it initiates an investigation to determine whether such sales are in fact occurring in the United States market. The information is given to a case handler of the United States Customs Service in Washington. He in turn refers it to a Customs representative with jurisdiction over the country whose producers are being investigated, for inquiry into the prices at which the items in question are being sold in the home market, and in the United States. This Customs representative—along with all other officials involved in the administration of the antidumping law—is an impartial investigator, rather than a prosecutor seeking to establish that a violation has occurred. Although much relevant information must be kept confidential, the present practice denies the American producers even the opportunity of learning from the Customs representative the manner in which the investigation is being conducted and offering suggestions for additional inquiry.

Present Treasury practice is to institute a country-wide foreign investigation of the subject product, even when the information as to possible dumping pertains only to a single exporter in that country. In this investigation, a substantial sample of the sales of those firms responsible for sixty percent of the exporting country's shipments of that product to the United States is examined. If sufficient LTFV sales are found (and if injury has resulted to domestic producers) a Finding of Dumping will issue which is applicable to all manufacturers of the specified product in the exporting country, except those who bear the considerable burden of



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showing that they have made no LTFV sales whatever. The effect of this finding is to require assessment of an antidumping duty on LTFV sales.

(b) *Agency review and decision.* The information assembled in the field investigation is transmitted to the case handler in Washington. He holds informal meetings with each of the interested parties separately, in which he discloses relevant, nonconfidential information, as well as his own tentative views of the merits. Both during and after the meeting, each party may present argument and evidence to the case handler. The case handler then prepares a detailed report, which includes a proposed tentative decision for publication in the Federal Register by the Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations. This report is forwarded (sometimes with changes made by the case handler's superiors) to the Commissioner of Customs. On the basis of the report, the Commissioner of Customs prepares a Memorandum for the Assistant Secretary recommending a tentative decision, with supporting documents that include a background paper which is what might be termed the final "institutional" version of the case handler's report. After reviewing the Memorandum, the Assistant Secretary causes a tentative decision embodying his views to be published in the Federal Register. This tentative decision may take one of three forms: a "Withholding of Appraisalment Notice," a "Notice of Tentative Negative Determination," or a "Notice of Tentative Discontinuance of Antidumping Investigation." Only the "Withholding of Appraisalment Notice" is a tentative affirmative decision; while it does not stop shipments from entering the United States, it renders all subsequent shipments subject to an antidumping duty should a Finding of Dumping issue. Thereafter, interested parties have an opportunity for briefing and argument before the Assistant Secretary. Treasury then issues its final decision on whether LTFV sales have occurred.<sup>1</sup>

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<sup>1</sup> A "Withholding of Appraisalment Notice" expires three months after publication in the Federal Register. During this period, the matter is considered by the Tariff Commission, and a final Finding of Dumping will issue if injury is found. However, the foreign exporters may agree to an extension of time of up to three additional months. See 19 CFR 153.34(b) (1973). In these instances, the matter is not immediately referred to the Tariff Commission upon publication of the "Withholding of Appraisalment Notice." Rather, the procedures described in that text are followed. An extension of time is agreed to in the overwhelming majority of cases. Because the Tariff Commission, in the absence of an agreement to an extension of time, must act within three months of publication of the "Withholding of Appraisalment Notice," and cannot act until a final LTFV determination is on the record, the final affirmative LTFV decision is issued simultaneously with the "Withholding of Appraisalment Notice" when no extension has been agreed upon, even though the hearing before the Assistant Secretary remains to be held. See 19 CFR 153.34(a), 153.35, and 153.37 (1973). In such circumstances, what is at issue in the hearing is the withdrawal of the "final" affirmative LTFV decision. Thus, for purposes of this recommendation, a "final decision"



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The Commissioner's Memorandum to the Assistant Secretary is currently unobtainable. Moreover, both the tentative and the final decision are extremely general and provide neither a meaningful explanation of the basis of the determination nor usable precedent. Parties' knowledge of the disposition of material issues comes mainly from informal discussions with the case handler.

### *2. Role of the Tariff Commission.*

The current statutory scheme requires that Treasury complete its investigation and render an affirmative LTFV determination before the Tariff Commission can consider the other issue relevant to a dumping finding—whether domestic producers have been, or are likely to be, injured. In the recent past, the Tariff Commission frequently has found no injury despite the presence of LTFV sales, thereby rendering Treasury's considerable expenditures in resolving the LTFV issue unproductive. In many of those instances, the dispositive issue of injury (left until last) was much the simpler of the two. There is also some factual overlap between the two issues. This rigid statutory bifurcation of the decisional process between Treasury and the Tariff Commission causes inefficient utilization of valuable agency resources, and prevents a preliminary injury determination by the Tariff Commission that may be desirable.

### *3. Judicial review.*

Before a Finding of Dumping can issue, there must have been determinations both that LTFV sales by foreign manufacturers were occurring, and that American competitors have been, or are likely to be, injured thereby. However, judicial review of the Finding of Dumping, and of the underlying affirmative determinations of LTFV sales and injury, is not specifically authorized by statute until after assessment of an antidumping duty on a particular shipment of the affected product. 19 U.S.C. § 169 (1971). The assessment itself may raise complicated issues, but generally these are not directly related to the LTFV and injury determinations. Despite active cooperation of Customs officials to expedite the assessment, the delay in obtaining judicial review of the Finding of Dumping sometimes has proven quite extended.

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issued under the three-month procedure is considered a "tentative decision." As indicated, this procedure is rarely used.



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### **Recommendation**

A. Any interested party should be given an opportunity to confer with the Customs representative, in the presence of the foreign exporters under investigation if they choose to attend. This conference normally should be held in the foreign country prior to the completion of the representative's report. He should apprise the participants of the methods he has employed to compile and verify data, and should receive suggestions for possible additions and refinements.

B. Those exporters whose sales have been subjected to the standard sampling, and as to whom no LTFV sales have been found, should be specifically excluded from the Finding of Dumping.

C. Upon publication of the tentative decision in the Federal Register, the Memorandum of the Commissioner of Customs to the Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations, including all supporting documents, should be made available at cost of reproduction, subject to deletion of confidential material and its replacement by a nonconfidential summary where feasible. This will allow more precise focusing on contested issues in later proceedings before the Assistant Secretary.

D. Both the tentative and the final decision should contain a statement of findings and conclusions and the reasons or bases therefor, on all material issues of fact or law presented. A more revealing tentative decision will greatly facilitate each party's presentation before the Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations. Both decisions, if so detailed, will provide a reviewing court with authoritative documents enumerating the bases of the determination from which appeal is taken, and will constitute a body of precedent on the subject.

E. The present bifurcation of the decisional process between the Department of the Treasury and the Tariff Commission, established in 1954, is, from the standpoint of administrative procedure, unnecessary and inefficient. At a minimum, section 160 of Title 19, United States Code, should be amended to enable Treasury and the Commission to coordinate their efforts, so that the injury investigation may be conducted either prior to, or simultaneously with, the LTFV investigation, as the circumstances warrant. Such amendment would enable the Tariff Commission to make a preliminary determination of likelihood of injury before issuance of a Withholding of Appraisal Notice by Treasury.



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F. Section 169 of Title 19, United States Code, should be amended so as to allow appeal to the courts immediately after issuance of the Finding of Dumping.

### **Citations:**

39 FR 4846 (February 7, 1974)

\_\_\_ FR \_\_\_\_\_ (2012)

3 ACUS 23

### **Separate Statement of Malcolm S. Mason**

It is disappointing that, apparently on grounds of convenience in administration, the Conference approves as it does in paragraph B of this Recommendation, the imposition of a sanction on four exporters who are not shown to have violated the rule against dumping (and indeed may be victims of dumping by competing exporters in their own country) merely because six strangers of the same nationality have violated. Realistically, this imposes a discriminatory presumption that remains a heavy economic burden even though dumping duties may in fact still be avoided. It is not generally, and should not be, our legal practice to impute guilt by nationality this way without proof of conspiracy or other stronger grounds.