INTERNATIONAL ANTIDUMPING CODE

HEARING

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

NINETIETH CONGRESS

SECOND SESSION

JUNE 27, 1968

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INTERNATIONAL ANTIDUMPING CODE

THURSDAY, JUNE 27, 1968

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:03 a.m., in room 2221, New Senate Office Building, Senator Russell B. Long (chairman) presiding.

Present: Senators Long (presiding), Smathers, Anderson, Hartke, and Williams.

The CHAIRMAN. The hearing will come to order.

The purpose of this hearing is to take testimony on the question of whether the International Antidumping Code agreed to at Geneva during the Kennedy round of tariff negotiations is consistent with the Antidumping Act of 1921, and thus can be placed into effect by this country without enabling legislation, or whether it is inconsistent with the domestic law, in which case it should not be implemented without specific authorizing legislation.

The Antidumping Act is one feature of a body of unfair trade laws that this Nation has provided to prevent foreign merchandise and foreign merchants from victimizing American industry. It is designed to protect against the rankest kind of commercial injustice—price discrimination by foreign competitors who are immune to prosecution under the laws of this country.

The Antidumping Act operates directly against the offending goods as they come into this country, since we are unable to act against the offender himself. It calls for a special levy against those goods in an amount sufficient to offset the price differentials caused by the dumping.

In 1962 when Congress enacted the Trade Expansion Act, it delegated certain specified authority to the President. However, there were certain laws he was not empowered to modify by negotiation. One of them was this antidumping Act. The 1962 report of the Finance Committee, in discussing the relationship of the Trade Expansion Act to other U.S. laws, stated unequivocally, and I quote:

> Other laws not intended to be affected include the Antidumping Act and section 303 of the Tariff Act of 1930, which relates to countervailing duties.

That will be found on page 19 of the committee report.

Having so expressed its intent, the committee was surprised in 1966 when it became known that the Anti-dumping Act was being made the subject of a trade agreement at Geneva. The committee voiced its concern in a resolution expressing the sense that no agreement

which would necessitate the modification of any duty or other import restriction should be entered into except in accordance with legislative authority delegated in advance by the Congress. In the report accompanying this resolution the committee stated, and I quote:

> The Committee on Finance has been disturbed over reports that the current Kennedy round of tariff negotiations may be broadened to include U.S. offers of concessions with respect to matters for which there is no existing delegated authority. In the committee's view, this would violate the principles which have made our reciprocal trade program so successful for more than 8 decades.

Further quoting:

> Another area may involve the treatment of "dumped" goods by the country in which the dumping occurs. This problem concerns unfair trade practices in a domestic economy and it is difficult for us to understand why Congress should be bypassed at the crucial policymaking stages, and permitted to participate only after policy has been frozen in an international trade agreement.

Despite the judgement of the Senate that the Antidumping Act should be preserved from international concessions and commitments, our trade negotiators agreed to the terms and conditions of the International Antidumping Code in June of last year. It is to become effective July 1 of this year.

The question before the Congress today is whether the code is consistent with the domestic law or whether it conflicts with our law. The Tariff Commission advises that there are a number of features of the code which appear to be in conflict with the law. They advise that if the code had been in effect, they would have been unable to find injury in four out of five recent cases in which they did find injury under the existing law.

The Kennedy round produced the most far-reaching trade agreement we have ever undertaken. Under it we cut our tariffs in half and exposed our industries to more foreign competition than they have ever had to face. That was authorized by Congress and business must adjust itself to more difficult and hotter competition. But it is a different matter indeed to negotiate away those laws and procedures which provide a defense against unfair foreign price discrimination. Our purpose is to determine whether the negotiation culminating in the International Antidumping Code has compromised our unfair trade laws.

I would like to insert at this point in the record, our committee press release announcing these hearings, and Senate Concurrent Resolution 100, with the accompanying committee report, which was favorably acted upon by the Senate in the 89th Congress.

I would also like to insert Senate Concurrent Resolution 38 of this Congress which questions the validity of the International Antidumping Code. In addition, we will print the Tariff Commission report on Senate Concurrent Resolution 38,[1] and various papers related to this hearing, such as the Antidumping Act, 1921, International Antidumping Code, the executive branch analysis of the code in relation to the act, etc.[2]

(The material referred to follows:)

[Press release]

FINANCE COMMITTEE TO HOLD HEARINGS ON INTERNATIONAL ANTIDUMPING CODE

Senator Russell B. Long (D. La.), Chairman of the Senate Finance Committee today announced that on *Thursday, June 27, 1968, beginning at 10:00 a.m.*, the Committee will hold a one-day *public hearing on the International Dumping Code* agreed to at Geneva, Switzerland, during the Kennedy Round of trade negotiations. Article 13 of the Code calls for its provisions to become effective on July 1, 1968, "for each party which has accepted it by that date". The Treasury Department has published amendments to its regulations under the Anti-dumping Act, 1921, intended to conform those regulations to the requirements of the Code.

The Chairman reported that questions had been raised as to whether this international agreement was sufficiently consistent with the provisions of the Anti-dumping Act, 1921, that it could be implemented by the United States without enabling legislation. He referred to the unusually comprehensive report regarding the Code submitted to the Committee on March 8, 1968, by the United States Tariff Commission describing and discussing features of the international agreement which appear to conflict with the U.S. law. He noted that numerous industry groups had also questioned the consistency of the agreement with the law. He stated that the purpose of the hearing was to enable the Committee to explore into these questions.

Senator Long stated that the following witnesses would present oral testimony to the Committee at this hearing:

Ambassador William M. Roth, Special Representative for Trade Negotiations (Accompanied by John B. Rehm, his General Counsel)

John C. Mundt, Senior Vice President, Marketing and Public Affairs, Lone Star Cement Corporation (Accompanied by Donald Hiss, Partner, Covington and Burling)

John P. Roche, President, American Iron and Steel Institute.

Honorable Bruce Clubb, Commissioner, U.S. Tariff Commission

The Chairman also extended an invitation to other interested persons who desire to do so to submit written comments with respect to this International Anti-dumping Code to the Committee so that their views can be made part of the record of the hearings and be considered by the Committee. He said these written views should be addressed to Tom Vail, Chief Counsel, Committee on Finance, 2227 New Senate Office Building, Washington, D.C., and should be submitted not later than Thursday, June 27.

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[1] App. B of this hearing, see p. 321.

[2] App. A of this hearing, p. 225, consists of:
Antidumping Act, 1921, as amended;
New dumping regulations of Treasury Department;
Present dumping regulations of Treasury Department;
Dumping regulations of Tariff Commission;
International Antidumping Code;
Article VI (relating to dumping) of General Agreement on Tariffs and Trade; and
Executive branch analysis of International Antidumping Code in relation to Antidumping Act, 1921.

Calendar No. 1311

89TH CONGRESS
2D SESSION

S. CON. RES. 100

[Report No. 1341]

IN THE SENATE OF THE UNITED STATES

JUNE 28, 1966

Mr. LONG of Louisiana, from the Committee on Finance, reported the following concurrent resolution; which was ordered to be placed on the calendar

CONCURRENT RESOLUTION

Whereas, since 1934, Congress has delegated to the President authority to reduce tariffs for the purpose of expanding international trade but has reserved to itself the establishment of limitations within which such reductions must be made; and

Whereas the Trade Expansion Act of 1962 provides broad authority for multilateral reciprocal tariff reductions on a most-favored-nation basis; and

Whereas the Committee on Finance has directed the United States Tariff Commission to make a comprehensive investigation of the method of valuation used by the United States and its principal trading partners and to report its conclusions and recommendations not later than Febraury 28, 1967: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That it is the sense of the Congress that, in

the conduct of or in connection with negotiations to carry out the Trade Expansion Act of 1962, no agreement or other arrangement which would necessitate the modification of any duty or other import restriction applicable under the laws of the United States should be entered into except in accordance with legislative authority delegated by the Congress prior to the entering into of such agreement or arrangement.

Calendar No. 1311

89TH CONGRESS 2d Session } SENATE { REPORT No. 1341

EXPRESSING THE SENSE OF CONGRESS WITH RESPECT TO CERTAIN TRADE AGREEMENTS

JUNE 28, 1966.—Ordered to be printed

Mr. LONG of Louisiana, from the Committee on Finance, submitted the following

REPORT

[To accompany S. Con. Res. 100]

The Committee on Finance, having had under consideration various proposals relating to the conduct of negotiations under the Trade Expansion Act of 1962, reports favorably a concurrent resolution to express the sense of Congress with respect to certain agreements which would necessitate the modification of duties or other import restrictions, and recommends that the concurrent resolution be agreed to.

PURPOSE OF THE RESOLUTION

This resolution expresses the sense of Congress that in the conduct of or in connection with negotiations to carry out the Trade Expansion Act of 1962, no agreement or other arrangement which would necessitate the modification of any duty or other import restriction applicable under the laws of the United States should be entered into except in accordance with legislative authority delegated by the Congress prior to the entering into of such agreement or arrangement.

GENERAL STATEMENT

Background.—Until 1934, delegated authority to cut U.S. tariffs on imported articles was limited to determinations under the so-called flexible tariff provision which permitted tariff charges based upon comparative costs of production in order to equalize the costs of production here and abroad. With this exception ratemaking was primarily a function of Congress. Beginning in that year, however, this Nation embarked upon a new course in foreign trade policy. For the first time Congress delegated broad tariff-cutting authority to the President empowering him to offer reductions in U.S. tariffs on articles imported from abroad in return for concessions from

foreign countries reducing barriers to U.S. exports. In 1945, 1955, and 1958, Congress delegated authority to the President to cut our tariff rates by additional amounts.

Each of these grants of authority provided for tariff reductions to apply equally to products of any nation. Under this delegated authority, articles coming from any country would be treated no less favorably than those from another country that did not discriminate against our commerce. Most-favored-nation treatment since the early 1950's has not been accorded products of Communist countries, and such products remain subject to the higher statutory rates of duty without regard to our tariff concessions.

This reciprocal trade policy has worked well within the framework of a constitutional system of checks and balances which vests in Congress the sole authority to change tariffs and confers on the President the sole authority over international negotiations. In this area where neither Congress nor the President has sufficient power to act independently of the other, the two branches since 1934 have joined their strengths to overcome their weaknesses. Thus, Congress delegated tariff-cutting authority in advance and the President entered into reciprocal trade agreements providing for tariff reductions pursuant to that authority. Historically, it has not been the practice under our trade policy to first enter into a tariff-cutting agreement and then seek its implementation.

Trade Expansion Act of 1962.—Because of the success of the reciprocal trade policy and because the existing tariff cutting authority had been exhausted, Congress approved the continuation of this policy in the bold new provisions enacted in the Trade Expansion Act of 1962. It not only continued the authority for the President to reduce our tariffs in return for concessions from foreign nations, but also for the first time authorized the complete elimination of some duties. Another important innovation in U.S. trade policy made by that act was the concept of adjustment assistance for workers and firms. This assistance, though still unused, was designed to relieve distressed workers and firms hard hit by import competition resulting from tariff concessions extended under authority delegated by Congress.

The basic negotiating authority under the Trade Expansion Act empowers the President to proclaim such modification or continuance of any existing duty or other import restriction as he deems appropriate to carry out any trade agreement entered into under that act, except that he may not cut any rate of duty to a rate below 50 percent of the rate existing on July 1, 1962. The President is further empowered to negotiate the complete elimination of duties where the rate in question is not more than 5 percent ad valorem or its equivalent, or where more than 80 percent of the world export value of an article is accounted for by the United States and the countries of the European Economic Community. Similarly, he may eliminate duties on certain agricultural commodities and on tropical commodities.

Authority to enter into trade agreements under the Trade Expansion Act expires June 30, 1967.

Reasons for the resolution.—The Committee on Finance has been pleased with the operation over the years of Congress' partnership with the President in foreign trade matters. Long experience convinces us that arming the President in advance with tariff-cutting

authority is the most effective means of achieving fair and equitable expansion of trade in the free world. Under this historical procedure, Congress, which is constitutionally vested with sole power to lay duties (art. 1, sec. 8), may weigh the merits of tariff reductions and the extent of contemplated concessions uninhibited by the international implications of a failure to implement obediently a trade agreement already negotiated by the President. It may similarly consider the circumstances under which adjustment assistance is appropriate.

The Committee on Finance has been disturbed over reports that the current Kennedy round of tariff negotiations may be broadened to include U.S. offers of concessions with respect to matters for which there is no existing delegated authority. In the committee's view, this would violate the principles which have made our reciprocal trade program so successful for more than three decades.

It has been reported that one area in which our negotiators may offer concessions concerns the American selling price method of valuation, which is part of the tariff determination process with respect to canned clams, and certain knit gloves, and more importantly, rubber-soled footwear (principally of the sneaker type) and benzenoid chemicals, the so-called coal tar products. Our negotiators concede that no delegation of authority exists, either under the Trade Expansion Act of 1962 or any other existing legislation, to modify the American selling price system pursuant to a trade agreement.

Another area may involve the treatment of "dumped" goods by the country in which the dumping occurs. This problem concerns unfair trade practices in a domestic economy and it is difficult for us to understand why Congress should be bypassed at the crucial policymaking stages, and permitted to participate only after policy has been frozen in an international trade agreement.

Congress has been no less forward-looking than the executive branch in trade matters and any action by our negotiators which tends to subordinate and degrade the important congressional role should not be condoned and will be resisted. The committee recognizes that our Constitution empowers the President alone to enter into international agreements and treaties. We do not question the legality of an agreement involving a trade matter for which no prior authority has been delegated. Our concern is that the experience gained over more than 30 years of a working partnership between the Congress and the Chief Executive may be set aside. It is this concern that moves us to protect the congressional role. We hope our negotiators will understand the great wisdom of confining their activities to those areas in which they have been authorized by Congress to proceed.

SUMMARY

For the reasons stated above, the Committee on Finance reports this resolution to express the sense of Congress that our trade negotiators in Geneva should not enter into any agreement or other arrangement which would require the modification of a U.S. duty or other import restriction except in accordance with clear legislative authority delegated by Congress prior to the negotiation.

90TH CONGRESS
1ST SESSION

S. CON. RES. 38

IN THE SENATE OF THE UNITED STATES

AUGUST 2, 1967

Mr. HARTKE (for himself and Mr. SCOTT) submitted the following concurrent resolution; which was referred to the Committee on Foreign Relations

AUGUST 3, 1967

The Committee on Foreign Relations discharged, and referred to the Committee on Finance

CONCURRENT RESOLUTION

Resolved by the Senate (the House of Representatives concurring), That it is the sense of Congress that—

(1) the provisions of the International Antidumping Code, signed at Geneva on June 30, 1967, are inconsistent with, and in conflict with, the provisions of the Anti-Dumping Act, 1921;

(2) the President should submit the International Antidumping Code to the Senate for its advice and consent in accordance with article II, section 2, of the Constitution of the United States; and

(3) the provisions of the International Antidumping Code should become effective in the United States

only at the time specified in legislation enacted by the Congress to implement the provisions of the Code.

The CHAIRMAN. Our first witness is Mr. William M. Roth, Ambassador and Special Trade Representative.

Mr. Roth, we are pleased to have you before the committee today and we will listen with interest to your statement.

STATEMENT OF AMBASSADOR WILLIAM M. ROTH, SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS, ACCOMPANIED BY JOHN B. REHM, GENERAL COUNSEL, OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS; FRED SMITH, GENERAL COUNSEL, DEPARTMENT OF THE TREASURY; AND MATTHEW J. MARKS, DEPUTY TO THE ASSISTANT SECRETARY, DEPARTMENT OF THE TREASURY

Mr. ROTH. Mr. Chairman, thank you very much. We are delighted to have this opportunity to appear before this committee. We have had the chance in the past to discuss this question in some detail with members of the committee individually. As you know, from previous correspondence, we have long felt that a meeting such as this would be very useful, because we would like to lay out as carefully as we can what the code is and how it relates to the law.

I would like to introduce Mr. John Rehm, our General Counsel and Mr. Fred Smith, General Counsel of the Treasury. This is very much a matter for lawyers and I feel like an innocent in the middle. So they will, with me, answer questions after my statement.

I would also, Mr. Chairman, like, if it were possible, to be able to reply to the public testimony at least by filing a brief after the discussion is over.[1]

The CHAIRMAN. I think that is very fine, Mr. Roth, and I would suggest that in fairness, the opposition should be entitled to rebuttal as well. The committee will accord them the same opportunity.[2]

Mr. ROTH. Thank you.

Mr. Chairman and members of the committee, I appreciate this opportunity to testify with respect to the International Antidumping Code, which was negotiated and signed in Geneva as part of the Kennedy round last June. In particular, I should like to discuss briefly three aspects of the code—the benefits to be derived from the code, its consistency with the Antidumping Act, and the importance of the code to the long-range effort of trade liberalization.

During the Kennedy round, we were mindful of any existing trade device maintained by other countries which, through little used to date, could have an adverse impact upon our trade in the future. We were especially concerned that the reduction of tariffs would lead other countries to a more prevalent—and protectionist—use of their antidumping laws.

Since 1948, article VI of the GATT has provided for the imposition of dumping duties on a product which is sold at a price in the United States, for example, lower than its home market price, and which, as a result, causes or threatens material injury to a domestic industry. However, there were several problems with this article, which was in fact modeled upon our own Antidumping Act. In the first place, it

[1] The executive department rebuttal statements appear on pp. 189–211.
[2] Other witnesses waived their privilege of surrebutal; see pp. 211–212.

uses largely undefined criteria and lacks procedural safeguards in the handlingof dumping complaints. Moreover, certain countries have been able to rely on the "grandfather" clause of the GATT in applying their antidumping laws which would otherwise be inconsistent with article VI.

The CHAIRMAN. Mr. Ambassador, before we go any further, would you mind just giving us for the record, classic example of dumping so we can have it to illustrate the problem we are talking about?

Mr. ROTH. I will be glad to. I would like to call Mr. Matthew Marks of the Treausry Department, who actually deals with all our dumping cases on a day-to-day basis.

The CHAIRMAN. Mr. Marks, what would appear to you to be a classic example of dumping which is clearly contrary to rules of fair competition in international trade.

Mr. MARKS. In order to have dumping, Mr. Chairman, you have to have two things. You have to have "sales at less than fair value"—I will explain what that means—and then, you also have to have injury.

The Treasury Department is responsible for determining whether there are sales at less than fair value and the Tariff Commission is responsible for determining injury.

If both these factors are present, then the Treasury Department is required to assess antidumping duties.

Take, for example, a product which is being sold by a foreign company in its home market for $1. It is discovered upon investigation that the same product is being sold by the same foreign company in the United States for 90 cents. In this case there is a margin of dumping of 10 cents. It is a very simple example that I gave you. The Treasury Department would find sales at less than fair value in this example and would then refer the case to the Tariff Commission. If the Tariff Commission found injury to U.S. industry in this particular case, it would be referred back to the Treasury and we would then assess a dumping duty of 10 cents on top of all normal duties.

The CHAIRMAN. In other words, a company is selling its product for a $1 a barrel, let us say, in its own country, It finds it has a big surplus on hand but if it cuts its price in the domestic market the competitors in that country also are going to cut prices with the result that they are all going to lose money. So, to dispose of his surplus he simply ships to another country at whatever price it can bring, maybe 50 cents a barrel. He dumps it on the other country. That is the kind of thing we have in mind in dumping. When he does that, in most instances he is injuring the industry in the second country which is producing the same product. So he is disposing of his headache by dumping it on somebody else which in turn, creates a very severe problem over there.

Mr. MARKS. The example you just gave, Mr. Chairman, would be a classical example of dumping.

The CHAIRMAN. Thank you. I can think of other illustrations but that is the kind of thing I had in mind.

Thank you very much.

Mr. ROTH. Canada, for example, has long had a dumping law which operates fairly automatically if a good is entered at a price lower than its home market price—regardless of the impact of such dumping upon the domestic industry in Canada. This has cost the United States

literally millions of dollars worth of trade. Aluminum is an example. We might sell at a lower price than Canada from time to time, but without injury to their industry. Nevertheless, under Canada's law, they could have in effect retaliated against us.

The CHAIRMAN. In other words, if the discrimination exists as far as Canada is concerned, that is dumping; is that right?

Mr. ROTH. That is right.

The CHAIRMAN. If Canada has a domestic industry producing the same commodity, and you put your commodity in there at a discriminatory price—selling beneath your own market price in this country—then as far as Canada is concerned you are dumping.

Mr. ROTH. That is right.

The CHAIRMAN. And, it does not require that there be a showing that a Canadian industry has been injured?

Mr. ROTH. That is right. And this is the law they will now change.

With these problems—both actual and potential—in mind, we had three basic objectives during the negotiating of the code. The first was to insure that all the major trading countries accepted the fundamental proposition—embodied in our own law—that dumping duties are legitimate only when dumping causes injury to a domestic industry. The second was to try to define and flesh out some of the key concepts used in antidumping actions. Our third objective was to reach agreement on a set of open and fair procedures—of the kind that we have—to protect exporters against whom a complaint of dumping is brought.

The code was negotiated pursuant to the President's constitutional authority to conduct foreign relations—and not under the Trade Expansion Act of 1962 or any other piece of legislation. In particular, the President expressly authorized the Special Representative for Trade Negotiations to conduct the negotiations for the United States. From the outset, we took the position that the code could not go beyond our Antidumping Act. Accordingly, Senate Consurrent Resolution 100—which was never taken up by the House—was not applicable to the code. I should add that while we were not required by law to do so, our Trade Information Committee held public hearings in September of 1966 concerning the issues involved in an international agreement on dumping. Moreover, as the negotiations progressed we kept our congressional delegates regularly informed. Finally, both before and after the conclusion of the negotiations, we expressed our willingness to discuss the code with this committee in whatever detail it might wish.

What was finally negotiated in the Kennedy round is, I believe, to the advantage of both our exporters and our domestic industries. Our exporters will have the assurance of being able to defend themselves against dumping complaints and the confidence that the proper criteria are being applied in each case. Any domestic industry should be able to have its dumping complaint investigated and decided in a considerably shorter period of time. This has been a matter of concern to a number of complainants in the past. A domestic industry will also be in a better position to know what it must demonstrate in order to qualify for relief, and on the basis of criteria which are reasonable and consistent with the act. I would add that, when these criteria in the code are properly read, they are no more demanding than those which

have been used in the past. In short, it will not be any harder for a domestic industry in the future to obtain relief under the act than it has been up to now.

I should like to make clear that during the negotiations, we consulted with the members of the Tariff Commission and kept them informed of the progress of these negotiations. I myself participated in a lengthy session with the Tariff Commissioners in February of 1967, when we were very close to a final draft in Geneva. Moreover, a member of the staff of the Tariff Commission was present during virtually all of the negotiating sessions in Geneva, thereby permitting the Tariff Commission to remain continuously up to date. It is quite true that the members of the Tariff Commission—with the exception of the then Chairman—did not give their formal clearance to the final version of the code. At no time, however, was there a suggestion by any of the Commissioners that the code was in conflict with the Antidumping Act, although that issue was raised with them. As a result, we were under the distinct impression that the Commissioners did not have any reservations about the consistency of the code with the act. In short, we did our best to obtain the views of the Tariff Commission in formulating our negotiating positions and indeed, believed we had done so.

Let me now turn to the question of the consistency between the code and the act. Since I am not a lawyer, I can claim no special expertise and, indeed, I will leave it to the lawyers to answer any specific questions you may have in this regard. But, I would like to take up briefly the two basic assertions that have been made in an attempt to demonstrate that the code is in conflict with the act.

The CHAIRMAN. Mr. Secretary, you say the Tariff Commission did not notify you that they felt you were violating the act. That's certainly not true of this committee. We passed a resolution—we sent word to you that in our judgment you were going beyond your authority. We warned that if you went beyond your authority we expected to call your hand, and although we did not say it expressly in the resolution that we passed, the committee report did make reference to the Antidumping Act. I quoted it in my opening statement. I'll read it again. On page 3 we said:

> Another area may involve the treatment of dumped goods by the country in which the dumping occurs. This problem concerns unfair trade practices in a domestic economy and it is difficult for us to understand why Congress should be bypassed at the crucial policy-making stages and permitted to participate only after policy has been frozen in an international agreement.

Now, that is what we were talking about at that time.

Mr. ROTH. Mr. Chairman, I am very well aware of Senate Concurrent Resolution 100. We felt it did not apply because what you were concerned about was any modification of the act by the code and, as we would like to explain in considerable detail later in the questioning, there was no such modification of the act by the code.

The CHAIRMAN. Well, the Tariff Commission says you did and industry thinks you did. And, after we hear both sides, we will conclude whether we think you did.

Mr. ROTH. Fine. I merely want to say again, Senator, that we have discussed this with individual Senators and we have been anxious since early last summer to have a meeting like this because I think you should be satisfied.

The CHAIRMAN. Of course, I am familiar with how these international negotiations go on. As a congressional adviser I went to that International Conference on the Law of the Sea. The position taken by the United States was diametrically opposed to what would be good for Louisiana, both with regard to the Outer Continental Shelf and with regard to the fisheries, but as one of that delegation over there all I could do was go along with it because as adviser to the executive branch, it was not my right or prerogative to do anything to impede the Executive from reaching an agreement for which he was in charge. The person who spoke for that delegation, who was your parallel part in those negotiations, in effect was the man who decided it. The vote was 10-to-1 and he was the one and that was the policy of the United States.

Mr. ROTH. The 10-to-1 type of vote was not the way we conducted our policy discussions. As a matter of fact, the kind of example you used about Louisiana was one reason why, even though we were not required to do so under the law, we felt we should have public hearings before we finalized our position, and we did.

The CHAIRMAN. But, in the last analysis, the delegation is speaking for the President and when the head of the delegation tells the President the various views and what he thinks about the matter, if the President agrees with him, even though everybody else might disagree, that is the position of the United States. Whether you are a Senator over there consulting, advising, or even a member of the delegation, or whether you are on the Tariff Commission the answer is still the same. The Nation speaks in a single voice and the person who is the President's representative is the person who speaks for the Nation.

Mr. ROTH. But, I think to make this work in terms of trade negotiations, you have to have terribly close liaison and consultation with Congress.

Senator ANDERSON. With what? Consultation with what?

Mr. ROTH. With the Congress.

Senator ANDERSON. Did we have it?

Mr. ROTH. We had, as you know, Senator, six congressional advisers, of which Senator Williams was one.

Senator WILLIAMS. Yes, but I do not remember your ever mentioning this.

Mr. ROTH. I discussed——

Senator WILLIAMS. So, we can answer that very quickly.

Mr. ROTH. I discussed this in considerable detail, Senator.

Senator WILLIAMS. Not to the extent that you had any authority to negotiate. I noticed on page 3 you state here that the code was negotiated pursuant to the President's constitutional authority, and yet section 8 of article 1 of the Constitution states that the Congress has the power to levy and collect taxes, duties, imports and excises, and also to regulate commerce with foreign nations. I am not a lawyer. I am just another layman, but I certainly did not understand that you were going to conduct these negotiations and make firm commitments in connection with this or the American selling price or anything else. As one member of that so-called advisory committee which knew very little of what was going on except what we read in the paper, I did not know that these negotiations were being carried through. Now, maybe the other members did. They can speak for themselves.

Mr. ROTH. I hope they did, Senator, because I did discuss both this and the American selling price issue frequently.

Senator WILLIAMS. Oh, yes, you did, but only to the extent that you were discussing it and not to the extent that you had any authority to negotiate it or enter into any agreements contingent upon what we did.

Mr. ROTH. That is absolutely true. I made clear that, for instance, in the negotiation of the American selling price package, we had no authority whatsoever to implement the package. It would have to be done on an ad referendum basis to the Congress.

Senator WILLIAMS. That is correct.

Mr. ROTH. And, this is how we have handled it. We have come back and brought it to the Congress in our trade bill and said in effect, we think this a good package but it is up to the Congress to decide.

Now, in the case of the Antidumping Code, we said that we realize that we must negotiate a code that relates to our own act and that if in any sense we were to require a change in that act, we had no authority to do so and we would have to come back to the Congress. And, therefore, in this case we stayed within the act as it is presently written.

These are the assertions that have been made in an attempt to demonstrate that the code is in conflict with the act.

The first such assertion is that the code changes the relationship between the Treasury Department and the Tariff Commission under the act. For example, the code requires that, in deciding whether or not to make an investigation, the Treasury Department shall consider evidence of injury as well as dumping—that is, sales at less than fair value. But only the Tariff Commission can consider the question of injury, the critics of the code say. In fact, however, the U.S. negotiators made quite clear what the new Treasury regulations provide. That is, the Treasury Department will simply review a complaint to see if it contains information concerning possible injury. It will not be the task of the Treasury Department to evaluate such information, since this is clearly up to the Tariff Commission. But, if a complainant cannot provide some information bearing on the question of injury, there is surely no reason why the Treasury Department should embark upon a pointless investigation, involving a waste of the Government's time and the taxpayer's money.

As another example of the alleged confusion of the functions of the two agencies, it is claimed that the Treasury Department's determination of dumping will not be final because it will continue to consider the questions of dumping while the Tariff Commisison is investigating into injury. But this claim is not true. The Treasury Department's determination will in every sense be final under the act and will thereby prompt the Tariff Commission to begin its 3-month injury investigation.

During this period, should new facts come to the attention of the Treasury Department indicating a contrary result, the original determination of dumping would be revoked. Such a revocation would effectively close the case, it came before the time the Tariff Commission made its determination on the question of injury. There is nothing novel in this kind of procedure and, in fact, I understand there has already been one case of a revocation of a determination of dumping based on a re-evaluation of information.

The second assertion that is made against the code is that it will force the Tariff Commission to apply criteria which are inconsistent both with its prior practice and with the requirements of the act. In considering this assertion, it is important to keep in mind that prior Tariff Commission decisions do not provide a consistent body of interpretations. On the contrary, individual commissioners, in various combinations, have approached the question of injury in different ways and necessarily with different results. Over the years, Commissioners have typically decided cases on their individual facts and only occasionally have they attempted any general interpretations.

Of equal importance is the fact that the act lays down only an abstract statutory test, and I quote—"whether an industry in the United States is being or is likely to be injured * * * by reason of the importation of such (dumped) merchandise into the United States." Neither the provisions of the act nor its legislative history give any guidance on such key questions as the necessary casual relationship between dumped imports and injury, the nature of injury, and the definition of industry.

With this in mind, let me take up several of the more frequently cited provisions of the code which bear on the functions of the Tariff Commission. First, the code requires that dumped imports must be "demonstrably the principal cause of material injury". The act, as I noted above, simply says "by reason of" the dumped imports, without getting into the question of the degree of casualty. Whatever the definition of "the principal cause" in the dictionary, its negotiating history makes clear that it does not mean the cause greater than all other causes combined—contrary to what critics of the code would have you believe. What "the principal cause" does mean is the cause which is greater than any other substantial or significant cause. That is an important shade of meaning and one which renders the concept in the code at the very least consistent with the act.

I will not dwell on the requirement of the code that the injury be material, since this is one of the few concepts that has been consistently used by the Tariff Commission since it was given the function of determining injury in 1954. But, as a final example of what critics of the code cite, let me discuss the definition of "industry." The code establishes two alternative general definitions of industry. The second provides that the industry shall be made up of the producers which produce a major proportion of the total domestic production of the product in question.

This is certainly a reasonable definition of an industry and one which would seem consistent with the act. But, what about the definition of geographic segmentation, the critics would ask. Here again, I would stress what some readers perhaps have missed. The code provides not one but two alternative definitions of geographic segmentation. The first is deliberately strict, based upon transportation costs. The second speaks in terms of "special regional market conditions"—a term deliberately intended to afford the Tariff Commission latitude when it feels segmentation is proper. Of course, this assumes that segmentation is proper at all under the act—a question which I understand is not without merit.

I would add a general point on this question of the consistency of the code with the act. The code has the status of an Executive agree-

ment negotiated by the President under his constitutional authority and does not purport to override the Antidumping Act. Of course, the two are to be read so as to be consistent, insofar as possible. However, any inconsistency between the code and the act must, as a matter of law, be resolved in favor of the act. Since actions taken under the act and the regulations may be challenged in the courts, the courts will decide these matters in the final analysis.

In conclusion, I want to underline the long-range importance of the code in terms of our efforts to liberalize trade throughout the world. In the field of foreign trade, we can try to solve existing or potential problems in one of two ways. On the one hand, we can take unilateral measures and strike back at other countries when we want to. On the other hand—and this is what we have been doing for over 30 years—we can tackle them collectively and try to arrive at practical understandings.

In these terms, the code has, I think, a special significance. At the time of its negotiation, there was a general concern that national antidumping laws might be put to protectionist uses. The countries involved, therefore, undertook—with no assurance of success whatsoever—to work out a code of rules in this difficult and technical field. The final result was commendable because a genuine consensus emerged on both substantial and procedural aspects of the treatment of injurious dumping. Like any negotiating document, the code is not without ambiguities nor, perhaps, deficiencies. But on the whole, it does represent another step forward in international cooperation in the field of trade. It is our hope that during the annual review sessions provided by the code, the participating countries can share their experience in administering the code and thereby lay a foundation for even closer cooperation in the future.

With the exception of Canada, all the other major signatories of the code are now in a legal position to implement the code beginning on July 1. We regard the Canadian situation as a very unfortunate one, but the dissolution of its Parliament left the Canadian Government no choice. That Government has, however, formally pledged to implement the code no later than January 1, 1969.

In short, the code is scheduled to enter into force on July 1, and it is the position of this administration that the schedule should be met. We believe the code is consistent with the Antidumping Act, and we are confident that its provisions can and will be applied effectively in specific cases. Moreover, we are convinced that its implementation is in the interest of the United States.

Mr. Chairman, with your permission, I should like to insert at this point in the record, our legal analysis of the relationship between the code and the act and a memorandum indicating the readiness of other countries to apply the code on July 1.

Thank you very much.

The CHAIRMAN. Is the analysis the same document we have printed here called Executive Branch Analysis?

Mr. ROTH. That is correct.

The CHAIRMAN. We will print these in the record.[1]

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[1] The executive branch analysis appears in app. A, p. 279.

(The memorandum referred to follows:)

OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS

READINESS OF OTHER COUNTRIES TO IMPLEMENT INTERNATIONAL ANTIDUMPING CODE

A. Of the 17 other governments which signed the International Antidumping Code, the following 15 are now in a position to implement the Code beginning on July 1, 1968:

European Economic Community

Belgium	Norway
Netherlands[1]	Sweden
Luxembourg	Switzerland
France	Finland
Federal Republic of Germany[2]	United Kingdom[3]
Italy	Japan
Czechoslovakia	Yugoslavia
Denmark	

B. The Government of Canada has informed us that although legislation necessary to implement the Code cannot be enacted before July 1 due to the dissolution of Parliament for elections, it "is prepared to undertake that not later than 1 January 1969 it will bring its laws, regulations and administrative procedures into conformity with the Agreement". It has also so officially informed the Director General of the GATT and, through the GATT Secretariat, all other signatories of the Code.

C. It is believed—but not certain—that Greece will be prepared to implement the Code beginning on July 1, 1968.

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[1] The Netherlands Government has informed us that procedural delays prevent it from ratification of the code by July 1. However, that Government has assured us that it will implement the code on that date.

[2] The Council of the European Communities adopted an antidumping regulation April 5, 1968, requiring Member States to implement the Code from July 1. Member States have informed us that they will comply.

To the best of our knowledge, the German Bundestag has not yet enacted an antidumping bill already introduced. It is expected to do so by July 1. German implementation of the Code is not contingent upon passage of the bill, however, since the Executive has independent authority to act July 1.

[3] Parliament has enacted an amended antidmuping act. The act is awaiting Royal Assent. If such Assent is not given before July 1, the British Government would have authority to implement the Code except for the application of provisional measures. Such measures are permitted—but not required—by the Code and not provided for in existing British law. Royal Assent is expected by July 1 or a few days thereafter.

The CHAIRMAN. Now, Mr. Ambassador, the code defines industry in terms of "domestic producers as a whole of like product or those of them whose collective output of such products constitutes a major portion of domestic production." The executive branch states in its report, page 67 that:

> The less strict interpretation of the definition of industry would permit an industry determination where the domestic industry as a whole is materially injured by dumped imports but where certain producers in that industry are not.

Now, let us turn that around a bit. Would the Tariff Commission be able to find injury where certain producers in an industry are injured but where the industry as a whole is not injured?

Mr. ROTH. I would like Mr. Rehm to answer that.

Mr. REHM. If I understand the question, Mr. Chairman, I would say it would depend upon how many of the producers and their production were being affected by the dumped imports. In other words, this second general test in the code lays down what you might call a

majority notion of industry. It permits a finding of injury to an industry where not all of the producers in question are being injured, but where a majority are.

The CHAIRMAN. Well, in my home town of Baton Rouge, we have one cement manufacturer, for example. Now, let us assume that foreign shipments are directed to Baton Rouge and they just absolutely clobber that one producer but there is no serious injury to the industry as a whole. Would that be a case in which relief could be obtained?

Mr. REHM. It is possible. I think we have to distinguish the general definition——

The CHAIRMAN. You say possible, but not likely.

Mr. REHM. No. I think——

The CHAIRMAN. You do not know?

Mr. REHM. I do not know, because I do not have sufficient facts which would indicate whether the general national definition of industry we have been talking about should be applied or whether one of the two alternative definitions of geographic segmentation should be applied in this case. It is not impossible, certainly.

The CHAIRMAN. All right, Now, he is being clobbered. You do not know whether he can get relief or not, under what you bring us. That is what you told me. Is that right or not?

Mr. REHM. All I am saying is I do not have enough facts in your hypothetical to determine whether one could.

The CHAIRMAN. It seems to me, that is just the facts you are looking for. Here is one mill. It is being clobbered by dumping, but it is not a significant segment of the overall industry. Now, would it be entitled to relief or not? It seems to me, that is just as clear as anything on earth you are looking for. After you get through hearing all the facts, that is your conclusion. He is being clobbered here at Baton Rouge. But, the industry as a whole is not being significantly injured.

Mr. ROTH. Mr. Chairman, it would be my understanding that if there were not a provable regional market where he was being clobbered, it would be difficult to prove injury. But this does not relate to the code so much as it relates to the Antidumping Act itself.

Mr. REHM. I would simply add Mr. Chairman, that if in your case he is the only producer of cement in this area and one could define a marketing area in this portion of Louisiana, then I think under the code you could find injury.

Senator HARTKE. Will you please speak louder?

Senator ANDERSON. Let him finish. What did you say?

Senator HARTKE. I did not hear what you said, either. You faded off.

Mr. Chairman, I would like to have the answer—Mr. Chairman, can we have the answer? I did not hear what he said there. I am sorry.

Mr. REHM. Yes, I will certainly repeat it, Senator. I said that if this company was the sole producer in the area and if one could find, and this would require looking at some other factors, I think, that this was a regional market, then I think it would be possible to find injury.

The CHAIRMAN. But, he is not the sole supplier. You have got cement coming out of New Orleans from Lone Star and OKC producing it down there. They sometimes put some of their cement into that

area when they have a surplus. That is just at Baton Rouge, La., where you have other producers shipping cement into it, but that one fellow right there is really being clobbered. Now, could you find injury?

Mr. REHM. Mr. Chairman, both under the act and the code one has to conceive of an industry. There has to be injury to an industry. The act does not grapple with the question how you define industry. The code attempts to—to a certain extent. If in your case there were other companies and one could find a regional market but the other companies were doing all right, in spite of the dumped imports; that is, imports at sales of less than fair value, then one could not find injury.

The CHAIRMAN. The Tariff Commission sometimes applies a competitive market area test in determining injury.

Can they apply that same test under the code?

Mr. REHM. I believe so. I have to state this generally, because it does turn upon specific facts. But as Ambassador Roth's statement tried to point out, and this is indeed something that I think a lot of people have missed, there are two alternative definitions of geographic segmentation provided for in the code.

Senator HARTKE. What page are you reading from?

Mr. REHM. If you have the committee print, Senator——

Senator HARTKE. I have it. Do not worry. I have it.

Mr. REHM. Page 42.[1] And, it is in particular a long sentence but I will try to go through it with you, if you would like. It is under article 4(a)(ii).

The CHAIRMAN. Well, you have two tests in the code, but neither one of them apply to the case I gave you in my hometown.

Mr. REHM. Well again, to repeat, if there were other producers who were fairing well, I do not think either under the code or the act how could you find injury. But, to return to Senator Hartke's question——

Senator HARTKE. I did not ask any question.

The CHAIRMAN. I have.

Mr. REHM. I am sorry. I thought you wanted to know——

Senator HARTKE. I wanted the page. That is all I asked for. I have the page.

The CHAIRMAN. Senator, one more and I am coming back to you.

Now, the Tariff Commission has found injury in a number of cases just exactly like I gave you.

Mr. REHM. One company? Not to my knowledge.

The CHAIRMAN. Here is their report.

In another case the LTFV, which means sales at less than fair value, imports were found to injure an industry composed of producers in/or adjacent to the competitive market area in which the imports were sold and in three cases such imports were found to affect an industry composed of producers adjacent to the competitive market area.

Mr. REHM. I think, Mr. Chairman, you will note that the Tariff Commission's report on page 19[2] you just read uses the plural—"producers."

The CHAIRMAN. I am informed that the rules in your code would not permit them to find injury in the case I just described—producers in/or adjacent to the competitive market area in which the imports were sold.

Mr. REHM. Let me speak to that, if I may, since it is an important point, which I notice the cement industry is concerned about and I

[1] P. 266 of these hearings.
[2] P. 339 of these hearings.

think reasonably so. This report of the Tariff Commission on page 19 clearly proceeds on the assumption and I think the last sentence of this paragraph so indicates, that there is only one definition of geographic segmentation provided for in the code and that is the notion of transportation costs. I will read the second definition: or, . . ."

This is, Senator Hartke, the fourth line from the bottom of page 42 on this committee print—

or . . . if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry . . .

Now, I have looked at these four cases which are cited in the majority portion of the Tariff Commission's report. I certainly cannot state for sure that this second alternative definition would apply. But, reading those decisions—and three of them are very terse indeed—I believe it fair to say that one cannot rule out the possibility, and, indeed, distinct possibility, that this second alternative definition could apply in these cases.

The CHAIRMAN. Let me just read you these two sentences from the Tariff Commission report. I am going to read you what I have and the sentences following it:

In another case,

This is *Portland Cement* from Belgium—

the LTFV, which is sale for less than fair market value imports, were found to injure an industry composed of producers in/or adjacent to the competitive market area in which the imports were sold, and in three cases such imports were found to injure an industry composed of producers adjacent to the competitive market area. The Code would limit a regional industry to all producers within such a market who sell all or almost all of their production of the product in question in that market.

Now, assume the market area were broad enough to include New Orleans and the area, let us say, from New Orleans over to Mobile, and as far west perhaps as Lake Charles or Houston and north to Shreveport, which would seem to me to be well within the argument for those who argue for a large market area concept. One could say that if the only injury to competition occurs up there at Baton Rouge, La., involving the fellow who is producing cement there, and those who are trying to compete with him in that area that is not injury to the market area. Here is the Tariff Commission saying that while they could perhaps find injury as the law exists, they could not find it if you are going to say they must find injury to the whole market area.

Mr. ROTH. I think the proof is in the pudding—the fact that they never have found injury where only one company was involved.[1]

The CHAIRMAN. Now, you are the man who negotiated the agreement and you cannot tell us the answer. Now, if you do not know the answer, how do you expect a businessman to know the answer, or even a lawyer who represents that businessman?

Mr. REHM. Well, my answer, Mr. Chairman, would be that, as in the case of any legal document, one cannot definitively determine in the

[1] Clerk's note: Steel jacks from Canada, AA 1921-49 (TD 66-91) involved injury to a single domestic firm.

abstract without the specific facts how a law or an agreement, or a provision thereof, would apply. All I am saying is that in terms of the four cases we have been talking about, I cannot rule out the possibility of the application of this second definition. I think the point you were making perhaps, in part, Mr. Chairman, was that the code talks about the producers in such a market whereas these three cases talk about producers in/or adjacent to. But, I would say that that obviously turns upon the boundary line you want to draw and that is an economic judgment. There is nothing scientific about it.

The CHAIRMAN. Now, the Tariff Commission tells us in four cases out of five where they have found injury, this code that you are bringing us here would bar them from finding injury. That's 80 percent of those cases.

Now, have you looked at those cases and concluded otherwise?

Mr. REHM. Well, as I was trying to say, their conclusion is clearly based upon an assumption—which is wrong—that there is only one test of geographic segmentation, concerning transportation costs, where indeed you have to find that all the producers within such a market sell all or almost all of their production of the product in question in that market. They were taking only the first test. I think it is clear that with the exception of the first case they cite, the other four would not fall under that provision. But, I am talking about the second alternative test.

The CHAIRMAN. All right. But you still have not answered the question. How about those 80 percent of the cases, four out of five cases? They say your code would make them come out the other way. Are you prepared to say that in those four cases out of five that your code would not make the case come out the other way?

Mr. REHM. No. I cannot without the record before me, Mr. Chairman.

The CHAIRMAN. Well, the report is there. You can go look at the cases.

Mr. REHM. The decisions which I have before me, Mr. Chairman, if you have seen them, are about two paragraphs long. They are a statement of legal conclusions. They do not permit me to see the kind of facts, sir, that were taken into account when the decisions were reached.

The CHAIRMAN. Well, you negotiated this thing. As a lawyer you should have been looking at those cases and the record behind those cases to see how they arrived at them so you would know whether you are giving away industry's rights or whether you are not.

Mr. REHM. Let me say on this very point we were very, very sensitive to this question of geographic segmentation. It was a major issue in the negotiations because other countries have long been suspicious of our concept of geographic segmentation. It was indeed an issue over which we fought bitterly, I may say, during the negotiations and we insisted that there be what we felt to be an adequate geographic segmentation notion in the code. The other countries pressed us very hard to hold us to this first definition of geographic segmentation based on transportation costs. We said that would not be enough, that the Tariff Commission has decided cases in the past which would not fall within that first definition and we needed, if you will, another definition and we finally worked out this alternative language.

The CHAIRMAN. Let me just tell you what I understand you to be telling me. See if we understand one another. You are saying that these Tariff Commission cases have each one been put on a single sheet of paper. I ask whether you have changed the result of those decisions. You say you do not know because all you have to look at is that sheet of paper. When we are passing an act of Congress we have committee reports and hearings that back it up. All you have to do is go look at them and see whether you have changed the results or not.

Now, do you know whether you have changed the results or would not change the results in those cases?

Mr. REHM. Mr. Chairman, all I can say is that this is why the Tariff Commission has divided opinions and our Supreme Court has divided opinions. These things are not black and white. They are not that clear. We were aware of these difficult cases. We certainly looked at the decisions. I do not believe we looked into the complete record but we were satisfied that in the second definition we wrote into the code did give latitude to the Tariff Commission. But I am sorry, Mr. Chairman. I cannot give you an unequivocal answer that it would have reached the same result.

The CHAIRMAN. Let me tell you how the Congress approaches a similar question. We looked at the *Miranda* case with regard to admissions and confessions. That was decided by a five-to-four vote by the Supreme Court. We said we think that is a horrible decision. It contributes to a major increase in crime in this country and if we can, we are going to reverse the finding in that decision. So, we passed a law seeking to change that *Miranda* decision.

Now, at the time we did it, the lawyers on the Judiciary Committee and the lawyers in the Senate, of which two-thirds are lawyers, well knew what that decision said and anybody who wanted to could go read the transcript although we did not regard that as necessary. We could read the hearing in the trial decision case, read what the court of appeals said, we could read what the Supreme Court said. It was clear enough to us what we were doing.

But you are telling me that you do not know what you did and what you did not do because looking at the cases about which you were negotiating, you do not know whether you changed the result or not.

Mr. REHM. Mr. Chairman, I think we are talking about different kinds of cases. We are dealing here in this field with very difficult economic judgments based upon quite abstract legal criteria. I think the antitrust field would be a far better analogy if you wish to draw one than the *Miranda* case where as I recall, you were dealing with specific criteria in terms of even numbers of hours for arraignment and the like.

In this field, where you have very delicate, difficult economic judgments to be made, one cannot be positive. I dare say that any antitrust lawyer would say reading Supreme Court decisions in the antitrust field, that it is hard to see what guidance one can draw for purposes of future problems. So, if you expect me to be unequivocal, I cannot be.

The CHAIRMAN. Do you know the facts of those cases? You said that in order to say whether what you are bringing here would change the results you would have to know the facts of the cases. That infers that you do not know the facts of the cases which they say would have changed the result. Now, do you know the facts of those cases?

Mr. REHM. No. We were aware of the decisions and had read them. They are brief decisions as I said. However, I personally cannot say I looked into the full record. We were satisfied having read the decisions, that we did not exclude the possibility of the Tariff Commission reaching the same decision.

The CHAIRMAN. All right. You say you do not know the facts or whether you would change the result or not. Those people on the Tariff Commission do know the facts. They made the decisions. They studied the records and they say you do change it.

Mr. REHM. Then, why is there a minority report of two Commissioners, Mr. Chairman?

The CHAIRMAN. But those two minority Commissioners were appointed by the executive branch, were they not? Out of your house, you might say and now they are trying to appoint a third one out of your house. That raises some very severe questions about the separation of powers, and whether the Tariff Commission is here to aid the Congress, carry out the word of Congress, or is supposed to take its bidding from the executive.

Mr. ROTH. Mr. Chairman, I think you can see by the majority report this is not always so.

The CHAIRMAN. Now, on page 62 [1] of the executive branch analysis it is stated that: "The concept of the principal cause in an injury determination is consistent with the act and present practice." The Tariff Commission report on pages 12 and 13 [2] on this subject, however, reports that under the two possible meanings of the code criteria of injury, both are inconsistent with the procedures and practices under the Antidumping Act of 1921. There is an obvious difference of opinion between the executive branch and the Tariff Commission.

Can you cite any language in the act which states that dumped imports must be demonstrably the principal cause of material injury which is the language used in the code?

Mr. REHM. No, I cannot, Mr. Chairman. As Ambassador Roth said, the statute simply speaks in terms of "by reason of" the dumped imports. As a matter of statutory interpretation, quite frankly, I think there is a very decent argument that the notion of "by reason of" is something much more like the dominant cause or very major cause, if not, indeed, total cause. The notion that we worked out in the code is a notion of principal causality. A lot of people have assumed—because I think they wanted to assume it quite frankly—that this was synonomous with the notion of major factor as it has been construed in the Trade Expansion Act. This, in fact, was another major issue in the negotiations and at a time the draft of the code contained the words "the major factor."

The CHAIRMAN. All right.

Mr. REHM. Now, we changed it to the principal cause on the understanding that the principal cause was, if I may put it this way, a plurality notion, just like the primary factor in the Canadian automotive legislation—namely, a cause greater than any other cause, but not a cause greater than all other causes combined.

The CHAIRMAN. Well, now, when you say demonstrably the principal cause, it means to me as a lawyer, that you must be able to dem-

[1] P. 286 of these hearings.
[2] Pp. 332, 333 of these hearings.

onstrate that this was the principal cause of material injury. You are saying that this language might not mean anything different than the old language, the language in the law right now.

Mr. REHM. I am saying it is consistent, Mr. Chairman. The old language, that is, the language in the act now, is subject to a variety of interpretations, such as a rigorous one of the kind I mentioned. I suppose a skillful lawyer could argue that it was a notion of very weak causality. But all I am saying is that the notion we have laid out in the code as it is understood by virtue of its legislative history is, I think, a reasonable one, a moderate one, which falls within, as far as we can see, the notion of "by reason of."

The CHAIRMAN. All right.

Now, the Tariff Commission has construed injury to occur under the 1921 act when the injury is more than de minimis.

Now, would this language in the code permit that Tariff Commission to find injury where the injury is more than de minimis?

Mr. REHM. I think now we have shifted away from the causality question, if I understand your question, to the notion of the quantum of injury which must be demonstrated to permit dumping duties to be applied. The notion of de minimis injury is, I think, regarded by all Tariff Commissioners, including present Tariff Commissioners, as not satisfying the notion of injury which, of course, the Tariff Commission has consistently read as material injury.

Now, once you are over the de minimis, the question arises how much do you need to satisfy a test of material injury? Mr. Clubb feels that it need be only a scintilla—another Latin word—above de minimis. Others would argue more. All I am saying is that, in terms of this question, I think material injury can cover quite a broad spectrum, Mr. Chairman. So, to put it another way, I think that the notion we have in the code, which in this respect is the same as in article 6 of the GATT now, is consistent with the law and indeed quite clearly, I think, with Tariff Commission practice.

The CHAIRMAN. I thought the question I asked could have been answered yes or no. You have me so confused now that I do not know what you answered.

Now, a de minimis injury to me, for example, in the law of personal injury, would be an injury that did not scratch the skin to draw blood and did not bruise you. Now, could that concept, if it bruised you at all, could that be regarded as a material injury under this clause you have here—"demonstrably the principal cause of material injury"?

Mr. REHM. Well, if you mean now a bruise, something more than de minimis——

The CHAIRMAN. Draw a drop of blood.

Mr. REHM. A drop.

The CHAIRMAN. A drop.

Mr. REHM. No. I do not believe that that would be material injury.

The CHAIRMAN. That is just the kind of thing we are talking about.

Mr. REHM. That would not be material injury.

The CHAIRMAN. So, you changed the law. When I say you changed the law, you have to look at the cases along with the statutes that the cases interpret.

Mr. REHM. Mr. Chairman——

Mr. SMITH. If I could state it another way, I think I would answer your question yes, and I would say that would be within the concept of material injury if it drew blood or was a bruise, to put it in the vernacular.

The CHAIRMAN. All right. So, what you have here is something about which the two administration lawyers cannot agree.

Now——

Senator ANDERSON. Pity the people who are not lawyers.

The CHAIRMAN. Senator Anderson says pity the poor people who are not lawyers.

The Tariff Commission report, on pages 14 and 15 read:

> The Anti-dumping Act is silent as to how the effect of the LTFV imports on an industry shall be evaluated. It requires the Commission to determine whether such imports are injuring an industry in the United States. Since the act contains no words of limitation concerning the degree of injury to be considered, the word has been generally construed to mean injury in any degree greater than de minimis, more than a trifling injury. An injury more than de minimis is considered to be a material injury.

Now, may I ask, are you talking about an injury that is more than de minimis and that is all? I ask you two lawyers if you can agree on that one. Now, would that be injury that would justify relief under the Antidumping Code or not?

Mr. REHM. My answer is, "Yes."

The CHAIRMAN. What is your answer?

Mr. SMITH. Yes.

The CHAIRMAN. So, now you say there is no difference. The language you have got here has no difference from the existing law.

Mr. REHM. That is correct.

Mr. SMITH. Correct.

The CHAIRMAN. As construed by the cases.

Mr. SMITH. It is up to the Tariff Commission to construe that part of the law, but in my opinion, the Tariff Commission can, as it has in the past, make the same determination as to what amounts to—what is a sufficient amount of injury under the provisions of the code as they could in the past before the code.

The CHAIRMAN. Well, may I say that the act says—

> The Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured or is prevented from being established by reason of the importation of merchandise into the United States.

That language has been construed as to refer to an injury that is more than a de minimis injury.

Now, to prove injury you come in here with language which says these imports must be "demonstrably the principal cause of material injury." The "principal cause of material injury." And you say that language could be construed to be de minimis injury or just slightly more than de minimis injury.

Mr. REHM. I think our answer on which we agree, Mr. Smith and I——

The CHAIRMAN. Material injury in my judgment, would mean something more than—slightly more than—de minimis injury.

Mr. SMITH. Yes. I think the Tariff Commission over the past has interpreted it to mean principal cause essentially. Now, when you say

how much more than de minimis, all I am saying is that I do not think this code changes the range in which the Tariff Commission has always regarded this, but, of course, I want to say that I am not the authority on this because it does not fall within the Treasury's area of responsibility. I was asked for an opinion and based on what I have read, that is my opinion.

The CHAIRMAN. Now, if you did not want to change the law, why did you bring in different language than the existing law?

Mr. REHM. The answer is, Mr. Chairman, because we were trying to render our dumping procedures and the dumping procedures of other countries more predictable and to try to build in greater insurance and certainty, so that the people would know what tests they had to meet, what evidence they had to offer, if they sought relief. We began, as we said before, with a very, very abstract act, with—I think I can almost literally say—no legislative history to guide any interpreter of the act. Therefore, it was felt that both with respect to our own country and other countries which have antidumping laws, it would be very worthwhile to try to work out some refinement of these concepts and some elaboration of the rules for this purpose of predictability, as I said.

The CHAIRMAN. But you have already demonstrated that you are unable to predict the outcome in the simple illustration I gave. The code has already failed the test of predictability. Now, when you bring this kind of language in, you are expecting the other fellow to arrive at the same conclusion based on the same facts that you do, are you not?

Mr. REHM. Who is the other fellow? I am sorry.

The CHAIRMAN. The other party to the agreement.

Mr. REHM. Oh, certainly, yes, sir.

The CHAIRMAN. And, I would assume that these discussions of this language would have included a considerable amount of minutes and it would include some various notes and discussions to indicate just what the contracting parties had in mind in making this code to guide members in interpreting them. Do you have that sort of information available to us, that sort of history of this language here so we can see just what is intended by this language?

Mr. REHM. To answer your question——

The CHAIRMAN. So that we can see what you intended and what you expect the other fellow to do and what he expects you to do when you apply the tests.

Mr. REHM. I do not know if it is true of most international negotiations but certainly in this one, where some countries perhaps gave up positions they would not have wanted to give up, no minutes were kept. That was a deliberate decision of the countries negotiating the Codes, so that we do not have—I think it is a very reasonable question—a document of the kind that I gather does exist for other negotiations indicating what the parties intended. But, we feel and we can state—and surely we could not state it publicly unless we had told this to the other countries during the negotiations—that we can validly rely upon the interpretations I have been discussing.

Now, obviously, if other countries feel we are taking liberties with the code, they will be quick to let us know.

The CHAIRMAN. Well, your interpretations show the Code in conflict with the law.

Now, in our State criminal code we have tried to codify much of our law. We historically were a code law State compared to the common law States. We had the Code Napoleon that we looked to for our basic law in Louisiana and there are all sorts of treaties as written by intellectual French writers to explain what the people had in mind when they drafted that Code Napoleon and to give all sorts of illustrations as to what this particular language would mean applied to a certain set of facts. There is nothing of that sort available, as I understand, on what you are bringing us here.

Mr. REHM. No, sir.

The CHAIRMAN. You were unable to cite any language which states that dumped imports must be demonstrably the principal cause of injury. Does it or does it not have to be a cause greater than all other causes? On page 62 you say "No." On page 63 you say "Yes."

Mr. REHM. How is it——

The CHAIRMAN. Let me read from page 62—

The term "the principal cause" is susceptible of such interpretations and indeed does not require that dumped imports be that cause which is greater than all other causes combined of material injury.

But then, on page 63 you say—

Paragraph (a) also provides that in reaching their decision the authorities shall weigh on the one hand the effect of dumping and on the other hand all other factors taken together which may adversely affect the industry. The determination shall in all cases be based on findings and not on the allegations of hypothetical possibility.

Mr. REHM. Yes, I think I understand your question. The paragraph (a) which provides for weighing, on the one hand, the effect of the dumping and, on the other hand, all other factors, is not intended as we read it and as we understand it to change our interpretation of "the principal cause." I think quite frankly, Mr. Chairman, you could infer from this procedural provision you just cited a notion of major cause. We do not view it that way. We told the other countries that.

The CHAIRMAN. Well, what you say on page 62 is very clear, that it does not require that the dumped imports be greater than all the other causes of injury together. Then, on page 63 you say you will put all the other causes on one side of the scale and put this import cause on this side of the scale and you will weigh them. The inference of that would be that the scale goes this way [indicating] that that is not the principal cause. That is, that the other causes outweigh this one and, therefore, this is not the principal cause of the injury.

Mr. REHM. As I said, Mr. Chairman, I do regard that as a not unreasonable inference, the kind you just made. All I say is that the United States views this provision concerning weighing as a procedural provision which does not change the substantive meaning of the motion of principal cause.

Now, frankly, if I went back into the negotiating history, although this is speculation on my part right now, I would imagine that this notion of weighing is a leftover, if you will, from the notion of "the major cause" which the other countries very badly wanted us to take. But, this is a negotiated document, as Ambassador Roth said.

The CHAIRMAN. What you say on page 63 suggests that picture of a pure woman standing there blindfolded with a scale in her hands and on one side of the scale there is what can be said for dumping and on the other side what can be said for all other causes of injury. If the scale is heavier on this side than it is on the other, then this is the side on which justice must go. That concept would indicate that you put all the other causes on the one side and you put this cause on this side, the dumping, and if all the other causes outweigh the dumping, that you would say that is not the principal cause of the injury.

Mr. REHM. All I am saying——

The CHAIRMAN. Then, you take the previous page and say no, that is not the case at all.

Mr. REHM. Mr. Chairman, if I may reply to that, we have an interpretation. We made this interpretation clear to the other countries with which we negotiated the code. I can assure you that if we were in public telling the Senate Finance Committee that we were now construing a provision of the Code in a manner at variance with the interpretation that we discussed and agreed upon in Geneva, there would be quite an outburst.

All I am saying is that this is our interpretation. I do not deny that the provision you cited could lead one to the other conclusion. All I am saying is that it is our interpretation. We stand by it and think on this basis it is consistent wtih the act.

The CHAIRMAN. Then, if I understand it, based on what you are testifying here, that this need not change a single one of these cases the Tariff Commission has decided.

Mr. REHM. Mr. Chairman, I really think we have been confusing two quite separate concepts—the notion of injury on the one hand, and we discussed material injury, where I think we agree the motion of material injury is something more than de minimis, on the other hand, the notion of causality—principal cause. The notion of cause is one with which the Tariff Commissioners for the most part, over the years, have not dealt at all.

The CHAIRMAN. Now, if I understand what you are saying here, you four gentlemen are here telling me, particularly you two lawyers, that this code you are bringing here need not require the Tariff Commission to change its decision in a single one of these cases in which it has found injury.

Mr. REHM. That is not our position, Mr. Chairman. Our position is——

The CHAIRMAN. Well, now, you see, I have been listening to you for more than an hour and having listened to you, you have made the argument that the Tariff Commission is totally in error when they say you are changing the law in such a way as to require them to decide 80 percent of the cases they have been deciding in a manner different from the way they have been deciding them. You have been saying that they are only reading half of what you did and if they read the other half they will find that they could continue to decide all those cases just the way they have been deciding them. That is what it sounds like to me as a simple country lawyer, although may I say I made good grades as a law student, was associate editor of the law review and got my name on the building as a winner of competition.

But, now, you are telling me that, as I construed it and as I understood it, that these people are upset about nothing—that they could take this code language and arrive at the same conclusion that they have reached in all these cases.

But when I ask you direct if they could do that, then you answer, no.

Mr. REHM. Well, what I meant——

The CHAIRMAN. So now, you started out saying you have not changed the law and now you answer yes, you did change the law.

Mr. REHM. Mr. Chairman, I think we have got to——

The CHAIRMAN. If you could, that is.

Mr. REHM. (continuing). Distinguish changing the law from changing past Tariff Commission decisions. The two are very separate notions.

The CHAIRMAN. Well, are you trying to change those?

Mr. REHM. I think it is virtually impossible to give any kind of specific definitive answer. In some respects, I think the code probably does limit the discretion of the Tariff Commission in applying certain of the concepts we have been talking about. With respect to material injury, I think we can quite clearly say, as we have said before, there is no change. With respect to the notion of geographic segmentation, perhaps. All I was trying to say is that one cannot come to the clearly contrary conclusion of the majority report.

Now, with respect to causation, I think this is the area where we really cannot generalize at all because Tariff Commissioners, as I read the cases, have not attempted to spell out how much of a causal relationship is required under the act between the dumped imports and the injury. So I would have to put a big question mark under the notation of causality.

The CHAIRMAN. What are you telling me? Today we have a law, we have cases that have been processed and experience that we can look to. While industry may not be entirely satisfied with it, we do have some experience and a lawyer can read the cases and—particularly good experienced lawyers who tried those cases—can predict what is likely to happen if you go before the Tariff Commission.

You are shaking your head as if that is not correct.

Mr. REHM. Well, I do not believe that is correct. I think many lawyers with whom I talk in the trade and customs field would say you cannot predict. And I do not say this critically of the Tariff Commission, because I think the very nature of the cases they hear does not make predictions possible. But I dare say a number of lawyers in this city would say you cannot predict how the Tariff Commission will come out on a given antidumping case. But if I may return——

The CHAIRMAN. Let me put it to you this way way. Take a lawyer who pled one of those cases before that Commission last year, where the Commission found injury and gave relief. Are you telling me that if he had the precise same case come before him again, he would not predict what that Commission would do with that same case?

Mr. REHM. I am sorry. Same case?

The CHAIRMAN. Same case.

Mr. REHM. Sure, of course.

The CHAIRMAN. That is what I am talking about. Now, can you predict what will happen in the same case with your language?

Mr. REHM. No. Not for sure.

The CHAIRMAN. All right. That is what I am talking about.

Mr. REHM. Fair enough. My only basic point is that while we may, I emphasize the words, "while we may" and in some respects, I think probably have changed—I will use another word, "limited"—the discretion of the Tariff Commission, so that they might not arrive at the same decision they have in the past, we have not in our view changed the law The law provides the scope within which a regulatory agency can move. The Tariff Commission has certainly moved a great deal under this act. We are now in this code trying to lay down what we consider to be reasonable criteria which will admittedly limit the discretion of the Tariff Commission, just as these criteria will limit the discretion of other bodies in other countries determining the validity of dumping complaints against our exporters. That is the purpose of the code.

But again, I want to stress the difference between prior Tariff Commission decisions and the act.

The CHAIRMAN. What you are saying to me is this: Let us take the Federal Trade Commission. They decide a case. The court sustains their decision and it stands. Congress then proceeds to say, now, we are going to change that rule and we do change it. One can argue. now, we are not changing the law, all we are doing is changing the rule, but that rule has the effect of law until we change it. So in one sense you might argue that you did not change the law. All you did was change that interpretation of it or that conclusion of it.

In the other case you could argue that as a practical matter you did change the law. As far as I am concerned, when you change the results of what happened with a given set of facts, you have changed the law.

Now, I am one of those that do not like to admit that some of those Supreme Court decisions are the law, especially when I think they are wrong, but I must concede until someone changes them, they are the law. You are contending here that where you have changed what the results would be as applied to individual cases, that you have not changed the law. My reaction is—if that is how it is—that you have changed the law. The reason I asked the question was that it occurred to me that you people wanted to contend that you have not changed the law.

We could settle this very easily by simply passing a resolution here and putting it on the President's desk on a bill we think he will sign. It would say the old law stands exactly the same as it is and this was intended just to codify what already was the law of the United States. But as I understand it, you would not be satisfied with that because you want to change the law if you can. Now, is that not about the size of it?

Mr. ROTH. Let me say just, Mr. Chairman, certainly the intent was not to change the law but to negotiate a code which would be entirely consistent with that law.

The CHAIRMAN. So your position, Mr. Roth, is that you think you have negotiated a code which is consistent with the law and does not

change the law that is in existence now and was in existence prior to this code?

Mr. ROTH. That is correct.

The CHAIRMAN. Senator Anderson?

Senator ANDERSON. I have to be very careful of these lawyers here. On page 3, about half way, you refer to "the Trade Information Committee held public hearings in September of 1966." Were those hearings published?

Mr. ROTH. No. Those hearings were not published. We used them as a means of gathering information from interested parties, both those who were against even the present antidumping law and those who were in favor of improvements—such as the need for Canada to have in injury requirement. And all these facts went intto the formulation of our negotiating position.

Mr. Senator, I would like to say that in the early part of the Kennedy round, quite apart from dumping, when we were putting together our exceptions list—that is, items that would not be negotiated—we also extensively used public hearings which were not published. After the hearings were over, we often had confidential discussions with certain industries, and all of this, as I said, we felt it was our responsibility to take and to use in determining a negotiating position.

Senator ANDERSON. I think it would be easier if the Congress would find out what the discussion was all about.

Mr. ROTH. I would say, Mr. Senator, as I recall, that some of the groups that appeared before us did submit briefs and these, of course, would be available for you to see if you would care to do so.

Senator ANDERSON. On page 4 you say:

In short, it will not be any harder for a domestic industry in the future to obtain relief under the act than it has been up to now.

If it is true they get no help anyhow, this says they will keep right on getting no help. It could not be any worse than the present. I have appeared in the copper hearings and others, and we think the State Department is always against us. This seems to say here that if we had the same situation, we would all be against you.

Mr. ROTH. Senator, as you know, the two agencies concerned with this, the Treasury and the Tariff Commission, have made affirmative findings in a number of antidumping cases. We are saying here that the code would not make it more difficult for a domestic industry, and in a certain sense——

Senator ANDERSON. You could not make it any more difficult under any circumstances, could you?

Mr. ROTH. In a certain sense, Senator, it will make it less difficult, in that it will meet one of the complaints of certain industries, namely, that the present proceedings of the Treasury and Tariff are so long that they themselves are an impediment for the domestic industry. This code will shorten the entire operation.

Mr. Marks, would you like to cover that?

Mr. MARKS. I do not think I have to add anything further. We are hopeful that this will shorten the operation as Ambassador Roth has just stated and we are certainly determined that we will do everything possible to make this so.

Senator ANDERSON. And will give some relief, perhaps?

Mr. MARKS. Yes. To the extent that the operation is more rapid, I think this in itself provides relief. Obviously, we cannot predict the outcome of any particular cases without knowing the facts.

Senator ANDERSON. I have no further questions.

The CHAIRMAN. Senator Hartke?

Senator HARTKE. Yes. Can I find out the name of the lawyer? I do not know his name.

Mr. REHM. John Rehm is my name. R-e-h-m.

Senator HARTKE. And he participated in these negotiations in——

Mr. ROTH. That is correct, Senator.

Senator HARTKE. What was his role there?

Mr. ROTH. He was one of the major negotiators and one of the major individuals in Washington responsible for putting together our negotiating position. Could I also say——

Senator HARTKE. Under what authority does he act?

Mr. ROTH. He acts under my authority. My authority comes——

Senator HARTKE. Was he a negotiator or was he one of your assistants? Let us get that straight.

Mr. ROTH. He was both.

Senator HARTKE. He was both?

Mr. ROTH. He was both.

Senator HARTKE. Under the law, if he is going to be a negotiator, he is required to be confirmed by the Senate. Why was he not confirmed by the Senate?

Mr. ROTH. No, sir. The only chief negotiator, which is myself——

Senator HARTKE. That is right.

Mr. ROTH. My deputy——

Senator HARTKE. Right.

Mr. ROTH. Which was Ambassador Blumenthal in Geneva——

Senator HARTKE. Both of them were confirmed by the Senate.

Mr. ROTH. Both confirmed by the Senate and they both had the responsibility for the negotiations.

Senator HARTKE. Well, I thought you said he was a negotiator. I mean, he can be an assistant and adviser to you but to be a negotiator he would be required to be confirmed. I notice he said we, we, we, as though he was "we." And I was just trying to find out who "we" was.

Mr. ROTH. Let me say that, in Geneva, where we had negotiations going on concurrently with a great many countries, you had in effect a "negotiator," if you want to put quotation marks around it, for each one of the country and sector negotiations and I think he was using it in that sense.

Could I also, Senator, introduce Fred Smith?

Senator HARTKE. I know Mr. Smith. He is from the Treasury.

Mr. Smith, let me return to some testimony. What is the responsibility now of the Tariff Commission under the present law?

Mr. SMITH. Well, under the act, the responsibility is divided between the Treasury and the Tariff Commission. The Treasury has the responsibility for determining whether there have been sales at less than fair value and if it so determines, the matter then goes to the Tariff Commission to determine whether there has been as a result of the dumping, material injury, threat of material injury, or prevention of the establishment of an industry. So, I would merely say that in a sense I was speaking off the cuff because I am not the principal

legal adviser responsible for questions of injury which is within the province of the Tariff Commission.

Senator HARTKE. All right.

Now, is it not true that we have a two-step procedure?

Mr. SMITH. Yes.

Senator HARTKE. They are not simultaneous.

Mr. SMITH. They are not simultaneous.

Senator HARTKE. And under the code they are simultaneous.

Mr. SMITH. Under the code they are not simultaneous.

Senator HARTKE. They are not?

Mr. SMITH. No, sir.

Senator HARTKE. Why are they not?

Mr. SMITH. Because before the Tariff Commission studies the question of injury under the code and our regulations implementing the code, we will have made a determination of sales at less than fair value.

Senator HARTKE. I thought that the code requires industries to furnish the Treasury Department with evidence of injury. Is that not correct?

Mr. SMITH. Could I ask you to repeat that again?

Senator HARTKE. Is it not true according to the requirements under the code that an industry must furnish the Treasury Department with evidence of injury?

Mr. SMITH. Some information to indicate injury. Of course, the mere fact that an industry files a complaint is pretty indicative that they could show some evidence of injury.

Senator HARTKE. I did not ask you what it is indicative of. I am asking a very simple question. As I understand it, the code requires industry to furnish the Treasury Department with evidence of injury. Is that correct?

Mr. SMITH. Yes.

Senator HARTKE. Now, can you cite me anything under the Antidumping Act of 1921 or the Customs Simplification Act of 1954, any language whatsoever that requires that the Treasury should require information on the question of injury?

Mr. SMITH. There is nothing specific, but it has always been the practice of the Treasury Department to ask——

Senator HARTKE. Is that a change, then, in the situation?

Mr. SMITH. No, sir.

Senator HARTKE. Well, tell me where it is in the law.

Mr. SMITH. Well, under our regulations implementing the law, and as has been pointed out, the law is very general, under our regulations in implementing the law we have for a long time, had a requirement that a complainant must supply some threshold facts.

Senator HARTKE. In other words, you admit, that the code itself says that this shall be submitted whereas heretofore there was no requirement of such submission, is that not correct?

Mr. SMITH. There is a requirement under our regulation of the submission of certain threshold facts and the code merely in my opinion, codifies what has been the past practice in general. So that there is nothing significantly new in the requirements that they supply these threshold facts.

Senator HARTKE. What do you use those threshold facts for?

Mr. SMITH. We use the threshold facts to determine whether there is any basis to conduct an investigation.

Senator HARTKE. For what?

Mr. SMITH. To determine whether there is any basis to conduct an investigation.

Senator HARTKE. Basis for investigation, is that right?

Mr. SMITH. Right.

Senator HARTKE. In order to do that you would have to make an evaluation, is that not right?

Mr. SMITH. No, sir.

Senator HARTKE. You would not have to? You do not evaluate the facts which are submitted? They are just submitted but you make a judgment without evaluation? Is that what you are saying?

Mr. SMITH. We do not make a judgment even. What I would like to say is this.

Senator HARTKE. What do you use these threshold facts of injury for?

Mr. SMITH. Just to determine whether an investigation would be futile.

Senator HARTKE. Do you evaluate them?

Mr. SMITH. No, we do not.

Senator HARTKE. In other words, do you do this as a result of allegations simply or do you investigate the facts?

Mr. SMITH. Let me say this first. There is a lot of misconception in this country——

Senator HARTKE. Now, there may be misconceptions; I noticed the gratuitous insult in the Ambassador's statement a few moments ago about people's interpretations. You use the fine words "shades of meaning," Mr. Ambassador. What is a shade of meaning? What does shade of meaning mean? You have that in your statement here.

Mr. ROTH. I am not aware that I——

Senator HARTKE. Shades of meaning. What does shade of meaning mean?

Mr. ROTH. I will have to find out from my statement. I certainly did not intend any gratuitous insult of any order.

Senator HARTKE. Do you want the page? I will give it to you. It is on page 8 of your statement. You say there: "There is an important shade of meaning." What does shade of meaning mean?

Mr. ROTH. I assume that a shade of meaning means a way in which something can be interpreted.

Senator HARTKE. Let me come back to that later. Go ahead, Mr. Smith. I through maybe I would give you a little time to get an answer to that question.

Mr. SMITH. Thank you. I was starting to say that there is a lot of misconception as to what dumping is, for instance, in the United States. Representatives of industry quite frequently think that if a foreign manufacturer sells something at a price which is lower than his price, that that QED is dumping. So that we have complaints that come in where there is absolutely no evidence of dumping or of injury, and all that we require and have in the past required, is that the complainant submit such information as is reasonably available to us so that we can make a threshold judgment, if you would like to use the

word, as to whether there is any basis for proceeding with a case, but we do not evaluate or weigh or in any way, prejudge the question of injury.

Senator HARTKE. You make a determination, then, if I correctly understand you, as to whether or not there is any evidence of injury. Is that what you are saying? Without going back and evaluating the extent of the injury? Is that what you are saying?

Mr. SMITH. Yes. Now, we do not do——

Senator HARTKE. Under what authority?

Mr. SMITH. Only on the basis of what he submits. We may on our own see if we can find out if there is any basis for this, but it is purely for the purpose of avoiding our Customs people, who are heavily pressed, from engaging in a futile investigation. And as I said, in any case where there is a complaint there is almost certain to be something that the complainant can show in the way of increased sales by a foreign competitor, or something of that sort, that would indicate a possibility of injury.

Senator HARTKE. Under the act there is no question put that the determination of injury is to be made in the Tariff Commission.

Mr. SMITH. That is right.

Senator HARTKE. There is no statement whatsoever in the act that there must be a finding of dumping by the Treasury. Is that not true?

Mr. SMITH. No. The act requires the Treasury to make the finding of dumping.

Senator HARTKE. Dumping?

Mr. SMITH. Yes.

Senator HARTKE. Let us get back, Mr. Smith.

Mr. SMITH. Sales at less than fair value.

Senator HARTKE. I understand you now. Now, let us go back to what you said. I do not know whether you want to stand on what you said or not, but I would think you would not. A lot of people do not understand what dumping is; and there is no authority in the Treasury Department to do anything with regard to dumping, is that not true? But you said that in order to make sure there was a case of dumping you had to have this threshold of injury. Is that not what you said?

Mr. SMITH. Some information indicating injury.

Senator HARTKE. Yes. But, is it not true that you have no authority to make decisions on any question of dumping—any authority to make any decision on dumping whatsoever. You told me you do not evaluate this injury materials because that under the act is the function of the Tariff Commission. Is that not true?

Mr. SMITH. The function of the Tariff Commission is to determine whether there is injury.

Senator HARTKE. Just listen to me.

Mr. SMITH. And after that, the Secretary of the Treasury must——

Senator HARTKE. Let me come back and go through the steps since you evidently cannot follow the steps. Dumping is not your business. Is that right? The Treasury only has authority to make the simple determination as to whether or not there is a sale at less than fair market value.

Mr. SMITH. Plus one thing.

Senator HARTKE. What?

Mr. SMITH. At the end of the whole proceeding, if the Tariff Commission finds injury, the Secretary of the Treasury is given the responsibility of making the final antidumping finding.

Senator HARTKE. At the end?

Mr. SMITH. At the end.

Senator HARTKE. Yes. I understand that. But, before that is done there is a procedural step which involves the Tariff Commission.

Mr. SMITH. That is right.

Senator HARTKE. What you do, what the Treasury Department does, as they did in the Italian steel fabricating case, is to make a determination, pure and simple.

Mr. SMITH. That was a countervailing duty case.

Senator HARTKE. The Treasury made a finding that there were sales at less than fair market value, pure and simple, is that not true?

Mr. SMITH. Less than fair value.

Senator HARTKE. That is all. Then the case goes to the Tariff Commission.

Mr. SMITH. Right.

Senator HARTKE. And the Tariff Commission on the basis of the facts, makes the second determination as to whether there is injury. That is all I am trying to establish.

Mr. SMITH. That is right.

Senator HARTKE. And what I am telling you is it does not make a continental difference to the Treasury Department whether or not there is a threshold of injury or whether there is no injury whatsoever. That is not your business, is it?

Mr. SMITH. Well, I think it is our business——

Senator HARTKE. You think, then——

Mr. SMITH. I think it is our business not to embark upon investigations where there appears to be no basis for any action.

Senator HARTKE. In other words, you are assuming this responsibility. You are doing more than the mere arithmetic. Under the law the arithmetic is up to the Treasury Department and the judgment of the injury is up to the Tariff Commission. You have the arithmetic and then the injury, and then the Treasury Department issues the order, is that not true? I am just trying to——

Mr. SMITH. That is right.

Senator HARTKE (continuing). Get the procedure settled.

Mr. SMITH. Right.

Senator HARTKE. And, as far as the injury is concerned, you have no responsibility, no authority to make that determination, issue the final order, or even make a determination whether there is a threshold of injury or anything else, is that not true?

Mr. SMITH. I feel we do have.

Senator HARTKE. Under what authority?

Mr. SMITH. There is no specific authority, but just to save the taxpayers' money in not embarking on a futile investigation. But, we do not evaluate. And if complainant says that his sales fell off or that a foreign competitor was getting a higher percentage of the sales in his area, or any one of a number of things that led him to file the complaint, when he has given us information of injury which warrants us proceeding with the case. We do not evaluate that.

Senator HARTKE. Tell the committee, then, how much is the cost incurred by the Treasury Department in finding sales at less than fair market value in a typical antidumping proceeding?

Mr. SMITH. I will have that for you in just a minute. You asked for the total cost of administering this area of law.

Senator HARTKE. As to one case?

Mr. SMITH. As to one case.

Senator HARTKE. In a typical antidumping proceeding.

Mr. SMITH. Well, some are much more complicated than others and some take more time, so that I think the best we could do would be to give you an average. Maybe I can get something on that. Just a moment. This would have to be a broad estimate, but my advisers tell me that depending upon the complexity of the case, probably $2,000 to $10,000.

Senator HARTKE. What is the cost to a complainant in a typical case of that kind?

Mr. SMITH. I would not have any idea.

Senator HARTKE. What is the cost to the importer or exporter involved in such a case?

Mr. SMITH. Well, it could—injurious dumping could cost a domestic producer tremendous amounts of money.

Senator HARTKE. That is right. Now tell me where in the act or where under the decisions under the act or in the legislative history accompanying the act or in any prior practices of any nature whatsoever which indicates that the cost of the proceedings—which is the basis for which you ask for this injury requirement—is a criteria for permitting the statutory remedy to be invoked?

Mr. SMITH. I could cite you anything. It is just the Government—in my opinion.

Senator HARTKE. The Government is going to make a decision that the cost of the proceeding rather than the legal remedy or legal end result is the determining factor?

Mr. SMITH. No.

Senator HARTKE. No. I would think not, either.

Mr. SMITH. I would like to put in the record, if I may, on the Treasury's Antidumping Regulations.[1] These are not the new regulations. These are the existing regulations. Section 14.6, subparagraph 3, which is the past practice on information to be supplied with the complaint: "Such information as is reasonably available to the person furnishing the information as to the total value and volume of domestic production of the merchandise in question." So that we always have asked for this type of information. This is nothing that is governed by the code.

Senator HARTKE. All right.

The Tariff Commission on page 22[2] with regard to its comments on article 5, the initiation of investigation of dumping, says:

> Article 5 of the code states in effect, that dumping investigations shall normally be initiated upon complaint of the industry producing the like products but that in unusual circumstances the Secretary of the Treasury may initiate such investigation. In either event, the investigation—

are you with me?—

> must not be initiated until there is evidence at hand of sales at less than fair market value and injury and a simultaneous consideration of such evidence to determine whether investigation is warranted.

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[1] Present dumping regulations of the Treasury Department appear at p. 251.
[2] P. 342 of these hearings.

Now, is that statement by the Tariff Commission erroneous?

Mr. SMITH. I do not think this is accurate.

Senator HARTKE. It is not accurate?

Mr. SMITH. No.

Senator HARTKE. Wherein is it not accurate?

Mr. SMITH. Could you show me, cite me the page there again, and the paragraph, what you were just reading?

Senator HARTKE. I am reading from page 22 of the committee print, Committee on Finance, Report of the U.S. Tariff Commission on S. Con. Res. 38.

Mr. SMITH. Well, it is a question of interpretation. Our interpretation is that article 5 of the code essentially says nothing more with respect to the information to be submitted with the complaint than has been our practice and has existed in our regulations as required in order for us to commence an investigation.

Senator HARTKE. In other words, you make a determination as to whether there is injury; is that not what you are saying?

Mr. SMITH. We make a determination as to whether there is any basis for entering upon an investigation, any evidence. We do not evaluate the evidence.

Senator HARTKE. Well, the investigation is not initiated until there is evidence at hand not alone of LTFV but also of injury. In other words, you are now going to make a determination of injury, is that not true, a preliminary determination of injury?

Mr. SMITH. We are going to make just a preliminary determination as to whether there is any indication of injury.

Senator HARTKE. I understand the chairman would like to proceed to another side of the question, but can I just ask one question on a matter which has not been touched.

Ambassador Roth, you appeared before the Subcommittee on Foreign Economic Policy of the Joint Economic Committee of Congress on July 11, 1967. In the course of that statement you said, and I want to quote:

> Unfortunately, however, the adjustment assistance provisions have not had the expected beneficial effect because in practice the present test of eligibility to apply for the assistance has proved too strict. In fact, in no case brought under the act have and firms or workers been able to prove eligibility. The present test of eligibility requires, one, that tariff concessions be shown to be the major cause of increased imports, and number 2, that such increased imports be shown to be the major cause of injury to the petitioner.

To continue your quote:

> In the complex environment of our modern economy, a great variety of factors affect the productive capacity and competitiveness of American producers making it virtually impossible to single out increased imports as the major cause of injury. In fact, it has usually been impossible to prove that tariff concessions were the major cause of increased imports.

Now, if it is as you say virtually impossible to single out increased imports as the major cause of injury, under the adjustment assistance provisions of the Trade Expansion Act, would it not be virtually impossible to single out dumped imports as the principal cause of injury as the code requires?

Mr. REHM. I think this is a question, Senator Hartke, of the interpretation of phrases. Whatever "the principal cause" may mean in the abstract—and I think probably it could be interpreted to mean the

major cause as Ambassador Roth described it—the fact is that during negotiations we made it clear that we would construe the notion of principal cause in a certain way. We said that we would not construe it as a major cause notion of the kind you have been describing. In short, in our view—and we made this very clear, we feel, to the other countries with which we negotiated—principal cause does not mean the cause greater than all other causes combined but rather the cause greater than any other cause.

Now, just to support the plausibility of that interpretation, I will cite the fact that there is another piece of legislation, the automotive legislation, which uses the term "primary factor" in the same way, and I think "primary" and "principal" are synonomous.

Senator HARTKE. You are telling me then the Code is less rigid than the act in this regard?

Mr. REHM. Well, it depends upon how you interpret a very key and undefined term in the act.

Senator HARTKE. But it is different?

Mr. REHM. Well, again, it depends upon how one construes "by reason of" in the act.

Senator HARTKE. I understand that. I am just asking is it different or is it not?

Mr. REHM. In our view, it is not.

Senator HARTKE. It is the same thing?

Mr. REHM. No.

Senator HARTKE. It is not the same thing. It has to either be the same thing or not.

Mr. REHM. I am sorry.

Senator HARTKE. It does not have to be the same or not.

Mr. REHM. If I may answer it my way, it is within the scope of the notion of "by reason of."

Senator HARTKE. Well, do they have identical meanings or do they not have identical meanings?

Mr. REHM. We do not know. The legislative history——

Senator HARTKE. If they do have identical meanings there is no change, right?

Mr. REHM. Correct.

Senator HARTKE. If they do not have identical meanings, then, there is a change, right? I mean, certainly you ought not to argue about simple English like that.

Mr. REHM. It depends upon what you are referring to.

Senator HARTKE. I am referring to English.

Mr. REHM. All right.

Senator HARTKE. I am talking about whether it is identical, whether it is a change.

Mr. REHM. Well, first, if I may, how do you——

Senator HARTKE. I know you do not want to answer. I understand that; it puts you in an intolerable position because if you say it is identical, which you do not want to say it is, then there is no change in the law. But, if you say it is not identical, then there is a change in the law which you have no authority to do. I know that this is a trap for you in that way, but you created the trap, not me. Do not accuse me of creating the trap.

Mr. REHM. Again, I would have to ask you, if I may, respectfully, Mr. Senator, how you construe "by reason of."

Senator HARTKE. I am not construing "by reason of."

Mr. REHM. But we have to——

Senator HARTKE. You are the construer. You negotiated this thing and we are asking you to give an interpretation of what you mean by "by reason of." What do you mean "by reason of"?

Mr. REHM. "By reason of," it seems to me, has a range of meanings within which this quite reasonably falls.

Senator HARTKE. Is the range of meaning the same as that in the act or is it different than in the act?

Mr. REHM. I can only repeat this falls within the range.

Senator HARTKE. I take it, then, that it is different.

Mr. REHM. No, it is not different.

Senator HARTKE. All right.

Mr. Chairman, I would like to ask one other thing. By what authority do you claim, by what Executive authority do you claim that you have proceeded and not under the Trade Expansion Act when you were only appointed by the authority of the Trade Expansion Act, so the creation of your office was by the Trade Expansion Act. Did you receive some special authority?

Mr. ROTH. No, sir. Section 241——

Senator HARTKE. Of what?

Mr. ROTH. Of the Trade Expansion Act. Section 241(a).

Senator HARTKE. Page what?

Mr. ROTH. Seven. I am sorry. You may not have—this is a Ways and Means Committee document.

Senator HARTKE. I have the legislative history of the Trade Expansion Act; is that what you are talking about?

Mr. ROTH. No. I am talking about the act itself. Section 241(a) of the Trade Expansion Act of 1962.

Senator HARTKE. What does it say?

Mr. ROTH. It says:

> The President shall appoint, by and with the advice and consent of the Senate, a Special Representative for Trade Negotiations, who shall be the chief representative of the United States for each negotiation under this title and for such other negotiations as in the President's judgment require that the Special Representative be the chief representative of the United States. * * *

I think this was basically the authority under which we proceeded. And the President——

Senator HARTKE. The only authority you have, though, is under Section 241.

Mr. ROTH. The President in giving me——

Senator HARTKE. Pardon?

Mr. ROTH. The President in giving me the authority to negotiate the code, did so——

Senator HARTKE. Under what?

Mr. ROTH (continuing). Pursuant to his constitutional authority to conduct foreign affairs and certainly pursuant to the——

Senator HARTKE. You have a special appointment other than this appointment, then; is that true?

Mr. ROTH. Sir?

Senator HARTKE. Under the constitutional authority of the President?

Mr. ROTH. No. My position was set up by law.

Senator HARTKE. Pursuant to the Trade Expansion Act of 1962, is that not correct?

Mr. ROTH. That is correct.

Senator HARTKE. So when you say, in your testimony that the code was negotiated pursuant to the President's constitutional authority to conduct foreign relations and not under the Trade Expansion Act of 1962 or any other piece of legislation, the statement you just made is not correct.

Mr. ROTH. I had not finished. I was saying it was pursuant to his constitutional authority and pursuant also to section 241(a) which I just read and which authorizes and directs me to be the chief negotiator not only for those negotiations authorized by the Trade Expansion Act, but also, as it says, for such other negotiations as in the President's judgment require that this be done.

Senator HARTKE. And, have you filed with anyone such other acts that the President authorized you to conduct?

Mr. ROTH. No; but I think in answer to Senator Williams earlier today, in talking about negotiation of the so-called American selling price package, I said that this was something which we clearly did not have the authority to do and, therefore, the President authorized the negotiation on an ad referendum basis back to the Congress.

Senator HARTKE. Do you recognize the authority of the *Capps* case or do you not? Do you understand what I am talking about? The case is referred to in the Tariff Commission's report and which is found in 204 Federal Report, second series, page 655. It says that there is no authority whatsoever in the Office of President to deal with questions relating to trade because that is an occupied field of the Congress.

Mr. REHM. As I recall the case, Senator Hartke, that dealt with the question of changing tariff law and the court concluded that the President did not have that power. The power to establish tariffs and to change tariffs is clearly vested by the Constitution in the Congress. I think we are talking about a different proposition here—the authority to negotiate, setting aside completely the question of implementing an agreement and affecting in one way or another U.S. tariff and trade law.

Senator HARTKE. This Executive agreement had nothing to do with that. In the *Capps* case it provided in effect that Canada would not permit potatoes to be shipped to the United States unless the U.S. buyer had agreed not to resell them for table use. They said in this case:

> Since the purpose of this agreement as well as the effect was to bar imports which would interfere with the agricultural adjustment program it was necessary that the provisions of this statute be complied with and that an Executive agreement excluding such imports which failed to comply with its use was void.

They say:

> We think that whatever the power of the Executive with respect to making Executive trade agreements regulating foreign commerce in the absence of the action by the Congress, it is clear that the Executive may not through entering into such agreements avoid complying with the regulations prescribed by Congress.

If you go back to the testimony by Mr. Dillon when the Trade Expansion Act was being considered you will find that he was specifically asked in the Ways and Means Committee whether or not the Trade Expansion Act would have any effect upon the antidumping laws, and he repeatedly stated that it did not. But you say you do not follow the authority of the *Capps* case and you are willing to disregard the testimony of Secretary Dillon at that time.

Mr. REHM. May I just say we do not regard the *Capps* case as applicable in this case. With respect to Secretary Dillon's testimony which I recall, he was dealing with the powers that would be delegated by the Congress to the President under the Trade Expansion Act of 1962.

Senator HARTKE. And you contend that you are operating outside the authority of the Trade Expansion Act; is that right?

Mr. REHM. Correct.

Senator HARTKE. Although the *Capps* case says that the whole question of commerce and the whole question of international trade—you agree it deals with trade, do you not?

Mr. REHM. Yes, sir.

Senator HARTKE. Even though the *Capps* case says that the Congress had occupied the field of international trade, but you claim that somehow you have been able to obviate that. You say this is something which is not in international trade.

Mr. REHM. No. I said——

Senator HARTKE. This is the holding in the *Capps* case.

Mr. REHM. Frankly——

Senator HARTKE. "Imports from a foreign country or foreign commerce subject to regulation so far as this country is concerned by Congress alone."

Now, tell me how you get outside of that.

Mr. REHM. Because we, in our view, are not changing the law. The *Capps* case as I recall it, and from what you have just read, was dealing with the case where the President through an Executive agreement attempted to change the law. I must confess I do not have the case before me.

Senator HARTKE. "The Executive may not bypass congressional limitations regulating such commerce by entering in an agreement with a foreign country, that the regulation be exercised by that country through its control over exports."

Mr. REHM. That is our position.

Senator HARTKE. "Even though the regulations prescribed by the Executive agreement may be more desirable than that prescribed by congressional action it is the latter that must be accepted as the expression of national policy."

In other words, Congress has the complete authority but you say you are acting outside the authority of Congress.

Mr. REHM. I am sorry. I said we are acting——

Senator HARTKE. Constitutional authority.

Mr. REHM (continuing). Outside the authority of the Trade Expansion Act of 1962, but within the scope of the Antidumping Act of 1921. That is our position.

Senator HARTKE. Do that again.

Mr. REHM. That we negotiated and will implement the code totally outside the Trade Expansion Act of 1962, as a matter of substantive authority, but that we negotiated the code pursuant to the President's constitutional authority and will implement the code within the scope of the Antidumping Act.

Senator HARTKE. You are a pretty good lawyer and you know as well as I do that if this is occupied area the Executive is without authority, certainly the Antidumping Act of 1921 dealt with exactly what you are talking about today. It that not true?

Mr. REHM. Yes, sir.

Senator HARTKE. Although contrary to the decisions of the court, since this is occupied territory, you are telling me that you have decided to exercise this authority outside of the authority of Congress.

Mr. REHM. No.

Senator HARTKE. And, you are moving into a field and stating here in affirmative fashion that you are not relying upon the Trade Expansion Act, but that you are relying upon the constitutional authority which under the action of Congress is already occupied by the Congress and, therefore, you have no right to move into that field.

Mr. REHM. In our view, Senator, we have a coexistence of authority. The Congress has clearly occupied the field of dumping. But we also have the clear authority of the President under the Constitution to conclude agreements. In that case——

Senator HARTKE. No. That is not the holding in the *Capps* case. In other words, you are saying the *Capps* case is not the law of the land.

Mr. REHM. I have not reached, in what I have just said, the point at which the *Capps* case comes in. The *Capps* case says, as I recall it, that the President, by Executive agreement cannot change an act of Congress. If that is the holding or the principle of the *Capps* case, then we would agree with you.

The CHAIRMAN. Senator, could I just——

Senator HARTKE. I will be glad to yield.

The CHAIRMAN. I have had occasion to look at this law and look at your proposed code. You say you have not changed the law. Let me give you an illustration, from the law of automobile injury, an area where I have a little experience. Have any of you ever tried an automobile injury case?

Mr. REHM. No, sir.

The CHAIRMAN. Let me give you a simple example. Let us say I am in a little Volkswagen automobile being driven by Senator Hartke. We are driving down the street just doing fine and behaving ourselves. We get to a stop sign but instead of coming to a complete halt the Senator just slows down. At that point here comes some big fellow with a truck, just barrelling down the highway at 80 miles an hour, and he knocks that poor little Volkswagen down the highway like a big ball knocking a tenpin, and keeps right on going. He does not even stop.

I am badly injured, so I file my suit for $200,000.

Now, the fellow who is the principal cause of that injury is that guy driving that big truck, but I cannot find him. He is gone. I have no recourse against him. Or let us go a step further and say even if I could, he is judgment proof. He is insolvent. The truck is damaged, and I could not get anything out of him anyway. But Senator Hartke

is contributorily negligent. He drove through that stop sign. So, I can sue Senator Hartke and take that house he has out there in Virginia to satisfy my judgment and get the money for my broken arm and broken leg and smashed up skull. I am in position to get some relief for my injury.

Now, to draw an analogy, the law you have now would let me recover against either one of two tort-feasors. If I cannot get it from the guy with the truck I can get it from Senator Hartke with the Volkswagen. But, you bring a code in here that says the only guy I can recover against is the truck driver. He is the principal cause.

Now, that is your analogy. So, in a market area you can find a situation where there are a number of causes for a competitor losing money. The dumping of cement in there is just one of the causes. Among the different reasons he is losing money is the fact that one of his competitors is just giving him fits or engaging in some pretty vicious trade practices himself in the area. Perhaps legally, perhaps illegally. It does not make too much difference. But the dumping is more than a de minimis part of that cause. It has something substantial to do with it. It is a material cause of the injury. It is a part of the picture and what you are saying in your provision here, just by the clear language of it, as I see it, that the dumping has to be the principal cause. If as between two causes the domestic competition is more responsible for that injury than the dumping, then he cannot get any relief because of the dumping. That is just as clear to me as the nose on my face from the language you brought us.

Can you get anything contrary to that?

Mr. REHM. No.

Mr. SMITH. Can I comment on that?

The CHAIRMAN. You said no and you want to comment.

Mr. SMITH. I would just comment this way, that there have been numerous cases cited by the Tariff Commission prior to the code where there would be no question but what sales at less than fair value had some impact on the domestic producer, but yet they did not find injury because in the same way the principal cause of the domestic producer's problem was not the dumped imports. In other words, while you may find specific cases, borderline cases which might be decided differently under the code, in general, it is my impression that principal cause is right within the ambit of the approach and interpretation of the law which the Tariff Commission has given in the past.

The CHAIRMAN. Well, it is just as clear to me as the nose on my face that what you are bringing in here is a code that says as between two tort feasors, I can only recover against the one who is the more negligent, while the existing law—just take a look at it—would be that between two tort feasors I can recover against the fellow who is contributorily negligent even though the other fellow's negligence might be greater or more culpable or more directly responsible for the injury.

If you apply the doctrine of last clear chance, Senator Hartke might have recovered against that truck driver but he and I could have both recovered if the truck driver had been insured. Unfortunately, he was not but I can recover against Senator Hartke. You are bringing me by analogies a law where I cannot get a nickel out of Senator Hartke. [Laughter.]

Senator HARTKE. I do not know what I have done. [Laughter.]

The CHAIRMAN. Well, it is just that simple to me. You just read the clear language of it insofar as it is clear, and I can recover against one, not against both.

Now, of course, you and I know in many cases where they have tried these cases, where there is no recovery allowed on dumping or on whatever the other relief might be, escape clause or otherwise, the fellow is usually told there are other competitive factors which do not have anything to do with the law violation. Competition in the industry may be primarily responsible for the unfortunate situation in which this competitor finds himself or which the industry finds itself. Foreign competition may be only a relatively unimportant portion, although perhaps a material and significant portion, of the overall injury. By just the simple reading of the language as a lawyer not experienced in this field of dumping but having tried an automobile injury case, I would conclude that under one statute I could recover, but under the other I could not. That is about what you answered insofar as an answer was given on a yes or no basis.

Senator Hartke, do you care to ask any further questions? I would like to put another witness on this morning but I trespassed upon the time of the witness more than you have and I apologize to you.

Senator HARTKE. I am going to make one statement about what Mr. Rehm read, and said some of us had not read or implied we had not read, when he went to that little provision, article 4, subsection (a) (2). I just want to point out that he also omitted to read the provided section at the end of that provision: "*Provided, however*, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in a market as defined," and that clearly is in violation of the present act and of every interpretation by the Tariff Commission.

I do not even think one of the Tariff Commissioners would oppose me on that. I think we will get a unanimous vote on that. I just want to clear up the fact that you forgot the "provided" section. That is all.

The CHAIRMAN. Thank you very much, Mr. Ambassador. As you can see, there is some room for difference of opinion between the views that we have on this matter.

Mr. ROTH. Thank you, Mr. Chairman.

The CHAIRMAN. We are only going to be able to hear one more witness in this morning's session and with deference to those that are scheduled, I would very much like to have Commissioner Bruce Clubb of the Tariff Commission if he is here. Commissioner, U.S. Tariff Commission, Mr. Bruce Clubb. Mr. Clubb, I would like for you to be the next witness even though that is not our order. I referred in so many instances to what the Tariff Commission has said about the matter that I think it would be appropriate that you be the next witness so we could see this issue from the administrative level and then we will hear the industry witnesses.

STATEMENT OF HON. BRUCE E. CLUBB, COMMISSIONER, U.S. TARIFF COMMISSION

Mr. CLUBB. Thank you, Mr. Chairman. I have a prepared statement here which I would like to present if it is agreeable.

The CHAIRMAN. You can proceed as you want to. You can read the statement and if so, I will read it along with you, or else you can summarize it. How would you prefer?

Mr. CLUBB. I would prefer to read it, if I may.

The CHAIRMAN. I think that would be good.

Mr. CLUBB. My name is Bruce E. Clubb. I am one of four members of the Tariff Commission currently in office. I am appearing here at the request of the committee to testify on the question of whether the International Anti-dumping code negotiated during the Kennedy Round and scheduled to become effective July 1, 1968, is sufficiently consistent with the provisions of the Antidumping Act of 1921 that it can be implemented by the United States without enabling legislation.

At present, the application of dumping duties in the United States is governed solely by the provisions of the Antidumping Act of 1921. This act, as amended, provides in effect that whenever the Secretary of the Treasury determines that imported merchandise is being sold in the United States at a price lower than that charged in the home market, he is to inform the Tariff Commission which has the responsibility of determining whether an industry in the United States is being injured by such sales. If the Commission determines that an industry is being injured by the sales of such dumped merchandise, dumping duties are imposed in an amount equal to the difference between the price in the country of production and the price at which the goods are sold here.

During the Kennedy Round an International Antidumping Agreement—hereinafter referred to as "the code"—was negotiated which describes the conditions under which the signatory countries, including the United States, agreed that dumping duties will be permitted. The code was signed on June 30, 1967, and later that year Senate Concurrent Resolution 38 was introduced, stating that it is the sense of Congress that the provisions of the code are inconsistent with the act; that the President should submit the code to the Senate for advice and consent in accordance with the treaty provisions of the Constitution; and that the provisions of the code should become effective in the United States only at the time specified in enabling legislation. In due course the resolution was referred to the Finance Committee and the committee asked the Tariff Commission to report on it.

On March 8, 1968, the Commission filed its report [1] which contained three separate statements. The report of the majority, made up of Vice Chairman Sutton, Commission Culliton, and myself, indicated that there are, in our judgment, important differences between the code and the act. Moreover, the majority stated that in any event the code could not alter domestic law. In this connection, the report states that:

> It is well settled that the Constitution does not vest in the President plenary power to alter domestic law. The Code, no matter what are the obligations undertaken by the United States thereunder internationally, cannot, standing alone without legislative implementation, alter the provisions of the Antidumping Act

[1] This report appears at p. 321.

or of other U.S. statutes. As matters presently stand, we believe that the jurisdiction and authority of the Commission to act with respect to dumping of imported articles is derived wholly from the Antidumping Act and 19 U.S.C. 1337.

That, Mr. Chairman, is the unfair practices section of the Tariff Act.

I filed additional comments setting out the legal basis for the majority's position on this issue, the thrust of which was that without legislative implementation of the code the Commission was powerless to either apply the code itself domestically, or to torture the construction of the act so that it would be consistent with the code.

In a minority statement, Chairman Metzger and Commissioner Thunberg stated in effect that, while there are differences in language between the act and the code, these differences do not appear obviously or patently to call for differing results in future cases coming before the Commission. The minority also differed with the majority on the question of what effect should be given by the Tariff Commission to the code in the absence of any action by Congress. The minority Commissioners took the position that the Commission had a responsibility to construe the act in accordance with the code. To do this it should—here I am quoting from the minority statement.

> * * * apply the principles of American law to the task of interpretation of the act as it affects the facts of the investigation, including those principles relating to interpreting the act so as to avoid inconsistency between it and the international obligations of the United States.

The CHAIRMAN. Let me read that again. The minority said that it should—

> apply the principles of American law to the task of interpretation of the act as it affects the facts of the investigation, including those principles relating to interpreting the act so as to avoid inconsistency between it and the international obligations.

Now, if I understand that correctly, that language, that would mean that the minority here of two were saying that you ought to construe the act so the act would not be in conflict with that agreement.

Mr. CLUBB. That is correct.

The CHAIRMAN. Rather than construing the act first and then seeing whether the Agreement was in conflict with it.

Mr. CLUBB. That is what this language would imply, Mr. Chairman. I think in fairness to the minority, they would take the position that the two views should be construed so that neither is inconsistent with the other.

The CHAIRMAN. Yes. I understand that. That is all very clear to me. You can take two statutes and construe them so that there is no conflict. I have seen that done and I understand that principle. I debated that principle in a political campaign in the election of a judge. He construed two acts passed in the same session of the legislature to find no conflict between them.

But, if you are talking about a 1921 act of Congress and an agreement which, if inconsistent with that act must fall, to say that you must construe those two so that the agreement does not fall even though it means putting a different interpretation on that act than what had existed prior to that time, then that to me, would be entirely wrong.

If you want to apply the same principle, take a provision of the Constitution. That is the fundamental law. Now, Congress passes a

law that says that a person is not permitted to express certain political opinions which might violate the first amendment as we know it. If we are to apply the principle that is set forth here, we must construe the first amendment to mean that the authors of that amendment were not talking about expressing opinions about political matters. They only meant about expressing opinion about the time of day or vice versa.

But that would be rejected by any judge for whom I have any respect. He would say, "Well, here is your fundamental law." That should be construed for what it is and should not be changed to meet this.

May I say that Mr. Metzger prior to doing this was before this committee. Senator Hartke, I would like your attention for a moment on this. Mr. Metzger was before this committee and I did not understand what Senator Hartke was getting at when he examined Commissioner Metzger in the greatest of detail on this problem of a conflict between the Code—an international agreement—and the existing statutory law. While I did not see what the Senator was getting at at the time when he had great difficulty getting a satisfactory answer, I believe I see it now. So that Commissioner Metzger subscribes to language here which says we will construe this Code so that they both stand. That means that you are striking down your fundamental law in order to uphold that international agreement which is in conflict with it. You are simply construing it so there is no conflict which means you are striking down your fundamental law, in my judgment.

Senator HARTKE. Which incidentally, by the way, does raise a question because what has happened here is there is also division of powers which immediately becomes a paramount question because this gives authority under the new code to the Executive whch they did not have heretofore and that is it gives them authority to make determinations as to injury which Mr. Smith admitted to, but it was awfully hard to read it through all his answers, but really what he said in effect was the Treasury Department is going to make a determination as to injury and he admits that that authority solely lies within the Commission which is not a part of the Executive, but a part of the legislative section of the U.S. Government.

The testimony will reveal this very clearly, that this is a complete statement in violation of everything that is in the law. I am sorry the Chief Counsel of the Treasury Department could not understand that. I hope he understands it when he gets back home.

The CHAIRMAN. It shows me something I have been trying to figure out for a long time and that is the law does not mean a blessed thing if you do not have administrators who will uphold it.

Will you proceed?

Mr. CLUBB. If I may pursue your thought here, Mr. Chairman, I am in agreement with your objection to this principle of law cited in the minority report and it is for that reason that I expanded on it in the majority statement.

The CHAIRMAN. Well, the point is, may I say, that if you had two statutes of equal authority, this principle, I think, should prevail. It should apply. But, you do not have two statutes of equal authority here. One is your fundamental law and the other is an agreement, a mere Executive agreement which must fall if in conflict with it.

Mr. CLUBB. Senator, the thing that moved me to write a more detailed statement on this question was a subtle transfer of authority to interpret the act from the Commission to the executive branch. I am not sure that it was fully understood by anyone at the time. Certainly, I did not when I first looked at the code. But in fact, what we have here is a situation where if we are to construe the two to be consistent as far as possible, and if we assume that in the Antidumping Act of 1921 there is ambiguous language which is capable of several possible interpretations, let us say three, A, B, and C, and at various times the Commission has adopted all three, depending upon the circumstances before it, the executive branch then makes an Executive agreement embodying interpretation A and the only way we can interpret the act in the future cases then, to be consistent with the Executive agreement, is to adopt interpretation A to the exclusion of B and C.

In effect, what happens here is that the act is not then being interpreted by the Commission but by the executive branch.

Further, should the Commission at a later time come up with interpretation D, which the executive branch found to be undesirable but which nonetheless was consistent with the act, it would be possible for them to change this interpretation merely by making an Executive agreement which excluded it and if we were bound by the Executive agreement in interpreting the act, we could no longer apply interpretation D.

The CHAIRMAN. What you are saying is so important I would like you to run me through that again because that is the first I have heard it explained that way. Take A, B, and C now.

Mr. CLUBB. Right. Let us assume that in the injury determination provisions of the Antidumping Act there are several possible interpretations, and believe me there are. They scatter from A to Z, not from A to B. And let us assume, and this is a factual assumption as well, that the Tariff Commission has at various times, depending sometimes on the facts before the Commission, sometimes on the makeup of the Commission, sometimes on other factors, has adopted one or more of these interpretations.

The CHAIRMAN. Just to get this so we can understand it, could you give us the possibilities of about three different possible interpretations available to the Commission, two or three, so that we could see how this would work out?

Mr. CLUBB. Surely. Let us suppose that——

The CHAIRMAN. Just apply it to a case, for example.

Mr. CLUBB. Right. Let us suppose that A, B, and C are not just letters but are substantive interpretations of injury. A interpretation is one which holds that injury for purposes of the Antidumping Act is anything more than de minimis injury. Interpretation B is material injury—reads material injury into the act.

The CHAIRMAN. What I would like for you to do, if you would, is put it in the context of an industry that has a problem—cement. That industry is very concerned about this matter.

Now, could you give me some idea as to how much cement you are talking about being shipped into a particular point and how much injury that might be so we can see what we are talking about? I would kind of like to get this in terms that a man who has never pled a case

before the Tariff Commission can understand and a fellow who is just a layman can understand. Could you put it that way?

Mr. CLUBB. I will try, Mr. Chairman. Again, addressing the injury point, let us take your cement case. Let us assume the facts are that the company—the industry involved is composed of 10 companies, one of which has encountered some loss of sales as a result of having to compete with dumped imports. The other nine have not.

Now, when that case comes before the Commission, it may be important what degree of injury the Commissioners are looking for to the industry. If, in order to make the act consistent with the code, we have to interpret the act to say that more than one producer has to be injured, or that he has to be injured in such a way that he is on the verge of bankruptcy, you may get very different results than you would in a case where we were free to choose any interpretation we chose under the act. That is the essence of the problem.

The CHAIRMAN. Under the existing law, as you look at the law you have presently and what has been happening on the Commission, could you arrive at the conclusion that it is enough to show that only one of these companies has been injured?

Mr. CLUBB. I could, Mr. Chairman.

The CHAIRMAN. And could you arrive at the conclusion that he need not be on the verge of bankruptcy, that he must merely have sustained a considerable financial set back as a result of the dumped commodity into his market in order to afford him relief, to apply the Dumping Act, that is?

Mr. CLUBB. I could. My thoughts on this were set out in my opinion on the *Cast Iron Soil Pipe from Poland* case which was decided sometime ago in which I pointed out that the U.S. Antidumping Act of 1921 was originally modeled after the Canadian act which contained no injury requirement at all. The only reason that I was able to find from the legislative history why the injury requirement was put in was an administrative one. If there was no injury requirement in the act, then the Customs officials would have to investigate every import to determine whether or not there were sales at less than fair value.

Once you have an injury requirement, of course, that cuts down the number of cases that have to be examined. But that does not mean to say that the injury has to be severe. It merely has to be enough in my judgment, and I recognize that there is great difference of opinion on this among people whose judgment I respect very much, the injury need only be enough to justify setting the wheels of Government in motion to correct it, and in my judgment, that need not be very much. If I may return to my prepared statement.

The CHAIRMAN. Yes.

Senator HARTKE. Mr. Chairman——

The CHAIRMAN. Now, was that the majority view of the Commission at the time?

Mr. CLUBB. That was the the statutory majority, Mr. Chairman. There were four of us on the Commission at the time and two voted affirmatively, that is, for injury, an injury finding, and two found no injury. The peculiarity of the statute is that a tie—in the case of a

tie vote, there is a positive finding. So, there was a positive finding in that case in spite of the fact that the Commission was evenly divided.

The CHAIRMAN. But, now, as I understand it now, if this Executive agreement is to prevail, you would be confronted with finding that this was the principal cause of the injury and if this particular industry or this particular competitor was losing money for a number of reasons, one of which was intense competition by the erection of new mills in his area, then it could be argued that imports were just one of a number of causes why his income went down and the big cause was the fact that one of his domestic competitors built a mill right across the street from him. In that event as I construe this code—this so-called Executive Agreement—it could be well contended that the principal cause of this man's injury was the new competition, not the imports that had been dumped on him.

Mr. CLUBB. Your understanding is correct, Mr. Chairman, but the matter is even more difficult than your example presumed. Under the trade adjustment provisions of the Trade Expansion Act, the Tariff Commission has had some experience with a weighing of different factors which cause injury. We found it most unsatisfactory. The reason is that in an economic situation, there are a host of reasons which have caused somebody to get into trouble, and to line all these up and try to weigh them is a very difficult matter. Moreover, when you are trying to pick out the biggest one, let us assume that you have 10 that you can agree on, although rarely everybody will agree on the same factors, but let us assume in a case you do have 10.

Well, if you lumped one and two together, so that you have—you make them one because, they then become bigger than the other eight, and so that then becomes the principal cause. And it results in a lot of philosophical nonsense in my judgment, which gets in the way of the practical considerations of commercial life which should govern the administration of the Antidumping Act.

The CHAIRMAN. Now, the act under which you are operating could be invoked if injury is likely to occur. But the agreement here says that the Antidumping Act would be applied only if dumping is demonstrably the principal cause. That would appear to me to require that you not only show that there is likely to be an injury. You have to be able to demonstrate, virtually to prove—it can certainly be construed that you have to prove or demonstrate—that this is going to occur. So demonstrably the principal cause.

Between a bunch of factors you have to be able to say imports are the big factor. It can even be contended, based on the history we have discussed here, that you have to establish that imports have more to do with it than all the other factors put together, although in the alternative you would at least be required to show that this would have more to do with it than any other single factor. "Of material injury."

Now, that word to me, would mean that it would have to be a lot more than some de minimis injury, and I should imagine that is about how you are construing it when you find some objection to this.

Mr. CLUBB. I think that is right, Mr. Chairman. My copy of the Antidumping Act has never said material injury. It says injury. Now, other people read it differently and I cannot speak for them. But, I spent a great deal of time and effort and spilled a lot of ink here recently explaining why I felt that the injury requirement was put into the Antidumping Act which was for administrative reasons, not to limit the application of the act.

If I may, I would like to go back to the statement.

Senator HARTKE. Mr. Chairman, if I may, even the minority opinion admits the validity of the Commissioner's assertion. On page 56 [1] of the report, the minority really comes forth and frankly say:

> Indeed, we are unable, in the absence of particular combination of facts and circumstances involved in each injury determination, to assert categorically that in such cases their application would lead to identical or different results.

What they say in substance is that they are unable to make the determination as to whether they will have identical or whether they will have differing results. Then, they say that you have to go ahead and interpret this act so that it is not inconsistent with the code, which puts you back to what the Commissioner said in the initial instance: that even though under the code there may be susceptible interpretations which would be perfectly legitimate, legal and proper, you are not permitted any longer to consider all of them. Now, you have to look not alone at the act itself and interpret it as you normally would, but you have to make sure that you pick out that one little category or that one interpretation which makes it consistent with the code even though this might have the effect as the majority opinion says, of making four out of five cases completely different in their results. But the remarkable thing about all this is that the validity of the argument of the majority is substantiated by the statement of the minority in their own report. What they have chosen to do, in summary, is to give an executive interpretation to a legislative act even in the absence, in fact in direct contradiction to, the interpretation that the court has given to the Antidumping Act of 1921.

Mr. CLUBB. Turning again to my prepared statement, the minority further noted that if it was impossible to avoid an inconsistency between the act and the code, then the act should prevail.

Subsequently, these hearings were scheduled, and I was requested to appear and give testimony on the question of whether the code is sufficiently consistent with the provisions of the act that it can be implemented by the United States without enabling legislation.

I will attempt to comply with this request by identifying for the committee some of those differences between the act and the code which are mentioned in the majority report to the committee on S. Con. Res. 38. These are differences which the majority felt were important, and which in my judgment could affect the outcome of cases before the Commission.

Before identifying differences between the act and the code, however, I think it is only prudent to remind you that I do not speak for the Commission in this matter, nor do I speak for the majority. The

[1] P. 376 of these hearings.

Commission's report on Senate Concurrent Resolution 38, including both majority and minority views, is the official position of the Commission. I appear here as an individual Commissioner, and what I will give you is my own interpretation of portions of the report and what I believe to be the substance of the majority view.

With that in mind, let me begin by noting that the act and the code are entirely different documents. Not only is the terminology different, but also concepts expressed in one or two words in the act are sometimes the subject of lengthy and often limiting definitions in the Code.

Accordingly, if one were attempting to determine what the differences are, he would have to say that in a technical sense the documents are different in almost every respect.

In the Commission's report on Senate Concurrent Resolution 38, however, we attempted to identify those differences which seemed most important, and which might call for a different result depending upon whether the act or the code were applied. The Commission report notes a number of such instances.

I will highlight only a few of them here:

A. THE INJURY TEST

THE ACT	THE CODE
The act requires that the Commission shall determine "whether an industry in the United States is being or is likely to be injured * * * by reason of the importation of such merchandise * * *"	The code states that before dumping duties can be imposed it must be found that the dumped merchandise is "demonstrably the principal cause of material injury or of threat of material injury to a domestic industry," (article 3) and that the authorities must "weigh, on the one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry."

One difference here appears to be that the code requires a weighing procedure——

The CHAIRMAN. Does this language that the authorities must "weigh on the one hand," and so forth, appear actually in the code itself or is that interpretation——

Mr. CLUBB. Yes, sir.

The CHAIRMAN. It appears in the code itself.

Mr. CLUBB. Yes, it does, Mr. Chairman.

The CHAIRMAN. By putting that weighing concept in there, does not that suggest that when you are determining whether something is demonstrably the principal cause of injury, that you must first look at the injury and then you must add up all the competitive factors that might have caused the injury, even including labor strikes, or an act of God, such as Hurricane Betsy, that did great damage to the industries in the areas which it struck, and put all these things together to determine whether the fact that the people had a bad year was due

more to the dumping than the hurricane and to the strike and all the other things that happened to them in that year?

Mr. CLUBB. I think that is a fair interpretation, Mr. Chairman.

The CHAIRMAN. What other purpose would you have to weigh on the one hand the effect of the dumping, and on the other hand, all the other factors taken together?

Mr. CLUBB. I don't know what other purpose there might be.

The CHAIRMAN. Why would you want to weigh them? It doesn't wind up saying, to determine whether imports were a contributing cause, does it? It says, weigh them to determine whether they were the principal cause.

Mr. CLUBB. That is the way I read it, Mr. Chairman.

One difference here appears to be that the Code requires a weighing procedure——

The CHAIRMAN. Let me put that in terms of something with which I have a small familiarity. The Oklahoma Cement Co. built a plant in Louisiana. It built it in the area hit by Hurricane Betsy. Hurricane Betsy did a billion dollars of property damage in Louisiana, of which I suppose a million dollars, or the better part of a million dollars of damage, was done to the Oklahoma Cement Co. in New Orleans.

Now, in addition to that, the company had a strike that year that caused them to lose some money. They also had competition by other producers in the area. They had competition from Lone Star at New Orleans, and they had competition from Ideal at Baton Rouge. And Lehigh used to ship cement into that area. I don't know how much Lehigh shipped in, or didn't, but all that had something to do with it.

Now, if you are going to weigh all these factors, I would assume when somebody sailed up there and dumped cement in there at half price out of Belgium, let us say, you have to put Hurricane Betsy, the strike, the new plant by their competitor, the general market condition and all the cement that was put in there by Lehigh on one side of the scale. It could be argued that you take these shipments at half price from Belgium and weigh whether they were the principal cause of OKC losing money.

I can tell you right now it would be awfully hard to outdo Hurricane Betsy.

Mr. CLUBB. We found this true under the Trade Adjustment provisions of the Trade Expansion Act, Mr. Chairman. At one point of the factors considered in a recent case, I believe, was the resurgence of the Japanese economy as a factor in injuring the domestic industry.

Well, you can conjure up all sorts of things that are the cause of the injury. It is limited only by the ingenuity of the person that is looking at the situation. And if you have to weight all these things, it presents very sizable problems in arriving at any affirmative determination.

Turning again to my prepared statement; one difference here appears to be that the code requires a weighing procedure, while the act

does not, requiring the Commission to evaluate all factors adversely affecting the industry and to determine whether other factors were more responsible for the injury to the industry than are the sales at less than fair value. Under the act it is merely necessary to focus on one factor, dumped imports, and determine whether an industry is being injured by them.

The code requires that in evaluating the effect of the dumped imports on the industry the Commission must consider all factors having a bearing on the state of the industry, and such as "development and prospects with regard to turnover, market share, profits, prices . . . , export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity; and restrictive trade practices." (Article 3.)

This appears to say that if the industry is otherwise healthy, then an injury finding cannot be made.

The Commission majority noted, however, that:

> The act does not authorize the forgiveness of a material injury caused by LTFV imports in those cases where consideration of all [other] factors having a bearing on the state of the industry in question shows that the industry is in a healthy condition despite the effect of the less than fair value imports.

Moreover, if I may add a personal view which does not appear in the majority report, if the language of the code relating to restrictive trade practices means that under it a dumping charge can be defended on the ground that the domestic industry is engaging in restrictive trade practices, then it is clearly different from the act, which provides no such defense.

B. THE INDUSTRY TEST

THE ACT	THE CODE
The act states that dumping duties must be applied if "an industry in the United States is being or is likely to be injured . . ." by dumped merchandise.	The code defines the domestic industry as producers of like products (article 4(a)) and defines like products as those which are identical or have characteristics closely resembling those of the dumped product (article 2(b)).

Differences: First, the act permits the Commission to find injury to an industry other than that producing a like article. The code would not. For example, if apples were being dumped and were being processed into applesauce, the act would permit the application of dumping duties if the domestic applesauce producers were being injured. The code apparently would permit the application of dumping duties only if there were injury to the apple producers, but not if there were injury to applesauce producers.

. . .

THE ACT	THE CODE
The Commission shall determine "whether an industry in the United States is being, or is likely to be injured" by the dumped imports.	In exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined." (Article (a) (ii).)

The act requires that injury to "an industry in the United States" must be found before dumping duties can be applied. The Commission has sometimes found that the producers in a particular area or those serving a particular market are "an industry" for this purpose.

The code would also permit a "segmentation" of the industry for purposes of determining injury, but would so restrict it that it could not be employed as it has in the past. Thus, the code would permit segmentation of the market only when all producers within a market (paragraph 4(a)) sell all or almost all of their production of the product in that market.

Senator HARTKE. Mr. Chairman, I would like to interrupt at this point. This is the very point I made at the last of the testimony with regard to the statement made by Mr. Rehm when he implied that we couldn't read all of the law and went down to that "or" provision, but did not go back to the "provided" section. And this is so typical of the type of deception which has been utilized.

In other words, to imply that there is a change without a difference when really they, themselves, in this case admitted the important provision which really was the substance of the difference.

Mr. CLUBB. The Commission in the past has included in such a regional industry producers who were adjacent to the competitive market area. The Commission majority noted that the circumstances under which the code would permit the employment of the regional industry concept are so narrowly defined that "four out of five affirmative determinations by the Tariff Commission might not have been made had the code been in effect when the determinations were made."

Senator HATTKE. Mr. Chairman, may I ask a question here of Commissioner Clubb?

In effect, though, if you would take the minority position as they and the negotiators have attempted to interpret this consistency, in those four out of five cases, it would be possible to interpret the act in such a fashion as to be consistent with the code in such case. Really, if both were to be construed concurrently, the net result would be different. But still there would not be under the law, if it were appealed to a court, any violation of the act.

Mr. CLUBB. I think your understanding is correct, Senator Hartke. I think that while the result in the case might not be different—it may or may not, I don't know, depending——

Senator HARTKE. The minority. That is the point.

Mr. CLUBB. But it is reasonably clear that the tests applied by the Commission would have to be different.

Senator HARTKE. That is right, and this is the very essence of the whole thing. Since the tests applied by the Commission have to be different, this means there is a basic inconsistency between the act and the code. In effect, we have before us an executive agreement which repeals the section of the act or is inconsistent with the act.

I understand you. I just want to make it clear.

The CHAIRMAN. I believe I begin to understand the argument that was made by the executive branch this morning—by Mr. Roth and his people. It was very difficult to comprehend at first, but I think I understand it now. If I understand their argument, it is that it is possible to construe the law in such a fashion that what they have done does not violate the law.

Mr. CLUBB. Yes, sir.

The CHAIRMAN. That is their argument.

Senator HARTKE. That is right.

The CHAIRMAN. But if you are going to do that, you would have to change the procedures and you would have to change the way the law was construed by the Commission and applied by the Treasury prior to this time.

Presumably, if what the Commission has been doing was not a proper construction of the law, then Congress would have changed it or, certainly, would have had the duty to change it. The fact that we didn't seek to change what the Commission was doing would imply that we agreed with the construction that the Commission had placed on the existing law.

Now, this novel approach is that a code can be written and the law can be construed all over again in a different fashion and by doing that you still haven't changed the words in the law. All you did was make the law mean something entirely different than what those words said. That is about the effect, as I understand it.

Mr. CLUBB. I think that is accurate, Mr. Chairman.

The CHAIRMAN. Well, may I say that is just something that they never taught me in law school. [Laughter.]

No body ever taught me that in law school, that the law is not what counts; it is the judge. I am beginning to learn that now, but they never taught me that in law school.

Mr. CLUBB. As one country lawyer and law review editor to another, I never learned that either.

Returning to my prepared statement; the Code also requires that in order to find injury in a segmented market it must be found that "all or almost all" of the producers in the segmented market area are injured. The act has no such requirement. In fact, under the act the Commission can find that an injury to one of the producers is sufficient to sustain a determination of injury to the industry.

PROCEDURAL MATTERS

THE ACT	THE CODE
The act provides that the Secretary of the Treasury is to make a determination of sales at less than fair value, and then the matter is to be sent to the Tariff Commission for an injury determination.	The code requires that dumping complaints be rejected by the Treasury Department unless their is sufficient evidence of injury to justify proceeding with the case (art. 5(c)).

Differences: Under the act, the Treasury Department normally receives a complaint from a domestic producer and is then required to make the arithmetical computation necessary to determining whether sales at less than fair value are being made. If they are, then theoretically Treasury automatically refers the matter to the Tariff Commission for an injury determination. Under the code, Treasury would not only have to make the LTFV determination, but would have to make a preliminary injury determination as well.

The present division of responsibility between the Treasury and the Commission was established by the 1954 amendment, which transferred the injury determination function to the Commission. The apparent reason for the transfer was that the Treasury Department was not staffed to handle it, and did not feel that it was competent to do so. The code requires the Treasury Department again to make injury determinations by requiring it to receive evidence of injury in order to determine whether to proceed with the investigation. This requires the Treasury Department to determine (a) what constitutes evidence of injury, and (b) what is the minimum amount of injury and evidence required for an injury determination.

Not only might the thinking of the Treasury officials be different from that of the Tariff Commission on such matters, but also, as noted above, there are differences between the code and the act on what constitutes injury and, indeed, what constitutes evidence of injury. If the Treasury officials apply the provisions of the code on the injury question, while the Commission applies only the act, there might well be cases which would be dismissed by the Treasury Department on the grounds that no evidence of injury—which would satisfy the code—

had been received, in spite of the fact that, had the matter been referred to the Tariff Commission for an injury determination, a positive finding would have been made under the act.

Even if there were no other objection, however, it seems clear that by requiring a preliminary injury determination at Treasury, another obstacle not contemplated by the act is placed in the path of a domestic producer seeking relief.

It might be argued that in fact the Treasury Department makes such de minimis determinations on the injury question even now, and has done so for some time under the act. If so, my answer would be that this practice, too, is inconsistent with the act.

Senator HARTKE. That is exactly what Mr. Smith said on behalf of the Treasury. I might point out, again, how well the minority documents the position. On page 59, they say that if the act is administered in this manner, as it is our understanding that the Treasury Department intends that it shall be, "it is our view that the Commission's statutory function of determining the question of injury within three months of the determination by the Secretary of the Treasury that there have been sales at less than fair value can"—not "shall"—"can continue to be performed by it as in the past."

In other words, again, they are stretching the situation; they say there is a permissive section in which this can be done. But in fact the law doesn't say that. It says very specifically that the question of injury is the prerogative and the authority only, and solely, of the Tariff Commission, and any interpretation by the Treasury, even now as Commissioner Clubb says, is in violation of the present act, or if they do it in the future, it certainly will be a direct change of procedure and a violation of the act.

Mr. CLUBB. I might point out, Mr. Chairman, that I have great respect for my friends, Chairman Metzger and Commissioner Thunberg. I do differ with them on this issue, however. And if I may elaborate——

The CHAIRMAN. I had a lot more respect for them until I read their conclusions about this matter. [Laughter.]

Mr. CLUBB. If I may elaborate for a moment on Senator Hartke's point about the division of responsibility between the Treasury Department and the Tariff Commission on the injury question, I had been in the process of preparing a file memorandum on this question because it disturbed me somewhat, and in doing this I went back over the legislative history of the 1954 act to determine precisely what sort of division of responsibility was intended.

And, while there is considerable legislative history, I think that the thrust of it is illustrated by the following exchange which took place between a member of the Ways and Means Committee and the Treasury Department witness when this issue was discussed over there.

The hearing record reads as follows:

> Mr. SIMPSON. who at that time was a member of the committee—
> It is mechanical; that there is no room for discretion. The price is either dumping or it is not?

He is talking here about the application of dumping duties being mechanical.

> Mr. ROSE. he was the Treasury representative—
> That is correct.

Mr. SIMPSON. Am I correct in this: Under this bill, having reached the conclusion that there is dumping, then automatically, you would notify the Tariff Commission, and they would proceed to find there was injury?

Mr. ROSE. Having reached the conclusion that there is a dumping price, we would then automatically refer that to the Tariff Commission for a determination as to whether there was injury.

Sometime later the Treasury Department prepared a memorandum on the Antidumping Act for the—I believe the Ways and Means Committee—in which they referred to their function in determining sales at less than fair value as an arithmetical computation, and this was all that it amounted to, and after that arithmetical computation had been made the transfer to the Tariff Commission was automatic.

In fact, that isn't the way the law works in practice. Since January 1, 1955, through December 31, 1967, there have been a total of 371 dumping complaints filed with the Treasury Department. In 230 of these, there was a finding of no price discrimination. In 52 cases they were referred to the Tariff Commission. But in 89 cases—in other words, about two-thirds of those in which price discrimination was found—the case was dismissed by the Treasury Department because the sales or the prospective injury was judged to be de minimis or because of price revision; that is——

The CHAIRMAN. Now, would you mind running through those figures again, because they are not in your prepared statement. You started out saying that there are 371 cases of, what?

Mr. CLUBB. The total number of complaints filed with the Treasury Department during the period January 1, 1955, through December 31, 1967, totals 371.

The CHAIRMAN. What dates?

Mr. CLUBB. January 1, 1955, through December 31, 1967. I believe I have a copy of——

The CHAIRMAN. Three hundred seventy-one.

Mr. CLUBB. Okay. Now, 230 of those were dismissed at the Treasury Department because there were no sales at less than fair value.

The CHAIRMAN. Now, do you have any reason to doubt that the Treasury was right or wrong about that?

Mr. CLUBB. No, sir; I don't.

The CHAIRMAN. No sales at less than fair value.

Mr. CLUBB. That is right.

In 89 cases the complaint was dismissed by the Treasury Department, not because there were no sales at less than fair value. There were. But, rather, because the injury that they thought had occurred was de minimis, or because the price revision had taken place.

Now, this price revision is an administrative device, pursuant to which the importer is permitted after having been charged with dumping, to come in and say, all right, I will raise my price to a nondumping level, and then the Treasury Department will dismiss the case.

Now, I haven't fully studied this practice and that is why I haven't presented this memorandum that I have been preparing for my files to the committee, but it strikes me——

The CHAIRMAN. I wish you would make it available to us, though. If you don't want to make it available for the record, let us see it.

Mr. CLUBB. I certainly shall.

The CHAIRMAN. It will help us understand the problem.

(The memorandum referred to follows:)

MEMORANDUM

June 29, 1968

FROM: Commissioner Clubb

TO: The File

RE: Antidumping Act--Division of Responsibility Between the Treasury Department and the Tariff Commission.

1. Introduction

A question has been raised regarding whether the Antidumping Act is being administered in a manner consistent with the intent of Congress expressed in that Act and the Customs Simplification Act of 1954, in which the injury determination function was transferred from the Treasury Department to the Tariff Commission. Under the Antidumping Act dumping duties are to be assessed against imported merchandise if it is found that (1) the imported goods are being sold at less than fair value, and (2) such sales are injuring a domestic industry. From 1921, when the Act was first passed, until 1954 the Treasury Department made both determinations. In the Customs Simplification Act of 1954, however, Congress transferred the second, the injury determination function, to the Tariff Commission.

The published materials preceding the transfer of the injury determination function to the Tariff Commission indicate that the transfer was made because Congress wished to consolidate such functions in one

agency, both to achieve economies and to insure that injury determinations would be made by an organization experienced in that field. Moreover, there appears to have been some feeling that the then existing informal proceedings at the Treasury Department made it impossible for the business community and Congress to determine how the law was being administered.

Under the new arrangement set up by the 1954 Act, Treasury is to make the "arithmetical" computation to determine whether sales at less than fair value are being made, and, if so, the case is to be "automatically" referred to the Tariff Commission, which is to conduct an investigation and determine whether the sales were injuring a domestic industry. If so, antidumping duties are to be applied.

The 1954 amendment has probably never worked exactly as Congress envisaged it would, and now, fourteen years after its enactment, the vast majority of cases in which price discrimination is found are still settled by the Treasury Department on a case-by-case basis, and the evils which Congress sought to remedy by its enactment still continue.

II. Reasons for the Transfer of the Injury Determination Function to the Tariff Commission

The transfer of the injury determination function to the Tariff Commission appears to have been first suggested during the Finance

Committee Hearings on the Customs Simplification Act of 1952, where the Treasury Department spokesman noted that all other import connected injury determinations were made by the Tariff Commission, and that an arrangement could be worked out whereby this function under the Antidumping Act would also be transferred to the Commission. 1/ This proposal was also supported by several industry witnesses. 2/

1/ Mr. Graham's testimony in this respect reads as follows:

> "Mr. Graham. * * * the Tariff Commission points out that the requirement that the Treasury Department should determine whether particular imports cause injury to domestic industry is an unusual provision. In all other cases where a determination with respect to the economic effect of imports upon domestic production is required to be made the finding is made by the Tariff Commission.
>
> " * * * We have reached an informal agreement with the Tariff Commission which, we believe, can be formalized into appropriate language . . . . The net effect of the proposal is that the Tariff Commission would be responsible for establishing injury to domestic producers in cases involving either antidumping or countervailing duty statutes. On the other hand, the Secretary of the Treasury would continue to be responsible for determining * * * whether or not a sale is made at less than fair value in antidumping cases." Hearings on H. R. 5505 Before the Committee on Finance, U. S. Senate, 82nd Congress, 2nd Sess. 25 (April 1952).

2/ See testimony of Richard H. Anthony, Secretary of the American Tariff League; Mr. Howard Huston of American Cyanimid Company; Mr. John Breckenridge of the Dehydrated Onion and Garlic Industry of America; and Mr. Harry A. Moss, Jr., Executive Secretary of the American Knit Handwear Association, Inc.

The Randall Commission also supported the transfer, but did not explain why. That Commission's Staff had noted that, although U. S. antidumping duties had "been applied sparingly", they nonetheless were regarded by domestic importers and foreign exporters as a considerable threat, at least in part because the standards in the Act were very uncertain. 3/ Subsequently, the Commission majority supported the transfer 4/ and the minority, while not specifically endorsing the transfer, noted that the

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3/ In this connection the Randall Commission Staff stated that antidumping duties were rarely applied, but that

> "Nevertheless, the antidumping duty has to be regarded as a threat by many domestic importers and foreign exporters. The definition of dumping in the Act is such that, in any situation in which the foreigner sells to the American market at a price lower than the price he charges at home or in other markets, he does so at his peril.
>
> "The uncertainties created by standards in the Act are greatly heightened by the manner in which it is enforced. On the suspicion that dumping is occurring, Customs officials must 'withhold appraisement' of the imported product; this means that the importer is unable to learn what his tariff liability is to be. The practical effect of such action, therefore, is to stop importation of the commodity in question. There is no time limitation on the investigation of dumping charges, so that the possibility exists of suspending importation indefinitely.
>
> "American competitors of imported goods, therefore, can create considerable uncertainty concerning continued trade in an import by filing charges of dumping . . . ." Commission on Foreign Economic Policy, Staff Papers 292 (Feb. 1954).

4/ Commission on Foreign Economic Policy, Report to the President and the Congress, Majority Report 48 (Jan. 1954).

then existing procedures failed to guarantee adequate notice and hearings to the importer and "permits what are in effect star-chamber practices contrary to American principles of justice." 5/

In 1954 the President joined in the call for revisions of the Antidumping Act which would "permit speedier and more efficient disposal of cases and to prevent undue interference with trade during investigation of suspected dumping." 6/ Later in that same year the Administration proposed legislation transferring the injury determination function to the Tariff Commission

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5/ The statement of the minority reads in pertinent part as follows:

> ". . . the law is grossly unfair in several respects. The test of 'injury to domestic industries' requires revision in light of technological developments in industry and reciprocal trade policies of recent years. The law fails to guarantee adequate notice and hearings to the importer and permits what are in effect star-chamber practices contrary to American principles of justice. The law also permits retroactive application of antidumping practices [sic] as well as the dragging out of proceedings for months and even years before final determination, with additional imports suspended or reduced to nominal volume in the interim." Commission on Foreign Economic Policy, Report to the President and the Congress, Minority Report 7-8 (Jan. 1954).

6/ 100 Cong. Rec. 4091 (1954).

because the Treasury was "not properly staffed to make those injury determinations and would have to specially staff itself for that purpose." 7/

In the Ways and Means Committee hearings the Treasury Department spokesman stated that under the proposed new system Treasury would "automatically" refer the case to the Tariff Commission for injury proceedings once it had made the mechanical LTFV determination. 8/

7/ The Treasury spokesman, H. Chapman Rose, Assistant Secretary, stated in this connection that

> "As to the finding of injury, after a very considerable study we have concluded and the President has recommended in his economic message of March that the Treasury, in the ordinary course of its duties, is not properly staffed to make those injury determinations and would have to specially staff itself for that purpose; whereas this type of activity relates very much more closely to a substantial part of the regular activities of the Tariff Commission. Title III therefore recommends that the job of finding injury under the Antidumping Act be transferred to the Tariff Commission." Hearings on H. R. 9476 Before the House Committee on Ways and Means, 83rd Cong., 2nd Sess. 14 (June 1954).

8/ The exchange between a member of the Ways and Means Committee and the Treasury witness on this point reads as follows:

> "Mr. Simpson. It is mechanical; there is no room for discretion. The price is either dumping or it is not?
>
> "Mr. Rose. That is correct.
>
> "Mr. Simpson. Am I correct in this: Under this bill, having reached the conclusion that there is dumping, then automatically you would notify the Tariff Commission, and they would proceed to find that there was injury?

(Continued on next page.)

The Ways and Means Committee reports on the bill also noted that the determination could be more effectively made by the Tariff Commission, and expressed the hope that the Commission would hold public hearings during injury investigations, while the Finance Committee stated that the transfer would result in "more efficient utilization of governmental facilities." 9/

As finally amended in 1954, the Antidumping Act provides in pertinent part that,

> "Whenever the Secretary of the Treasury . . . determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States." 19 U.S.C. § 160 (1964 ed.) 10/

8/ Continued:

> "Mr. Rose. Having reached the conclusion that there is a dumping price, we then would automatically refer that to the Tariff Commission for a determination as to whether there was injury."
>
> Hearings on H. R. 9476 Before the House Committee on Ways and Means, 83rd Cong., 2nd Sess. 40 (June 1954).

9/ H. R. Rep. No. 2453, 83rd Cong., 2nd Sess. 3 (1954). S. Rep. No. 2326, 83rd Cong., 2nd Sess. 2 (1954).

10/ Prior to the 1954 Amendment the Act provided (Sec. 201(a)),

> "Whenever the Secretary of the Treasury . . ., after such investigation as he deems necessary, finds that an industry in

(Continued on next page.)

III. Antidumping Practice Since the Transfer of the Injury Determination Function to the Tariff Commission in 1954

Despite the transfer of the injury determination function to the Tariff Commission, only about 1/3 (52 out of 141) of the cases in which Treasury has found LTFV sales have been referred to the Commission. The vast majority of cases are dismissed by Treasury because the injury resulting from such sales is thought by Treasury to be insignificant (De Minimis Cases), or because the sales at LTFV have stopped (Price Revision Cases). The following table supplied by the Treasury Department shows the disposition of all dumping complaints from January 1, 1955, to December 31, 1967:

10/ Continued:

> the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States of a class or kind of foreign merchandise, and that merchandise of such class or kind is being sold or is likely to be sold in the United States or elsewhere at less than its fair value, then he shall make such finding public . . .".

Record Year by Year, January 1, 1955, through December 31, 1967

Year	Finding of dumping	No dumping			Total
		No price discrimination	Price Revision or termination of sales (De Minimis)	No Injury	
1955	1	40	5	5	51
1956	0	19	1	2	22
1957	0	21	4	2	27
1958	0	20	5	2	27
1959	0	23	13	1	37
1960	1	19	7	2	29
1961	3	25	5	5	38
1962	0	9	12	2	23
1963	1	19	4	6	30
1964	3	14	12	9	38
1965	1	12	9	1	23
1966	1	3	4	3	11
1967	1	6	8	0	15
Total	12	230	89	40	371

A. Cases Dismissed by Treasury because Present Unfair Imports Are Deemed Insignificant

Treasury Department regulations state that the Department may dismiss a case because "the quantity involved in the sale . . . is not more than insignificant." 11/ An example of this type of case is Velvet Floor Coverings from Great Britain, AA643.3-G, 31 Fed. Reg. 540 (January 15, 1966), where the Department made a tentative determination that the goods in question were

11/ See Treasury regulation 14.7(b)(8) which reads:

"(8) Quantities involved and differences in price. Merchandise will not be deemed to have been sold at less than fair value unless the quantity involved in the sale or sales to the United States, or the difference between the purchase price or exporter's sales price, as the case may be, and the fair value, is more than insignificant."

not being, and were not likely to be, sold at less than fair value. In explaining its action, the Department noted that "for fair value purposes (the) purchase price should be compared with the adjusted home market price." It then explained that it would dismiss the matter without referral to the Commission because,

> "Purchase price was found to be not less than the adjusted home market price except as to a few types imported in such small quantities that the amount involved is deemed not more than insignificant."

This is in effect an injury determination; Treasury found that, although there were sales at less than fair value, the imports involved were so small that there could be no injury. This, of course, is the function which was transferred to the Commission in 1954.

It is not clear what standard the Treasury Department uses to determine when the amount of sales involved are so small that there can be no injury. Certainly one would be hard put to find such a standard in Tariff Commission decisions, because from those decisions it is not even entirely clear that the amount of past imports has ever been a controlling factor. Thus in one recent case the Commission found injury when the imports amounted to less than one-half of one per cent of the U. S. market. (Cast Iron Soil Pipe from Poland.) Moreover, it has frequently been pointed out that the Antidumping Act contemplates a finding of injury in

cases where there have been no importations at all, but where there merely have been price quotations which have disrupted the market. 12/ Accordingly, it seems clear that the Commission, which is charged by statute with the responsibility for making injury determinations, may find injury where the amount of unfair imports has been small or even where there have been none. Yet this type of case apparently does not reach the Commission, having already been dismissed by the Treasury Department.

12/ As the Commission noted in its report entitled Information Concerning Dumping and Unfair Competition in the United States and Canada's Antidumping Law (1919), which Congress had before it when it enacted the Antidumping Law

> ". . . Moreover, even the quotation of dumping prices, though no sales in fact be made, may occasionally result in compelling merchants with established trade to cut their prices in order to hold their business against threats of dumping competition." (P. 20)

More recently Commissioner Sutton reiterated the same thought in Cast Iron Soil Pipe from Poland, AA1921-50, TC Publication 214, page 7 (September, 1967):

> ". . . Argument has been advanced in this case that the volume of the subject imports amounted to less than one-half of one percent of U. S. consumption of comparable pipe and that, therefore, there could be no injury within the meaning of the Antidumping Act. Such argument, standing alone, is untenable. The Antidumping Act contemplates possible affirmative determinations in situations where there have been no imports. When importers undersell domestic producers by means of less than fair value imports and thereby disrupt market patterns and depress prices, injury to an industry is not to be equated solely on the market penetration of such imports nor on the number of lost customers."

B. Cases Dismissed because the Foreign Producer Has Raised His Price (Price Revision)

It appears that most of the cases dismissed by the Treasury Department (where there are LTFV sales) are dismissed because price revisions have been made. (This is not clear from the Treasury Department table set out on page 9, where Price Revision and De Minimis Cases are lumped together. Experience indicates that this is the case, however.) Such cases apparently arise when Treasury finds that sales at less than fair value have been made, but the foreign producer, after discussing the matter with Treasury officials, decides to increase his price to a non-dumping level. 13/ In consideration of this agreement, Treasury then discontinues its investigation. An illustration of this type

13/ This practice is provided for in Treasury Regulations, Section 14.7(b)(9), which reads as follows:

> "(9) Revision of prices or other changed circumstances. Whenever the Secretary of the Treasury is satisfied that promptly after the commencement of an antidumping investigation either (i) price revisions have been made which eliminate the likelihood of sales below fair value and that there is no likelihood of resumption of the prices which prevailed before such revision, or (ii) sales to the United States of the merchandise have terminated and will not be resumed; or whenever the Secretary concludes that there are other changed circumstances on the basis of which it may no longer be appropriate to continue an antidumping investigation, the Secretary shall publish a notice to this effect in the Federal Register. . . ."

of case is found in Ceramic Glazed Wall Tile from Japan, ATS 643.3-b (July 13, 1967 - 32 Fed. Reg. 10312), in which the Department stated,

> "Purchase price was found to be lower than adjusted home market price in a majority of the comparisons made.
>
> "Promptly after the commencement of the antidumping investigation, price revisions were made which eliminated the likelihood of sales below fair value. Assurances were given that, regardless of the determination of this case, no future sales to the United States will be made at prices which would be construed as being at less than fair value within the meaning of section 201(a) of the Antidumping Act, 1921, as amended (19 U. S. C. 160(a)). There appears to be no likelihood of a resumption of prices which prevailed before such price revision.
>
> "In view of the foregoing it appears that there are not, and are not likely to be, sales below fair value of ceramic glazed wall tile from Japan."

The present price revision system appears to create at least three serious problems. First, it probably results in higher consumer prices than are required by the Antidumping Act in some cases. Thus, the act envisages that, where LTFV sales occur, the consumer should get the benefit of lower prices unless a domestic industry is being injured. When foreign producers raise their prices before it is determined whether it is legally necessary to do so, it undoubtedly results in unnecessarily higher prices in some cases. What it amounts to is an elimination of the injury requirement from the Antidumping Act; the consumer is denied the benefit of lower prices whether or not a domestic industry is being injured.

Second, price revision affecting only a portion of a case may so limit the facts that the Commission can consider on the injury question that it may make an injury finding all but impossible. Recently, for example, Treasury received a complaint that Polish Soil Pipe and fittings were being dumped. Treasury accepted a price revision agreement on fittings (a substantial part of the imports), but referred the soil pipe portion of the matter to the Commission. The question before the Commission was thus whether the dumped soil pipe was doing injury to the "industry" which produced both pipe and fittings. The Commission found injury anyway (by a divided vote), but took the occasion to note that

> "The complainant in this case claimed that both cast iron soil pipe and fittings from Poland were being sold at less than fair value. The Treasury Department tentatively determined that such fittings were being sold at less than fair value. However, because the exporter adjusted his prices to a fair value level, the Treasury Department made a determination of no sales or likelihood of sales of such fittings at less than fair value. Thus the Tariff Commission is technically precluded from considering the injurious effect, if any, that such imports are having on any domestic industry." (P. 2)

Thus the likelihood of an injury finding by the Commission is reduced because it is precluded from considering the injurious effect of all LTFV sales adversely affecting the industry.

Third, and perhaps most important, there is no official report of the informal proceedings leading up to the price revision agreement, or of the agreement itself (beyond the bare announcement in the Federal

Register). Accordingly, a party not privy to the negotiations cannot determine exactly how the Act is being administered and the action on a given case thus does not inform the public of what to expect in the next case.

It is difficult to determine what incentive a foreign producer has for entering into a price revision agreement, since, had he tried the injury issue in the Commission, he could be no worse off, and he might find that he could lawfully continue his low prices. Perhaps the incentive is to save time. Thus, if the foreign producer agrees to raise his price early in the investigation to a level which satisfies Treasury, the matter can be settled immediately, and he can get back to his business, knowing what price can lawfully be established. If he resists the "voluntary agreement", he may be faced with a long investigation, withholding of appraisement and the concomittant uncertainties which can virtually bring his trade to a halt. Moreover, there may be some feeling among foreign producers that, if they agree to increase prices on some dumped goods, Treasury will dismiss the charges on others as part of the deal. In addition, if they let the matter go to the Commission, and an injury determination is made, they are then "guilty" in the eyes of the trade. Also once the formal dumping finding has been made, it may leave them in a less flexible position than the informal agreement with Treasury does. Whatever the reasons, however, it appears that a large amount, perhaps as many as one-half, of the cases in which LTFV sales are found are "settled" in this manner.

IV. Conclusion

It is probably accurate to say that the substance of the congressional instruction to the effect that the injury determination function should be transferred to the Tariff Commission has not been carried out. In fact, as noted above, in about two-thirds of the cases in which less than fair value sales take place the matter is not "automatically" referred to the Tariff Commission for an injury determination. Instead, the Treasury Department dismisses the case because it feels a minimum standard of injury has not been shown, or because the importer has revised his prices. As noted above, the first practice amounts to an injury determination by the Treasury Department, and the second amounts to administrative repeal of the injury requirement.

It should also be noted, however, that it is not very important in an overall sense whether the determination is made by the Treasury Department or the Tariff Commission, so long as the objectives of Congress are being fulfilled. One of the reported objectives of Congress in the 1954 amendment which transferred the injury determination function to the Tariff Commission were to ensure that the injury determination would be made by an agency which was expert in making such determinations. It was represented that the Tariff Commission was such an expert agency and that the Treasury Department was not. Accordingly, under existing circumstances, it might be observed that in about two-thirds of the cases

the injury determination is being made by an agency which some years ago announced that it was not competent to make the determination. Secondly, and perhaps even more important, in contrast to the congressional directive that antidumping proceedings be conducted publicly, the same "star-chamber" practices referred to by the Randall Commission minority in 1954 appear to continue. Thus, upon being informed by the Treasury Department that it has found LTFV sales an importer is apparently asked to come in and "negotiate price revisions." No record is kept of these negotiations, or at least none is published, nor is there any accurate statement of the result. Accordingly, importers who are next summoned to "negotiate" with the Treasury Department have no official knowledge of what standards were applied to those who preceded them or which will be applied to those who follow. In short, the evils which Congress sought to remedy by the enactment of the 1954 Amendment appear to continue.

It is not clear whether these practices provide greater or less protection to the domestic producers than is contemplated by the Act. In most cases where a dismissal is made by Treasury on de minimis grounds the Commission might well have arrived at the same conclusion had the case been referred to it; in some others it might well have found injury. In price revision cases the domestic industry may be getting more protection than was contemplated by the Act, since the importer's prices are increased

whether or not the LTFV sales have caused injury. In such a case, of course, the consumer would be denied the benefit of lower prices where Congress contemplated this would not happen.

Mr. CLUBB. It seems to me that when the importer comes in and raises his price in a coercive situation before the proceeding is completed—that is, before the injury determination has been made—you have only two possible results. Either the Commission would not have found injury, in which case the price shouldn't be raised and the consumer is being charged too much; that is, the consumer should get the benefit of the lower price, or the Commission would have found injury, in which case there should be a dumping finding on the books and enforced from then on out.

But, instead, what we have is an informal arrangement between the importer and the Treasury Department.

I am not fully acquainted with exactly how this works, but I think that the details can be obtained from the Treasury Department.

The CHAIRMAN. Well, that is kind of like that case where I lost some of my friends in the drug business by insisting they be prosecuted for violating the antitrust laws, rather than to have a consent decree entered. As a result of prosecution, they were found guilty. It is going to cost them a great deal of money and they are going to have to pay treble damages all over this entire world for people that they robbed and raped with that conspiracy of theirs.

And the public will get some relief, including a $20 million refund to the State of Louisiana, to the extent that they overcharged us for some of those drugs we were buying for poor people under our welfare program.

Now, if we had let them have the consent decree, they could have settled that matter in a way that they could have avoided paying off all these people they robbed and raped all over the country and all over the world, for that matter, with that international conspiracy.

So that is just a parallel case you are talking about where some foreigner dumps his product in here. He is subject to paying the difference between that price and what a fair price would be, and that is in the nature of a fine on that person for trying to engage in an unfair trade practice. He is punished for his unfair conduct.

But in the kind of case you are talking about, in many instances, Treasury is letting this fellow get away with it in effect by simply raising his price and avoiding punishment for his crime.

Mr. CLUBB. Mr. Chairman, the thing that bothered me about the statistics is that it appeared not to be just many cases, but indeed a majority of the cases. In fact, 89 cases were handled either on a de minimis or price-revision basis.

The CHAIRMAN. Can you break that down as between the ones that were handled on a de minimis basis and those handled on a price-revision basis?

Mr. CLUBB. No, Mr. Chairman, and the Treasury Department can't either. I asked them to do it and they apparently don't have the records in that detailed fashion. I am sure they could get it if it were desirable. But 89 cases were handled on that basis.

Senator HARTKE. Mr. Chairman, could we have the Treasury Department submit that? Surely somebody in the Treasury is still here.

The CHAIRMAN. If you want to get it, we will get it, then.

Senator HARTKE. I want it.

The CHAIRMAN. We will get it.[1]

[1] See p. 181.

Mr. CLUBB. Eighty-nine cases, in which there was price discrimination, were dismissed on that ground in Treasury without referring them to the Tariff Commission, and I believe 52 cases were referred to the Tariff Commission during the period 1955 to 1967.

The CHAIRMAN. Now, out of the 52, in how many cases did the dumper suffer the penalties under the Dumping Act?

Mr. CLUBB. Well, we made positive determinations in 12 cases.

The CHAIRMAN. In only 12 cases?

Mr. CLUBB. That is right.

The CHAIRMAN. And they seem to think that that is too many.

Mr. CLUBB. I don't know what the motive is for this. I think that it is entirely possible that there is a very good reason for the way this is handled.

All I mean to point out is that the statistics look strange and may be inconsistent with the——

The CHAIRMAN. Doesn't that lend credence to some of the industry arguments that they just don't gain the protection they are entitled to under the Dumping Act? It just doesn't mean much because the protection they are entitled to simply doesn't come through.

It is not accorded to them.

Mr. CLUBB. Mr. Chairman, I am not at this time prepared to make that statement. I have been looking into the matter in some depth for some time, as I say, and I am preparing this file memorandum, and I certainly will make it available to the committee.

I think there are things wrong with the administration of the Antidumping act. I don't know whether it amounts to a denial of the protection that the domestic industries feel they deserve.

The CHAIRMAN. Well, against those figures, you would have a great deal of difficulty in contending that the domestic industry is receiving too much protection; would you not?

Mr. CLUBB. I think that is a fair statement.

The CHAIRMAN. In other words, out of these 371 complaints that came in, people wouldn't bother to file a complaint because it costs money to file a complaint, doesn't it—to prepare it, document it, support the complaint?

Mr. CLUBB. Mr. Chairman, I don't know exactly what they call a complaint. It might be like a pauper's petition, that sometimes you get it handwritten in the jail. That doesn't cost very much to prepare. On the other hand, it might be a very detailed thing. There might be a vast range of possibilities here.

The CHAIRMAN. If they have to show injury along with it, though, it might be something that would cost them a fair amount of money to prepare; might it not?

Mr. CLUBB. Well, it might, Mr. Chairman, and more than that, I don't understand what will go on in this preliminary injury determination to be made at the Treasury Department.

If, as I understand, they don't intend to evaluate the injury information which is submitted, let's suppose a case where a complainant comes in and gives them detailed information on price discrimination and then he hands them the Manhattan Telephone Directory and he says, this is information relating to injury.

Now, are they going to simply accept that as information relating to injury or are they going to say, no, this clearly is not? Once they say clearly it is not, then they are evaluating the evidence.

Now, it seems to me if they don't evaluate the evidence, then they are violating the code, and if they do, they are violating the act.

Senator HARTKE. That is the point I was making this morning. I was trying to get Mr. Smith to come forward about his evaluation part. There is an evaluation, whether they admit it or not. Actually, they have the practice in which they make the evaluation, even today, after an order is issued; they are making an evaluation that the injury has ceased to exist and then, on their own, without legislative authority, they terminate the order.

Isn't that true?

Mr. CLUBB. I think that is accurate, Senator.

Senator HARTKE. And that, to, is a clear violation of law.

Mr. CLUBB. I have a conclusion here that I think is important in view of the turn this has taken.

I have attempted to point out some of the material differences between the code and the act which in specific cases could provide different results under the code than would be reached under the act. There are other instances whereby the code can be made consistent with the act only by the most tortured interpretation of the act. Some of these are noted in the Commission's majority report on S. Con. Res. 38.

I should say in conclusion that in making the report on Senate Concurrent Resolution 38 and in presenting this testimony, the Commission majority and I have no desire to embarrass the President or his representatives, or further to confuse international trade negotiations.

We were merely asked whether there are inconsistencies between the code and the act, and our answer is yes.

The majority of the Commission went further and said that, whether or not there are inconsistencies between the act and the code, the code is not the law in the United States, and until the Commission is otherwise instructed by a proper authority, we will not apply it as such.

The Commission did not attempt, on the other hand, to pass judgment on the value of an international dumping agreement, or the desirability of this one.

The CHAIRMAN. May I say, Commissioner Clubb, the statement that you have made here is extremely enlightening to me. I must commend you for the courageous efforts that you have made on that Commission to uphold the law. I believe I now understand what this thing is all about.

If you will just stay by your guns and we keep them from putting anybody on that Commission who is going to engage in strange theories of law that I am not very familiar with, we might be able to give American industry a fair defense against an unfair trade practice. That is what the law says, anyway.

I just have never seen a case where, to me, there is so clearly a matter of black and white, as the problem we have right here. It is just a question of whether you want to give citizens of this country the benefit of the laws that were passed to say what their rights were, or were not, or whether you want to strip them of those rights. I sup-

pose if we do our job the way the Constitution intended, if we are loyal to our oath of office and you are loyal to yours, my guess is we might be able to retain for industry a little bit of what the law says it is entitled to expect—some of the rights they are supposed to have.

Mr. CLUBB. Thank you, Mr. Chairman.

In this connection, I might point out that——

The CHAIRMAN. Because I can't do that by myself, and you can't do it, either.

Mr. CLUBB. That is right.

The CHAIRMAN. I need at least a majority on this committee, maybe in the Senate itself, but between what we might be able to do here and what you can do over there, we might be able to uphold the law. We might just make our affirmation to uphold the Constitution and laws of this country mean what they say.

Mr. CLUBB. In this connection, it might be desirable to note that my interest on the Commission is, as you know, to uphold the law, not necessarily to protect American industry. Before I was appointed to the Commission, I had an undergraduate degree in foreign trade, and then I represented, as a lawyer, importer interests for nearly 10 years. I suppose that I have as great an interest in liberal trade as anybody on the Commission, but I also have a considerable interest and a duty to uphold the law, as you folks up here write it, and I certainly will do that.

The CHAIRMAN. Well, you take an oath when you start your term, don't you?

Mr. CLUBB. Absolutely.

The CHAIRMAN. Does yours say what mine says, "I swear to uphold the Constitution and laws of this country?"

Mr. CLUBB. I think it is the same, Mr. Chairman.

The CHAIRMAN. Well, I salute you for doing what you swore you were going to do.

Mr. CLUBB. Thank you.

The CHAIRMAN. Senator Hartke?

Senator HARTKE. I have no further comments. I will say one thing for the chairman. He sure believes in long sessions. [Laughter.]

The CHAIRMAN. Well, we want to hear it out. We will meet again to conclude this testimony at 3 this afternoon.

(Whereupon, at 1:40 p.m., the committee recessed, to reconvene at 3 p.m., this same day.)

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

Mr. John Mundt, senior vice president, marketing and public affairs, Lone Star Cement Corp., accompanied by Mr. Donald Hiss, a partner in the law firm of Covington & Burling.

We are pleased to have you with us, Mr. Mundt.

STATEMENT OF JOHN C. MUNDT, SENIOR VICE PRESIDENT, MARKETING AND PUBLIC AFFAIRS, LONE STAR CEMENT CORP.; ACCOMPANIED BY DONALD HISS, PARTNER, COVINGTON & BURLING

The CHAIRMAN. I assume you will be stating the position generally of the cement industry.

Mr. MUNDT. That is correct, Mr. Chairman.

The CHAIRMAN. I am honored they chose you to speak for them because you do have a plant in Louisiana, and we are proud to have you there.

Mr. MUNDT. We are glad to be there, sir.

Mr. Del Rentzel is the chairman of the Cement Industry Antidumping Committee, and he did ask me to coordinate the industry's preparation and presentation on this subject.

Mr. Hiss and I will divide this up. As I indicated, I will handle the business and commercial aspects.

The CHAIRMAN. Pardon me—if I might just interrupt you.

Mr. Clubb has been kind enough to stay with us here and I think we could excuse him so he can get on back to his business. I think you are doing very well, Mr. Clubb.

Mr. CLUBB. Thank you very much.

Mr. MUNDT. Mr. Chairman, we would be remiss if we didn't begin our presentation with a statement of our sincere appreciation for the opportunity of appearing in these hearings. Our industry has always felt that the Senate has been particularly cognizant of the unfair trade practice of dumping and the problem that it represents for our industry.

For example, a little over a year ago, S. 1726 [1] was introduced to amend and strengthen the Antidumping Act of 1921. As has been indicated in the hearing this morning, it has been difficult for us to obtain relief under the 1921 act. And many Senators have realized this.

As a consequence, 41 Senators, which is 41 percent of the Senate, including nine members of the Senate Committee on Finance, sponsored S. 1726. The cement industry has spent a good many years attempting to have this act amended and strengthened, and we want to——

The CHAIRMAN. Just permit me to say, after what I heard here this morning, I am very much tempted to suggest that we offer either that or an amendment that has been drafted by our staff about this matter—as a part of any bill we might put out hereafter to help with our Nation's balance-of-payments problems.

I don't understand how the Secretary of the Treasury could come before us one day telling us that the situation is desperate and we have to put a tax on tourism in order to discourage Americans spending

[1] The bill, S. 1726, is printed on p. 112.

abroad, and that we ought to try to do something to encourage foreigners to spend some money over here, and then have representatives of the Treasury Department sitting at the side of the witness for the State Department the following day and proceed to testify that we ought to just let them dump in an unfair manner. That's contrary to our laws and contrary to all concepts of justice and fairness. The dumping of cement, steel, and other commodities into this American market is further destroying and depressing our trade balance, and destroying American industries which have every right to at least be a part of the competitive economy and help with our balance of payments by producing for the American markets and, perhaps, exporting some.

Mr. MUNDT. We are concerned, too, about the balance of payments and it is doubly ridiculous, we think, to have 's altered byproducts sold in this market at dumped prices.

We do want to make it clear to the committee that we continue to support such legislation as S. 1726, which is pending before your committee.

The CHAIRMAN. Let me ask you this now: As between you and the OKC Co., both producing cement in Louisiana, if you engaged in the kind of discriminatory pricing against them that some foreign countries are doing against you, you would be prosecuted for violating the antitrust laws of this country.

Mr. MUNDT. We certainly would.

The CHAIRMAN. And prosecuted successfully.

Mr. MUNDT. That is right.

The CHAIRMAN. But these people are fighting for the right to do to you what the law makes it unlawful for your competitor to do to you, or you to do to him.

Mr. MUNDT. This is absolutely our position, Mr. Chairman. It was, as a matter of fact, the very first point I did want to clarify to the committee and that is that our concern in this hearing is only with the unfair trade practice of dumping. We are not concerned here with increased tariffs or quotas. We are concerned only that imports that arrive in this country be legitimate.

The CHAIRMAN. In other words, what you are trying to do is to prevent a trade war, not start one. I recall the old days, you would get two ice cream companies fighting between one another, two dairies, and one fellow would give you a double dip on one side on the highway, and the other would give you a triple dip, and they would have a war, and just price themselves out of business, the question being who had the most financial resources, because somebody was going to have to go out of business by losing money.

We try to pass laws to prevent that from happening, but that type of unfair competition, while it is against our law, is the kind of thing that a foreigner can do to us with impunity, except for this antidumping law. Isn't that about the size of it?

Mr. MUNDT. Yes, sir.

The cement industry's concern with the unfair trade practice of dumping is only to insure that the import competition is subject to the same standards of fair trade observed by the U.S. cement industry under the unfair trade practice law and antitrust laws.

The second matter that we would like to clarify concerns our international position if the effective date of this code is postponed beyond July 1. As set forth in our comprehensive 37-page statement,[1] we are here today to ask your committee to urge the President to postpone the implementation of the code until this committee has had an opportunity to give full consideration to the code. This would also give this committee time to give consideration to S. 1726, which we referred to a minute ago, Senator Concurrent Resolution 38, or any other action that the committee might deem appropriate.

All of this pending legislation is before your committee at this time. One bill relates to another.

The CHAIRMAN. Well now, I think that this committee is likely to be very sympathetic to what you are arguing here. However, it occurs to me that to do what you think would be appropriate under the circumstances, and what the committee thinks would be appropriate, it would be necessary for the House to concur in our action.

Now, if we amend some House-passed bill to make the dumping law about the way it ought to be, or at least protect you from the kind of thing that I can anticipate, based on testimony we have heard up until now, do you have any indication that there might be a favorable response over in the House of Representatives?

Mr. MUNDT. We thought that the House Ways and Means Committee listened to our presentation over there with interest and with close attention.

The CHAIRMAN. Did those members indicate that they appeared to be in sympathy with your problem as though they might want to help you if they could?

Mr. MUNDT. I don't believe we could really speak for them, sir, to that extent.

The CHAIRMAN. Well, you have to kind of know your people that you are talking to. I know some people nod their head, meaning that they agree with you and some people nod their head meaning they understand you. [Laughter.]

But I would think you would probably have some people who would know whether they agree with you or not.

Mr. MUNDT. We are very confident that the members of the House would adopt the same position you people over here would.

The CHAIRMAN. If men like Chairman Wilbur Mills and John Byrnes and Hale Boggs tend to agree with it, my guess is it has a pretty good chance.

Mr. MUNDT. The comments of Mr. Mills we thought were very favorable to our position. It should be pointed out, I think, Mr. Chairman, that Canada has definitely not ratified this code and will not ratify it by July 1. The papers indicated that the new Canadian Parliament was elected this week. No legislation was passed by the former Parliament. Ambassador Roth this morning described this as unfortunate, but I think the point is there need be no embarrassment on the part of our own executive by postponing the effective—the intended effective date of this code beyond July 1 until the committee has had time to give this matter careful consideartion.

I would like to summarize for just a moment the reason for our concern in the cement industry, and I would like to do this from a businessman's point of view. I will have to summarize a little bit of past history.

[1] See p. 100.

We have had some very bad experiences in the past with dumped cement in this country. Between 1958 and 1965 the cement industry was forced to file 19 complaints under the Antidumping Act of 1921. These are summarized in appendix B in our statement.

The Treasury found reason to suspect dumping in 14 cases and in four cases the special dumping duties called for by the law were imposed on cement coming in from Sweden, Belgium, Portugal, and the Dominican Republic. During this period dumping was on a continuing basis with importers shifting from country to country as complaints were filed against their sources of supply.

The formal proceedings involved 15 different nations.

Now, what about the present? When the International Antidumping Code was announced last year and Treasury on June 1 of this year announced substantial amendments to the regulations to become effective July 1, which is next Monday, the Cement Industry Antidumping Committee consulted its attorneys, Messrs. Covington and Burling. We explained to our attorneys that our concern was that dumping could well begin again after the Vietnam war. For one thing, ocean shipping will become more available and foreign cement can be shipped into this country as ballast.

We also pointed out that the anticipated postwar increase in demand would raise the price levels in this country which would make this market more attractive for foreign cement.

We also pointed out to our attorneys the developing excess of cement in Canada and Mexico, our two nearest neighbors.

We were advised by Covington & Burling that had the code been in effect at the time these four cement antidumping cases that were referred to this morning were decided, they would have been decided differently, and relief in all probability would have been denied.

The CHAIRMAN. Covington & Burling is a pretty big firm. It is a well-known firm and it is regarded as being one of the most expensive firms here in Washington. Some of the lawyers have a reputation of being good lawyers and are well known. Dean Acheson is a member of that firm; is he not?

Mr. MUNDT. Yes, sir.

The CHAIRMAN. He is former Secretary of State and many regard him as a very able and capable lawyer. He certainly has prestige among the American Bar Association. Is he one of the attorneys who was consulted to advise whether or not this thing would change the results in the four cases out of five?

Mr. MUNDT. Mr. Chairman, it is a real pleasure to answer that question and say the gentleman who is seated on my left tried these four cases and he is acquainted with the facts of these cases.

Mr. HISS. And I have consulted a number of my partners, Mr. Chairman, but I regret to say I have not consulted Mr. Acheson on this particular issue. He is familiar with the earlier cement antidumping cases.

Mr. MUNDT. We were very disturbed at the——

The CHAIRMAN. Frankly, I would think, if there is no conflict involved, I think members of this committee would be curious to know if Mr. Acheson agrees with that opinion.

Mr. HISS. I am sure he would, but I can confirm this, Mr. Chairman.[1]

[1] The confirmation was not received by the committee at the time this document was printed.

The CHAIRMAN. I think we would like to know that. I am sure you are a specialist in that area for your firm, but if Mr. Acheson, who is highly regard here both as an attorney and former Secretary of State of the United States—and a very courageous one, I would say—concurs in your judgment in that matter, I think the committee would like to know that.

Mr. MUNDT. I want to express the fact that this advice we received from our attorneys came from the firm that actually tried these cases and therefore was very much acquainted with the facts, and they told us under the code we would not have won those cases.

The CHAIRMAN. I just want to get from your attorney one point that does concern me. It was suggested with regard to these 371 complaints that had been filed with the Treasury on dumping, that perhaps not knowing any better from the point of view of the members of the Tariff Commission, there might not have been any experience involved in some of the cases or some of the complaints filed.

My impression about that matter is that if you really are serious about pursuing one of those cases, you had better be ready to pay quite a sum of money to see it through.

For example, I am told that the steel industry paid about $50,000 to try to fit itself in a dumping procedure and couldn't get anywhere with it and concluded that the law, while it sounded good on the face of it, really provided very little protection to them as it worked out.

What is your impression of that, sir?

Mr. HISS. I represented the steel company in one of those proceedings. They have had two. And I forget the amount of money but it cost them a lot of money because this was a very involved, difficult case. We did go to the Tariff Commission and we lost there. I think wrongly. I think the steel industry thinks wrongly. The other case I was not a party to. That was earlier. And I think that was under the escape clause or maybe dumping, I forget which. But they did not get relief there either.

The CHAIRMAN. One thing that always irritates me is for some fellow to get up and say we are trying to attack the administration or impugn some of its honor or integrity because we pass a law up here. But this is as if we pass a law but by the time the courts get through construing it they wind up saying it is something contrary to what we thought we did. If we were sincere about the matter to begin with, we should go back to work and try to accomplish what we started out to do to begin with—pass a law to achieve a certain result. If the court construed that differently from what you had in mind, you will try to do it again until eventually you have done what you tried to do.

Sometimes people just fail to say in language what they mean or else the court fails to construe it properly, and that being the case, you are under the burden, if you want to do a given thing, to try to pass a law again.

Now, we don't seek to impugn the honor of anybody who has a difference of opinion with us. It is just if they are getting the wrong results, while we want to get the right results. If they can't do it for us, then we think we ought to do it with the legislative branch, and that is our duty as I see it. That is what we are hired for. Isn't that about the way you see it, sir?

Mr. HISS. Precisely, sir.

Mr. MUNDT. Mr. Chairman, this brings us to some of the legal considerations that are pertinent and that were alluded to this morning, and I would like to ask Mr. Hiss to provide the committee with that legal analysis.

By way of concluding my own remarks, I would like to just read a single paragraph conclusion from our full statement.

The Cement Industry Antidumping Committee strongly urges that this committee take positive action to postpone the July 1 effective date of the International Antidumping Code, and to report out favorably Senate Concurrent Resolution 38. The code is in fundamental conflict with the Antidumping Act of 1921, and would severely weaken and emasculate the act. The cement industry, which has suffered serious injury from dumping in the past, would be effectively barred from relief under the code. Moreover, there was no legal authority for the negotiation of the code, and its implementation in this country would constitute a usurpation of congressional authority by the executive. Implementation would also lead to administrative chaos as the Treasury and the Tariff Commission have taken contradictory positions. Hence, action by this committee is vital if U.S. industries are to be able to compete free of the unfair trade practice of dumping—a practice condemned by Congress for over 50 years and condemned by all major trading nations as well.

The CHAIRMAN. If you will permit me to say it, I was at one time regarded as a bad boy by the cement industry because I fought to keep you people from putting your basing point price system back into effect after the Supreme Court declared that it was contrary to the Robinson-Patman Act, and contrary to the Federal Trade Commission Act.

Now, the effect of that, of course, was to make competition even more severe in the industry, and while there was a lot of complaint about it, the industry had to adjust itself to those Supreme Court decisions because we wouldn't let them change it. Someone from your company came to me and complained that I was going to hurt your company. I said if it is all the same to you—I will not name the president of the company at that time, but you and I know who it was—if I am successful in defeating your bill, there will be other cement mills in Louisiana besides Lone Star, and I was successful and you see a mill up there at Baton Rouge built by the Ideal Cement Co., and Oklahoma Cement came in and built one to compete with you in New Orleans.

We were big winners by making competition tougher on you fellows. But the last thing on earth I would want to do is to fix it up so a foreigner hasn't got to comply with same rigid laws of competition that you are complying with and which involves fair competition. We must protect a fellow from unfair competitive methods on the one hand, as well as protect fair competition for the benefit of the public on the other.

And I think what is good for the goose is good for the gander. If I am going to try to tell you that you must compete fiercely with no holds barred with the other fellow—no hitting below the belt or gouging the eye, or biting off the ear, that's against the rules—then you should at least be protected from some fellow outside this country who is not required to abide by any of those rules and comes in here selling below your cost and selling below the cost that he could produce and sell it for within his own country.

I feel a burden, having been on the other side of the case on the Basing Point Heights to see that you receive justice on this one, and if I can, I will. I assure you of that.

Mr. MUNDT. Thank you very much. You have just summarized our position, by the way, the basis for our appearance.

The CHAIRMAN. May I say, if you ask most people what they ought to invest their money in, they will say, "Don't invest in a cement company. It is too darned competitive."

Mr. HISS. Mr. Chairman, on the legal aspects of this matter, we have filed a long, 37-page document [1] which explains our reasons for the conclusion that there is no legal authority to negotiate an antidumping code inconsistent with the act. I think from the way I read Ambassador Roth's statement, at page 3, he is in agreement, and I think he and Mr. Rehm—even Mr. Rehm agrees that they have no authority from any statute of Congress or any place else to adopt a code which conflicts with and overrides the Antidumping Act of 1921.

The CHAIRMAN. Well, may I say that I had to hear the succeeding witness to figure out what they were saying in their testimony. What I understand they are saying is that they agree that they have no power to negotiate a code in conflict with the act. They just want to negotiate a code and then say that the two must be reconciled and that means the act shall be construed to conform with the code rather than the other way around.

That is a very strange theory of law, may I say. I have never quite heard of it before. It reminds me of some of these people who take an oath on the Supreme Court to uphold the Constitution and laws of the United States and then proceed to rule that it doesn't mean what it says, it means the opposite, and proceed to put something in the Constitution that never was there and take something out that was there. You ask those people, how on earth could you justify that after you swore before God that you wouldn't do that, and my understanding is that those who pursue that philosophy say:

Oh, no; you are wrong about that. You see, in the last analysis, the Constitution means what the Court says, and the law is what the Court says it is. So if I say it is contrary to what everybody else has said it was for the last 200 years, I am the final authority and therefore I am not breaking my oath, since I am the law.

That is in effect what is being suggested here by Mr. Metzger's language. That you are supposed to read the law to conform to the code rather than the code to conform to the law.

Mr. HISS. I have heard of judge-made law. I have known a few instances of it. But I have never known of executive branch-made law, and that is what I think they are trying to do here and I think it is completely wrong.

On the question of authority——

The CHAIRMAN. Would you mind researching it and see if you can find some case where this Metzger argument has been advocated before?

It was quoted here by Mr. Clubb. Here is the language from Mr. Metzger. This fellow has written a book or two. He is supposed to be a real educated authority I believe—does he have any legal degrees? Yes. This man is a lawyer. He went to law school; even taught some.

[1] See p. 100.

I think that is one of the points that came up at his confirmation hearing. Here is the kind of law this fellow is teaching. He says that you should apply the principles of American law to the task of interpreting the act as it affects the facts of the investigation, including those principles relating to interpreting the act so as to avoid inconsistency between it and the international obligations of the United States.

So, they start out by conceding that they have no authority to engage in a contract that would make us violate the existing law. Then they proceed to make a contract that violates the law and then they say we must construe the law so we don't violate it.

Isn't that, basically, what they have done here?

Mr. HISS. That is the way I see it, Mr. Chairman.

The CHAIRMAN. Now, can you find where that doctrine has actually been put into effect by someone prior to Commissioner Metzger?

Mr. HISS. We will research it, sir, and file a memorandum.[1]

The CHAIRMAN. It would be interesting to find if any court has so explained the duty of the court to be that way.

Mr. HISS. He cites no authorities in that report, and he mentions no cases. Maybe he has looked and not found any. I know of none, but I will look some more.

The CHAIRMAN. Why don't you take a look and see if Covington & Burling can find one, and let's see if Mr. Metzger can find one, either a board or commission or somebody who espoused that theory.[2] I know some people have tried this kind of thing before, but I would be curious to know who is bold enough to say this is what we are up to.

Mr. HISS. It is, by a strange coincidence, I understand, that Mr. Clubb, while he was practicing law here, took a course under Mr. Metzger. It seems to me he learned a lot more than Mr. Metzger could teach him. [Laughter.]

But on the question of legislative authority, on June 14, Mr. Mundt testified before the Ways and Means Committee, and Chairman Mills asked the question, whether we had been able to find any legal——

The CHAIRMAN. Just a moment. I might stop you. I think that Mr. Metzger gave authority for his statement—there is a footnote to that effect: See Restatement of the Law, Second Foreign Relations Law of the United States of America Law Institute, 1965, Section 1, 3(3), and Comment J to Section 3(3) which apparently states:

> If a domestic law of the United States may be interpreted either in a manner consistent with the international law or on a matter that is in conflict with international law, a court of the United States would interpret it in a manner that is consistent with international law.

Now, if I would understand that, it would seem to me that for that to be the case, that would be a case where the international law preceded the statute. Not the other way around.

Mr. HISS. Not the other way around. Not when you have a statute and then you have a code drafted, and then you have the obligation, according to Mr. Metzger, to make the statute now to conform to the code. It is the other way around.

The CHAIRMAN. Nor would it apply where one is an act of Congress and the other is a mere executive agreement.

Mr. HISS. Right. Exactly.

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[1] See p. 188.
[2] See p. 186.

The CHAIRMAN. An executive agreement is something that the President agrees with some other head of state about what they are going to do or not do, and both proceed to keep their agreement, and it is binding only so long as those two men see fit to agree to it, to stay by it. They are powerless, as I understand it, by executive agreement, to bind the Congress or to change an act of Congress.

Isn't that about the size of it?

Mr. HISS. Precisely.

Chairman Mills asked Mr. Mundt the question, and then asked me, whether we had been able to find any legislative authority for the executive to negotiate the code, and we answered categorically, "No." And he replied, "We haven't been able to find it, either."

We did submit a document detailing the reasons why we came to that conclusion. That is set forth in part IV of the statement which we have filed. But in any event, as I understand Mr. Rehm, although I am not sure I understand him, but I believe that the issue comes down to, if the code and the act are in conflict, then even Mr. Rehm will say the code must fall, unless Congress approves it.

The CHAIRMAN. May I just read this. I didn't read the rest of what Mr. Metzger said. After he got through quoting the restatement, and quoting it obviously in error, he then proceeds to put his own error down behind it.

After July 1, 1968, the International Antidumping code will contain rules of law applicable to the United States in its relation with other States which 'cannot be modified unilaterally by it'.

Now, that is just so much hogwash.

Mr. HISS. Right.

The CHAIRMAN. That binds the President as long as he wants to be bound by it, and he can terminate it any time he wants to, and the same thing is true of the other guy. And it is doesn't bind the Congress for a moment.

The fact that it is an Executive Agreement made by the President under his own authority makes it no less binding upon the United States in this regard as an international agreement. Sections 122, 131.

That is him saying that.

Now, that is so much hogwash, too. It is binding only on the President's conscience, and not on the Congress for a moment.

See McCulloch versus Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 1963; Murray versus Schooner Charming Betsy, 2 Cranch 64, 118 (1804); Lauritzen versus Larsen, 345 U.S. 571-578 (1952).

I haven't seen those. I haven't looked at them. I will make you a bet that not a blessed one of them supports what he is saying there.

Mr. HISS. We will do a research job, Mr. Chairman, and supply you with the results. But, in that connection, even on the Metzger approach, I did not hear Mr. Rehm justify why he ignored Senate Concurrent Resolution 100 adopted in 1966. When you read sections from your report, this committee's report in 1966 on that, it specifically and categorically instructed the negotiators not to negotiate an antidumping code, and yet the only explanation I heard is—it was passed by the Senate and not the House.

This was a Senate concurrent resolution and I think they defied the Senate. When that resolution came to vote, it was adopted by voice vote, and there was only one person opposed to it. Everybody else was

unanimously in favor of it, and I think it is only a little less than shocking to just ignore the Senate completely.

The CHAIRMAN. You say it was passed by the Senate but not by the House, but when the Senate passed it, both through this committee and through the Senate, we in effect told them that if they tried to do this, they weren't going to get away with it.

Mr. HISS. Right.

The CHAIRMAN. Now, they have a man named Norwood, part of that State Department and trade negotiating team up there, to go on the Tariff Commission.

Mr. HISS. Right.

The CHAIRMAN. You just see how long he waits to get on that Tariff Commission.

Mr. HISS. Now, on the question of whether there is a conflict between the code and the act, the four of the five cases on which the majority of the Tariff Commission concluded that the results would have been different under the code were the Swedish cement case, the Belgian cement case, the Portugese cement case, and the Dominican Republic cement case.

I was in charge in our firm of a group of us who worked on all of those cases. Not only do I know the record; I made the record. And I can categorically and without any equivocation say that the results would have been diametrically opposite under the code. We have explained it in our statement. If you want me to summarize and take one instance, I will be very glad to.

The CHAIRMAN. Would you mind just taking one case and explaining? Just give us a case and tell us the facts why it would have to come out differently under this code.

Mr. HISS. The Swedish cement case involved dumped cement from Sweden. It was entered at Fall River, Mass., and at Providence, R.I. It was sold within a radius of roughly 200 miles from those two ports. It was all of Rhode Island, eastern Massachusetts, and eastern Connecticut.

The mills which shipped into that area, which was called the competitive market area by the Tariff Commission, consisted of a mill in Maine, a few mills in the Hudson Valley, and several mills in the Lehigh Valley. They shipped in competition with the dumped cement. We could not possibly have proved that the dumping was demonstrably the principal cause of material injury.

There were other factors in the marketplace at that time. First, there was other imported cement which we had not proved to have been dumped. We later proved a lot of it was dumped.

Second, there was a slight contraction in demand, so that if you got the scales, as you said, the lady with the blindfolded eyes, holding in one hand the scale of dumped imports, and in the other all of the factors, we would have been outweighed. We couldn't possibly have done it.

Knowing the record, which Mr. Rehm does not, as he admitted, I categorically state on that basis we could not have prevailed.

Secondly, under the code, you would have to prove for a regional market that all or almost all of the cement shipped by those few plants in Maine, the Hudson Valley, and the Lehigh Valley went into the

competitive market area. In truth and in fact, the range varied from 6 percent of some plants to 27 percent of others, so that is not all or almost all, and we couldn't possibly have established that.

On those two bases I have not the slightest hesitation—I will take my oath before anybody—that we could not have prevailed under the code.

The CHAIRMAN. In other words, not trying to torture the language the way this young lawyer did, sitting right where you are today, but just reading it for what it really says, there is no way on earth you could have carried that burden of proof.

Mr. HISS. Never could. I haven't the slightest doubt.

Now, on another aspect of the question of whether there is a conflict, Mr. Smith of Treasury referred to the fact that it was reasonable for Treasury to seek some evidence of injury from a complainant.

Now, I have been filing complaints with Treasury for more than 10 years, and a great number of them. I have never been asked to file any evidence of injury with Treasury; since 1954, as you know, the Congress has taken the power of determinations of injury from Treasury and placed it in the sole responsibility of the Tariff Commission.

Not only do they now amend the 1921 act but they have started to chisel and really restrict the 1954 amendment of Congress because they would give Treasury some functions of determining injury.

Mr. Rhem says, oh, but they would not evaluate. We would submit evidence, and we would have to submit evidence of injury—but the Treasury wouldn't evaluate it. Mr. Smith says that he wants to save the taxpayers money, but why would they have us make expensive injury investigations if he is not going to evaluate of what use the evidence might be?

It is going to cost my client a lot of money to get the evidence. I say this is a completely new innovation and completely inconsistent with the act.

One other aspect in that connection. There is a preliminary element of relief which Treasury is required to impose.

Whenever it has reason to believe or suspect dumping, it has to issue a notification to all of the Customs officials to withhold appraisement on entries of the products under consideration because of suspected dumping.

This is obligatory and automatic under the statute. There is no question. There is no looseness. It is crystal clear. Nothing on injury. It is whenever they have reason to believe or suspect.

Under the code, they cannot take preliminary measures in the absence of sufficient evidence—whatever that may mean—of injury. Here, again, it is perfectly clear that there is an inconsistency between the act and the code and the code would really modify basically the antidumping Act.

It reminds me of the Swedish cement case, and we established the regional market concept. Cast iron soil pipe had done it before. I ran into the chief counsel of the Tariff Commission—this was just after the Swedish case was announced and it was unanimous—and I said, "How do you like the decision?" He said, "We are going to have to amend the Commission or amend the act.

He later became chairman and unfortunately he is no longer there. He tried to amend the Commission but he was not successful.

I think now through the code they are trying to amend the act. And I don't think they can do that unless Congress gives them——

The CHAIRMAN. A person said when that case was decided in favor of the industry, that you either had to amend the Commission or the act?

Mr. HISS. He became chairman. He was Mr. Dorfman. He was not a lawyer. He was an economist.

The CHAIRMAN. He became chairman but was never in the position to speak for the majority?

Mr. HISS. No. I don't think he amended—he became a member of the Commission, but was not successful in changing it.

The CHAIRMAN. As a lawyer, you undoubtedly have thought about the matter enough to try to imagine what possible motives could be involved in doing this kind of thing, where we have an unfavorable balance of payments to begin with. The Secretary of the Treasury was up here pleading for us to put a tax on American tourism to Europe, and I mentioned the matter to him just yesterday about things done in the executive branch of Government which are hurting our balance of payments.

Clearly, this hurts our balance of payments.

Mr. HISS. Certainly.

The CHAIRMAN. I didn't bring this particular matter up. I did mention some other matters in other branches. Here is one in his area where it is hurting our balance of payments. At least, Treasury has a hand in this matter.

What conceivable reason could occur to you that would make these people want to do this kind of thing?

Mr. HISS. Sometimes the right hand doesn't know what the left hand does in the Government is all I can say, and that is not a very responsive answer. But that is the best I can find. There is great inconsistency.

The CHAIRMAN. Well, the only thing that I know of which might suggest it would be that in this Kennedy round, the American negotiators might have been told by the Frenchmen, Belgians, Dutchmen, and others:

Look, we are just not interested in negotiating with you people at all unless you will let us do something about your dumping laws and do something about your American selling price.

In order to get some kind of agreement, these negotiators at the 11th hour—rather than come back and report they had utterly failed and dishonored the memory of John Kennedy, and all that sort of business, for the show of it—might have come back and said they had negotiated a great trade victory, or some such thing as that, and—in the memory of our beloved, departed, late President—might have said:

Well, look, tell you what we will do with you. We will work something out to your satisfaction. We can't under the law negotiate about American selling price but we will work out something that will change the American selling price if Congress will agree to it. We would hope to get from you some concession but we will yield about half of that back if Congress won't buy the American selling price change.

And on the dumping pattern, we will seek to change that so that we will get you what you want on that one by amending the Commission and coming up with this interpretation that this man Metzger suggested here.

which is just a complete prostitution of the law as I know it—

and that by doing this, we will have achieved for you the dumping parts of what you want. We will try to get you what you want on the American selling price, if Congress will buy it.

That is about the only conceivable basis upon which I could understand it.

Just in the last analysis, facing a failure of a conference on the one hand, and being fearful of reporting back that they couldn't succeed in reaching a meaningful agreement, at the 11th hour they might have arrived at some such thing as that, to say, well, after all, this is something the executive can do for you if Congress won't.

Senator HARTKE. Mr. Chairman, sort of a propaganda victory for them.

The CHAIRMAN. If I were to have someone erect a monument to me, I wouldn't want them to erect it on that basis.

Senator HARTKE. I agree with you.

The CHAIRMAN. Now, let me ask you: Do you know whether the U.S. industry is going to be able to get any benefits under the antidumping law out of any of the other 18 countries who signed this Antidumping Code?

Mr. HISS. Could you ask that again? I am sorry.

Mr. CHAIRMAN. Well, this so-called Antidumping Code is supposed to let them dump on us, where they couldn't before. What I want to know is: Do you know of any U.S. industry anticipating getting any benefits by dumping into foreign countries under this new code?

Mr. HISS. I know of none. I have heard, or it was announced by the Office of Special Trade Representative that one of the great results of these negotiations was that Canada would enact a statute adding injury as a requirement to dumping before dumping duties could be assessed. We now know that is illusory. There are statements in Mr. Roth's paper in which he said there were concessions granted to American exporters.

The CHAIRMAN. Well, as I understand, one of the benefits of this thing is supposed to be that we were supposed to be able to dump some things into Canada which we can't dump right now.

Mr. HISS. We can't do it now.

The CHAIRMAN. And their Parliament has adjourned and it doesn't meet again until January 1. The information that I get is that they aren't going to agree to that when they do meet.

Mr. HISS. That is our understanding.

The CHAIRMAN. Now, furthermore, I have an article from the Journal of Commerce here which indicates that in Britain, far from letting us dump more stuff into Britain, that they are toughening up their dumping procedures, rather than loosening them up, so that there is, so far as I can determine, no immediate benefits between now and January 1 of any sort that this Nation can expect, and, even then, it is just sort of a song-and-a-prayer kind of thing as to whether you get any benefit out of it anyhow.

But they sure will be dumping on us if they can; won't they?

Mr. HISS. When the code was announced, they also asserted there would be no more star chamber proceedings in England. Now, we are finding exactly what you are reading, that they are toughening their laws, rather than relaxing them.

The CHAIRMAN. I will just submit this article that I am quoting for the record.

(The article referred to, follows:)

[From the Journal of Commerce, May 1968]

RETALIATION FEARED—BRITISH BOARD OF TRADE CAUTIOUS ON DUMPING

By Nicholas Ashford

LONDON, May 9.—The British Board of Trade is to tread warily in enforcing strengthened powers to be taken by the government against the "dumping" of foreign goods in Britain.

The main feature of the new powers—to be incorporated in the Customs Duties (dumping and subsidies) Amendment Bill—is to permit provisional antidumping action in appropriate cases in the interests of British industries. This is aimed at overcoming the often lengthy process of establishing fully that a dumping offense has in fact taken place before applying antidumping customs duties.

The Board of Trade's cautious line on the new anti-dumping measures is attributed partly to its fear of triggering off discriminatory action against British goods amongst its main trading partners, particularly the United States, and partly to keep in line with the GATT rules on dumping.

Indeed, Mrs. Gwyneth Dunwoody, parliamentary secretary at the Board of Trade said as much during the second reading of the bill at the end of April when she pointed out that the government had resisted pressure from some sections of industry and agriculture to act on evidence of dumping alone as this would "be against our interest as a great exporting country and it would be inconsistent with our international commitments."

Mrs. Dunwoody added that the Board of Trade intended to take action "only sparingly and only where there is particular need for it."

The proposals of the new bill, in fact, are in line with GATT and with the anti-dumping code agreed in the Kennedy Round. Before the Board of Trade can take action it must be satisfied on three counts: first, the imports are dumped or subsidized; secondly, that the dumping is causing or threatening material injury to British industry; and thirdly that the action to be taken by the board will be in the national interest, both from a maunfacturer's and consumer's point of view.

QUICK ACTION

Basically, what the new bill is trying to do is to speed up the whole process of anti-dumping action. At present, a British manufacturer who wants the Board of Trade to take action against dumping must first make out a prima facie case before a full investigation is started which means there can be a gap of six months or even more before any action is taken.

During this time market trends may have changed, prices altered and there is often no longer a complaint—although considerable damage will have been done to the home industry. Producers of foodstuffs, particularly seasonal crops are the most frequent complainants.

The new bill, which will be given its third and final Parliamentary reading shortly and is expected to become law before the summer, will allow the Board of Trade to take provisional anti-dumping action without a full investigation being completed. There will, however, be a safeguard against firms taking unfair advantage of the swifter application of anti-dumping duties. If the full investigation shows that dumping was taking place, the industries which have benefitted from the Board of Trade action in imposing duties on imports will have to pay back the amount of benefit they received.

British industry and particularly the farming community have generally welcomed the provisions of the new bill as there has been a sharp upturn in dumping complaints during the past year, especially since evaluation.

Just over 100 formal applications for anti-dumping action have been made over the past 10 years, 12 of which resulted in anti-dumping duties being imposed.

Mr. HISS. It does seem strange to me that if, as claimed, the act is not made less effective in any way, and we got concessions from foreign governments—though they have never been elaborated—that we gave nothing in return?

This doesn't seem to be the kind of operation that this country usually engages in in international relations. We always give something and get very little back, but here, as is claimed, to get something and not give anything is really absurd as I see it.

On the question of Mr. Smith and Mr. Rehm both maintaining there was not inconsistency because the Antidumping Act was cast in general terms, and that these would make—the code would make those terms more specific, it seems self-evident to me—as my law school taught me this and I never read any course to the contrary—when you have an act of Congress in general terms, there is only one body that can make it specific, and that is the Congress. That is what I think should be done here, and if Congress doesn't make it more specific, the act ought to remain as is and the code should not become effective.

Now, one final point, and I am much appreciative for your letting me testify—is the dangerous precedent which this would create if allowed to go without check. You could have the Sherman Act, the Clayton Act, the Robinson-Patman Act; you could have the countervaling duty statute, you could have the unfair import practice provisions of the Tariff Act of 1930; you could have the provision which has been in the Tariff Acts from time immemorial, that when an America-flag vessel has repairs made in foreign shipyards, there is a 50-percent duty on the costs.

All of those could be written off the books, or reduced to the stage where they have been emasculated just as I think the code will emasculate the act, and I think this is really outrageous and the precedent is most unfortunate.

I said that was my final point, but I do have one final point. You said we don't have a judge we can go to. The importer does. He can go to the customs court. A domestic industry cannot go to court to challenge any antidumping proceeding. We tried. The cement companies have tried. I tried the case and lost it.

We have no way of getting judicial relief.

The CHAIRMAN. Well, I think even worse than that would be the precedent that would be set if we were to buy this Metzger theory, that the executive could negate the laws of this country, render them meaningless and even reverse them, by simply making a mere executive agreement between himself and any foreign potentate and then proceed to appoint himself some judges or some commissioners, or some persons in decisionmaking positions somewhere, to make decisions that completely reverse and negate the laws of the land which we are all sworn to uphold.

Now, this is the first time I have seen this doctrine out in the open. Justice Fortas sent a letter up here to Senator Ervin, which will make news, to explain his views of the duties of the Supreme Court to write the Constitution to mean what those Justices want it to mean rather than meaning what the Founding Fathers intended.

That will be the subject of considerable debate before Justice Fortas becomes Chief Justice of the Supreme Court, if he ever does. But here we see Mr. Metzger didn't wait for Justice Fortas. He is already on his way.

Mr. HISS. Thank you very much, indeed, Mr. Chairman.

The CHAIRMAN. We will print the entire statement in the record.

I am very sorry. Senator Hartke?

Senator HARTKE. I am perfectly content that the chairman is doing such a good job, he just doesn't need any questions from me.

(The complete prepared statement of Mr. Mundt and a bill, S. 1726, referred to previously, follows:)

PREPARED STATEMENT OF JOHN C. MUNDT ON BEHALF OF THE CEMENT INDUSTRY ANTIDUMPING COMMITTEE

The Cement Industry Antidumping Committee consists of thirty-five companies in the Cement Industry which account for approximately 90 per cent of the total rated cement capacity in the United States There is attached as Appendix A a list of these thirty-five companies.

The Cement Industry Antidumping Committee is submitting testimony at this hearing and filing this statement in support of its position concerning the International Antidumping Code. It is the Cement Industry's position that the Code is in serious and inevitable conflict with the Antidumping Act of 1921, as was recently concluded in a report filed by the Tariff Commission with the Finance Committee. Further, the Code will severely weaken and emasculate the Antidumping Act. Moreover, there was no legal authority for the negotiation of the Code, and its implementation in this country without Congressional approval will constitute a dangerous precedent of usurpation of Congressional authority by the Executive.

Accordingly, the Cement Industry urges this Committee to adopt Senate Concurrent Resolution 38, which would express the sense of Congress that the International Antidumping Code may not become effective without specific Congressional approval, and to take immediate action to postpone the July 1 effective date for the Code. An outline of the points that will be covered in support of this position, with page references, is as follows:

I. Introduction—The Cement Industry's concern with the unfair trade practice of dumping.

II. The Cement Industry's position on the International Antidumping Code is unrelated to the Kennedy Round concessions or any pending quota proposals, and is concerned only with the unfair trade practice of dumping.

III. Senate Finance Committee action on the International Antidumping Code is urgently required before July 1, 1968.

IV. There was no legal authority for the negotiation of the International Antidumping Code.

V. The implementation of the Antidumping Code without Congressional approval will constitute a dangerous precedent of usurpation of Congressional authority by the Executive.

VI. As concluded by the Tariff Commission, there is serious and inevitable conflict between the International Antidumping Code and the Antidumping Act of 1921.

VII. The International Antidumping Code will weaken and emasculate the Antidumping Act of 1921.

VIII. The Cement Industry would not be able to obtain any relief from dumping under the International Antidumping Code.

IX. There is a serious prospect of administrative chaos in the administration of the Antidumping Act.

X. Canada, a key signatory, cannot provide reciprocal concessions under the International Antidumping Code by the July 1 effective date.

I. INTRODUCTION—THE CEMENT INDUSTRY'S CONCERN WITH THE UNFAIR TRADE PRACTICE OF DUMPING

The Cement Industry has been vitally interested for the past ten years in United States policy concerning the unfair trade practice of dumping. The Cement Industry has had substantial experience under the Antidumping Act of 1921. As set forth in Appendix B, the Cement Industry during the period 1958–1965 was forced to file nineteen complaints under the Antidumping Act. The dumping during this period was on a continuing basis, with importers shifting from country to country as the complaints were filed against their sources of supply. The formal proceedings involved cement imports from fifteen different nations. That the industry suffered serious injury was borne out by the antidumping proceedings, in which the Treasury Department found reason to suspect

dumping in fourteen cases. A number of these proceedings were discontinued by Treasury on assurances by foreign exporters that there would be no further dumping. In four cases the Tariff Commission made affirmative determinations of injury and special dumping duties were imposed on dumped cement imports from four countries (Sweden, Belgium, Portugal and the Dominican Republic), which continue in effect.

Because of the injury sustained from dumping, and because of its inability to obtain effective relief under the Antidumping Act of 1921, the industry has since 1963 supported legislation to amend the Act. The primary purpose of this legislation is to provide meaningful relief to domestic industries injured by dumping. S. 1720, which is sponsored by 41 Senators, is pending before your Committee and provides such relief. The Cement Industry wishes to make clear to the Committee that it continues to support this legislation.

II. THE CEMENT INDUSTRY'S POSITION ON THE INTERNATIONAL ANTIDUMPING CODE IS UNRELATED TO THE KENNEDY ROUND CONCESSIONS OR ANY PENDING QUOTA PROPOSALS, AND IS CONCERNED ONLY WITH THE UNFAIR TRADE PRACTICE OF DUMPING

The Cement Industry's position in the trade area is concerned only with the unfair trade practice of dumping and has no impact on or relation to the Kennedy Round tariff concessions. The Code was negotiated separately and is in no way tied to the Kennedy Round agreements.

Hence any action by this Committee involving the Code will not affect or impede the schedule of Kennedy Round tariff reductions in this country or elsewhere.

The Cement Industry's only concern is that imports that arrive in this country are legitimate, and are not sold unfairly at dumped prices. This has been the policy of the United States Congress for over fifty years, and dumping has been universally condemned as an unfair trade practice, as affirmed in the General Agreement on Tariffs and Trade.

Similarly, the Cement Industry's position does not involve any pending quota or tariff proposals. The Cement Industry does not seek increased tariffs on cement, nor does it seek quota relief. In fact, the industry has never sought to restrict the entry or imports into this market. The industry's concern with the unfair trade practice of dumping is only to ensure that import competition is subject to the same standards of fair trade that are observed by U.S. industries under the antitrust laws.

III. SENATE FINANCE COMMITTEE ACTION ON THE INTERNATIONAL ANTIDUMPING CODE IS URGENTLY REQUIRED BEFORE JULY 1, 1968

The International Antidumping Code is scheduled to become effective on July 1, 1968. The Code will be implemented in this country by means of substantial amendments of the Treasury regulations, which were published on June 1, to become effective on July 1. As described more fully below, these new regulations have been promulgated by Treasury despite their conflict with the Antidumping Act. Furthermore, although Treasury intends fully to implement the Code, the recent Report of the Tariff Commission, filed at the request of this Committee, suggests that that agency does not intend to be bound by the Code in the numerous areas of conflict. Therefore, among other repercussions if the Code is permitted to become effective, there will be administrative chaos in the administration of the Antidumping Act.

Under these circumstances, it is essential for the Finance Committee immediately to urge the President to postpone the implementation of the Code until this Committee has had an opportunity to give full consideration to the Code. This will enable the Committee to determine whether it should recommend that the Senate adopt Senate Concurrent Resolution 38, or take other appropriate action.

As stated above, postponement of the effective date of the Code would have no impact on the United States' obligations or its trading partners' obligations under the Kennedy Round. Furthermore, there would be no need for embarrassment on the part of the Executive, since Canada, one of the key signatories of the Code, definitely will not implement it by the scheduled July 1 effective date. (The significant implications of Canada's failure to implement the Code are reviewed more fully in Section X below.)

Moreover, the Code itself merely provides that it is to become effective on July 1 "for each party which has accepted it by that date." The Code will remain open for parties to accept it subsequent to July 1. Hence, the United States need only indicate that Congress has not yet "accepted" the Code.

IV. THERE WAS NO LEGAL AUTHORITY FOR THE NEGOTIATION OF THE INTERNATIONAL ANTIDUMPING CODE

Both the legislative history of the Trade Expansion Act of 1962, and Senate Concurrent Resolution 100 adopted in 1966, made absolutely clear that Congress did not delegate any authority to the Executive to negotiate an international antidumping code. The Cement Industry Antidumping Committee and other industries testified before the Trade Information Committee in 1966 to the effect that there was no legal authority for the negotiation of such a code. Despite this testimony, and despite the passage of S. Con. 38, the Executive branch proceeded to negotiate the International Antidumping Code.

The authority of the office of the Special Representative for Trade Negotiations, which negotiated the Code, derives solely from the Trade Expansion Act of 1962. The Office of the Special Representative was created by Congress in that Act. Under the Trade Expansion Act, the President, through the Special Trade Representative, was given specifically limited authority to negotiate trade agreements concerning "existing duties or other import restrictions." The Act and its legislative history make it clear that this authority concerns *only* tariff duties or other import restrictions (such as quotas) relating to specific articles of merchandise. There was no authority to negotiate trade agreements with respect to non-tariff legislation, such as the Antidumping Act of 1921, which is not a tariff act and which does not relate to specific articles of merchandise.

As described more fully in Section V below, the Antidumping Act is an integral part of the unfair trade laws of the United States. It is not designed to impose tariff duties upon specific articles of merchandise but rather to prevent unfair price discrimination by foreign sellers in their exports to the United States.

The International Antidumping Code necessarily requires extensive modification and revision of the Antidumping Act of 1921, as fully documented in Sections VI and VII below. The legislative history of the 1962 Trade Expansion Act understandably is meager on the relationship of that statute to the Antidumping Act since the latter clearly deals with matters of domestic economic regulation of unfair competition that fall beyond the purview of the former. As set forth in Section V below, the Antidumping Act was clearly intended to apply the domestic antitrust laws to imported merchandise.

However, the references in the legislative history of the Trade Expansion Act that do appear demonstrate conclusively that Congress did not delegate to the Executive any authority to revise the Antidumping Act, or to negotiate an international antidumping code. The report of this Committee specifically stated:

"Section 257(h) provides that section 22 of the Agricultural Adjustment Act and import restrictions imposed thereunder shall be unaffected by the bill. *Other laws not to be affected include the Antidumping Act* and section 303 of the Tariff Act of 1930, which relates to countervailing duties." (S. Rep. No. 2059, 87th Cong., 2d Sess., 19 (1962)). (Emphasis added.)

It thus becomes clear that "special dumping duties" imposed pursuant to the Antidumping Act are not comprehended within the phrase "duty or other import restriction" found throughout the Trade Expansion Act.

An exchange between Secretary of Treasury Dillon and Congressman Utt in the Hearings Before the House Ways and Means Committee considering the proposed 1962 Act reinforces the view that, in the contemplation both of the Administration which proposed the bill, and of the Congress which enacted it into law, the Trade Expansion Act did not in any way touch upon the Antidumping Act:

"Secretary DILLON. Treasury is responsible for carrying out antidumping activities. I do not think this bill affects the antidumping legislation at all.

"Mr. UTT. I was wondering if you could point out to me where the antidumping legislation is still in force?

"Secretary DILLON. I think that is a totally separate piece of legislation. It never was part of the trade agreements legislation. It is a separate piece.

"Mr. UTT. We have several sections entitled 'Repeals.' I am wondering if any of those sections on antidumping are repealed by reference?

"Secretary DILLON. So far as I know, nothing is. I cannot give you a positive answer, but as far as I am informed, it is my understanding there is no change at all in the antidumping procedures so far as this bill is concerned." Hearing on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 2, at 897–98 (1962).

Another Administration spokesman, Secretary of Commerce Luther H. Hodges, gave broad assurances that the government would not act under the 1962 legislation so as to undermine other statutory protection against unfair foreign competition:

"And I am resolved that the Government shall take no action in the field of tariff policy that will work undue hardship to U.S. industry, workers, and farmers through *unfair foreign competition.*" Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 1, at 81 (1962). (Emphasis added.)

Section 201 of the 1962 Act confers authority upon the President to modify "other import restrictions" as well as duties under specified circumstances but the legislative history suggests that the term "other import restrictions" refers primarily to quotas:

"He [the President] can also impose additional import restrictions (*e.g.*, quotas)." H.R. Rep. No. 1818, 87th Cong., 2d Sess. 2 (1962).

"The basic grant of authority also permits the modification of existing import restrictions other than duties, while at the same time authorizing the imposition of additional import restrictions (*e.g.*, quotas)." *Id.* at 14.

Although there are occasional instances within the legislative history of efforts to expand the term "other import restrictions" beyond mere quotas, it is significant that no such effort can be found which alludes to antidumping regulations:

"What are they [other import restrictions]? Embargoes, quotas, import licenses, currency manipulations, quarantines, and a decision that goods must be delivered within 5 days after they are manufactured." 108 Cong. Rec. 18674 (daily ed. Sept. 18, 1962) (remarks of Senator Curtis).

A memorandum on the 1962 Act prepared by the Tariff Commission and submitted to the House Ways and Means Committee suggests a very limited delegation of authority to the President to modify duties or other import restrictions. This limited authority is inconsistent with the bald assertion of power by the office of the Special Representative for Trade Negotiations in revising and amending the Antidumping Act of 1921, even if some justification could conceivably be found for treating antidumping regulations as coming within the scope of "duty or other import restrictions:"

"The existing authority to proclaim modifications of existing duties is apparently intended to permit the President to make rate and classification changes *within and subordinate to the statutory structure* of the tariff classification schedules, and not to permit him to change the scope of *any statutory provisions.* In any event, whatever the President's ultimate authority under section 350(a)(1) may be, he has so confined his proclaimed 'modifications.' It is assumed that there would be no departure from past practice in exercising the authority under the new legislation." Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 2, at 923 (1962). (Emphasis added.)

The Senate reaffirmed, by its virtually unanimous adoption in 1966 of Senate Concurrent Resolution 100, that there was no authority in the Trade Expansion Act of 1962 for any negotiations concerning antidumping. The Resolution stated that it was the sense of the Congress that no trade agreement or other arrangement under the Trade Expansion Act of 1962 should be entered into except in accordance with legislative authority specifically delegated by Congress. The report filed by the Finance Committee, recommending adoption of the Resolution, concluded as follows:

"The Committee on Finance has been disturbed over reports that the current Kennedy Round of tariff negotiations may be broadened to include U.S. offers of concessions with respect to matters for which there is no existing delegated authority * * *

"It has been reported that one area in which our negotiators may offer concessions concerns the American selling price method of evaluation * * *

"*Another area may involve the treatment of 'dumped' goods by the country in which the dumping occurs. This problem concerns unfair trade practices in a domestic economy and it is difficult for us to understand why Congress should be by-passed at the crucial policymaking stages, and permitted to participate*

only after policy has been frozen in an international trade agreement." (Emphasis added.)

It is thus clear that the negotiation of the International Antidumping Code was without legal authority and in clear defiance of Senate Concurrent Resolution 100. The substantive revisions and amendments of the Antidumping Act of 1921 required by the Code, which are described in Sections VI and VII below, can be legally accomplished only by the Congress.

V. THE IMPLEMENTATION OF THE ANTIDUMPING CODE WITHOUT CONGRESSIONAL APPROVAL WILL CONSTITUTE A DANGEROUS PRECEDENT OF USURPATION OF CONGRESSIONAL AUTHORITY BY THE EXECUTIVE

If the Antidumping Code is permitted to become effective without Congressional approval, this will constitute a dangerous precedent of usurpation by the executive of Congressional authority. This would necessarily be a result because the Code, in the form of an international agreement, amends and revises substantially the Antidumping Act of 1921 without any Congressional action. The extent to which the Code amends and conflicts with the Antidumping Act is covered in Sections VI and VII below.

The Antidumping Act of 1921 is a domestic trade law and an integral part of the unfair trade laws of the U.S. As early as 1916 the Congress of the United States recognized that the "dumping" of goods in this market was an unfair trade practice, and made the practice punishable by criminal penalties and the subject of civil treble damage actions, 15 U.S.C. § 72.

The Antidumping Act was clearly intended to apply the domestic antitrust laws to imported goods in competition with domestic products. That this was the intention of the Congress is clear from the legislative history of the Act.

" * * * the purpose of the proposed bill (forerunner of the Antidumping Act) is to prevent the stifling of domestic industries by the dumping of foreign merchandise. * * * Over 20 years ago, by the enactment of the Sherman Antitrust Law, Congress recognized the necessity of legislation to prevent unfair methods of competition and monopoly within the United States, but effective legislation to prevent discriminations and unfair practices from abroad, to destroy competition and control prices, has not been enacted." H.R. Rep. No. 479, 66th Cong., 1st Sess., 1 (1919).

Like other unfair trade laws, the Antidumping Act can be revised only through the Congressional process. As the Tariff Commission concluded in its recent Report to the Finance Committee on Senate Concurrent Resolution 38—"The Code, no matter what are the obligations undertaken by the United States thereunder internationally, cannot, standing alone without legislative implementation, alter the provisions of the Antidumping Act." The amendment of this legislation by an international agreement is indistinguishable from an effort, for example, of the Executive to change through such an agreement the standards of the Sherman Antitrust Act. Similarly, the Executive could just as well sign an international criminal code purporting to cover crimes committed by importers. It is unquestionable that such actions would be considered by Congress and the States as clearly interfering with their legislative prerogatives.[1]

If Congress fails to act to prevent the Executive Branch from revising both the standards and procedure of a statute passed nearly fifty years ago to protect American industry from an unfair trade practice, then there should be little to deter the Executive in the future from negotiating revisions of other trade legislation, such as the countervailing duty statute, or even legislation outside the trade field.

The Cement Industry Committee respectfully submits that it is in Congress' own interest to express its sense that the International Antidumping Code should not become effective unless and until it has been specifically approved by the Congress. It is our position that in the first instance the issue of the Code is one of the balance of power and Congress' constitutional mandate in the area of domestic unfair trade legislation.

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[1] The office of the Special Trade representative has on occasion referred to the President's Constitutional authority to conduct foreign affairs as a basis for the negotiation of the Code. The President has authority to enter into international agreements as long as they do not conflict with or override existing Congressional legislation. In this instance, the Executive's action has resulted in substantial revisions of a vital domestic unfair trade law, as described in Sections VI and VII below. The Executive cannot accomplish this without enabling legislation from Congress.

VI. AS CONCLUDED BY THE TARIFF COMMISSION, THERE IS SERIOUS AND INEVITABLE CONFLICT BETWEEN THE INTERNATIONAL ANTIDUMPING CODE AND THE ANTIDUMPING ACT OF 1921

The Cement Industry Committee takes the position that the proposed provisions of the International Antidumping Code would amend and conflict with the Antidumping Act of 1921. A majority of the Tariff Commission in its recent Report submitted to this Committee confirmed that the Code is in serious and inevitable conflict with the Act. This conclusion was reached in a 3–2 decision in which two dissenting Commissioners took the position that conflicts between the Code and the Act should be determined only on a case-by-case basis.

The Tariff Commission majority found in almost every instance that the Code is in conflict with or in some manner alters the Act. This statement will concentrate on the three basic areas of conflict between the Code and the Act found by the Commission.

A. Injury standards

The Tariff Commission Report emphasizes that the injury provisions of the Code require a showing "that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry," whereas the Act requires only that the Commission determine "whether an industry in the United States is being, or is likely to be injured." The Commission majority emphasizes that the Act does not require a determination that dumped imports cause an adverse effect to a greater degree than any other factor adversely affecting an industry before there can be a finding of injury, as is required by the Code.

B. Industry standards

Similarly, the Commission majority concludes that the industry concept of the Code differs substantially from that of the Act. The Code permits consideration of a regional industry only where the producers within such a market "sell all or almost all of their production" in that market, and there is injury to "all or almost all" of the producers in the regional market. The Commission majority concludes that this concept is "so narrowly defined" that four out of five prior injury determinations of the Commission under the U.S. Act would have been reversed under the Code, and that the Code's permissible circumstances for regional industry consideration "rarely exist."

C. Treasury versus Tariff Commission functions

The Commission majority also concludes that the Code conflicts with the division of functions between the Treasury Department and the Tariff Commission under the Antidumping Act. The majority states that the Code's requirements of simultaneous consideration of dumping and injury creates "an anomalous result," and that effective simultaneity under the Act is "not procedurally feasible or logical." Furthermore, the Code's requirement that a dumping complaint must be rejected (by Treasury) if there is not sufficient evidence of injury is in conflict with the U.S. Act, which vests sole authority in the Commission to make injury determinations. Moreover, the Code prohibits the imposition of any provisional measures until there is "sufficient evidence" of injury. Under the U.S. Act, the Treasury Department must automatically issue a withholding of appraisement notice on the product in question once it has reason to suspect dumping. Since Treasury has no authority under the Act to make any determination of injury, the Commission majority concludes that compliance with the "sufficient evidence" provision of the Code would preclude use of the withholding notice required by the Act.

Notwithstanding these findings of the Tariff Commission, the new Treasury regulations will implement the Code. To accomplish this, however, Treasury proposes to ignore a specific decision of Congress. In 1954, Congress amended the Antidumping Act in order to transfer completely the injury determination to the Tariff Commission. Under Section 53.27(e) of the new regulations, a dumping complaint is required to show evidence of injury and thus Treasury will make some kind of injury determination. There is no indication of whether this injury determination will be based on the onerous standards of the Code, described above, as distinguished from the more reasonable injury standard of the U.S. Act. Whatever standard Treasury in fact adopts violates the Congressional mandate that the Tariff Commission alone should make determinations of injury.

Similarly, Sections 53.38 and 53.39 of the new regulations effectively would authorize simultaneous consideration of injury by the Tariff Commission and reconsideration of dumping and injury by Treasury, in clear defiance of the Act's requirement that the injury determination is to be made only after the dumping investigation has been concluded. Section 53.34 of the regulations would once more inject Treasury into the injury arena, by requiring that there be evidence of injury before the provisional measure of withholding of appraisement is imposed. This is designed to comply with the Code requirement that there be sufficient evidence of injury before provisional measures are imposed, and will eviscerate one of the basic protections against dumping afforded under the present statute.

After reviewing these three major areas of conflict and other serious conflicts between the Code and the Act, many of which have been reflected in the new Treasury regulations, the Tariff Commission concludes that such an alteration of domestic law cannot be accomplished without Congressional action. As already quoted above, the majority states that "The Code, no matter what are the obligations undertaken by the United States thereunder internationally, cannot, standing alone without legislative implementation, alter the provisions of the Antidumping Act". In additional comments, Commissioner Clubb states that the majority's position is that the Commission is "powerless" to apply the Code until it is implemented or approved by Congress.

S. Con. Res. 38 would express the sense of Congress that the Antidumping Code is in conflict with the Antidumping Act and therefore can be implemented only with Congressional action. This was the conclusion of the Tariff Commission—the agency directed to enforce the main provision of the Antidumping Act. If there is any need for further support for S. Con. Res. 38, it is readily available in the fact that the Code not only conflicts with the existing Act but would weaken it so severely as to effectively repeal it. This is covered by the next section.

VII. THE INTERNATIONAL ANTIDUMPING CODE WILL WEAKEN AND EMASCULATE THE ANTIDUMPING ACT OF 1921

If the International Antidumping Code is permitted to become effective, the Antidumping Act will inevitably be weakened. In fact, the emasculation of the Act by the Code will effectively repeal it. Domestic industries have not been able to obtain meaningful and effective relief from dumping under the Act, but under the Code it would be extremely difficult, if not impossible, to obtain any kind of relief. The specific problems the Cement Industry would encounter under the Code are covered in Section VIII below.

While the Antidumping Code weakens the Act in many respects, the revision of the industry and injury standards required by the Code will have the greatest impact. It has already been explained above that the Code would require a showing that the dumped imports are "demonstrably the principal cause of material injury or of threat of material injury". This rigid burden of proof is in marked contrast to the Antidumping Act which simply requires the showing that an industry "is being or is likely to be injured". The Code's injury standards severely restrict the Tariff Commission's ability to make an affirmative finding of injury.

For example, in the Tariff Commission's recent 2-2 affirmative finding of injury in Cast Iron Soil Pipe From Poland, the two Commissioners finding injury under the Act applied standards which clearly would not satisfy the Code. Commissioner Clubb applied a test of causality that required merely that price fluctuations were "at least in part" due to dumping. He concluded that a finding of injury is required when there is anything more than "immaterial" injury. Commissioner Sutton concluded that any injury in excess of *de minimis* requires an affirmative determination.

The onerous burden of the "demonstrably principal cause" test is amply verified by recent experience with the adjustment assistance provisions of the Trade Expansion Act of 1962. Under these provisions adjustment assistance relief is available to domestic industries or workers where increased imports from tariff concessions are shown to be the "major cause" of injury to an industry. No industry or labor group has been able to sustain this difficult burden, and all petitions filed under this provision since 1962 have been unsuccessful. It is for this reason that the Administration has recently proposed that the Trade Expansion Act be amended to require a showing only that increased imports

are "a substantial cause" of injury. In his trade message on May 28, 1968, to the Congress, President Johnson described the "major cause" test as "too rigid, too technical, and too complicated". In his statement on July 11, 1967 to the Subcommittee on Foreign Economic Policy of the Joint Economic Committee of Congress, Ambassador William Roth described the difficulties of the "major cause" test as follows:

"Unfortunately, however, the adjustment assistance provisions have not had the expected beneficial effect, because in practice the present test of eligibility to apply for the assistance has proved too strict. In fact, in no case brought under the act have any firms or workers been able to prove eligibility.

"The present test of eligibility requires (1) that tariff concessions be shown to be *the major cause* of increased imports and (2) that such increased imports be shown to be *the major cause* of injury to the petitioner.

"In the complex environment of our modern economy, a great variety of factors affect the productive capacity and competitiveness of American producers, making it virtually impossible to single out increased imports as *the* major cause of injury. In fact, it has usually been impossible to prove that tariff concessions were *the* major cause of increased imports."

Despite the Administration's clearly articulated position that a "major cause" test is far too difficult for domestic industry to meet under the Trade Expansion Act, the same Administration would require domestic industries under the Antidumping Code to carry an equally onerous burden. There is language in the Antidumping Code that suggests that the "principal cause" is that which outweighs the combined importance of other causes. Although one might debate the semantic distinctions between principal and major, it is clear that the principal cause test under the Code is no less strict than the major cause test that has been employed under the Trade Expansion Act. Surely, in the words of Ambassador Roth quoted above, it is virtually impossible in the "complex environment of our modern economy" to show "demonstrably" that dumped imports are the "principal cause" of injury.

It is difficult for the Cement Industry to understand why the Administration is convinced that liberalization of the adjustment assistance provisions is needed while at the same time it advocates a severe restriction of this nation's law prohibiting dumping. After all, the adjustment assistance provisions are a form of protection of industry from legitimate competition, not an unfair trade practice like dumping. One can only surmise that in the bargaining in Geneva the U.S. negotiators—in order to obtain concessions from other countries which are of doubtful value—were willing to bargain away any real substance that the Antidumping Act contains.

The Antidumping Code also would weaken severely the industry provisions of the Antidumping Act. The next section will describe how this revision of the Act will preclude any relief to the Cement Industry. The Code defines the term "domestic industry" so as to encompass all producers of a particular product which is "like" the dumped product under consideration. Only in very "exceptional circumstances" is the Tariff Commission permitted under the Code to consider a regional market as the area affected. Furthermore, as the Tariff Commission concluded in its Report, a regional industry can be considered only where producers in the region sell "all or almost all" of their product in the limited market area, and there is a finding of injury to "all or almost all" of such producers. In contrast, the Antidumping Act does not restrict the Tariff Commission in its determination of what constitutes "an industry in the U.S.". Under the Act, the Commission has concluded in many cases, and particularly in cement cases, that the industry may be appropriately defined as a regional competitive market, without requirements that producers sell virtually all of their production in the market and that virtually all of the producers are injured.

The rigid standards of the regional industry provision of the Code are thus so restrictive as essentially to preclude any consideration of a regional market where the companies involved operate in more than one market area. This has a particular impact on industries like cement, where the product is expensive to transport and the impact of imports is not likely to be felt much beyond the immediate port area. It is for this reason, as discussed in the next section, that the Tariff Commission concluded that it would have been forced to reach an opposite result in four cement dumping cases under the present Act if it had been required to apply the restrictive regional industry concept contained in the Code.

There are many other provisions of the Code which would weaken the Antidumping Act. It has already been pointed out that the withholding of appraisement provisions of the Act would be severely curtailed by the requirement that there be evidence of injury before provisional measures can be imposed. Similarly, the injection of the Treasury Department back into the injury determination further restricts the function of the Tariff Commission in antidumping proceedings.

The Cement Industry Committee submits that in addition to the usurpation of Congressional authority and the severe conflict with the Antidumping Act involved, the Code should not be permitted to become effective because it effectively repeals the Antidumping Act of 1921. It is manifest that only Congress can approve and implement an international agreement that substantially amends and revises an act of Congress.

VIII. THE CEMENT INDUSTRY WOULD NOT BE ABLE TO OBTAIN ANY RELIEF FROM DUMPING UNDER THE INTERNATIONAL ANTIDUMPING CODE

As was noted at the outset, the Cement Industry has suffered serious injury in the past from the unfair trade practice of dumping. During the period 1958–1965, the Treasury Department found reason to suspect dumping in fourteen out of nineteen cases filed by the industry. A number of these cases were dismissed by Treasury on assurances of discontinuance of dumping and for other reasons, as described in Appendix B. There were four cases in which the Tariff Commission made an affirmative finding of injury and the industry obtained the maximum relief in the form of special dumping duties on cement imports from Sweden, Belgium, Portugal and the Dominican Republic. At the time of the cases, imports from these countries were entering New England, New York, New Jersey and Florida. Under the Antidumping Act these special duties continue in effect any time that cement imports are found to be dumped in this country.

In these four cases, the Tariff Commission found that the Cement Industry had been injured and relief was warranted. Yet, such a finding and such relief would have been completely barred if the Antidumping Code had been in effect. As set forth above, the Tariff Commission reached this conclusion in its recent Report to the Senate Finance Committee. As counsel to the Cement Industry in each of the four cases, it is this firm's judgment that the Tariff Commission majority is correct that an opposite outcome would have resulted under the Code. In the first place, the Cement Industry under the Code would have been required to show "demonstrably" that the dumped imports were "the principal cause" of material injury. The extreme burden of proof required by this standard has already been discussed in Section VII above. It is sufficient to say here that it is doubtful that the Cement Industry would have been able to sustain this burden under the Code, although the Commission found the requisite injury under the Act in each of the four cases. For example, the Commission in the four cases found that there were economic factors other than dumping that contributed to the injury to the cement companies involved. Under these circumstances, it would have been exceedingly difficult, if not impossible, to show that the dumping demonstrably was the "principal cause" of material injury.

It is absolutely clear that, as the Tariff Commission concluded, the restrictive concept of regional industry in the Code would have prevented the Commission from finding injury to "an industry in the United States" in the four cement cases. It may be helpful to consider two of the cases as examples. In the case of Portland Cement from Sweden, the Tariff Commission determined that the "competitive market area" consisted of a limited number of cement plants, supplying Rhode Island, Eastern Massachusetts and Eastern Connecticut. This group of producers sold in the designated regional market area only between 6.1 and 27.2 percent of their total domestic production. Hence, this limited group of producers clearly failed to satisfy the "exceptional circumstances" necessary for consideration of a regional industry under the Code. They sold considerably less than "all or almost all" of their production in the limited New England market. It is also extremely doubtful that it could have been "demonstrably" shown that the dumped Swedish imports were a "principal cause" of injury to "all or almost all" of the producers in the market.

Similarly, in the case of Portland Cement from Belgium, one of the market areas involved the Southeast Florida market, where two new cement plants opened in the Miami area in 1958. Both companies involved had cement plants in other

markets, totally unrelated to Southeast Florida. They did not "sell all or almost all of their production" in Southeast Florida; under the Code they would, therefore, not have been entitled to relief.

Thus, the Report of the Tariff Commission, and the application above of the Code's regional injury standards to two of the prior cement cases, support fully the proposition that the Cement Industry will be effectively precluded from obtaining any relief under the Antidumping Code. The Cement Industry consists of a series of regional markets. As noted earlier, the effective impact of dumped cement imports is limited because of the high cost of transporting the cement inland from the port of entry. The total area of competitive impact will always remain confined to limited geographic markets. Putting to one side the rigid injury tests of the Code, it is obvious that a cement company or group of companies cannot show material injury if the test is based on the entire national market, as required under the Code.

It is reasonable to assume that once it becomes known that the Cement Industry will be unable to deter dumped cement under the Antidumping Code, foreign producers will resume dumping in this market. The dumping of cement during the period 1958–1965 was consistent and involved at least fifteen countries. The industry's diligent prosecution of these dumping violations and the pendency of legislation to strengthen the Act have no doubt deterred dumping in recent years. The implementation of the Antidumping Code will remove such deterrents, and it is very likely that the dumping of excess cement capacity will be resumed. Under these circumstances, the Cement Industry believes strongly that full deliberation and consideration of the Antidumping Code by Congress is essential.

IX. THERE IS A SERIOUS PROSPECT OF ADMINISTRATIVE CHAOS IN THE ADMINISTRATION OF THE ANTIDUMPING ACT

If the International Antidumping Code is allowed to become effective in the U.S., it appears inevitable that there will be confusion bordering on chaos in the administration of the Antidumping Act. This is because of the contrary positions of the Treasury Department and the Tariff Commission, which have been outlined above and need only be briefly referred to again.

The new regulations promulgated by the Treasury Department, which become effective on July 1, will implement the Code within those areas encompassed by the Treasury function. Under the Antidumping Act, Treasury is charged only with the responsibility of making the determination of whether dumping has occurred; the Tariff Commission has the sole responsibility of making the determination of whether injury has resulted from the dumping. Under the new regulations, however, the Treasury Department will now consider injury. As previously pointed out, it is not clear what standard of injury will be used—the restrictive standard of the Code or the less strict standard of the Act. In any event, the new Treasury regulations are designed to follow the Code to the letter.

On the other hand, a majority of the Tariff Commission has made abundantly clear that it will not be able to apply the Code unless and until it has been approved by the Congress. Furthermore, the Commission has indicated its disagreement that Treasury can—consistent with the specifically limited authority delegated to it under the Act—require injury evidence before it will accept a dumping complaint, or before it will issue a withholding of appraisement notice. And with respect to Treasury's consideration of injury, there is a strong possibility—as discussed above—that Treasury will use the Code standard of injury whereas the Commission will apply the Act's standard. It should be emphasized that no dumping case can reach the Tariff Commission unless it is referred there by Treasury.

The contrasting positions of Treasury and the Commission concerning the Code suggest the inevitability of different interpretations of many sections of the Act. This situation would preclude any prospect of certainty and predictability for businessmen—both importers and domestic producers—in evaluating their status under the Antidumping Act.

Although there are sufficient other reasons for Congress to express its sense that it should consider the Antidumping Code, the prospect of administrative chaos in the administration of a Congressional unfair trade statute provides an additional practical reason for such consideration. Congress specifically directed in 1954 that the functions under the Act be separated as between Treasury and the Tariff.

Commission. Unless action is taken to clarify the status of the Code, this division of functions will be obliterated, and the two agencies will differ markedly in their interpretation and administration of the Act.

X. CANADA, A KEY SIGNATORY, CANNOT PROVIDE RECIPROCAL CONCESSIONS UNDER THE INTERNATIONAL ANTIDUMPING CODE BY THE JULY 1 EFFECTIVE DATE

At the time of the announcement of the conclusion of the negotiation of the International Antidumping Code, the Administration emphasized that meaningful concessions had been obtained from other countries in order to encourage U.S. exports. Ambassador Roth has emphasized this point in recent testimony before the House Ways & Means Committee. In particular, stress has been placed by the Administration in the past on the fact that Canada had signed the Code and thereby agreed to require a finding of injury as a prerequisite to the imposition of dumping duties. Under present Canadian law, a determination of dumping automatically results in the imposition of such duties.

Canada, however, along with many other countries—in inexplicable contrast to the United States' position—made clear that its signature on the Code was not binding since Parliamentary approval and legislation were required. Notwithstanding this, the United States negotiators represented that they viewed the Code as final and binding on the United States, evidently without regard as to whether other countries took steps to implement the Code.

As might well have been expected, the significant concessions purportedly obtained from Canada have so far proven illusory. No Canadian legislation has been adopted to implement the Code, and the Parliament has been dissolved for the elections later this month. The newly elected Parliament is not expected to convene until after July 1, the date by which Canada agreed to implement the Code. Moreover, there has been no real indication that Canada will ultimately enact the required legislation to make the Code effective there. It is our information that no bill has actually been introduced in Parliament, and that the Code has met with substantial opposition from a number of important Canadian industries.

Canada's failure to implement the Code by the effective date has no direct bearing on the Code's many legal defects from this country's standpoint. On the other hand, the lack of assurance that the concessions supposedly obtained to benefit U.S. exports will actually be forthcoming is yet another factor strongly mitigating against hasty implementation of the Code in this country, without Congressional consideration. Moreover, the failure of a major trading partner of the United States to implement the Code by July 1 provides an appropriate opening for the United States to take action to postpone the implementation of the Code here. If there is any concern about embarrassment—and there should not be where the Executive branch has acted beyond its authority—the Canadian situation does provide a valid reason for reconsideration of the Code by the United States. As stated earlier, the Code provides only that it shall become effective on July 1 as to those countries which have "accepted" it by that date.

CONCLUSION

The Cement Industry Antidumping Committee strongly urges that this Committee take positive action to postpone the July 1 effective date of the International Antidumping Code, and to report out favorably Senate Concurrent Resolution 38. The Code is in fundamental conflict with the Antidumping Act of 1921, and would severely weaken and emasculate the Act. The Cement Industry, which has suffered serious injury from dumping in the past, would be effectively barred from relief under the Code. Moreover, there was no legal authority for the negotiation of the Code, and its implementation in this country would constitute an usurpation of Congressional authority by the Executive. Implementation would also lead to administrative chaos as the Treasury and the Tariff Commission have taken contradictory positions. Hence, action by this Committee is vital if United States industries are to be able to compete free of the unfair trade practice of dumping—a practice condemned by Congress for over 50 years and condemned by all major trading nations as well.

APPENDIX A

THE CEMENT INDUSTRY ANTIDUMPING COMMITTEE

Allentown Portland Cement Co.
Alpha Portland Cement Co.
American Cement Corp.
Arkansas Cement Co.
Ash Grove Lime & Portland Cement Co.
Atlantic Cement Co., Inc.
California Portland Cement Co.
Columbia Cement Co.
Coplay Cement Manufacturing Co.
The Flintkote Co.
General Portland Cement Co.
Giant Portland Cement Co.
Gulf Coast Portland Cement Co.
Huron Cement Co.
Ideal Basic Industries
Kaiser Cement and Gypsum Corp.
Keystone Portland Cement Co.
Lehigh Portland Cement Co.
Lone Star Cement Corp.
Marquette Cement Manufacturing Co.
Martin Marietta Corp.
Medusa Portland Cement Co.
Missouri Portland Cement Co.
National Cement Co.
The National Portland Cement Co.
Nazareth Cement Co.
Northwestern States Portland Cement Co.
OKC Corp.
Oregon Portland Cement Co.
Penn-Dixie Corp.
Puerto Rican Cement Co.
San Antonio Portland Cement Co.
Southwestern Portland Cement Co.
The Whitehall Cement Manufacturing Co.
Wyandotte Chemicals Corp.

APPENDIX B

Country of exportation	Date of formal complaint	Treasury initial finding of reason to believe or suspect dumping	Nature of final determination by Treasury Department of Tariff Commission
Belgium	Oct. 2, 1959	Yes	Treasury found dumping and Tariff found injury to the domestic industry.
Canada	May 28, 1959	Yes	Treasury found dumping, but Tariff found no injury to the domestic industry in part because continuation of dumped sales seemed unlikely.
Columbia	Sept. 25, 1959	No	Treasury found no dumping.
Denmark	Apr. 28, 1960	Yes	Treasury found dumping but did not refer it to Tariff partly because of cessation of shipments.
Dominican Republic	Aug. 19, 1961	Yes	Treasury found dumping, but Tariff found no injury at the time to the domestic industry.
Do	May 4, 1962	Yes	Treasury found dumping and Tariff found injury to the domestic industry.
Israel	July 21, 1959	Yes	Treasury found no dumping partly because of a non-cost-justified quantity discount allowance.
Italy	June 7, 1962	No	Treasury found no dumping.
Japan	Dec. 1, 1961	None	Treasury found dumping but did not refer to Tariff partly because of assurances by the producer that dumping would not be resumed.
Do	Feb. 5, 1963	Yes	Treasury found dumping, but Tariff found no injury to the domestic industry.
Do	Aug. 26, 1965	No	Treasury found no dumping.
Norway	Sept. 15, 1958	Yes	Treasury found no dumping solely because of a non-cost-justified quantity discount allowance.
Do	Dec. 27, 1961	Yes	Do.
Poland	Dec. 29, 1960	Yes	Treasury found no dumping, but used a 3d country price and not Polish as home market price.
Portugal	June 9, 1960	Yes	Treasury found dumping and Tariff found injury to the domestic industry.
Sweden	Nov. 25, 1958	Yes	Do.
Tunisia	Sept. 13, 1960	No	Treasury found dumping but did not refer it to Tariff on assurances by the producers that dumping would not be resumed.
West Germany	Aug. 13, 1959	Yes	Do.
Yugoslavia	Aug. 28, 1961	Yes	Do.

90TH CONGRESS
1ST SESSION

S. 1726

IN THE SENATE OF THE UNITED STATES

MAY 9, 1967

Mr. HARTKE (for himself, Mr. SCOTT, Mr. BAYH, Mr. BENNETT, Mr. BIBLE, Mr. BOGGS, Mr. BREWSTER, Mr. BROOKE, Mr. BURDICK, Mr. BYRD of West Virginia, Mr. CARLSON, Mr. CLARK, Mr. CURTIS, Mr. DIRKSEN, Mr. DODD, Mr. DOMINICK, Mr. ERVIN, Mr. FANNIN, Mr. HANSEN, Mr. HICKENLOOPER, Mr. INOUYE, Mr. KUCHEL, Mr. LAUSCHE, Mr. MCCARTHY, Mr. METCALF, Mr. MILLER, Mr. MORSE, Mr. MOSS, Mr. MUNDT, Mr. MURPHY, Mr. PEARSON, Mr. PROUTY, Mr. RANDOLPH, Mr. RIBICOFF, Mr. SPARKMAN, Mr. SYMINGTON, Mr. TALMADGE, Mr. THURMOND, Mr. TOWER, Mr. YARBOROUGH, and Mr. YOUNG of Ohio) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Antidumping Act, 1921.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 201 of the Antidumping Act, 1921 (19 U.S.C. 160), is amended to read as follows:

"DUMPING INVESTIGATION

"SEC. 201. (a) Whenever the Secretary determines in accordance with the procedure prescribed in section 212 that foreign merchandise of a class or kind has been sold at any

time after the date six months preceding the date of complaint, or is likely to be, sold at less than fair value, he shall so advise the Commission. Whenever the Secretary, from invoices or other papers or from information presented to him, is advised by a complaint or complaints filed simultaneously that such sales have been made, or are likely to be made, of merchandise from more than one foreign source or country, and if such sales have in fact been made, or are likely to be made, he shall so advise the Commission, but not until his investigation as to all such foreign sources or countries is complete. The Commission shall determine within three months after notification from the Secretary whether a domestic industry or labor in the United States has been, is being, or is likely to be, materially injured (or, in the case of any industry, is prevented from being established) by reason of the sale at less than fair value of merchandise from one or more foreign sources or countries.

"(b) Material injury to a domestic industry shall be established, and the Commission shall make an affirmative determination, when it finds that the foreign merchandise determined to have been sold at less than fair value and supplied to any competitive market area—

"(1) has amounted to 5 per centum or more (in units sold or in gross receipts from the sales under consideration) of domestic merchandise of the same class

or kind sold by the domestic industry and supplied to the same competitive market area, during any three of the months from six months before the initiation of the investigation by the Secretary to the conclusion of the Commission's investigation, unless clear and convincing evidence is presented that, had such sales of foreign merchandise not been made, the domestic industry would not have increased its sales during the three months involved; or

"(2) has been a contributing cause of a decline in the prices at which 50 per centum or more (in units sold or in gross receipts from the sales under consideration) of domestic merchandise of the same class or kind supplied to the competitive market area has been sold by the domestic industry, during any month from six months before the initiation of the investigation by the Secretary to the conclusion of the Commission's investigation; or

"(3) has been a contributing cause of a decline amounting to 5 per centum or more (in man-hours worked or in wages paid) of direct labor employed by a domestic industry in producing merchandise of the same class or kind supplied to a competitive market area, during any three of the months from six months before the initiation of the investigation by the Secretary to the

conclusion of the Commission's investigation, compared with the average monthly level of such employment during the year ending on the date the Secretary's investigation began; or

"(4) has been a contributing cause of any anti-competitive effects in any competitive market area.

"(c) The Commission shall render an affirmative determination of likelihood of injury when it finds a reasonable likelihood that an injury cognizable under subsection (b) of this section will occur by reason of sales of foreign merchandise at less than fair value.

"(d) The Commission shall make the determinations required by this section without regard to whether foreign mechandise was sold with predatory intent or at prices equivalent to or higher than prices of foreign merchandise of the same class or kind. The Commission, after proceeding and hearing under the provisions of section 212, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice of his determination and the determination of the Commission. For the purposes of this section, the Commission shall be deemed to have made an affirmative determination if the Commissioners of the Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's dumping

finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

"(e) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not published a dumping finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him, that such merchandise has been, or is likely to be, sold at less than fair value, he shall forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports upon such class or kind of merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to him until the further order of the Secretary, or until the Secretary has published a dumping finding relating to such merchandise.

"(f) For the purposes of this section—

"(1) The term 'at less than fair value' means that either the purchase price or the exporter's sales price of foreign merchandise, as defined in sections 203 and 204, is less than its foreign market value (or, in the absence of such value, less than its constructed value), as defined in sections 205 and 206.

"(2) The term 'domestic industry' means domestic vendors who supply directly or indirectly to the competitive market area merchandise which is of the same class or kind as foreign merchandise sold at less than fair value and supplied to the same competitive market area.

"(3) The term 'competitive market area' means any geographical area of the United States to which the foreign merchandise determined to have been sold at less than fair value has been supplied in competition with domestic merchandise of the same class or kind.

"(4) Domestic merchandise which is reasonably interchangeable in use with a class or kind of foreign merchandise shall be deemed to be 'of the same class or kind' as such foreign merchandise. Two or more units of foreign merchandise shall be deemed to be 'of a class or kind' whenever reasonably interchangeable in use with one another."

SEC. 2. Section 202 of the Antidumping Act, 1921 (19 U.S.C. 161), is amended to read as follows:

"SPECIAL DUMPING DUTY

"SEC. 202. (a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has published a dumping finding as provided for in section 201, if either the purchase price or the exporter's sales price is less than the foreign market

value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference. If both the purchase price and the exporter's sales price are less than the foreign market value (or, in the absence of such value, than the constructed value), such special dumping duty shall be an amount equal to the greater difference. This subsection shall apply to imported merchandise entered, or withdrawn from warehouse for consumption, not more than one hundred and twenty days prior to the receipt of a complaint by the Secretary, and as to which no appraisement report has been made before such dumping finding has been published.

"(b) In determining the foreign market value for the purposes of this title, if it is established to the satisfaction of the Secretary that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—

"(1) differences in the cost of manufacture, sale, or delivery resulting from the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which

such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), except that no allowance shall be made for such differences unless they were actually considered and taken into account by the vendor in establishing his price,

"(2) other differences in circumstances of sale affecting the cost of doing business, to the extent that such differences were actually considered and taken into account by the vendor in establishing his price, or

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

then due allowance shall be made therefor.

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

"(1) differences in the cost of manufacture, sale, or delivery resulting from the fact that the wholesale

quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), except that no allowance shall be made for such differences unless they were actually considered and taken into account by the vendor in establishing his price,

"(2) other differences in circumstances of sale affecting the cost of doing business, to the extent that such differences were actually considered and taken into account by the vendor in establishing his price, or

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

then due allowance shall be made therefor."

SEC. 3. Section 204 of the Antidumping Act, 1921 (19 U.S.C. 163), is amended by inserting "and profits" immediately after "(2) the amount of the commissions", and

by striking out "and (4)" and inserting in lieu thereof "(4) an amount equal to the expenses and profits of the exporter in the foreign country (unless (A) the exporter is the foreign manufacturer or is owned or controlled by the foreign manufacturer, or (B) the foreign market value includes such expenses and profits), and (5)".

SEC. 4. Section 205 of the Antidumping Act, 1921 (19 U.S.C. 164), is amended to read as follows:

"FOREIGN MARKET VALUE

"SEC. 205. (a) For the purposes of this title, the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the usual wholesale quantities (as defined in section 213) and in the ordinary course of trade—

"(1) in the principal markets of, and for home consumption in, the country from which exported, so long as at least 15 per centum of the total sales (excluding sales to the United States) of such or similar merchandise by any vendor who supplies any of those markets are sales for home consumption in that country, or

"(2) if paragraph (1) is inapplicable, in the principal markets of that country (other than the United

States and the country of export) which is, for any vendor in the country of export whose sales are under consideration, the largest consumer of such or similar merchandise sold by that vendor.

plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. The price at which such or similar merchandise is sold or offered for sale shall be deemed to be seller's list or published price in the absence of conclusive evidence that the merchandise was actually sold or offered for sale in the usual wholesale quantities and in the ordinary course of trade at a different price. In the ascertainment of foreign market value for the purposes of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related

to the seller in any of the respects described in section 207, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

"(b) If any of the imported merchandise is manufactured or produced in a country or area in which, in the opinion of the Secretary, the method of establishing prices is not realistically related to cost or profit factors, the Secretary shall determine the foreign market value in any manner he deems appropriate, such as by reference to (1) the price at which such merchandise is sold or offered for sale for exportation to countries other than the United States from such country or area, (2) the foreign market value of merchandise of the relevant class or kind in appropriate non-Communist countries, and (3) the constructed value of merchandise of the relevant class or kind in appropriate non-Communist countries."

SEC. 5. Sections 208 and 209 of the Antidumping Act, 1921 (19 U.S.C. 167, 168), are amended by striking out "finding" each place it appears in each such section and inserting in each such place "dumping finding".

SEC. 6. The Antidumping Act, 1921, is amended by redesignating sections 212 and 213 as sections 213 and 214,

respectively, and by inserting after section 211 the following new section:

"PROCEDURE

"SEC. 212. (a) INITIATION AND CONTINUANCE OF ANTIDUMPING PROCEEDING.—

"(1) INITIATION OF PROCEEDING.—An antidumping proceeding shall be initiated by the Secretary at the earliest practicable time after receiving a complaint. The Secretary shall consolidate in a single antidumping proceeding all complaints received together regarding the same class or kind of merchandise regardless of the number of importers, exporters, foreign manufacturers, and countries involved. The Secretary shall make reasonable effort to give notice of the initiation of an antidumping proceeding to all known interested parties and shall publish such notice in the Federal Register. The notice shall identify the date and nature of the complaint.

"(2) DISCONTINUANCE OF PROCEEDING.—The Secretary may not discontinue an antidumping proceeding unless (A) he is satisfied that promptly after the initiation of the proceeding, the dumping (if any) of imported merchandise of the class or kind under investigation has been terminated by revisions in price or by cessation of sales of such merchandise to the United

States, (B) he has received bona fide assurances from the exporter that dumping will not be resumed, and (C) he concludes that the quantities of merchandise involved in the sales of imported merchandise under investigation are insignificant.

"(b) DISMISSAL DECISION.—The Secretary may decide within fifteen days after receiving a complaint that there is no evidence to support it supplied by the complaint and no evidence to support it available to the Secretary from customs forms or other sources, and that any differential between the prices at which the imported merchandise and domestic merchandise of the relevant class or kind are offered for sale in the United States cannot reasonably be attributed in whole or in part to the possibility that either the purchase price or the exporter's sales price of a class or kind of foreign merchandise has been, is, or is likely to be, less than the foreign market value (or, in the absence of such value, than the constructed value). If the Secretary so decides he shall forthwith notify the complainant of his dismissal decision, together with the reasons therefor and such of the supporting information of the character required by subsection (c) of this section as is available to the Secretary, without initiating an antidumping proceeding or publishing any document in the Federal Register. For purposes of subsection (j) of this section such decision shall be considered a negative

dumping determination, published as of the date the complainant is notified.

"(c) PROPOSED DUMPING DETERMINATION.—The Secretary shall obtain sufficient information to enable him to prepare for each antidumping proceeding at the earliest practicable time a proposed affirmative or negative dumping determination which he shall publish in the Federal Register and make reasonable effort to send to all known interested parties. Where complaints have been consolidated in a single antidumping proceeding, the Secretary may prepare and publish a proposed negative dumping determination as to a country or countries prior to the preparation and publication of any proposed affirmative dumping determination in such consolidated antidumping proceeding. Each proposed affirmative or negative dumping determination shall indicate the specific data (such as manufacturers, dates, prices, discounts, quantities, home consumption, cost of containers, taxes, duties, and commissions, as well as delivery, selling, advertising, technical service, and other expenses, but not including confidential costs used in ascertaining constructed value in the absence of foreign market value or costs of manufacture used pursuant to sections 202(b)(1) and 202(c)(1)) used by the Secretary and his computations and reasoning in arriving at and applying the concepts used in this title (such as foreign market value, such or similar merchan-

dise, purchase price, exporter's sales price, and constructed value). If, in a particular antidumping proceeding, the disclosure of some of the detailed information required by this subsection would, in the judgment of the Secretary, impede his obtaining similar information in the future, he may so declare in his proposed negative or affirmative dumping determination and omit that information. If the Secretary does withhold such information, however, he shall prepare for the use of the complainant a supplementary statement of the information required by this subsection which has been so withheld, and the reasons for so withholding. The information in such supplementary statements shall not be published or otherwise be made public by the complainant, subject to such sanctions as may be established by the Secretary by regulation, but may be considered by a reviewing court as if otherwise a part of the record.

"(d) ANTIDUMPING HEARING.—The Secretary shall accord an antidumping hearing by permitting any interested party to communicate in writing with the Secretary regarding a proposed affirmative or negative dumping determination within thirty days after its publication in the Federal Register. This communication may include such matters as factual or legal argument, additional factual information in the form of affidavits or other documents, and requests for informal conferences or an oral antidumping hearing. The

Secretary may call for an oral antidumping hearing on his own motion, or on the request of any interested party. Any denial of a request for an oral antidumping hearing shall be in writing with reasons. Notice of an oral antidumping hearing, or denial of a request for one, shall be given to all known interested parties and shall be published in the Federal Register. Notice of an oral antidumping hearing shall state the time and place of such hearing, and summarize or refer to the Federal Register publications of the notice of the initiation of the antidumping proceeding, and the proposed affirmative or negative dumping determination. All interested parties will be accorded at an oral antidumping hearing the rights to counsel, to present evidence, and to conduct such cross-examination as may be required for a full and fair disclosure of the facts. A transcript shall be made of all oral antidumping hearings, and the Secretary may prescribe such regulations as he deems necessary for their fair and orderly conduct. The record in an antidumping hearing shall consist of the notice of initiation of an antidumping proceeding, the proposed affirmative or negative dumping determination, any written communications between interested parties and the Secretary regarding the proposed affirmative or negative determination (unless the Secretary has made a judgment regarding a given document, or part thereof, under the

standard of subsection (c) of this section, which shall then be made available only to interested parties and a reviewing court), the transcript of any oral antidumping hearing, the affirmative or negative dumping determination, and any other relevant documents the Secretary chooses to include on his own motion or the request of any interested party after having heard the parties to be affected.

"(c) DUMPING DETERMINATION.—The Secretary shall prepare an affirmative or negative dumping determination and shall publish it in the Federal Register. The Secretary shall make reasonable effort to send copies to all known interested parties. The contents of the affirmative or negative dumping determination shall comply with the standards for a proposed dumping determination contained in subsection (c) of this section. In addition, it shall contain the Secretary's reply to any new facts or arguments advanced during the antidumping hearing pursuant to subsection (d) of this section. The Secretary shall make his affirmative or negative dumping determination at the earliest practicable time after receiving a complaint or complaints, but in no event more than six months after such date, unless, within the said six months, he shall have submitted a report to the chairman of the Committee on Ways and Means of the House of Representatives and to the chairman of the Committee on Finance of the Senate stating the reasons why a longer period is re-

quired within which to reach such dumping determination and the estimated extent of such longer period.

"(f) FAILURE OR REFUSAL TO FURNISH REQUESTED INFORMATION.—Whenever in any antidumping proceeding the Secretary decides that an importer, exporter, or foreign manufacturer has failed or refused to furnish information which the Secretary has requested and deems necessary to make his proposed dumping determination pursuant to subsection (c), the Secretary shall resolve all doubts relating to such information against the person failing or refusing to furnish it, and shall base his proposed dumping determination upon information from other sources, including, but not limited to, the complainant.

"(g) INJURY PROCEEDING.—An injury proceeding shall be initiated by the Commission at the earliest practicable time after receiving an affirmative dumping determination from the Secretary. The Commission shall make reasonable effort to give notice of the initiation of an injury proceeding to all known interested parties, and shall publish such notice in the Federal Register.

"(h) INJURY HEARING.—The Commission shall accord an injury hearing by permitting any interested party to communicate in writing with the Cominission regarding an injury proceeding. This communication may include such matters as factual or legal argument, factual information in

the form of affidavits or other documents, and requests for informal conferences or an oral injury hearing. The Commission may call for an oral injury hearing on its own motion, or on the request of any interested party. Any denial of a request for such oral injury hearing shall be in writing with reasons. Notice of an oral injury hearing, or denial of a request or requests for one, shall be given to all known interested parties and shall be published in the Federal Register. Notice of an oral injury hearing shall state the time and place of such hearing, and refer to the Federal Register publication of the notice of the initiation of the injury proceeding. All interested parties will be accorded at an oral injury hearing the rights to counsel, to present evidence, and to conduct such cross-examination as may be required for a full and fair disclosure of the facts. A transcript shall be made of all oral injury hearings, and the Commission may prescribe such regulations as it deems necessary for their fair and orderly conduct. The record in any injury hearing shall consist of the notice of initiation of the injury proceeding, the transcript of any oral injury hearing, the injury determination, and any other relevant written communications or documents the Commission chooses to include on the request of an interested party or its own motion after having heard the parties to be affected.

"(i) INJURY DETERMINATION.—The Commission shall

obtain sufficient information to enable it to prepare an injury determination for each injury proceeding, shall publish its injury determination in the Federal Register, and shall give notice thereof to the Secretary. The Commission shall make reasonable effort to send copies to all known interested parties. Each injury determination shall fully indicate the specific data used by the Commission, and its computations and reasoning in arriving at and applying the concepts used in this title. If, in a particular injury proceeding, the disclosure of some of the detailed information required by this subsection would, in the judgment of the Commission, impede its obtaining similar information in the future, it may so declare in its injury determination and omit that information. If the Commission does withhold such information, however, it shall prepare for the use of any interested party a supplementary statement of the information required by this subsection which has been so withheld, and the reasons for so withholding. Such supplementary statements shall not be published or otherwise be made public by any interested party, subject to such sanctions as may be established by the Commission by regulation, but may be considered by a reviewing court as if otherwise a part of the record. The Commission shall render its injury determination within three months after receiving an affirmative dumping determination.

"(j) JUDICIAL REVIEW.—Any interested party shall

be entitled to seek judicial review in the United States Court of Customs and Patent Appeals of (1) any negative dumping determination, within thirty days after its publication in the Federal Register, and (2) any affirmative dumping determination and injury determination, or any dumping finding, within thirty days after the publication of the Commission determination or dumping finding. Such judicial review shall be on the records made in the antidumping hearing and Commission hearing, shall be in accordance with section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e)), and shall be independent of that provided in section 516 of the Tariff Act of 1930 (19 U.S.C. 1516). Any reviewing court may, in its discretion, order the continued withholding of appraisement reports as to the merchandise in question, pending the outcome of its appeal. The United States Court of Customs and Patent Appeals shall establish rules or procedure necessary to effectuate this subsection."

SEC. 7. The section of the Antidumping Act, 1921, redesignated as section 213 by section 6 of this Act is amended—

(1) by adding at the end of paragraph (4) the following new sentence: "In determining what is the usual wholesale quantity, the Secretary shall exclude from his determination (A) all sales at a quantity dis-

count which was not freely available to all purchasers at the time the sales in question were made; (B) all transactions between persons who are related to one another in any of the ways described in section 207; and (C) all transactions pursuant to any agreement or arrangement for exclusive dealing, such as, but not limited to, an exclusive distributorship or an exclusive requirements contract.", and

(2) by adding at the end thereof the following new paragraphs:

"(5) The term 'Secretary' means the Secretary of the Treasury or any person to whom authority under this title has been delegated.

"(6) The term 'antidumping proceeding' means the inquiry by the Secretary pursuant to this title to decide upon an affirmative or negative determination.

"(7) The term 'complaint' means a communication to the Secretary from any customs officer or other person setting forth reasons why an antidumping proceeding should be initiated or a withholding order entered, along with such supporting information as the Secretary may by regulation require and as is reasonably available to the complainant.

"(8) The term 'complainant' means any person or persons outside the customs service who files a complaint with the Secretary.

"(9) The term 'withholding order' means the order entered by the Secretary pursuant to section 201 (e) authorizing the withholding of appraisement reports.

"(10) The term 'dismissal decision' means the decision of the Secretary to dismiss a complaint pursuant to section 212 (b).

"(11) The term 'affirmative dumping determination' means a determination by the Secretary of the Treasury pursuant to section 201 (d).

"(12) The term 'negative dumping determination' means a decision by the Secretary not to render an affirmative dumping determination.

"(13) The term 'Commission' means the United States Tariff Commission.

"(14) The term 'injury proceeding' means the inquiry by the Commission to decide upon an injury determination.

"(15) The term 'injury determination' means a determination by the Commission pursuant to section 201, whether such determination is in the affirmative or in the negative.

"(16) The term 'dumping finding' means the notice published by the Secretary pursuant to section 201 (d) of his affirmative dumping determination, and the injury determination of the Commission."

SEC. 8. Section 406 of the Act of May 27, 1921 (19

U.S.C. 172), is amended by inserting "Puerto Rico and" immediately after "The term 'United States' includes".

SEC. 9. The antidumping regulations of the Treasury Department in effect on the date of the enactment of this Act are ratified and approved, except insofar as they are inconsistent with the provisions of this Act.

SEC. 10. (a) Subject to the provisions of subsections (b) and (c) of this section, the amendments made by this Act shall apply with respect to all merchandise as to which no appraisement report has been made on or before the date of the enactment of this Act.

(b) The amendments made by this Act shall not apply in the case of any article if—

(1) before the date of the enactment of this Act the Secretary of the Treasury or his delegate has made public a finding of dumping with respect to a class or kind of merchandise which includes such article, and

(2) such finding of dumping is in effect with respect to such article on the date it is entered, or withdrawn from warehouse, for consumption;

except that in the case of any such article exported from the country of exportation on or after the date of the enactment of this Act, the special dumping duty applicable to such

article shall be computed under section 202 (a) of the Antidumping Act, 1921, as amended by this Act.

(c) If the question of dumping with respect to any class or kind of foreign merchandise has been raised by or presented to the Secretary of the Treasury or his delegate before the date of the enactment of this Act and either such question is pending on such date before the Secretary of the Treasury or his delegate, or the question of injury by reason of the importation of such merchandise into the United States is pending on such date before the United States Tariff Commission, then in applying the Antidumping Act, 1921, as amended by this Act—

(1) if such question of dumping is pending before the Secretary of the Treasury or his delegate on such date, the Secretary of the Treasury or his delegate shall make his affirmative or negative dumping determination at the earliest practicable time, but in no event more than six months after such date, or

(2) if such question of injury is pending before the United States Tariff Commission on such date, the Commission shall be treated as having received the affirmative determination of the Secretary of the Treasury or his delegate on such date.

The CHAIRMAN. Our next witness is Mr. John P. Roche, president of the American Iron & Steel Institute.

Mr. Roche, we are certainly proud to have you here today. I promise my good friend, Senator Hartke, that I am not going to ask any questions until he has asked all the questions he desires.

May I say, Mr. Roche, Senator Hartke was the principal sponsor of the resolution in this committee to make a study of the problems of the iron and steel industry. Your institute was very helpful in helping us to get the information together, and thanks to what was done in that area at some cost to the committee—I had to fight on the Senate floor for the right to hire some additional employees so we could do something on this—I became more acquainted with the problems of your industry and I am very sympathetic to your problems, even though you don't produce any steel in Louisiana.

I don't know of any steel mills we have there. I wouldn't object to having one, but I do understand some of your problems thanks to Senator Hartke's efforts to make us study some of the problems of your industry.

STATEMENT OF JOHN P. ROCHE, PRESIDENT, AMERICAN IRON & STEEL INSTITUTE; ACCOMPANIED BY DONALD M. SWAN, GENERAL ATTORNEY AND ASSISTANT SECRETARY, BETHLEHEM STEEL CORP.

Mr. ROCHE. Mr. Chairman, I appreciate those remarks and I can say on behalf of the steel industry that we are deeply indebted to Senator Hartke for his great interest in our problems and we are also indebted to you and this committee for the sympathetic understanding we have had, particularly from you, at prior appearances before the committee on the overall subject of trade.

I have with me today Mr. Donald Swan, who is general attorney and assistant secretary of the Bethlehem Steel Corp.

It has been a rather long day and a most interesting one.

I am not going to read my paper in its entirety. I will read from some of the more pertinent paragraphs and then, hopefully, we can engage in some discussion about the steel problem if it is your desire, or Senator Hartke's wish.

The American Iron & Steel Institute believes that many of the provisions of the International Antidumping Code are in conflict with the provisions of the Antidumping Act of 1921, as amended, and should not be permitted to become effective until reviewed by Congress.

We appeared before the Trade Information Committee in 1966 and made this point as strongly as we could at that time, as others did, but as has been pointed out here earlier today, and we repeat it, the negotiators went to Geneva and apparently completely disregarded not only the wishes of the iron and steel industry, but many other industries, as well as the wishes of the U.S. Senate.

Turning over to page 2 of my statement, I comment that in response to the Treasury's request for comments on its proposed antidumping regulations, this institute, by letter dated December 21, 1967, pointed to some of the more obvious inconsistencies, and I would ask, Mr. Chairman, that that letter be made part of the record of these proceedings.

The CHAIRMAN. Without objection.
(The letter referred to follows:)

AMERICAN IRON AND STEEL INSTITUTE,
Washington, D.C., December 21, 1967.

COMMISSIONER OF CUSTOMS,
Washington, D.C.

DEAR SIR: The Commissioner of Customs, by notice published in the Federal Register on October 28, 1967, invited comments on the proposed amendments to the Customs Regulations relating to procedures under the Antidumping Act of 1921. The stated primary purpose of the proposed amendments is to conform the antidumping regulations to the provisions of the International Anti-Dumping Code which was adopted June 30, 1967, as part of the Kennedy Round.

The American Iron and Steel Institute (AISI), which is a nonprofit trade association, the membership of which includes 70 companies which together account for 95% of the steel produced in the United States, submits the following comments relating to the International Anti-Dumping Code and to the proposed amendments. These comments supplement the statement made by AISI in September of 1966 before the Trade Information Committee expressing concern that the interest shown by foreign nations in an international antidumping code seemed prompted by an effort to challenge the Antidumping Act of 1921.

AISI believes that many of the provisions of the International Anti-Dumping Code are inconsistent and in conflict with the provisions of the Antidumping Act of 1921. Such inconsistencies and conflicts have been referred to by many organizations and have been spelled out at some length in the "Staff Study and Comparative Analysis by the American Mining Congress of the International Antidumping Code" published in August, 1967.

Senator Vance Hartke, in a speech to the Senate on September 27, 1967, has termed the International Anti-Dumping Code "an illegal effort to achieve such an amendment of a Congressional statute by executive 'legislation' ". Since many of the provisions of the International Anti-Dumping Code are in conflict with the Antidumping Act of 1921, it should not be permitted to become effective and the Treasury Department should not amend its Customs Regulations to give effect to it.[1]

The more obvious conflicts between the International Anti-Dumping Code and the Antidumping Act of 1921 are:

(1) The International Anti-Dumping Code requires that dumped imports be found to be "demonstrably the principal cause of material injury" before antidumping duties may be assessed and requires the authorities to "weigh, on the one hand, the effect of the dumping and, on the other hand, all other factors, taken together which may be adversely affecting the industry". This requirement places a tremendous burden on any domestic industry. The Antidumping Act grants discretion to the Tariff Commission in the determination of injury: dumped imports need not necessarily be the principal cause of injury so long as they are a cause.

(2) The International Anti-Dumping Code defines "domestic industry" considerably more broadly by the inclusion of all of the industries producing the items in question than does the Antidumping Act which permits the Tariff Commission to define industry in more narrow, regional terms. Under the express language of the Anti-Dumping Code, only "exceptional circumstances" could justify the division of a country into regional markets.[2]

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[1] On June 29, 1966, the Senate of the United States passed Senate Concurrent Resolution 100 stating the sense of the Congress that Ambassador Roth lacked authority to bind the United States to any international antidumping code or other agreement or arrangement which would be in conflict with any law of the United States. In spite of that Resolution, Ambassador Roth did conduct negotiations and did reach agreement on the Code which is in conflict with the Antidumping Act. Senator Hartke has since introduced Senate Concurrent Resolution 38 declaring it to be the sense of the Congress that the International Antidumping Code is in conflict with the Antidumping Act of 1921 and should not be permitted to become effective until acted upon by Congress. House Concurrent Resolution 447 to the same effect was introduced in the House of Representatives on August 2, 1967.

[2] Circumstances required: "all the producers within such a market (must) sell all or almost all of their production * * * in that market, and none, or almost none, of the product in question produced elsewhere in the country (could be) sold in that market". A regional market could also be found where there exists "special regional marketing conditions * * * which result in an equal degree of isolation of the producers in such a market from the rest of the industry" and then "injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined."

(3) The International Anti-Dumping Code provides that a dumping investigation shall be initiated only when there is evidence of both sales at dumping prices and injury to a domestic industry. The Antidumping Act, on the other hand, states specifically that the injury determination shall be undertaken only after the Treasury Department has determined that sales have been at less than fair value. This is an extremely important conflict inasmuch as it will tend to transfer, at least initially, to the Treasury the present role of the Tariff Commission in making the injury investigations required under the Antidumping Act.

The International Anti-Dumping Code places the American producer at a serious disadvantage. This is best exemplified by the requirements, mentioned above, that dumped imports be found to be the principal cause of material injury and that evidence of injury be included in the complaint.

Members of the steel industry have spent months developing information regarding dumping. Were domestic producers to be required also to include evidence of injury in the complaint, an additional time consuming burden would thereby be placed.

There is a serious question as to whether any industry could make out a case of injury under the Code's standard. Ambassador Roth himself recognized this in a statement made in July, 1967, before the Subcommittee on Foreign Economic Policy of the Joint Economic Committee on the subject of the adjustment assistance provisions of the Trade Expansion Act:

"In the complex environment of our modern economy, a great variety of factors affect the productive capacity and competitiveness of American producers, making it virtually impossible to single out increased imports as the major cause of injury."

Small businesses in the United States are discriminated against by the International Anti-Dumping Code. In Article 5(a), the Code provides that investigations of dumping practices should normally be initiated only upon a request by an "industry" supported by evidence of both dumping and injury. Under the Antidumping Act of 1921, the Customs Bureau is authorized to conduct investigations of possible dumping on its own motion. Lack of resources and manpower may therefore prohibit small businesses from obtaining relief from dumping practices under the Code. Further, "industry" is defined in Article 4 of the Code "as referring to the domestic producers as a whole * * *" thereby requiring smaller producers to first persuade most other producers to agree upon a complaint. The Customs Bureau should continue to conduct investigations on its own motion when it believes dumping may be taking place.

The International Anti-Dumping Code is also inconsistent with the Antidumping Act in giving "the authorities" discretion to determine whether the antidumping duty to be imposed shall be less than the full margin of dumping, whether to assess antidumping duties nationally or in only limited geographic areas and to limit the periods during which provisional measures may be imposed.

AISI is opposed to revisions which would weaken the effectiveness of existing procedures. Specifically, the new regulation Section 53.15 (19 Code of Federal Regulations) provides that "whenever the Secretary of the Treasury is satisfied during the course of an antidumping investigation 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 of the prices which prevailed before such revision * * * or whenever the Secretary concludes that there are other changed circumstances on the basis of which it may no longer be appropriate to continue an antidumping investigation, the Secretary shall publish a notice to this effect in the Federal Register." This would seem to permit the Secretary to terminate an antidumping investigation even after a finding of dumping had been made. This revision vitiates a very important section of the Antidumping Act in that such assurances of future fair value sales or price revisions need not be made until after the foreign exporter has been found to have been dumping. The Secretary is therefore in a position to thwart the mandate of the Act.

It is interesting to note that the revision made in Section 53.15 is not even referred to as a revision in the introductory material describing proposed amendments in the regulations. Yet it is quite different from its predecessor (Section 14.7(b)(9)). That Section provides that the Secretary may determine that it is no longer appropriate to continue an antidumping investigation when he is satisfied that "*promptly after the commencement of an antidumping investigation* * * * (1) price revisions have been made which eliminate the likelihood of sales

below fair value * * * or (ii) sales to the United States of the merchandise have terminated and will not be resumed; or whenever the Secretary concludes that there are other changed circumstances on the basis of which it may no longer be appropriate to continue an antidumping investigation."[1] The present Section has been interpreted as permitting the Secretary to act in cases of inadvertent dumping when the exporter immediately revises his selling prices upward. It was not intended to prevent the imposition of sanctions after an exporter has been found to be dumping.

Still other proposed revisions tend to perpetuate existing Treasury practices which favor foreign exporters in a manner not required by the Antidumping Act. Such revisions should not be permitted to become effective.

For example, the proposed Regulations in Section 53.4(b) provide "Generally, the quantity of such or similar merchandise sold for consumption in the country of exportation will be considered to be an inadequate basis for comparison if it is less than 25 percent of the quantity sold other than for exportation to the United States."

The comparable section in the present Regulations is Section 14.7(a)(2) which provides, largely in the language of the Antidumping Act, that the Secretary may use the price at which such merchandise is sold for exportation to countries other then the United States if the quantity sold for consumption in the country of exportation is so small as to be an inadequate basis for comparison. By reason of the geographical proximity of other markets, European producers often sell slightly less than 25% of their output in their home market. AISI believes that a home market percentage of less than 25% is an adequate measure of fair value in many cases. Since deducting freight rates from selling prices to determine fair value causes fair value to be lower on third country sales, home market sales on which the mill receives the highest return should be included in any calculation of fair value. In any event, fair value should be determined by reference to the highest price at which goods are sold in the export market.

Further, Section 53.27 imposes an additional burden on the domestic industry filing the complaint by requiring it to furnish at the outset information indicating that it is being injured, or is likely to be injured, by the dumping. AISI members have spent months in securing evidence of dumping, naturally difficult to obtain. To be required to anticipate the material the Secretary would require as satisfactory evidence of injury at the time of filing the complaint without opportunity for hearing is an unreasonable burden upon domestic producers.

Finally, at least two recurring suggestions offered by the domestic industry have been disregarded. Proof of sales below fair value is difficult to secure as noted above, particularly as to foreign market value. AISI members believe that Treasury should not rely on unverified assertions by foreign exporters. The domestic industry has sought the right to cross examine representatives of exporters as to the accuracy of the material they furnish. Proposed Sections 53.33 and 53.38 do not grant this right.

In addition, AISI takes the position that where foreign exporters refuse to respond fully to Treasury's requests for information, any assertions of exporters and importers based upon the information withheld should be disregarded.

This letter enumerates only certain of the major areas in which the International Anti-Dumping Code and the proposed revisions of the Regulations are in conflict with the Antidumping Act of 1921. We have given these examples to support our position that the International Anti-Dumping Code should not be recognized and the Regulations not revised. There are, of course, other conflicts between the International Anti-Dumping Code and the Antidumping Act of 1921 which have not been enumerated herein. AISI urges that the International Anti-Dumping Code should not be made effective until reviewed and approved by Congress and that the Treasury Department should not revise any of its Customs Regulations to give effect to the provisions of the International Anti-Dumping Code until so reviewed and approved.

Should the Treasury hold hearings on the proposed amendments, representatives of the domestic iron and steel industry would welcome the opportunity to more fully develop the comments made above and to offer additional comments and material.

Very truly yours,

JOHN P. ROCHE, *President.*

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[1] Emphasis added.

Mr. ROCHE. As part of our paper, we list some of the inconsistencies and the only one that I will point to is the one that Commissioner Clubb mentioned earlier today as the most significant one; namely, that the Code requires that dumped imports be found to be demonstrably the principal cause of material injury before antidumping duties may be assessed and requires the authority to weigh on the one hand, the effect of the dumping, and on the other hand, all of the factors taken together which may be adversely affecting the industry.

This requirement places a tremendous additional burden on any domestic industry. The Antidumping Act grants discretion to the Tariff Commission in the determination of injury. It does not require, as does the Code, a determination that dumped imports adversely affect an industry to a greater degree than any one of a combination of other factors.

We move over to the next page, where we comment that the Code provides that a dumping investigation shall be initiated only when there is evidence of both sales at dumping prices and injury to a domestic industry. The Antidumping Act, on the other hand, states specifically that the injury determination shall be undertaken only after the Treasury Department has determined that sales have been at less than fair value.

This is an important conflict inasmuch as it will tend to transfer to the Treasury, at least initially, the present role of the Tariff Commission in making the injury investigations required under the act.

I think, Senator Hartke, you brought that point out very well in your exchanges with the representatives of Ambassador Roth's group this morning.

Turning to page 5, we comment that the domestic steel industry today is facing an extremely serious situation as a result of increasing imports of low-cost foreign steel. This committee is familiar with the dimensions of the problem as a result of the study by its own staff, to which you have already referred, Mr. Chairman, but I do want to comment that imports of steel have increased from 1.2 million tons in 1957 to 11.5 millions in 1967.

Those factors create a competitive situation in the U.S. market too pervasive to be dealt with effectively by antidumping measures. That is why the steel industry supports the adoption of S. 2537, which would place flexible quantitative limits on future steel imports.

Nevertheless, in its effort to prevent further erosion of its markets, the domestic steel industry has initiated various antidumping proceedings. In only two of the approximately 15 proceedings did the industry prevail. And I think we can say here, as the group did which preceded us here today, Mr. Chairman, that on those two cases where we did prevail, that under the code we are convinced we would not have prevailed.

The International Antidumping Code, as the Treasury proposed to implement it, would weaken an already inadequate law. While even a vigorous enforced Antidumping Act would not solve the steel industry's competitive plight, the institute believes that the act's position as a law of the United States designed to prevent one type of unfair trade practice should not be made even less effective.

You mentioned, Mr. Chairman, earlier by your reference to the balance-of-payments deficit that you thought this was a significant part

of this overall problem, and we agree. And I would like to comment that in 1967 the deficit in the steel account, trade account, was some $877 million, and it is estimated that this year the deficit in the steel trade account very well may be $1.3 billion.

We appreciate the opportunity to make this statement, Mr. Chairman, and we believe the record is so well documented here today that we will close with these brief comments, unless there are some questions.

The CHAIRMAN. Senator Hartke?

Senator HARTKE. I have no questions but I do want to make a comment concerning a matter which I brought to the attention of the committee yesterday. When the Secretary of the Treasury was here testifying upon balance-of-payments, I brought forward the fact that it was proposed by France to impose quotas, and at that time there was no recognition of that fact, which has since been revealed. I think news stories today note that imposition has gone into effect. And I notice that our Government is going to give it thorough consideration, whatever that may be.

The CHAIRMAN. What did you say France did? They imposed——

Senator HARTKE. France imposed quotas on practically everything across the board because of their severe balance-of-payments problem, and they have done it quite legally, I think. I don't think there is any question about the legality of what they have done, but I just note the difference in approach of the administration towards the actual action by the French as compared by the action proposed by us in the Congress.

They are quick to condemn those of us who see a real problem here in America concerning our balance of payments and condemn the temporary relief that we are seeking for the sharp increases in imports; but they don't offer that same criticism of France. I am not interested in criticizing; but I just point out that when it becomes necessary for other countries to provide for the interests of their own people, they look out for them, which I think is a proper role of government.

I just wish our people would do the same sometimes.

Mr. Chairman, could we have three articles from the Wall Street Journal, describing the French action, printed in the record?

The CHAIRMAN. Without objection.

(The articles referred to follow:)

[From the Wall Street Journal, June 27, 1968]

FRANCE PLANS TRADE QUOTAS ON SOME ITEMS TO PROTECT BALANCE-OF-PAYMENTS POSITION

PARIS.—France disclosed plans to impose trade quotas on automobiles, appliances, certain textiles and steel to protect its balance-of-payments position, but it may face opposition from its trading partners.

The commission of the European Economic Community, which has been studying the French moves for two days, is expected to give its opinion today or tomorrow. France also has consulted with the secretariat of the General Agreement on Tariffs and Trade in Geneva on the protectionist measures it desires. There are possibilities that it will comment on problems both in the EEC and GATT, which is the agency through which international trade agreements are negotiated.

Under Article 109 of the Treaty of Rome, which set up the Common Market (comprised of the Netherlands, Belgium, Luxemburg, Italy, France and West Germany), a member state that runs into a sudden crisis in its balance of payments may take "provisional" measures to safeguard itself if it notifies the commission and other member states in advance.

The commission then gives its opinion to a council of ministers of the six member nations. The ministers can decide, by a qualified majority vote, to either support the safeguards taken or amend, suspend or abolish them.

[France's special trade measures included moves to bolster exports as well as restrict imports, the Associated Press reported.

[The export measures reduced the cost of loans to French exporters through the end of 1968 and broadened the French system of contingent export subsidies. This system guarantees subsidies to exporters to compensate them in the event of rises in production costs.]

France said it was putting the quotas into effect for only a few months, perhaps until the end of the year. It also said it won't hold imports below a "normal" level. It simply wants to protect against sudden increases in imports of the products in question. It justifies the moves because of the economic dislocations brought on by its two-week general strike.

But some Common Market sources interpret the Treaty of Rome's permission for provisional measures to mean that such measures can last only a few days, until the commission and ministers can act, and not for several months. This question will be no doubt have to be thrashed out between France and its partners.

France's overtures to GATT were presented by Jean Chappelle, a representative of finance. Although details of his discussion aren't known, they presumably deal with the quotas, since they affect other nations as well as those in the Common Market. Although there was speculation in Geneva that other nations would oppose the French moves, few immediate statements were forthcoming. The British Board of Trade said it will probably have something to say today. An official of Italy's Foreign Trade Ministry said a "certain amount of sympathy should be shown for France's plight."

Last night, Couve de Murville, French Finance Minister, confirmed that France had recently sold gold to other central banks. Although he gave no details, the sales have been estimated at about $121 million.

[From the Wall Street Journal, June 27, 1968]

U.S. Position on French Rules

WASHINGTON.—The U.S. will take "appropriate steps" under U.S. laws and within the General Agreement on Tariffs and Trade if the French government's export subsidies and import restrictions jeopardize U.S. trade, a U.S. official said.

William M. Roth, President Johnson's international trade negotiator, said the French government's export subsidies, announced yesterday, "could affect the bulk of French exports to this country." In contrast, he said the import quotas imposed as a temporary measure by France apparently will affect primarily France's trading partners in Europe.

Mr. Roth said "our laws and the GATT provide for the use of countervailing duties to offset export subsidies by others. They also provide redress if import quotas impair our trade."

He added, "Once we have all of the provisions of the French regulations, we will, of course, take the appropriate steps under our laws and GATT to protect our interests."

[From the Wall Street Journal, June 28, 1968]

Fading Europe Unity—French Protectionism Underscores Divisions in the Common Market

Nationalist sentiment dims hopes for real economic union, nuclear cooperation—a battle over butter prices

By Ray Vicker

BRUSSELS.—On Monday, the Common Market is officially scheduled to become, at long last, what its name implies—a 440,000-square-mile market of 185 million consumers where goods move freely among the six member nations.

Yet the Common Market is in serious trouble. Right now it seems to be facing more problems than at any time during its 10 years of existence.

The most immediate problem stems from France's efforts to protect its industries as the adjust to the big wage boosts that followed the recent industrial and

social turmoil. On Wednesday, France announced import restrictions and export subsidies aimed at immunizing its economy from the effects of the Common Market tariff cuts, as well as the worldwide Kennedy Round tariff reductions also scheduled to take effect Monday (for a story on tariff developments, see story on page 4). The French measures, effective Monday, too, might well spur other Common Market members to protect their industries from some of the tariff cuts.

In a masterly bit of understatement, Michel Debre, French foreign minister, says: "It is certain that our partners can't accept the measures with enthusiasm." But, he adds, "I am sure our partners will accept the measures with understanding."

Endless meetings

Just how "understanding" other Common Market nations may be, however, is open to question. Even before this week, protectionist and nationalist sentiments were strong within the other Common Market members—West Germany, Italy, Belgium, Holland and Luxembourg—as well as in France. Such sentiments have been thwarting efforts to set new multinational policies on transportation, agricultural prices and other matters. In the seemingly endless rounds of meetings here, Common Market officials are still debating topics that were on agendas back in 1962. And they don't seem much closer to solutions than they were back then.

The French protectionist moves underscore anew the difficulties of achieving real economic unity among Common Market nations. "We will have a customs union in name, but not in spirit," says one official of the Commission of the European Communities, the executive arm of the Common Market. A Belgian government official declares: "If France is going to have exceptions for its industries, we may have some, too."

Always in the past when the Common Market has faced issues that could cause disintegration, it has succeeded in stretching its rules far enough to allow some sort of compromise. In making those compromises, the organization has evolved into something very different from the united Europe envisioned by the diplomats who conceived the Common Market as a way of bringing about free movement of goods, people, companies and money among the member nations. Such close economic and financial cooperation would lead eventually to political union, the diplomats reasoned.

Some accomplishments

The Common Market can claim some noteworthy accomplishments, of course. Trade among the member nations has increased 256% in the past 10 years, a much faster growth rate than the 87% expansion in total world trade in the same period. The Common Market's industrial production is up 70% from 1958, twice the United Kingdom's growth rate and only slightly less than the U.S. increase. The combined gross national product of Common Market members has soared 55% since 1958, compared with 49% in the U.S. and 32% in Britain.

Nevertheless, says one official of the Commission of the European Communities, "the spirit which launched the Common Market now seems to be lacking." He doesn't have to look beyond his own agency to find evidence.

The Commission was established recently by merging the three administrative agencies (the European Atomic Energy Community, the European Economic Community and the European Coal and Steel Community) that originally were set up by the three separate treaties which launched the Common Market. Despite the merger, the three treaties and the agencies they set up are technically still in existence; hence the plural form of the commission's name.

For the agency to be called the "Commission of the European Community," would require scrapping the original treaties and writing a single new one. But Common Market officials don't dare try that right now, for fear France will insist on deleting many supranational aspects of the organization at a new treaty conference.

Going backwards?

S. L. Mansholt, one of the members of the Common Market commission, minces no words when talking about the inroads nationalism is making into the original concept of a united Europe. "Supranational links are being loosened and reduced to a mere front," he says. "Instead of finding broad-minded solutions, we are liquidating even the modest beginnings of such solutions out of nationalistic narrow-mindedness."

The European Atomic Energy Community (Euratom) originally was viewed as a way to help close the nuclear technology gap between Europe and the U.S. But France, the leading nuclear power in the Common Market, refused to share its knowledge with the other members. And Germany, Holland and Belgium acted as if the Common Market didn't exist when they drew up a separate agreement for nuclear power cooperation in constructing a prototype reactor at Aachen, Germany.

The members haven't been able to agree on common policies on other energy forms, either Holland wants largely unrestricted oil imports; France wants rules that favor French and Italian oil companies. Italy wants unrestricted coal imports; Germany and Belgium, both coal producers, want imports controlled.

Officials also have been trying unsuccessfully for years to develop market-wide corporate laws that would allow companies to merge across national boundaries.

The member nations haven't yet agreed on customs laws and product nomenclature, so when the tariff barriers fall Monday some shippers could have real headaches. For instance, a truckload of "pure wool" sweaters bound for Brussels from Paris could be barred at the Belgian border because "pure wool" means 85% wool in France but must be 97% wool in Belgium. Italy has a law barring imported cars that don't have laminated glass windshields (which some Volkswagen models lack), and German law prohibits imports of cars that have doors hinged at the back (as on some Italian Fiat models).

Trains vs. Trucks

As far back as 1962, Common Market officials discussed ways of unifying European transportation policies by creating a system similar to the Interstate Commerce Commission to regulate rail, water and truck transportation. Yet today, all of the members still set independent transportation policies—often with little regard for how their neighbors are affected.

Georg Leber, West Germany's transportation minister, currently is striving to carry out a massive overhaul of his nation's transportation system with the aim of switching substantial freight volume from highways to the country's nationalized, money-losing railroad. The effort is having a severe impact on Dutch truckers. Until recently, 4,300 Dutch trucks were licensed to operate on German highways, but Mr. Leber has now ruled that only 1,950 Dutch trucks can be on German highways at one time.

German customs officials have been enforcing his edict by halting incoming Dutch trucks at the border and making them wait until an outgoing Dutch truck passes through the border crossing. Dutch companies control about 40% of the truck transportation in the Common Market, and an official of the Dutch ministry of transport says his office is "in a permanent state of negotiations" with the German ministry of transport—to no avail.

Agricultural policy questions have been particularly troublesome. Initially, Common Market policy aimed at setting agricultural prices at levels that would force inefficient farmers to quit but at the same time would allow efficient producers to make a good living. But officials found it almost impossible to cut prices without sparking bitter protests from politically strong farm groups.

Cream cheese on cars

Delegations of farmers from all six nations recently descended on Brussels to demonstrate in front of the Congress Palace, where the Common Market's Council of Ministers meets. A concierge at the Westbury Hotel in Brussels says the farmers halted motorists, asked them their views on farm price supports and smeared cars with cream cheese if they didn't like the drivers' answers: "If you didn't say you favored high farm prices, you got the cheese," says the concierge.

The farmers were particularly agitated about butter prices. After the demonstration, a patchwork compromise drawn by the Council of Ministers cut Common Market price support levels for butter but allowed France, Belgium and Luxembourg to increase prices to the levels demanded by farmers by using national price supports.

Joint price supports for milk and dairy products alone cost the Common Market members about $800 million a year, and the high prices are encouraging even inefficient farmers to raise production. One French research organization estimates that if current Common Market price support policies are continued, there will be 1.2 tons of butter for every Common Market nation citizen stored in warehouses by 1970.

Hermann Hoecherl, West Germany's minister of agriculture, says his country will insist on changing current policies to put more of the Common Market price support burden on nations—in particular, France—that are producting large surpluses. Germany currently contributes 31.1% of the money going into Common Maket farm surplus programs but draws out only 11.5% of the disbursements to farmers.

Just at the time the Common Market seems in need of greater public support, some citizens of its member nations seem to be growing disillusioned about it. A French Institute of Public Opinion poll taken in August 1966 showed 80% of the persons queried thought the Common Market was good for France. This spring a similar poll showed the number had dropped to 55%. At universities throughout Europe, student polls invariably show that European unity ranks low on the list of things students consider important, well below world peace and improved East-West relations.

Mr. ROCHE. I think, Senator Hartke, from what we understand, the French action not only contemplates quotas on imports, but some subsidies identified with their exports, all again part of the same pattern that you have been mentioning.

Senator HARTKE. Yes. All across the package. Quite comprehensive. And I am sure of one thing: it was not done overnight. It is not something which they concocted at midnight in the middle of one of their riots. But something which has been given quite a bit of thought.

It would be interesting to know whether the French had consultations with some of our people, and whether our people knew this regulation was coming. I would imagine we would say we did not. Now, either we knew or we didn't know what was coming.

If we knew and didn't tell our Americans, that borders on something short of being un-American. If we didn't know, I wonder where our sharp intelligence is that would have prevented us from getting caught asleep.

So what we have here is either the commission of a very serious action against our own people, or the omission to really be alert.

Under any circumstances, it is not one which I feel I would want to look to with a great deal of pride.

I might point out that the Secretary of the Treasury yesterday proclaimed no knowledge of the French action. He said this matter fell within the responsibility of the chief negotiator who was here today.

I would have asked him about it; but as I understand it, the requirements for countervailing duties are not within the purview of the authority of Mr. Roth, but within the authority of the Treasury Department.

Mr. ROCHE. Yes. This is right, Senator.

The CHAIRMAN. Incidentally, you made reference on page 1 of your statement to the fact that Senator Ribicoff introduced Senate Concurrent Resolution 100, stating the sense of Congress that our negotiators lacked authority to bind the United States to any international dumping code or arrangement that would be in conflict with any law of the United States.

That resolution—when that resolution was originally introduced, it was Senator Ribicoff's resolution. When we reported it out, we reported it as a committee resolution and it bore my name as chairman of the committee.

Mr. ROCHE. Yes. I understand so, Mr. Chairman.

The CHAIRMAN. And that wasn't any accident that it bore my name. I agreed with it. So as one member of this committee, I understand your problem and I think you are just as right as you can be about it.

Senator Hartke said something about this Nation not defending the rights of its citizens and its industry. It is my judgment that the problems really are not in the Congress. I think that it is the furious, frantic, zealous opposition in the executive branch of the Government to do anything that would help American business to compete successfully with those abroad that prevents us from being able to legislate effectively in this area.

We passed an amendment to give some direly needed aid to the textile industry, for example, and we got it as far as conference. I fought as hard as I know how to sustain that in conference even though Louisiana does not produce enough textile to really make any difference.

It passed the Senate by a large majority. The people had a good case, and the House, I think if permitted to vote on it, would have voted for it, but the administration made an all-out desperate last-ditch fight to prevent the House from accepting any part of what the Senate voted with regard to that. If the administration had left us alone, I think the House would have accepted that, or some reasonable, substantial part of it. So it is really not in the Congress that the fault lies.

Perhaps, you can get it through the Congress, but you have a Presidential veto waiting for you because of the all-out efforts of the administration to keep something from happening along that line. But I do think with regard to what you have here, the chances of doing something constructive are pretty good.

I think in this area we ought to be able to act.

Mr. ROCHE. I would hope so, Mr. Chairman, because we think it is a vital area. I am not talking about antidumping. It isn't the core of our problem but it is a factor in the problem, and we have tried to deal with it, and as I point out in this paper, we have run into some administrative problems, but nonetheless, we have pursued antidumping measures under the act of 1921, but we can see now that under the code, particularly after what we have heard here today, we would just despair of ever prevailing in any antidumping proceeding if the code were adopted.

The CHAIRMAN. Well, it seems to me that the policies being pursued by the executive at this time are not likely to be the policies of the executive next year, no matter how the election comes out.

My guess is, no matter who is elected, be it Democrat or Republican, there will be more sympathy for the problems of American industry than there is right now. As for your industry and the cement industry and the textile industry and the maritime industry and the oil industry and the others in this Nation that are really suffering--while to give them the same kind of consideration any foreign power would give its own would give them relief and help tremendously with our balance of payments—I would think that the new President, be he Democratic or Republican, would try to cooperate with the Congress or even lead the Congress in a policy that would be helpful to American industry in solving our balance of payments, and in prospering in its own markets.

In any event, that is the position I will continue to take about this matter. I think you have made a very fine case here. I regret Senator

Hartke didn't see fit to interrogate you any further because he is very much on your side in this matter, as you know. He listened to me ask some questions of the cement industry—and we do have a few mills in Louisiana.

I thought it would be my turn to listen to him interrogate you about the steel industry which is very important in the State of Indiana.

Mr. ROCHE. May I make a comment in closing, not for the record, Mr. Chairman, that your recital this morning of some instances of tort law I found very interesting because I was always interested in this subject. But when you mention the matter again, maybe it is better that you don't put the two of you in an imported car. [Laughter.]

The CHAIRMAN. Well, we can just put ourselves next time in an American Rambler. We will meet the same problem. [Laughter.]

Mr. ROCHE. Thank you very much.

(The complete prepared statement of Mr. Roche, above-referred to, follows:)

PREPARED STATEMENT OF JOHN P. ROCHE, PRESIDENT, AMERICAN IRON & STEEL INSTITUTE

My name is John P. Roche. I am President of the American Iron and Steel Institute, a non-profit trade association having 67 member companies in the United States. Those companies account for about 95% of this country's raw steel production. I am accompanied today by Donald M. Swan, General Attorney and Assistant Secretary of Bethlehem Steel Corporation.

The American Iron and Steel Institute believes that many of the provisions of the International Antidumping Code are in conflict with the provisions of the Antidumping Act of 1921, as amended, and should not be permitted to become effective until review by Congress.

When the subject of an international antidumping code was first discussed, I appeared as a witness before the Trade Information Committee and expressed the Institute's corn that the interest of foreign nations in achieving an international code seemed to be prompted by an effort to weaken the Antidumping Act. We held this concern in common with many others. In the Spring of 1966, Senator Ribicoff introduced Senate Concurrent Resolution 100 stating the sense of the Congress that our negotiators lacked authority to bind the United States to any international antidumping code or arrangement which would be in conflict with any law of the United States. The Senate passed that Resolution on June 29, 1966. Nevertheless, representatives of the United States participated in the negotiations which resulted in agreement on the International Antidumping Code.

Following announcement of that agreement, Senator Hartke introduced Senate Concurrent Resolution 88 which would declare it to be the sense of the Congress that the International Antidumping Code is inconsistent with, and in conflict with, the provisions of the Antidumping Act of 1921 and should not become effective until acted upon by Congress. House Concurrent Resolution 447 to the same effect was introduced on August 2, 1967. The American Iron and Steel Institute supports the adoption of those resolutions.

While certain provisions of the International Code might be deemed to be permissive administrative modifications of the Act's procedures, numerous organizations, including the United States Tariff Commission in its Report to your Committee, dated March 13, 1968, concluded that certain sections of the Code are inconsistent with the Antidumping Act and therefore should not be given force and effect.

The American Mining Congress prepared a detailed "Staff Study and Comparative Analysis of the International Antidumping Code" under date of August, 1967, pointing out these inconsistencies. In response to the Treasury's request for comments on its proposed antidumping regulations, this Institute by letter dated December 21, 1967, pointed to some of the more obvious inconsistencies. I ask that a copy of that letter be made a part of the record of these proceedings. The Tariff Commission also notes more than 10 inconsistencies in the 33 page opinion of its majority.

In brief, some of the inconsistencies between the International Antidumping Code and the Antidumping Act of 1921 are:

(1) The Code requires that dumped imports be found to be "demonstrably the principal cause of material injury" before antidumping duties may be assessed and requires the authorities to "weigh, on the one hand, the effect of the dumping and, on the other hand, all other factors, taken together which may be adversely affecting the industry". This requirement places a tremendous additional burden on any domestic industry. The Antidumping Act grants discretion to the Tariff Commission in the determination of injury; it does not require, as does the Code, a determination that dumped imports adversely affect an industry to a greater degree than any one or a combination of other factors.

(2) The Code defines "domestic industry" considerably more broadly by the inclusion of all of the companies producing the item in question than does the Antidumping Act which permits the Tariff Commission to define industry in more narrow, regional terms. Under the express language of the Code, only "exceptional circumstances" could justify the division of a country into regional markets.[1] As the Report of the Tariff Commission notes: "The conditions under which a regional industry concept may be employed in an injury determination under the Code are so narrowly defined that four out of five affirmative determinations by the Tariff Commission might not have been made had the Code been in effect when the determinations were made." The only basic steel cases in which the Tariff Commission found injury involved regional markets.

(3) The Code provides that a dumping investigation shall be initiated only when there is evidence of both sales at dumping prices and injury to a domestic industry. The Antidumping Act, on the other hand, states specifically that the injury determination shall be undertaken only after the Treasury Department has determined that sales have been at less than fair value. This is an important conflict inasmuch as it will tend to transfer to the Treasury, at least initially, the present role of the Tariff Commission in making the injury investigations required under the Act.

(4) Article 8 of the Code provides that the assessment of an antidumping duty is not mandatory but permissive. In the language of Article 8, "the decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled * * * are decisions to be made by the authorities of the importing country or customs territory." This provision would permit the complete avoidance of the Act. Even where antidumping duties are to be assessed, the Code states: "It is desirable * * * that the duty be less than the margin (of dumping), if such lesser duty would be adequate to remove the injury to the domestic industry." Under the Act, assessment of a duty equivalent to the dumping margin is mandatory.

These and other provisions of the International Antidumping Code would place the American producer at a serious disadvantage. In fact, there is a serious question as to whether any industry could make out a case of injury under the Code's standard.

The domestic steel industry today is facing an extremely serious situation as a result of increasing imports of low cost foreign steel. This Committee is familiar with the dimensions of the problem as a result of the study by its own Staff. Imports of steel have increased from 1.2 million tons in 1957 to 11.5 million tons in 1967. Steel imports for the full year 1968 may run as high as 17 million tons.

The principal factors causing such imports have been documented in "The Steel Import Problem" published by the Institute in October 1967 and recently updated, and by this Committee's own staff Study published in December. Those factors create a competitive situation in the United States market too pervasive to be dealt with effectively by antidumping measures. That is why the steel industry supports the adoption of S. 2537 which would place flexible quantitative limits on future steel imports.

Nevertheless, in its effort to prevent further erosion of its market, the domestic steel industry has initiated various antidumping proceedings. In only two of the approximately 15 proceedings did the industry prevail. The International Antidumping Code, as the Treasury proposed to implement it, would weaken an already inadequate law. While even a vigorously enforced Antidumping Act

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[1] Circumstances required are: "all the producers within such a market (must) sell all or almost all of their production * * * in that market, and none, or almost none, of the product in question produced elsewhere in the country (could be) sold in that market". A regional market could also be found where there exists "special regional marketing conditions * * * which result in an equal degree of isolation of the producers in such a market from the rest of the industry" and then "injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined."

would not solve the steel industry's competitive plight, the Institute believes that the Act's position as a law of the United States designed to prevent one type of unfair trade practice should not be made even less effective.

The CHAIRMAN. Mr. Frederick Hunt sent me a note. He indicated that he handled the classic case against Poland in connection with the cast iron soil pipe, and he might be able to enlighten as to how this matter works out.

If he is here, I would like him to take the witness stand and just explain his views on this matter to us.

STATEMENT OF FREDERICK D. HUNT, FOREIGN TRADE CONSULTANT, WASHINGTON, D.C.

Mr. HUNT. Thank you, Mr. Chairman.

The CHAIRMAN. I understand you would be willing to give us a rapid rundown of your experience with the Treasury Department and that it would help our understanding of the problem.

Mr. HUNT. Yes, sir. It will only take about 10 minutes.

I was very interested this morning in the remarks made during the questioning of the gentleman from the Treasury Department and also in the remarks of Commissioner Clubb. Commissioner Clubb, I believe, told you that in making his report to this committee, he had this cast iron soil pipe case in mind.

I think one reason he did was that it was a case that involved this question of injury in just one sales region within this country, and previously Chairman Dorfman, who has been referred to, had taken the attitude that you had to be injured in the entire United States.

Cast iron pipe is like cement. It is something that you don't move around very much, and so the region around one port could be easily affected and enough to disrupt the market so as to cause injury to the whole industry.

I wanted to get back to Senator Hartke's questioning as to what happens in the Treasury. Now, you heard Commissioner Clubb tell about how few cases ever reach the Tariff Commission. Well, our experience with the Treasury Department was interesting in that it took them a year to report out a preliminary finding of dumping and, in the first place, because it was Poland, they said that those countries having state trading companies, such as Eastern Europe, give very little information, and so it is necessary to construct the information on the basis of another typical country, like Germany.

Now, I suspect it was only because I kept prodding the Assistant Secretary of the Treasury and the Customs, that we got something within a year, but, finally, it was decided that, based on the investigation made by the Customs, there was an import at less than fair value of both pipe and fittings.

Now, as you know, Mr. Chairman, you can't have a drainage system without both of them. It was apparent to us at that time that the Assistant Secretary, reflecting the views of the White House staff, was leaning over backwards to try to avoid doing something which would not be in the interests of Poland because at that time there was considerable publicity concerning the encouragement of East-West trade.

It is significant that imports of both pipe and fittings from Poland increased after the complaint was made rather than, as some industries

would claim, or some importers would claim, their business is hurt when a complaint is published in the Federal Register.

That was not the case. It increased.

Now, as Mr. Clubb brought out, exactly what happened was that after the preliminary decision, the attorney for the Polish exporters appeared at the Treasury Department. He sat there in the Assistant Secretary's office and he said Polish pipe does not complete with American pipe in this market. It competes with Indian pipe.

In other words, he implied there in the Treasury Department that these two countries were importing pipe and fittings at very low prices to get the American market. They were competing with each other. That made it, to my mind, doubly bad.

However, by a slight manipulation in the prices of certain sizes and shapes of fiittings, the Treasury Department decided that there was no longer any dumping in fittings, only in pipes, because the Poles did not see fit to adjust the prices of pipe at that time.

Now, I think this is an example of the decision being made in the Treasury Department on the basis of policy when it should be only arithmetical, as you said.

So we were confronted at the Tariff Commission with a hearing which was restricted to pipe, simply because the Treasury Department said so, and I had the feeling that the Tariff Commissioners were not too sympathetic with that idea; in other words, that they agreed that you can't have a drainage system without both pipe and fittings.

The CHAIRMAN. Here is another case that is somewhat interesting. Here was a case involving cement from Denmark. They had reason to suspect dumping—they found dumping, but did not refer it to the Tariff Commission, partly because of cessation of shipments.

Now, what has that got to do with the ballgame? Can you explain that to me? What difference does that make? If they were dumping, they ought to pay the penalty for it.

Mr. HUNT. That is what makes me think, Mr. Chairman, that those in the Treasury are always looking for a means of getting off the hook to please the foreigner.

The CHAIRMAN. It is like saying, yes, it is true that you committed a burglary, but we are not going to do anything about it because the burglary is over with. The store has already been robbed. That being the case, we are not going to do anything about it.

Now, here is a case with Japan. The Treasury found dumping but did not refer it to Tariff, partly because of assurances by the producer that dumping would not be resumed. What has that got to do with the ballgame? That is about the same again, as if you found a man was guilty of burglary but you didn't prosecute him because he said he wasn't going to steal any more.

Mr. HUNT. That is correct, Mr. Chairman, and in the case of the fittings, which similar, it was my contention that consideration should have been given to what was the situation at the time the complaint was made.

The CHAIRMAN. Here three other cases, the same thing, Tunisia in 1960, Treasury found dumping but did not refer it to Tariff on assurances by the producer that dumping would not be resumed. West Germany, same thing. Yugoslavia, 1961, same thing.

Now, my impression would be that if the law is to be enforced, they should have enforced it and referred it to the Tariff Commission and given the Tariff Commission a chance to take action on it if that were correct. Is that about the way it impressed you?

Mr. HUNT. I agree with you, Mr. Chairman. I feel that the Tariff Commission has been bypassed too many times by the executive branch of the Government and, in my opinion, it should be strengthened as a guardian of American labor and industry both.

The CHAIRMAN. Thank you very much, sir.

Mr. HUNT. Thank you very much.

The CHAIRMAN. We will keep the record open for the executive branch rebuttal and then we will offer those who would like to respond an opportunity to rebut the rebuttal, so as to give everybody a chance to be heard.

Mr. HUNT. Mr. Chairman, the Cast Iron Soil Pipe Institute submitted a statement in writing today and I would appreciate it if it will be incorporated in the record.

The CHAIRMAN. We will incorporate it in the record.

(The statement referred to follows:)

STATEMENT SUBMITTED ON BEHALF OF THE CAST IRON SOIL PIPE INSTITUTE

The Cast Iron Soil Pipe Institute is an association of twenty-three manufacturers of cast iron soil pipe and fittings who account for about ninety-five percent of the production of these products in the United States. The plants of these companies are located in Alabama, California, Colorado, Florida, Missouri, New Jersey, North Carolina, Oregon, Pennsylvania, Iowa, Tennessee, Texas and Virginia.

Our industry has been injured several times by the importation of cast iron soil pipe and fittings at less than fair value and has sought relief on some occasions through the anti-dumping laws now in effect. The experience gained from our complaint against Poland which took twenty-two months has made the members of the Cast Iron Soil Pipe Institute experts on dumping.

The manufacturers of cast iron soil pipe and fittings are convinced that the favorable decision of injury reached by the Tariff Commission in the complaint against Poland could never have been made under the terms of the new International Anti-Dumping Code. As a matter of fact, this same opinion was rendered by a majority of the Tariff Commissioners in their report to your Committee in May. That report cites the Cast Iron Pipe case against Poland as an example of serious and inevitable conflict between the Anti-Dumping Act of 1921 and the International Code.

It is significant that imports of cast iron soil pipe and fittings from Poland increased rapidly during the long time taken for investigation by the Treasury and then during the period when such items were withheld from appraisal. This disproves the theory that the time required to execute the existing law is detrimental to the importers.

In the International Code, 35 out of 60 major points of substance are mandatory and it is difficult to believe that the remaining permissive criteria may not also be asserted as controlling in United States antidumping proceedings. We believe that the International Anti-Dumping Code will weaken and emasculate the Anti-Dumping Act of 1921, as amended.

The definition of "Industry" in the Code is highly questionable. The Code permits consideration of a regional industry only where the producers within such a market sell all or almost all of their production in that market. This narrow definition would, by itself, have reversed the decision of the Tariff Commission in the case against Poland where it was found that disruption of the market in the northeastern sector of the country by imports at less than fair value was a material threat or actual injury. The injury provisions of the Code require a showing that the dumped imports are demonstrably the principal cause of material injury to a domestic industry. However, the existing

Act requires only that the Tariff Commission determine whether an industry in the United States is being, or is likely to be injured. Furthermore, the Code's requirement that a dumping complaint must be rejected by the Treasury Department if there is not sufficient evidence of injury is in conflict with the U.S. Act which vests sole authority in the Tariff Commission to make injury determinations. This was made quite clear by the Congress in 1954 when an amendment to the Anti-Dumping Act specifically transferred determination of injury to the Tariff Commission.

The manufacturers of cast iron soil pipe and fittings have been injured even further by the fact that their products are not required to be marked as to country of origin when imported into the United States. During the anti-dumping hearings before the Tariff Commission it was disclosed that pipe and fittings were being imported from Poland which did not only have the country of origin thereon, but did have a typical American name cast on the pipe. Foreign pipe is easily comingled with domestic pipe and fittings when there is no marking at all. The use of an American name deceives the public that much more, and makes it possible to sell at the domestic price pipe and fittings which were already at "less than fair value".

The Cast Iron Soil Pipe Institute has twice requested the Commissioner of Customs to remove cast iron pipe and fittings from the list of articles exempt from marking but this request has been refused despite precedent for such action in the past. A third request has been made to the Commissioner and is pending at this time. We think it is most significant that the International Code does not make any provision for a declaration of injury resulting from defrauding the consumer in this manner.

In addition to the belief that our industry would not be able to obtain any relief from dumping in the future under the International Code, there is serious prospect of administrative chaos which will probably result in expensive litigation before the Courts. This has already been foreseen by the Tariff Commission in its report to this Committee.

The implementation of this International Anti-Dumping Code without Congressional approval will constitute a dangerous precedent of usurpation of Congressional authority by the Executive. It is significant that Canada, a key signatory, cannot provide reciprocal concessions under the Code by July 1st. The representatives of that country made it clear that their signature was not binding since Parliamentary approval was required. Why then do Ambassador Roth and his Counsel, Mr. Rehm, view the Code as final and binding upon the United States whether or not other countries take steps to implement it?

The Trade Expansion Act of 1962, which served as the terms of reference for the American Delegation to the "Kennedy Round" of tariff negotiations under the General Agreement on Tariffs and Trade, did not give to that delegation the right to make any new international agreement. They were to consider only reciprocal reductions in tariffs. Yet they saw fit to make such an agreement secretly in far off Switzerland under the guise of the President's authority to conduct foreign affairs. However, the Constitution gives to the Congress the power to regulate the foreign commerce of the United States. Thus, the President has authority to enter into international agreements only so long as they do not conflict with, or override, existing Congressional legislation. That the Executive should insist on making this new Code effective so quickly in the face of Senate Resolution 100 passed a year ago is beyond comprehension.

The Cast Iron Soil Pipe Institute membership calls upon the Senate Finance Committee to report out favorably Senate Concurrent Resolution number 38. Positive action by the Committee is vital and steps should be taken immediately to postpone the effective date of the International Anti-Dumping Code until such time as the subject has been reviewed and discussed and acted upon by the Congress. This is an important domestic matter of concern to American industry and labor. Dumping has always been condemned by all trading nations of the world. We believe that this matter should be given full consideration by the representatives of the American people.

The CHAIRMAN. Thank you very much. That concludes our hearing.

(Whereupon, at 4:35 p.m., the committee adjourned.)

(By direction of the chairman, the following letters and statements are made a part of the printed record:)

U.S. SENATE,
Washington, D.C., June 26, 1968.

HON. RUSSELL B. LONG,
Chairman, Finance Committee,
New Senate Office Building, Washington, D.C.

DEAR RUSSELL: As one of the 41 consponsors of S. 1726, I am delighted that you have scheduled a hearing on June 27th relating to the proposed international Anti-dumping Code. I hope that as a result of these hearings, the Finance Committee will order the Administration to delay this Code from becoming effective on July 1st as scheduled.

As you undoubtedly know, there are many conflicts between the proposed International Dumping Code and the U.S. Anti-dumping Act which has been in effect since 1921. In cosponsoring S. 1726 which, incidentally, was cosponsored by 8 other members of the Finance Committee, I indicated that I believe the U.S. Anti-dumping Act needs further amendment to protect domestic producers and manufacturers from the harmful effect of foreign imports which are being dumped in increasing amounts on our American markets. I am sure that you have received correspondence from businessmen in your own state as well as an urgent appeal from the American Mining Congress to delay the implementation of the proposed International Anti-dumping Code until such time as the Congress has had an adequate opportunity to consider the conflicts between the proposed code and existing U.S. law. I also think the proposed code should be delayed until the Finance Committee has had time to consider S. 1726 which, as you know, proposes very constructive and material changes to be made in the existing U.S. Anti-dumping Act.

In my own State of Utah, many industries have been affected by the increasing rise in foreign imports which have dumped substantial amounts of both manufactured goods and raw materials on the American market. These foreign imports have resulted in a decline in production and unemployment in industries in my own state and particularly the iron, steel, coal, lamb, wool and mink industries have been adversely effected. The present Anti-dumping Act and adverse decisions by the Tariff Commission have been ineffective in providing the assistance needed by these industries.

I am sure that I do not need to go into detail in this letter. You and other members of the Committee are acutely aware of the problem which exists in the United States because of the rise of foreign imports and the decline of our exports, both of which have added to our balance of payments problem. As Chairman of the Finance Committee, I hope you will support the cosponsors of S. 1726 in voting for a postponement of the effective date of the proposed International Anti-dumping Code.

With kindest personal regards.

Sincerely,

WALLACE F. BENNETT.

THE NATION-WIDE COMMITTEE ON IMPORT-EXPORT POLICY,
Washington, D.C., June 25, 1968.

HON. RUSSELL B. LONG,
Chairman, Senate Finance Committee,
New Senate Office Building, Washington, D.C.

DEAR MR. LONG: This is in reply to the notice of hearing on the International Anti-Dumping Code announced in your Press Release of June 21, 1968.

The Treasury Department gave notice on October 28, 1967 of its proposal to amend the Customs Regulations providing procedures under the Anti-Dumping Act of 1921. Interested persons were given an opportunity to submit relevant data, views, or arguments in writing regarding the proposed amendments.

No public hearings were held.

Now that Department has issued the new regulations to become effective July 1, 1968.

The notice states that consideration has been given to all comments, views and other data received. Changes were made in certain enumerated paragraphs of the Regulations in response to the comments or for editorial purposes.

These modifications, however, do not meet the objections that the code proposed and the changes in our Regulations materially modify the provisions of the Anti-Dumping Act of 1921. This view was supported by the Tariff Commission in its report of March 8, 1968.

An extremely important issue is at stake.

The President's Special Representative for Trade Negotiations proceeded with the negotiating of the International Code despite a number of protests to the effect that the Trade Expansion Act of 1962 did not empower him to carry out such negotiation. The Special Representative's reply was to the effect that no authority was needed from Congress since no law was being changed by the proposed Code. The United States would have to do no more than amend the Treasury regulations; and this it could do on its own authority without submission to Congress.

Such a course represents a high-handled disregard of the division of powers in the Government. If the Executive has the power to negotiate an executive agreement modifying existing law and is then free to promulgate the agreement binding the United States, a massive shift of power will have occurred.

The Executive branch may then on its own reconnaissance enter into international agreements and upon challenge simply allege that no infringement of existing law is involved; and may then proclaim the agreement. The burden of undoing the action would then shift to those opposed. The Executive branch would be difficult to dislodge from its position on the ground that the other countries, parties to the agreement entered into the negotiations in good faith. The United States by setting aside the agreement would be in the position of dishonoring its international commitments.

It may be appreciated that the action proposed by the Treasury Department in this instance has far-reaching implications for the future, going far beyond the present proposal.

So much is at stake that the Senate Finance Committee would be fully justified even at this late date to do all that lies in its power to seek a postponement of the International Anti-Dumping Code. Such postponement should be for such time as Congress may need to inform itself sufficiently of all the implications of the proposal to arrive at a mature judgment.

It may be noted that Canada has postponed its adherence to the Code.

Sincerely,

O. R. STRACKBEIN,
Chairman.

STATEMENT SUBMITTED ON BEHALF OF THE UNITED CEMENT, LIME & GYPSUM WORKERS' INTERNATIONAL UNION, AFL–CIO, BY VICTOR H. THOMAS, FIFTH GENERAL VICE PRESIDENT

This statement is submitted to the Senate Finance Committee on behalf of the United Cement, Lime & Gypsum Workers' International Union, AFL–CIO. We wish to express our views on the proposed International Antidumping Code because we feel that dumping is a problem of real concern to American labor in general and to our Union in particular.

It is our position that the International Antidumping Code would severely weaken the sanctions and legal remedies available to American labor or American industry for combatting foreign dumping. The Code would, in effect, repeal the enforcement provisions of the Antidumping Act of 1921 and replace them with new procedures and standards. This would be a most unwise and unjustified step Moreover, the Code attempts to do this without Congressional authorization or approval.

We therefore urge this Committee to adopt Senate Concurrent Resolution 38, which would express the sense of Congress that the International Antidumping Code must not become effective without specific Congressional approval, to take immediate action to postpone the July 1 effective date for the Code, and to consider legislation which would strengthen, rather than weaken, our domestic anti-dumping laws.

Dumping is an unfair trade practice under which some foreign manufacturers "dump" their excess production in the United States at prices greatly reduced below their own home market prices. Dumping is condemned by our domestic unfair trade laws, most importantly by the Antidumping Act of 1921. Yet, during the last ten years, workers in the domestic cement industry have continually been seriously affected by the dumping of foreign cement in the United States.

This unfair and illegal situation can hardly be said to result from a lack of effort or due diligence on the part of the domestic cement industry or domestic cement workers to attempt to protect their rights. During the ten-year period, representatives of the cement industry have engaged in extended and continued legal proceedings in an atempt to stop such dumping and to keep the industry free of such unfair trade practices. If our domestic legislation were adequate, these efforts would have been effective and the legitimate interests of American workers in not losing jobs as the result of the unfair competitive practices of foreign companies would have been protected. The record makes it apparent, however, that such efforts were not effective, and both domestic industry and labor continue to suffer serious injury. This situation would surely be greatly exacerbated if the much less effective provisions of the International Antidumping Code were substituted for the already too limited enforcement provisions of the 1921 Act.

On several previous occasions we have sought to bring tis serious and unfair situation to the attention of those concerned here in the Congress. The first time was during the August, 1961 hearings before the House Committee on Education and Labor, General Subcommittee on Labor, on the impact of imports and exports on employment (Statement of Victor H. Thomas). The second time was during the September and October, 1966 hearings of that same Subcommittee on the impact of imports and exports on American labor (Statement and Testimony of Victor H. Thomas). We have also just filed a statement and presented testimony before the House Ways and Means Committee in their recent hearings on tariff and trade proposals (Statement and Testimony of Victor H. Thomas, June 25, 1968). On each of these occasions we presented an analysis dealing at some length with recurring instances of dumped imports of foreign cement and with the substantial amount of unemployment and underemployment caused thereby to American workers and to members of our Union. We would like to incorporate by reference our 1961, 1966 and 1968 submissions to these House Committees for consideration now by this Committee.

For the convenience of the Committee we have also attached to this statement a series of five tables from our 1968 submission to the House Ways and Means Committee. The tables reflect the most recent import statistics of the Department of Commerce, Bureau of International Commerce, U.S. Trade Section, and bring home the seriousness of the dumping problem for members of our Union.

Table I is a list of the antidumping proceedings filed by the domestic cement industry against imports from no less than 15 foreign countries during the years 1958–1967. Table II records the amount of foreign cement imported from these "dumpers" during the same period. Table III shows how much this unfair competition has hurt our critical balance of payments position. These figures were computed by adding to the F.O.B. value of the imports (as recorded by the Commerce Department from U.S. Customs duty valuation certificates) an additional factor of 10% to cover freight and insurance, which is also uniformly purchased from overseas firms. Addition of the 10% factor for these items is in accordance with the report of the U.S. Tariff Commission, "C.I.F. Value of U.S. Imports", February 7, 1967. Using the latest Bureau of Labor Statistics figures on productivity in the domestic cement industry (5.07 barrels per man hour in 1966 and 6.27 barrels per man hour in 1967), Table IV translates these unfairly lost sales into man hours lost for domestic workers. Finally, using average domestic cement industry wage rates ($3.97 per hour in 1966 and $4.27 per hour in 1967), Table V shows the amounts of wages by which

American labor has been unfairly deprived as a result of the dumped and tainted imports.

We would like to call the Committee's attention particularly to the figures in Tables IV and V. These tables show that American labor has lost well over 7 million man hours during the 1958–1967 period, an average of more than 700,000 man hours per year. Similarly, the equivalent wages lost have amounted to over $24,000,000, an average of almost $2.5 million a year. Surely American labor should not have to sustain such drastic injury from an importing practice that has been condemned as an unfair method of competition not only by the United States Congress but also by Article VI of GATT.

For these reasons our Union strongly urges that the relief from dumping practices now available under the Antidumping Act of 1921, limited as it is, surely should not be further restricted by implementation of the International Antidumping Code and by the new implementing regulations issued by the Treasury Department to become effective on July 1. Our Union feels that the new Code procedures for combatting such dumping would inevitably and substantially increase the exposure of American workers in general, and our members in particular, to lost jobs and underemployment resulting from dumping.

This would be particularly true in the cement industry, which under the new Code provisions could hardly ever expect to qualify as a regional industry, therefore exposing our members working along the Gulf Coast, the East Coast, and the Great Lakes to complete loss of jobs without ever satisfying the new, very difficult Code standards for finding injury to a domestic industry. We also particularly object to the fact that the new provisions do away with any effective interim relief while an investigation of injury takes place. Our experience has been that such investigations take any where from 6 to 18 months, a period of time during which domestic workers can well be, and often have been, entirely thrown out of work, even though the eventual result of the legal jousting is to find that injurious dumping has been taking place. Once again, this is a highly unfair and intolerably vulnerable position in which to place American workers.

The unrealistic standards and mixed procedures for determining injury under the provisions of the International Antidumping Code are unhappily similar to the provisions for determining injury now contained in the adjustment assistance sections of the 1962 Trade Expansion Act. As the Committee knows, no American workers have ever successfully petitioned for relief under those provisions. In his message of May 28, 1968, the President recommended that these sections be amended and that relief be susbtantially broadened so that it would be available to American workers whenever increased imports are a substantial cause of injury. It is difficult for our Union to understand why we should allow the standards for relief under the antidumping laws to become more limited and less available at the same time that we are trying to liberalize these adjustment assistance provisions.

If such a change in our domestic antidumping laws is to be considered, it is perfectly clear that this should be done in accordance with the normal legislative

procedures of the Congress. Our Kennedy Round trade negotiators at Geneva did not have prior authorization from Congress, or any lawful authority whatsoever, to negotiate the International Antidumping Code or implement it without such Congressional approval. The illegality of Code in this respect is fully set forth and documented in the statement being submitted today by the Cement Industry Antidumping Committee, and we fully endorse and support their position.

For these reasons our Union strongly urges this Committee to seek enactment of S. Con. Res. 38 and to take all other appropriate steps to prevent the weakening of our domestic antidumping laws through implementation of the International Antidumping Code on July 1.

TABLE I

Country of exportation	Date of formal complaint	Treasury initial finding of reason to believe or suspect dumping	Nature of final determination by Treasury Department or Tariff Commission
Belgium	Oct. 2, 1959	Yes	Treasury found dumping and Tariff found injury to the domestic industry.
Canada	May 28, 1959	Yes	Treasury found dumping, but Tariff found no injury to the domestic industry in part because continuation of dumped sales seemed unlikely.
Colombia	Sept. 25, 1959	No	Treasury found no dumping.
Denmark	Apr. 28, 1960	Yes	Treasury found dumping but did not refer it to Tariff partly because of cessation of shipments.
Dominican Republic	Aug. 19, 1961	Yes	Treasury found dumping, but Tariff found no injury at the time to the domestic industry.
	May 4, 1962	Yes	Treasury found dumping and Tariff found injury to the domestic industry.
Israel	July 21, 1959	Yes	Treasury found no dumping partly because of a non-cost-justified quantity discount allowance.
Italy	June 7, 1962	No	Treasury found no dumping.
Japan	Dec. 1, 1961	None	Treasury found dumping but did not refer to Tariff partly because of assurances by the producer that dumping would not be resumed.
	Feb. 5, 1963	Yes	Treasury found dumping, but Tariff found no injury to the domestic industry.
	Aug. 26, 1965	No	Treasury found no dumping.
Norway	Sept. 15, 1958	Yes	Treasury found no dumping solely because of a non-cost-justified quantity discount allowance.
	Dec. 27, 1961	Yes	Do.
Poland	Dec. 29, 1960	Yes	Treasury found no dumping, but used a 3d country price and not Polish as home market price.
Portugal	June 9, 1960	Yes	Treasury found dumping and Tariff found injury to the domestic industry.
Sweden	Nov. 25, 1958	Yes	Do.
Tunisia	Sept. 13, 1960	No	Treasury found dumping but did not refer it to Tariff on assurances by the producers that dumping would not be resumed.
West Germany	Aug. 13, 1959	Yes	Do.
Yugoslavia	Aug. 28, 1961	Yes	Do.

TABLE II: DUMPED OR "TAINTED" CEMENT IMPORTS, 1958-1967 (BBLS.)*

Year	Canada	Belgium	Sweden	West Germany	Columbia	Norway	Poland	Israel	Italy	Yugoslavia	Dominican Republic	Tunisia	(White Cement) Japan	Portugal	Denmark	Totals
1958	657,100	410,800	339,900	325,100	473,900	335,600	68,500	58,200	--	47,500	7,500	--	--	--	192,800	2,916,900
1959	1,441,200	581,400	280,700	578,600	791,400	454,400	42,000	349,000	--	67,400	--	--	--	--	129,600	4,765,900
1960	868,700	326,200	269,600	51,400	537,000	310,200	243,700	--	--	58,800	111,100	85,400	--	290,800	--	3,172,900
1961	1,221,800	89,500	29,000	17,900	513,300	721,500	206,900	--	24,200	49,100	439,600	--	58,900	--	--	3,371,700
1962	1,170,100	485,100	117,600	314,800	584,200	1,162,500	144,900	420,000	188,900	16,400	298,200	--	60,500	--	--	4,917,200
1963	1,485,200	110,800	254,000	26,800	378,500	919,000	--	300,000	--	20,600	29,600	--	52,300	--	--	3,576,800
1964	1,399,300	41,400	51,200	17,400	540,000	969,700	--	--	--	23,100	--	--	54,900	--	--	3,077,100
1965	1,431,600	17,400	200	15,500	623,700	958,300	--	--	--	17,100	--	--	64,700	--	--	3,124,500
1966	2,128,200	16,700	--	19,300	479,400	1,008,300	--	--	--	23,200	--	--	66,500	--	43	3,729,643
1967	1,692,600	12,400	37,200	13,800	448,100	--	--	--	--	16,200	--	--	52,300	--	--	2,268,600
TOTALS -	13,536,800	2,063,700	1,392,400	1,342,600	5,369,500	6,811,500	706,000	1,127,200	213,100	339,800	880,000	85,800	410,100	290,800	322,643	36,923,243

TABLE III: DOLLAR OUTFLOW

Year	Canada	Belgium	Sweden	West Germany	Columbia	Norway	Poland	Israel	Italy	Yugoslavia	Dominican Republic	Tunisia	(White Cement) Japan	Portugal	Denmark	Totals
1958	1,314,200	821,600	679,800	650,200	947,800	671,200	137,000	116,400	--	95,000	15,000	--	--	--	385,600	5,833,800
1959	2,882,400	1,162,800	561,400	1,157,200	1,582,800	908,800	84,000	698,000	--	134,800	--	--	--	--	259,600	9,531,800
1960	1,737,400	652,400	539,200	102,800	1,074,000	620,400	487,400	--	--	117,600	222,200	1,218,614	--	414,844	--	6,612,014
1961	2,443,600	179,000	58,000	35,800	1,026,600	1,443,000	413,800	--	48,400	98,200	879,200	--	222,455	--	--	6,848,055
1962	2,340,200	990,200	235,200	629,600	1,168,400	2,325,000	289,800	840,000	377,800	32,800	584,400	--	207,705	--	--	10,335,989
1963	2,970,400	221,600	508,000	57,600	757,000	1,838,000	--	600,000	--	41,200	59,200	--	175,185	--	--	7,228,185
1964	3,868,490	116,998	95,000	171,106	1,197,551	1,925,668	--	--	--	159,996	--	--	249,629	--	--	6,407,625
1965	3,813,544	46,251	3,948	139,489	1,327,246	2,140,715	--	--	--	99,417	--	--	309,872	--	--	6,468,689
1966	5,902,380	49,270	--	199,275	1,052,598	2,178,829	--	--	--	177,538	--	--	328,586	--	3,581	9,882,057
1967	4,496,148	32,569	67,824	183,686	1,031,029	--	--	--	--	130,282	--	--	238,836	--	--	12,042,522
TOTALS -	31,865,762	4,172,688	278,372	3,267,056	11,165,024	14,052,612	1,412,000	2,254,400	426,200	1,086,833	1,760,000	1,218,614	1,716,268	414,844	648,781	81,810,736

* Excludes clinker and white cement (except Japan).

TABLE IV. -- MAN-HOURS LOST

Year	Canada	Belgium	Sweden	West Germany	Columbia	Norway	Poland	Israel	Italy	Yugoslavia	Dominican Republic	Tunisia	Japan	Portugal	Denmark	Total
1958	169,396	105,876	87,603	83,789	122,139	86,495	17,655	15,000	--	12,242	1,933	--	--	--	49,661	751,770
1959	344,388	134,273	64,827	133,626	182,771	104,942	9,700	80,601	--	15,566	--	--	--	--	29,977	1,100,671
1960	202,494	76,037	67,505	11,981	125,175	72,308	56,807	--	--	13,706	25,897	19,912	--	67,785	--	739,607
1961	290,214	22,259	6,888	4,252	121,924	171,378	49,145	--	5,748	11,663	104,418	--	13,991	--	--	800,880
1962	249,759	92,344	24,398	65,311	121,203	241,183	30,062	87,137	39,191	3,803	60,622	--	12,552	--	--	1,029,165
1963	290,078	21,641	49,609	5,625	73,926	179,492	--	58,594	--	4,023	5,781	--	10,215	--	--	698,984
1964	299,130	7,667	9,482	3,222	100,000	175,870	--	--	--	4,278	--	--	10,185	--	--	969,834
1965	251,158	3,053	35	2,719	109,421	167,421	--	--	--	3,000	--	--	11,351	--	--	548,158
1966	354,807	3,132	--	3,233	80,302	168,224	--	--	--	3,886	--	--	11,139	--	7	624,730
1967	269,252	1,998	5,033	2,201	70,829	--	--	--	--	9,584	--	--	8,241	--	--	361,769
TOTALS -	2,879,293	467,210	316,980	315,899	1,107,710	1,367,313	163,369	241,332	44,939	74,351	198,651	19,912	77,774	67,785	79,975	7,144,511

TABLE V. -- EQUIVALENT WAGES LOST

Year	Canada	Belgium	Sweden	West Germany	Columbia	Norway	Poland	Israel	Italy	Yugoslavia	Dominican Republic	Tunisia	Japan	Portugal	Denmark	Total
1958	457,260	285,866	236,528	226,229	329,775	233,536	47,667	40,500	--	33,054	5,219	--	--	--	134,165	2,029,799
1959	988,393	385,362	186,053	383,506	524,554	301,184	27,838	231,323	--	44,674	--	--	--	--	86,034	3,158,921
1960	619,632	232,674	206,567	36,663	383,034	221,261	173,827	--	--	41,941	79,246	609,307	--	207,422	--	2,811,574
1961	922,879	67,603	21,905	13,520	387,718	544,981	156,260	--	18,279	37,087	332,049	--	44,491	--	--	2,546,792
1962	803,533	305,699	80,758	216,180	401,182	798,314	99,505	288,423	129,721	11,262	200,660	--	41,541	--	--	3,376,738
1963	994,967	74,227	170,160	19,293	253,565	615,658	--	200,976	--	13,800	19,829	--	35,037	--	--	2,397,512
1964	909,544	26,910	33,280	11,309	351,000	617,305	--	--	--	15,015	--	--	35,749	--	--	2,000,112
1965	929,264	11,294	129	10,061	404,857	619,457	--	--	--	11,100	--	--	41,999	--	--	2,028,181
1966	1,408,584	12,434	--	12,835	318,799	667,849	--	--	--	15,427	--	--	44,222	--	28	2,480,178
1967	1,152,695	8,533	25,334	9,398	302,440	--	--	--	--	41,034	--	--	35,616	--	--	1,584,750
TOTALS -	9,186,771	1,408,157	960,714	938,994	3,696,924	5,619,545	505,117	761,222	148,000	238,394	637,003	609,307	278,655	207,422	220,227	24,167,135

AMERICAN MINING CONGRESS,
June 24, 1968.

Senator RUSSELL B. LONG,
Chairman, Senate Finance Committee, U.S. Senate, New Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: May I commend you for scheduling a hearing on the International Anti-Dumping Code for Thursday, June 27. The prospect of the International Anti-Dumping Code becoming effective on July 1, in view of the many disparities between the Code and existing U.S. law and the manner in which the executive branch has negotiated the Code in disregard of the prerogatives of the U.S. Senate, certainly makes this hearing most timely.

Even as the hour grows late, I am hopeful that something can be done at least to delay the implementation of the Code until the Congress has had an adequate opportunity to consider the conflicts between the Code and the U.S. law and also between the Code and long-pending legislative proposals to improve the existing U.S. Antidumping Act, such as S. 1726. Both these conflicts can be reviewed in the *Staff Study and Comparative Analysis*, prepared by the American Mining Congress and sent to members of the Senate Finance Committee on November 1, 1967 and included in the Committee's *Compendium of Papers on Legislative Oversight Review of U.S. Trade Policies.*

Why the Code was negotiated and agreed to by the Office of the Special Representative for Trade Negotiations, in the face of S. Con. Res. 100 adopted in 1966, has never ceased to amaze me. Certainly the "blockade" against Congress dealing objectively with our own U.S. antidumping law—because the Executive in effect on July 1 pre-empts the Congress from the field because of "existing international agreement"—may have far-reaching consequences for U.S. trade policy.

The June 27 hearing should be most significant and I hope that the Senate Finance Committee will make timely effort to delay U.S. implementation of the International Code pending proper Congressional consideration.

Respectfully,

J. ALLEN OVERTON, Jr.,
Executive Vice President.

[TELEGRAM]

LITTLE ROCK, ARK., *June 25, 1968.*

J. WILLIAM FULBRIGHT,
Senate Office Building, Washington, D.C.:

On June 27 the Senate Finance Committee will hold a 1-day hearing on the International Anti-Dumping Code scheduled to become effective July 1, 1968. The cement industry will submit information showing there was no legal authorization for negotiation of code. Furthermore, that code is in serious conflict with the existing antidumping law and cannot become effective without congressional legislation. This point is substantiated by Tariff Commission report filed with the findings committee in March. Urgently request that you contact administration and seek postponement of July 1 effective date. This is of great concern to the cement industry.

JOHN E. MILLER, Jr.,
Vice President, Arkansas Cement Corp.

STATEMENT SUBMITTED ON BEHALF OF THE COPPER & BRASS FABRICATORS COUNCIL, INC., T. E. VELTFORT, MANAGING DIRECTOR

INTRODUCTION

On October 31, 1967, a statement on U.S. Foreign Trade Policies was submitted to the Senate Committee on Finance on behalf of the domestic brass mill industry. In this statement a full description of the industry was included, as well as a comprehensive review of the adverse effects on the industry resulting from excessive imports of brass mill products made by low-wage labor abroad.

PURPOSE OF STATEMENT

The injurious impact of imports on the industry has been aggravated by dumping which the Antidumping Act of 1921, as implemented by current regulations, has been unable to prevent. It is the sense of our present statement that the ineffective enforcement of the Antidumping Act of 1921 must be remedied by appropriate amendment. In the meantime, however, immediate action should be taken on S. Con. Res. 38 to prevent the International Antidumping Code, which is in conflict with the Antidumping Act of 1921 and which was agreed to on behalf of the United States without the Authority of the Congress, from going into effect on July 1, 1968 without congressional approval.

DEFINITIVE ACTION AGAINST DUMPING IS IMPERATIVE

The Antidumping Act of 1921 recognized dumping for what it really is; a discriminatory and therefore unfair trade practice involving sales by foreign vendors to buyers in this country at prices lower than they charge at home. This interpretation of dumping is quite consistent with the structure of our domestic laws and regulations against discriminatory pricing as being repugnant to fair competition. But an idea that claims of dumping might and would be used as a non-tariff barrier against imports has gradually developed. It has in recent years apparently become one of the principal aspects of the dumping problem as our latter-day foreign policy steadily edged toward international free trade.

Over the years the enforcement of the Act has become quite ineffective and the efforts to establish a finding of dumping under regulations implementing the Act, a frustrating and futile experience. The available record of dumping cases (1934–1967) illustrates this discouraging situation:

Total cases disposed of	496
Imports negligible or ceased	117
Complaint withdrawn	6
No sales at less than fair value	205
No injury	59
Subtotal	477
Finding of dumping	19

Either a law against dumping is not needed because this unfair practice is really rare (which many injured industries will certainly dispute!) or the law as administered has been ineffective.

The brass mill industry has had two painful instances of how ineffective the antidumping procedures can be, even when the Treasury Department has established presumptive evidence of the price discrimination involved. In one case, for example, copper tube was being sold in this country by a Canadian company at a special discount not available to its Canadian customers. After several years of investigation based on extensive evidence furnished by the domestic industry, during which time, of course, the dumping continued, the Treasury Department confirmed that dumping had occurred. It dismissed the complaint, however, on the company's assurance that dumping had ceased and relied on its promise that it would not be resumed. There is evidence that dumping has since recurred, although somewhat more subtly managed. But no further action appears practicable under present interpretation of the law and regulations.

A second case involved sheet copper from Yugoslavia, sold in this country at a price offered regularly at ten percent below the competition. Its result was a disastrous price demoralization in the concentrated markets in this country where the Yugoslavian product was sold. As far as the domestic mills were concerned, the prices which they had to lower drastically in a vain attempt to meet this local competition, however, had to be generally offered in a far wider market to avoid alleged price discrimination under our domestic laws. The Treasury again made a preliminary finding of dumping, but ultimately dismissed the case because it could not satisfy itself as to the price in Yugoslavia and had to depend on prices in certain free countries abroad. Also, it reasoned that the quantity involved was relatively small; related to the national market this was true, but

the Treasury disregarded the chain effect of the dumping on the entire domestic market.

It was because of experiences of this kind that the brass mill industry strongly supported the efforts of Senator Hartke and Congressman Herlong and more than 100 fellow senators and congressmen in bills successively introduced in the Congress since 1965, to make government action against dumping reasonably effective without opening the door to its possible misuse as a non-tariff barrier. When in 1964 the Treasury did issue new regulations in apparent recognition of the ineffectiveness of the antidumping procedure, these fell considerably short of requirements. The conclusion still remains that remedial legislation is needed. We must, therefore, repeat our urgent request that S. 1726 and the companion bills in the House be passed and so make the Antidumping Act what is should be, an effective weapon against an exceedingly unfair trade practice.

Despite the fact that the Trade Expansion Act of 1962 gave our Kennedy Round negotiation team no authority to deal with dumping, and notwithstanding the adoption in 1966 of S. Con. Res. 100, stating it was the sense of the Congress that no agreement or other arrangements applicable under the laws of the United States should be entered into under the Trade Expansion Act of 1962 except in accordance with prior legislative authority delegated by the Congress, the so-called International Antidumping Code was agreed to in the Kennedy Round, with an effective date of July 1, 1968. In view of a general complaint that the International Antidumping Code was in serious conflict with the Antidumping Act of 1921 and would tend even further to vitiate the effectiveness of our antidumping procedure, S. Con. Res. 38 was introduced, stating it to be the sense of Congress that the provisions of the International Antidumping Code are inconsistent with, and in conflict with, the provisions of the Antidumping Act of 1921; that the President should send the International Antidumping Code to the Senate for its advice and consent; and that the provisions of the International Antidumping Code should become effective in the United States only at the time specified in legislation enacted by the Congress to implement the Code.

In a report requested by the Senate Finance Committee in connection with S. Con. Res. 38, the Tariff Commission on March 13, 1968 gave as its three to two majority opinion a confirmation of the fact that the International Antidumping Code was inconsistent with, and in conflict with, the Antidumping Act of 1921 and could not be put into effect without appropriate legislation. Logically the Commission would find it impossible to enforce the Code if it is allowed to go into effect on July 1, 1968. Even the Tariff Commission minority, while disagreeing with the overall approach of the majority and recommending a case by case determination, nevertheless agreed that where inconsistencies between the Code and the Act occurred under these circumstances, the provisions of the Act should prevail. Obviously without Congressional action, which the minority fails to mention, its recommendation would be an invitation to further chaos.

In the meanwhile the Treasury published proposed extensive amendments to its antidumping Regulations to conform them to the International Antidumping Code, and invited the written opinions of those interested. No report has been made on the opinions received, but the Treasury has now issued amended Antidumping Regulations (T.D. 68–148) which after purportedly giving due consideration to these opinions, put the conforming regulations in effect on July 1, 1968. This date is only a short time ahead. Immediate Congressional action is imperative to prevent the International Antidumping Code and the Treasury's new conforming regulations from going into effect as planned. Without such action, the preemption by the Kennedy Round negotiators of the legislative power to amend the Antidumping Act of 1921 without Congressional delegation, would go unchallenged. The resultant legal complications as disputes over the control of our antidumping procedure arose, together with the impracticability of the required simultaneous consideration of the complaints by both the Treasury and the Tariff Commission and the far more restricted interpretation of injury, domestic industry, the market and other pertinent factors, would reduce even further the already slim chance of effective remedial action in bona fide dumping cases.

RECOMMENDATION

Pending favorable action on the badly needed amendment of the Antidumping Act of 1921, as proposed in S. 1726 by Mr. Hartke and his cosponsors, immediate action needs to be taken on S. Con. Res. 38 which states in effect that it is the sense of the Congress that the International Anti-dumping Code be submitted to

the Senate for advice and consent and that its provisions become effective in the United States only at the time specified by appropriate legislation. As July 1, 1968 is the date set for the International Antidumping Code to go into effect, there is only a very short time left to avoid the confusion bordering on chaos which would result from the conflict between the Antidumping Act of 1921 and the International Antidumping Code.

NATIONAL MILK PRODUCERS FEDERATION,
Washington, D.C., June 27, 1968.

TOM VAIL,
Chief Counsel, Committee on Finance,
U.S. Senate,
New Senate Office Building, Washington, D.C.

DEAR MR. VAIL: We shall greatly appreciate it if you will call to the attention of the Committee, and place in the record of the hearing of June 27, 1968, this letter opposing any relaxation of our antidumping laws and regulations.

The National Milk Producers Federation represents American dairy farmers and the cooperative dairy associations which they own and operate.

Dairy production in this country is in surplus supply, and the Commodity Credit Corporation is removing domestic dairy products from the market to maintain prices for milk to farmers at 90 percent of parity.

The importation of unneeded dairy products is adding millions of dollars of unnecessary cost to the support program. It is also adding millions of dollars of unnecessary dollar drain to our difficult balance of payments position.

In testimony submitted to the House Ways and Means Committee, March 1, 1968, we included figures showing an unnecessary dollar drain for 1966 of $70.5 million and for 1967, $73.7 million. The dollar drain for 1968 was estimated at $36.8 million.

In the same testimony, we estimated that the added cost to the support program from these unneeded imports was $29.2 million in 1966 and $131.2 million in 1967. The added cost of unneeded imports in 1968 was estimated at $48 million.

These exports to the United States are heavily subsidized, the subsidy in some cases being as much as 2 or 3 times the foreign selling price. For example, France has been exporting butter for 13–20½ cents per pound with an internal wholesale price of about 80 cents per pound.

The following quotation from the Dairy Situation, U.S.D.A., March, 1968, is in point:

"A major factor in the deterioration of world dairy product prices is the subsidization of dairy product exports by European countries in an effort to reduce internal stocks of dairy products. For example, with an average internal wholesale butter price of about 80 cents per pound, France is reported to be exporting butter at 29½ cents and selling storage butter in export outlets as low as 13–16 cents. Exporters in the Netherlands are delivering fresh butter at 25 cents per pound and storage butter at 15 cents, while their internal wholesale butter price is about 72 cents. Nonfat dry milk exports also are being subsidized. With an internal nonfat dry milk wholesale price of about 21 cents per pound, France is delivering nonfat dry milk to Lima, Peru, for 16 cents and to Bern, Switzerland, for 12 cents. Faced with prices of 10–12 cents per pound from Canada, the Netherlands, and France, Switzerland increased its import duty to raise the cost of imported dry skim milk powder above its 21-cent domestic price. Switzerland also has large stocks of butter and nonfat dry milk."

By comparison the Government support price for butter in this country is 67.25 cents per pound in New York, and nonfat milk is supported at 23.10 cents per pound.

The Secretary of Agriculture in a letter to the President dated June 4, 1968, reported evaporated milk imports being offered in New York delivered and duty paid for $5.60 per case with comparable U.S. prices ranging from $6.90 to $7.85. Export subsidies on this product paid by foreign nations run about $2.00 per case.

The same letter reports sweetened condensed milk imports being offered in Chicago, duty paid, for $7.34 per case, compared with a comparable U.S. price of $14.00. Export subsidies being paid on this product by foreign countries run from $1.97 to $5.37 per case.

This condition has continued for about 2 years, and there is no indication foreign nations intend to discontinue it unless they are forced to do so.

It is most important that immediate and serious consideration be given by Congress to strengthening the antidumping laws and that no action be taken to weaken either the laws or regulations.

Sincerely,

E. M. NORTON,
Secretary, National Milk Producers Federation.

MANUFACTURING CHEMISTS' ASSOCIATION, INC.,
Washington, D.C., June 27, 1968.

TOM VAIL,
Chief Counsel, Committee on Finance,
New Senate Office Building, Washington, D.C.

DEAR MR. VAIL: On behalf of the Manufacturing Chemists Association, a nonprofit trade association of 180 United States and 12 Canadian company members representing more than 90 percent of the production capacity of basic industrial chemicals within these countries, I wish to submit the following comments for inclusion in the record of the public hearings on the International Dumping Code, conducted by the Committee on Finance.

On March 13, 1968, the Senate Finance Committee published the report of the United States Tariff Commission on S. Con. Res. 38 regarding the International Antidumping Code which raised some serious questions as to its legal status and the administrative problems which it presented. The Tariff Commission, very properly, confined their remarks strictly to the provisions of the new Code. The report speaks for itself and need not be reviewed here.

On June 1, 1968, the Treasury Department published revised Customs Regulations setting forth new rules and administrative procedures designed to implement the commitments assumed by the United States in accepting the new Code. Our remarks here are directed to some areas of particular concern which the new Regulations bring into focus.

With respect to the simultaneous investigation of dumping and injury, we call attention to the fact that responsibility for injury determination was transferred from the Treasury Department to the Tariff Commission in 1954. However, Subpart 53.27 (e) of the Regulations requires that dumping complaints filed with the Treasury Department must include information indicating that an industry in the United States is being injured, or is likely to be injured, or prevented from being established. We have no objection to a requirement that a dumping complaint contain enough information to indicate that the complaint has reasonable substance. It should be sufficient for the complainant to supply such trade information and import data as may be available. It is not reasonable to expect a domestic producer to go beyond his own market problems to investigate either inqury or threat of injury to an industry. The requirement as it is written impinges on the function of the Tariff Commission and has no place in the dumping complaint.

The Treasury Department Investigation is a cumbersome and lengthy operation divided into three main stages as indicated by the following summary:

Part 53.29 of the Regulations provides that when a complaint has been filed, the Commissioner shall conduct a summary investigation which may result in the complaint being rejected. It should be noted here, that the Embassy of the foreign country involved is promptly notified of antidumping actions.

Part 43.30 provides that if the case has not been closed under Part 53.29, an Antidumping Proceeding Notice is to be published in the Federal Register, and 53.31 provides that the Commissioner of Customs shall then proceed to make a full scale investigation. Following this investigation, the Secretary may publish a Notice of Tentative Negative Determination which is followed later by a final determination which is also published.

If the case is not terminated at this point, the Secretary will publish (Part 53.34), a Notice of Withheld Appraisement, which will be effective for no more than three months unless a longer period has been requested by *both* the *importer* and *exporter*.

The procedures outlined above may take a year or more during which time the foreign exporter and the domestic importer are completely free to continue a dumping operation without fear of any penalty.

Part 53.48 provides that withheld appraisement shall be applied "to such merchandise entered or withdrawn from warehouse, for consumption, after the date of publication of the "Withholding of Appraisement Notice."

It is this quoted provision that provides a guarantee of no dumping duty assessment on imports entered up to that date. In addition, there is a further guarantee that the period of withheld appraisement, in accordance with the provisions of Part 53.34, will be limited to a period of three months. It is at this stage that the case is referred to the Tariff Commission which has by law only 90 days in which to complete the injury determination. Even after that, the provisions of Part 53.30 reserve to the Secretary the right to revoke his determination of sales at less than fair value if further information persuades him that his initial determination was in error. Thus, the Tariff Commission can be left in the position of trying to determine injury attributable to dumping prices before the Secretary has finally determined the facts.

As noted above, the Antidumping Act does not prescribe a time limit for the dumping investigation, but the Act does prescribe that when the Secretary makes public a dumping finding he "shall authorize the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than *120 days before the question of dumping has been raised by or presented to him*—." (Emphasis added.)

There is no basis in the law for the 90-day limitation on the period of withheld appraisement and the law clearly provides that withheld appraisement shall be applied *retroactively* to at least the date of the complaint.

The net effect is an open invitation to wholesale dumping for extended periods during which time irreparable injury may be done to domestic producers.

If the Regulations accurately reflect our obligations with respect to the new International Dumping Code, we can only conclude that these commitments cannot be implemented within the framework of the Antidumping Act and they should be sent to Congress for legislative action.

I trust that these views will be helpful to the Committee in its deliberations.

Sincerely,

G. H. DECKER.

WASHINGTON, D.C.

COMMITTEE ON FINANCE,
New Senate Office Building,
Washington, D.C.:

In reference to your June 21st release of hearings June 27th on the "International Dumping Code" as "agreed to" (sic) during the Kennedy Round"—becoming effective July 1, 1968, I submit the following paper. It is an excerpt from my papers which appears in your 931 page 2-volume "Compendium on Legislative Oversight" of February 7, 1968. Only its pages, 722–5 (written by me) go into analyses of foreign devaluations.

Since 1940 there has been 101 devaluations of foreign currencies, 26 of them during the Kennedy Round!

(The paper follows:)

Devaluation of foreign currencies

There are about 140 currencies on our planet, all used in world trade, which is business. Each nation fixes the "value" of its own currency, and can alter that "value" again and again and again; and almost all changes in the "value" of a currency are downward, i.e., devaluation. (The European guilder and the deutschemark were upvalued, but by only a tiny fraction of their prior devaluations. I know of no other up-valuation.) The International Monetary Fund, a non-U.S. agency, attempts to monitor devaluation, with incomplete success.

For I have a list [should be published] of 99 devaluations since 1940, 25 of them in 1966 alone (that is, during the Kennedy round trade negotiations). All these devaluations were made on the advice of the devaluing countries' trade experts, i.e., not on whims.

All aimed at (1) increasing the devaluing country's sales of its goods and services (tourism, etc.); and (2) decreasing the devaluing country's purchases of its imports of goods and services (tourism, etc.) Both objectives were usually aimed mainly at the United States of America. (Two examples: Canada's devaluation of its dollar on May 2, 1962; and Mexico's four devaluations of its peso which was worth 0.20⅝ U.S. cent in 1940, but since 1954, has been worth only 0.08 U.S. cent. Both these two countries have pronounced their respective devaluations a "success," thus implying, perhaps, future devaluations, an implication which I read into President (of Mexico) Gustavo Diaz Ordaz's address to our Congress on October 27, 1967, using the original version in Spanish.)

A devaluation "lasts" about a decade. All its impacts are not implemented the next day, as some U.S. experts seem to me to think.

After its trading partners have "adjusted" to one of its devaluations, a devaluing country can devalue—again. Devaluation is, now, recurrent trade strategy.

The most important part of this paper

Items 3 and 5 of section 8 (powers of Congress) of article I of the Constitution of the United States read:

The Congress shall have power—

3. To regulate commerce with foreign nations * * *

5. To coin money, regulate the value thereof and of foreign coin * * *

But, the powers of the U.S. Congress are limited to the one fifty-fourth of our planet's surface; i.e., to one-sixteenth of earth's land which is the geographical United States, which insignificance is emphasized by noting that our country is but one of our planet's 140 "nations."

The planet's other 139 nations have, only since 1940, devalued their currencies at least 101 times. In so doing they have up-valued our U.S. dollar in their markets, a de facto change in its value which our Congress cannot control. It is, therefore, in order for an American to denounce those devaluations as "unconstitutional." I beg that the Senate Finance Committee take a position on this point.

Illustration of the above: If your neighbor removes—say—2 feet of topsoil from his plot, he has done two things, viz: (1) He has made his plot lower than yours, but, (2) he has made your plot higher than his.

Shocking: There is no study of the impacts of foreign devaluations in the U.S. socioeconomy. In 2 years of search I have been unable to find one in any U.S. agency and in any U.S. college.

Worse: Two employees in Federal Reserve, one in Export-Import Bank, a staff member of the Joint Economic Committee, a member of Brookings Institution, and the Bureau of International Commerce, U.S. Department of Commerce, in official letters in 1965 and in 1967, all confirm that "no official U.S. Government study has been prepared on this subject" of the "effects of foreign devaluations on the U.S. balance of payments and the U.S. balance of trade."

No denunciation of the above bureaucratic stupidity/negligence can possibly be too strong.

Conclusion: U.S. nonrealism in (1) the official U.S. arithmetic of U.S. foreign trade (this is not payments) and in (2) the manipulated "values" of non-U.S. currencies vis-á-vis our U.S. dollar has made U.S. foreign trade policies catastrophically harmful to both the U.S. socioeconomy and to the socioeconomies of the other 139 nations on our planet.

How? By generating synthetic "comparative advantages" which drive a nation's industries into wrong areas of production for generations.

(This subject is better discussed with trade experts in the fifteen-sixteenths of our planet's peoples outside our country than with their counterparts inside the United States, only one-sixteenth of our planet's peoples.)

Addendum of incredible oddities applicable because all are true, to assertions in the above "paper."

The devaluation of the U.S. dollar in 1934 made—

Our goods and services cost foreigners 40 percent less.

Our purchases of foreign goods and services cost us 69 percent more.

When Canada devalued (May 2, 1962), a U.S. broker supplied a list of seven Canadian industries which would benefit—one being International Nickel—and, contrariwise, (a) the mayor of a Connecticut town wrote to me about the harm done industry in his community, (b) GM and Mead Johnson suffered, etc., etc.

Devaluation equates technical know-how! In one of its publications available in both our language and Spanish, the International Monetary Fund reports that the British pound was devalued to equate $2.80 simply because, at its previous "value" of $4.03, the British could not meet U.S. competition in third countries!

NOTE.—The British are fond of, and adept at, the strategy of devaluation, and are now, the press of November 15, 1967, reports, probably "forced" to devalue their pound again. The British pound has equated: $8.23, $4.87, $4.03, $2.80 (the current rate), and only $2.43 if Britain's 15-percent surcharge on imports (of October 1964, and since rescinded) is computed as one more devaluation of it. Make your own appraisals of what happened in world trade.

There were 25 devaluations in 1966, i.e., during the Kennedy round in Geneva, yet I am informed by a staff member of the President's Special Representative for Trade Negotiations that "* * * devaluations were not up for consideration,"

which is as fantastic as saying that the designs of a transatlantic liner ignore the water!

In its press release of October 12, 1967, the Embassy of Finland reports the devaluation of its markka, making imports cost Finnish purchasers 31.25 percent more, but making Finnish goods and services (tourism) cost foreign purchasers of them 23.81 percent less.

On pages 65–70 of its "General Summary" (undated; I received it August 25, 1967) the office of the Special Representative for Trade Negotiations reports on the Kennedy round negotiations with Finland—but the devaluation of the markka, taking place after those negotiations, has completely vitiated their impacts upon the socioeconomies of both the United States and Finland!

Uruguay devalued, again, on November 6, 1967. Devaluations are currently normal world trade strategy.

Etc., etc.—That U.S. experts on international trade ignore devaluations reflects on them adversely to the nth degree.

The import/export impacts of the Finnish markka's devaluation, in F–5, are official, i.e., the 31.25 percent more and the 23.81 percent less. As given in F–1, the corresponding figures for the U.S. dollar's devaluation (in 1934) are 69 percent more and 40 percent less, according to authorities.

It is incredible that no U.S. agency will compute—and publish—the corresponding percentages for the 101 devaluations that I list, or for any of them, from United Kingdom's repeated devaluations of its pound to, say, Italy's devaluation of its lira. (The U.S. dollar once brought 5 lira; today it buys 625[1] lira!)

Any mathematician can make the required computations, but they should be made, and published officially by the authorities in the U.S. Government (Treasury, Federal Reserve, etc., etc.) so that they may be quoted. It would be of great help if Senate Finance could insist upon these devaluation percentages.

Because of the fact that U.S. giveaways and U.S. subsidized exports are tabulated as "commercial exports," it is possible for the United States to (1) "up" its "trade surplus" to any figure, merely by, say, giving more wheat to India, etc., etc.; (2) meaning that U.S. trade deficits are easily eliminated, merely by using U.S. taxpayers' money to buy U.S. "exports"!

Ecology of our Nation's Capital: Were our U.S. capital a commercial center, like Pittsburgh, Bonn, London, Berne, Paris, Tokyo, Amsterdam, etc., etc., U.S. official trade negotiators would live intimately, for years, with U.S. industries, experiencing as their neighbors the harmful or helpful impacts of imports. This "education" is standard for all the foreign negotiators!—but not for the U.S. bureaucrats who confront those talented foreigners in trade negotiations.

All our planet's 140 nations, having exploding populations, require more jobs. There are only two ways by which any nation can generate its jobs, viz: its internal commerce and its foreign trade. It is now in "style" to stress the latter rather than the former, but this solution cannot be final, since our planet, as a whole, has to be self-sufficient. It cannot export to or import from other planets.

C. A. CASTLE,
Washington, D.C.

(Submitted on behalf of the National Footwear Manufacturers Association and its affiliate, the New England Footwear Association)

COLLIER, SHANNON & RILL,
Washington, D.C., June 27, 1698.

TOM VAIL,
Chief Counsel, Committee on Finance,
New Senate Office Building, Washington, D.C.

DEAR MR. VAIL: The National Footwear Manufacturers Association and its affiliate, the New England Footwear Association, hereby submit for the record their comments on the International Antidumping Code. These associations represent over 90 percent of the footwear production of the United States.

With shipments of footwear increasing from iron curtain countries and likely to increase in the future, the industry has become increasingly concerned over

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[1] Meaning, in reverse that an Italian must now assemble 625 lira to buy $1 worth of U.S. goods and services. He can't do it!

dumping of footwear in the United States at less than home-market price. State-controlled enterprises that manufacture footwear in these countries may establish prices for exported footwear which have no relation to cost but simply reflect the country's demand for dollars at that moment.

Over the past few years complaints have been filed by the Association on imports of footwear from Czechoslovakia, Poland, and Rumania. In all three cases, Customs found the shoes were being sold at less than fair value, the home-market price as described in the Antidumping Act of 1921. In the Czechoslovakian case the Tariff Commission found no injury to domestic industry. In the Polish and Rumanian cases the importers assured Customs that there would be no further sales at less than fair value, and the matter was not referred to the Tariff Commission. All of these actions were unsatisfactory.

Now it appears that on July 1, 1968 the largely ineffective Antidumping Act of 1921 will be further emasculated by the International Antidumping Code. This Code, negotiated by the Executive Branch despite widespread doubts as to its authority to do so, is in several respects contrary to our own law. For example:

(1) The Code requires that evidence of injury be considered both in the decision of whether or not to initiate an investigation and before the imposition of provisional measures. This directly conflicts with the 1954 amendment to the Antidumping Act of 1921, under which the Tariff Commission possesses sole jurisdiction over consideration of injury, which jurisdiction is to be exercised only after the Treasury has withheld appraisement and has made a final determination as to sales at less than fair value.

(2) The Code precludes relief unless dumped imports are the *principal* cause of *material* injury. The 1921 Act requires only that a domestic industry "injured" by reason of dumped imports.

(3) The Code narrowly defines the circumstances under which a regional concept of "industry" may be employed. The 1921 Act contains no such limitations.

In view of these conflicts and the lack of authority in the Executive Branch to legislate in the area of foreign trade, we urge the adoption of Senate Concurrent Resolution 38, under which the effective date of the Code would be postponed pending full review and proper implementation by Congress.

Sincerely,

THOMAS F. SHANNON.

[Submitted on behalf of Tanners' Council of America]

COLLIER, SHANNON & RILL,
Washington, D.C., June 27, 1968.

TOM VAIL,
Chief Counsel, Committee on Finance,
New Senate Office Building, Washington, D.C.

DEAR MR. VAIL: The International Antidumping Code is scheduled to become effective on July 1, 1968. On behalf of the Tanners' Council of America, the national trade association of the leather industry, may I respectfully request that the Senate Finance Committee take whatever steps may be necessary to postpone the Code's implementation.

Significant areas of conflict between the Code and the United States Antidumping Act of 1921 are pointed out in the Tariff Commission's recent report to your committee. Of particular interest is the Commission majority's statement that the regional industry concept under the Code is so narrowly defined that "four out of five determinations by the Tariff Commission might not have been made had the Code been in effect. . . ."

Also of interest are some of the effects of the recent Treasury regulations which implement the Code. Under these regulations the Treasury Department would take back a portion of the injury determination in dumping cases, in spite of the fact that by the Customs Simplification Act of 1954 Congress withdrew the injury function from the Treasury and placed it solely with the Tariff Commission. The regulations would also limit the withholding of appraisement to a period clearly not anticipated by the drafters of the 1921 Act.

Senate Concurrent Resolution 38 would prevent implementation of the Code without prior consideration and approval by Congress. We urge the immediate, favorable report of this Resolution.

Sincerely,

WILLIAM F. MARX.

[Submitted on behalf of the Bicycle Manufacturers Association]

COLLIER, SHANNON & RILL,
Washington, D.C., June 27, 1968.

TOM VAIL,
Chief Counsel, Committee on Finance,
New Senate Office Building, Washington, D.C.

DEAR MR. VAIL: I submit the following comments on the International Antidumping Code as counsel for the Bicycle Manufacturers Association. BMA is a non-profit trade association having offices at 122 East 42nd Street, New York, New York. Its members account for more than 95 percent of the bicycles produced in the United States.

The concern of BMA with U.S. antidumping law and practice is long standing and of great interest to its members. The Association now strongly protests the fact that recent attempts by the Executive Branch to legislate in an area clearly reserved to Congress will be successful if the International Antidumping Code is permitted to go into effect on July 1, 1968.

The implementation of this Code without Congressional approval will constitute a dangerous precedent of usurpation of Congressional authority by the Executive Branch. Equally significant, it will weaken the Antidumping Act of 1921 to a degree where dumping relief for domestic industry will be vitrually unobtainable.

BMA urges the Committee to thoroughly review the report of the Tariff Commission, which sets out in full all areas of conflict between the Code and the 1021 Act. The Association also recommends the immediate favorable report of Senate Concurrent Resolution 38.

Sincerely,

THOMAS F. SHANNON.

[Submitted on behalf of the Tool and Stainless Steel Industry Committee]

COLLIER, SHANNON & RILL,
Washington, D.C., June 27, 1968.

TOM VAIL,
Chief Counsel, Committee on Finance,
New Senate Office Building, Washington, D.C.

DEAR MR. VAIL: I submit this letter as counsel for the Tool and Stainless Steel Industry Committee, which is an association of seventeen specialty steel producers, all having a particular interest in the area of international trade. This Committee strongly urges that steps be taken to prevent the International Antidumping Code from becoming effective on July 1, 1968.

In 1966 the Senate Finance Committee report on Senate Concurrent Resolution 100 stated that dumping "concerns unfair trade practices in a domestic economy and it is difficult for us to understand why Congress should be bypassed at the crucial policymaking stages, and permitted to participate only after policy has been frozen in an international agreement." The Resolution 100 was then overwhelmingly passed by the Senate.

Notwithstanding this clear warning the Administration negotiated a Code which in many respects directly conflicts with our domestic dumping law as set forth in the Antidumping Act of 1921. As pointed out by a majority of the Tariff Commission in its recent report to the Senate Finance Committee, the Code (1) contains a more stringent test of inquiry than the Act by requiring that dumped imports be demonstrably the *principal* cause of *material* injury; (2) so narrowly defines "industry" as to preclude, in the Commission's words, four out of five of the Commission's existing affirmative determinations, and (3) makes consideration of evidence of injury a condition to the successful filing of a complaint and the withholding of appraisement, notwithstanding the fact that sole jurisdiction over injury consideration was transferred to the Tariff Commission in 1954. Any one of these new proviso's would make domestic industries already difficult task of securing dumping relief a virtual impossibility.

For this reason the Committee wholeheartedly endorses Senate Concurrent Resolution 38 introduced by Senator Hartke, and House Concurrent Resolution 447.

Sincerely,

R. H. S. FRENCH.

AMERICAN IMPORTERS ASSOCIATION, INC.,
New York, N.Y., June 26, 1968.

Hon. RUSSELL B. LONG,
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: In response to the invitation in the press release you issued June 21, we submit for the consideration of your Committee our views on the International Antidumping Code, signed at Geneva on June 30, 1967. We respectfully request that this statement be made a part of the record of the public hearing which your Committee will hold on June 27, 1968.

We agree with the Administration, Senator Javits, and authorities in and out of the Government that the United States may implement this code without enabling legislation.

As an importers organization, we know at first hand how the provisions of the Antidumping Act are applied in practice. Our long experience in importing and living with the Antidumping Act convinces us that the provision prohibiting foreign sellers from shipping goods to the United States at prices which are lower than the prices charged in the home market, and the provision requiring imposition of a dumping duty when this practice results in an injury to the American industry are sound and adequate.

We believe that the Code does not alter, amend, or in any way impair these basic requirements. Neither does the Code make any changes in the duties which the Antidumping Act assigns to the Treasury Department and to the Tariff Commission. Treasury must continue to determine whether or not imported goods are sold to the United States at "less than fair value," and the Tariff Commission will continue to make findings regarding injury.

The Bureau of Customs has already promulgated amended regulations under the Antidumping Act which conform with the Code. Here, too, we firmly believe that the amended regulations, which will be applied on and after July 1, 1968, are in accordance with the spirit of the Act. The most important amendments merely accelerate the procedures leading to a Tariff Commission determination as to whether or not there is injury to an American industry requiring imposition of dumping duties. These accelerated procedures will benefit not only importers, but domestic interests complaining of dumping.

In addition to being faithful to the basic concepts of the Antidumping Act, the Code will require other countries which accept it to make their antidumping procedures conform with our own United States practices as embodied in the Antidumping Act and the Regulations under it. These are more elaborate and more precise than any others in existence, and, most important, they are published in official documents for all to see and study. This is in contrast to the situation existing in many other countries which have only vestigial or no published statutes or regulations on dumping. This vagueness allows other countries to apply antidumping practices in a capricious and willful manner. Thus, when their interests suit them, such countries can discriminate against American exports by alleging dumping. But when a country accepts the Code, it must follow its provisions, and then American exporters will know where they stand when allegations of dumping are brought against their goods. This will remove another non-tariff barrier against American exports, and finally lead to a harmonization of antidumping laws and procedures to the benefit of all trading nations, large and small.

We urge that the Senate Committee on Finance take no action which would jeopardize this very significant achievement in codifying this non-tariff barrier and thus improving the rules of international trade.

Sincerely,

GERALD O'BRIEN,
Executive Vice President.

BRIEF OF JAMES R. SHARP, COUNSEL FOR ELOF HANSSON, INC., NEW YORK, N.Y., PAN PACIFIC TRADING CORP., NEW YORK, N.Y., ROBINSON EXPORT-IMPORT CORP., ALEXANDRIA, VA.

SUMMARY

The International Dumping Code is largely designed to bring the administrative procedures of other countries in line with our own.

Those practices provide fair and equitable procedures conforming to our Administrative Procedures Act.

The differences between the International Code and our law are advantageous and provide no basis for protracted arguments between the Legislative and Executive branches of the Government. They make sense—they should be approved if that is found necessary or be allowed to be put into effect by the Executive. Rejection of the Code will lead to increased difficulties for our exporters in foreign markets.

The bills pending before this Committee would freeze the hands of those charged with administration of the Antidumping laws. The administrator's ability to find equitable solutions would be replaced by rigid rules required to be applied whether or not they made sense.

The proposed amendments are not necessary and should be rejected.

STATEMENT

I am James R. Sharp, attorney for several U.S. companies who for some years past have imported substantial quantities of hardboard. Hardboard is a wood product made of imploded or ground up wood, the fibers of which are thereby torn apart and put back together by wet matting and pressing. Hardboard is used largely in the building and furniture business. The companies I represent here are: Elof Hansson, Inc., New York, N.Y.; Pan Pacific Trading Corp., New York, N.Y. and Robinson Export-Import Corp., of Alexandria, Virginia, one of our local Washington area companies.

On behalf of these clients I support the International Dumping Code formulated in the course of the Kennedy Round negotiations and I oppose the bills pending before this Committee which would amend the Antidumping Act of 1921 in a very substantial manner. The principal bills now pending before you are H.R. 8510 introduced by Representative Herlong of Florida, and H.R. 10332 introduced this Session by Representative Saylor of Pennsylvania.

I have had considerable experience in respect to dumping matters having acted as counsel for numerous American importers in a broad spectrum of dumping cases over the past 14 years. I have also frequently counseled with American manufacturers with respect to their complaints relative to dumping of foreign products on this market. Dumping is an unfair trade practice. However, the term has been loosely used to apply to all sorts of marketing practices—fair ones as well as unfair ones. The concept of dumping as spelled out in our 1921 Act is the sale of goods produced abroad to U.S. buyers at a lower f.o.b. mill price than the price charged for the same goods on an f.o.b. mill basis for consumption in the producing country involved.

There has been a lack of uniformity in the concepts of dumping incorporated into the laws of the major trading nations. The laws of some countries like Canada have provided that a mere difference in price for home country and for export constituted dumping. Under the laws of such nations it makes no difference whether imports injured or threatened injury to their domestic producers of like or similar goods, nor is the extent of competition between the foreign and domestic goods an issue.

The laws of other countries, like those of Great Britain for instance, have provided that a dumping order requiring additional duties would be entered only if the sales for export were lower than the sales for domestic consumption in the exporting country, and a domestic industry in the importing country was injured or was likely to be injured by such sales.

In the recent Kennedy Round the diversity in the statutes applicable to dumping practices in the major trading nations led to the desirability of negotiating a common code providing uniformity in the rules to be applied in determining when dumping penalties should be applied. Of additional importance was the fact that in the United States we have developed a system of administrative practice before agencies of the Government which provides fair and equitable investigations, open hearings and the adoption of orders under the dumping statute only after all interested parties had been given an adequate hearing on the factual and legal issues involved. In other countries the dumping proceedings have historically been conducted *in camera* with neither the accused or the accusers being provided the opportunity of hearing the other side of the story or knowing the factors taken into consideration by the administrator of the dumping law in arriving at a proposed decision.

In the Kennedy Round, a great concession was obtained by our negotiators, a concession which involved the requirement that other countries *conform to our own pattern of administrative procedures*. In other words, we obtained a concession which will require all those nations who accept the International

Dumping Code before entering a dumping order, to hold an open, fair and square hearing in which all parties concerned may express themselves openly and frankly with the knowledge of their adversaries so that the facts can be clearly laid before the administrators of the law before their decision is made.

This concession by other nations is bound to be of great advantage to the United States. In some areas, particularly in the area of agricultural products, we have maintained a two-price policy—selling our agricultural products abroad for less than they would draw in the domestic market. This is dumping under the standards generally accepted by our country and dumping in the concept of that word as used in the laws or regulations of other countries if the sales should result in injury or the likelihood of injury to the country to which the goods are shipped.

While I don't know too much about U.S. products as to which dumping proceedings have been instituted by foreign countries, I do know that dumping proceedings have been instituted in the United States with respect to a large variety of commodities. They have involved everything from cold rolled sheets of steel to cement, cellophane, bicycles, fertilizer, vital wheat gluten, chronic acid, window glass, titanium dioxide, fig paste, plastic baby carriages, badminton shuttles, 12-ounce canned luncheon meats, halibut steak and a host of other products, including bubble chewing gum.

As most of you know, the complaints under the Antidumping Act were few and far between from the period 1930 to 1944. During that period it was practically a dead issue. Since that date as competition between foreign producers and U.S. producers increased, so has the volume of dumping complaints in the U.S. increased. As a result, it became of utmost importance that in the Kennedy Round our negotiators tackle this international problem and arrive, if possible, at an agreed upon code for application of dumping duties—a code which would provide uniform rules for the instigation of dumping orders and, insofar as possible, uniform administrative procedures in line with our domestic procedures. Obviously it is of importance that this country's exporters be treated with the same fairness in dumping proceedings which may occur abroad as we find necessary in dumping proceedings in our own country.

Based on our experience in this field I and my clients are satisfied that our negotiators did a good job in the Kennedy Round and therefore we support the International Dumping Code agreed on in that Round. I am quite aware of the fact that it has been charged by a substantial number of members of this Congress and by representatives of a number of industries in the United States that our negotiators agreed to matters which either go beyond, or are contrary to, provisions of our 1921 Antidumping Act. A recent report of the U.S. Tariff Commission rendered March 18, 1968, indicated that three of the five Commissioners agreed with those Congressmen and industries who believed that the Code goes beyond our own statute and is not altogether interpretative but instead requires a change in our law. Without taking a position on whether the majority of the Commission was correct in that conclusion, I can only say to you that it is of the utmost importance to our administrative procedures and to our international relations that this problem be solved by the Congress promptly and definitively. There should be no uncertainty in the effectiveness of our laws or our international agreements. Be it otherwise, our trading partners may well shy away from conformance with the Code. Should this happen, our exporters will be denied the procedural and substantive benefits which will flow from the Code. If this Congress should renounce the Code or prevent the President from putting it in effect, reciprocal action will undoubtedly occur and we will face an international battle which would in the long run affect our exports in a much larger measure than we might anticipate.

One of the major points involved is whether an injury investigation should be conducted at the same time as a fair value determination. Prior to 1955, the Treasury Department conducted both of these investigations and it conducted them simultaneously. It was only after adoption of the 1955 amendments to the Act that an initial determination was required by the Treasury Department on the fair value question, followed by a subsequent reference to the Tariff Commission on the question of injury. May I ask what is all the yelling about? Isn't a simultaneous determination not only more efficient but more rapidly determinative of the issues involved, *less* ruinous if the determination is in the negative, and *more* beneficial if the determination is in the affirmative. Why should the Congress fight over the question of whether our Executive Department

exceeded its authority in the Kennedy Round by agreeing to more or less simultaneous inquiries into the fair value and injury questions? This seems to be an argument which has no merit. If the President's agreement makes sense we should go along with it and if necessary enact legislation approving it. Enough of the argument as to whether the Executive exceeded its authority. If what it did is good let's go along with it or, if necessary, bless it after the fact.

Frankly, in other ways it seems to me that the Members of Congress and the industries who criticize the International Dumping Code, or who fail to propose that our own statutes be conformed to that Code, if necessary, are standing on principle rather than on practical considerations. Thus, some argue that our Statute provides that a dumping price exists if exports are sold to the United States at less than *"fair value"* whereas the Code provides that it is a dumping price if they are sold at less than *"normal value."* Our Anti-dumping Law contains no definition of "fair value." The International Code defines normal value in terms approximately equivalent to the definition of fair value as provided in the regulations of the Treasury Department long since adopted. So why should an argument prevail over this matter?

Similarly, there has been considerable argument over the injury test provided in the International Dumping Code as distinguished from the injury test in our statute as it has been interpreted by the Tariff Commission, which since 1955 makes the injury findings. In the International Code it is provided that the sales at less than normal value must be "the principal cause of material injury" but that in making a determination as to "principal cause", the administrative body involved must consider *all other factors* which are simultaneously adversely affecting the industry involved. Our statute simply provides that the Tariff Commission must find that the U.S. industry is being or likely to be injured *"by reason"* of the imports of the sales at less than fair value. To my mind this is simply fiddledee and fiddledum and not worth extended consideration and to say the least not a protracted argument between the legislative and executive branches of the government over whether or not authority of the legislature has been usurped by the executive. Over the 34 years during which it made injury findings, I don't believe the Treasury Department, or the Tariff Commission over the 14 years since, has ever made an injury finding unless it involved *material* injury. No administrative body in determining whether injury has been brought about by one factor can blind itself to all the other factors which usually enter into the problems which an industry may face at any particular moment. Furthermore, why should we prejudice imports if they have not been a *principal* cause as distinguished from a minor cause of the difficulties of a domestic industry.

Article III of the International Code sets forth the factors which are to be considered in evaluating the effect on an industry of "dumped imports." The factors are, frankly, fair considerations which any administrative body *should* consider and which I am confident both Treasury during its period of injury findings, and the Tariff Commission during its jurisdictional period, have considered. But the Tariff Commission's majority and those who would emasculate the 1921 Act complain that the Act is silent as to how less than fair value imports of an industry should be evaluated in an injury proceeding. What in the world is wrong with our country agreeing with other countries that our exporters will get fair and square treatment in dumping proceedings instituted abroad? What is wrong with the idea that reasonable factors should be considered by any administrative body determining an injury question in a dumping proceeding? I cannot see any merit in this argument.

Similar arguments have been made with respect to the scope of the industry which is to be considered in dumping proceeding, i.e., whether it can be regional or national. I think the International Code conforms with the scope of the industry "concept" which was adopted by the Tariff Commission in 1955 in the first injury finding it made. That one related to British soil pipe. The concept adopted is that if injury or likelihood of injury would result to the U.S. industries selling in a particular area as a result of sales in that area, it makes no difference that the entire industry in the United States may not be seriously affeced—dumping is dumping even if only a segment of the entire industry is affected thereby. This in my opinion is precisely what the Code requires. So I don't go along with the argument that the Code goes beyond our presently enacted statute.

STATEMENT OF THE DOW CHEMICAL CO., MIDLAND, MICH.

INTRODUCTION

The Dow Chemical Company, whose home offices are in Midland, Michigan, is a broad-based, global chemical company. Sales in 1967 were $1,383,000,000. The product line includes hundreds of organic and inorganic chemicals, plastics, light metals, agricultural products, animal and human health products, and consumer products.

Dow, has production facilities in 17 states; and in addition, has 19 wholly or partially owned production facilities in 17 countries outside the United States. More than 10% of our U.S. production is being exported. On the other side of the picture, many of our products meet competition from imports into the domestic market.

Dow is vitally interested in the antidumping question. It is certain that dumping, if practiced on an extensive scale, will nullify much of the advantages that can normally be expected from world trade. When the tariff reductions that were negotiated in Geneva, during the Kennedy Round, are fully effective (1972), tariff rates for most industrial products in the developed countries of the world will be so low that dumping could become a completely destructive factor in world trade.

Other restraints on world trade are also important. Certain practices, such as export subsidies and political regulations, greatly affect the competitive positions of local producers in relation to foreign producers. Although the vital importance of such practices cannot be neglected, this paper will address itself only to the question of dumping, which is a complicated problem worthy of some careful consideration. Any final decision concerning foreign trade will be of minimal value in the absence of a strong antidumping regulation and enforcement.

It is generally recognized that world trade has advantages for all. It assists in allocating world resources and in bringing about their most efficient use. Modern, fast transportation and communications have, in fact, created the *potential* of a "one world", international marketplace. However, political regulations of sovereign countries and tactics of shortsighted businessmen may thwart or distort the world marketplace so much that competitive forces are prevented from serving their appropriate economic function. Noneconomic restraints may prevent the most efficient from winning.

A prerequisite for competition to perform the desirable allocative function is orderliness in the marketplace. A reasonable amount of stability permits planning by producers—planning of plant capacity, raw-material sources, power and other service facility. It also is needed to establish the relations between supplier and customer, which communicates the customer's needs and the supplier's economics.

In any marketplace where there are predatory sales practices, the market is disrupted, excesses and imbalances develop, and false signals are given both to producer and consumer. As a consequence, prices fluctuate widely, average costs increase, and the consumer ultimately will pay a higher average price. In some cases, predatory sales practices may be able to drive out established producers, but in every case they will prevent the establishment of new local production.

TRADE CLASSIFICATIONS

World trade may be classified in four categories with respect to competitiveness:

1. Trade that is essentially monopolistic, based on patented products or products newly developed and unavailable in other markets.

2. Shipments from parent company to foreign subsidiary are another type of foreign trade where competition is restricted. In the past 8 or 10 years, $3 to $4 billions' worth of American exports are reported by the Commerce Department to be of this type. The shipments consist primarily of intermediates and parts for further processing or assembly.

A different type of trade is what is called a co-manufacturer or co-producer sale. From time to time there are instances where a producer of a given product, usually due to temporary shortages or short-term imbalances in supply and demand, will import the same product from another producer.

3. The bulk of world trade is on the basis of normal competition, which involves not only price competition but quality, service, design and other factors. In any growing industrial country there will always be imbalances in supply and demand, and shortages of particular products at a given time. As expansion takes place, the capacity for a given product is likely to be out of balance with the consuming plants.

This is particularly relevant in the chemical industry where new plants are designed for a size to give low-cost production rather than on the requirements for immediate sales. These imbalances lead to short-term demands which often are supplied from excess capacity in other countries.

4. And finally, there are examples of foreign trade which can be labeled "dumping". This occurs when a producer with excess capacity is willing to sell his product overseas at prices below his home price, on the theory that the incremental cost of the additional product that is obtained by running the plant at capacity is low; therefore, if he can sell overseas, even at low prices, without disturbing his domestic price, he is making a good incremental return on the foreign sale. Such sales are not destructive competition where the product is sold into a nonproducing country. In such instance, the result may even be considered beneficial in the unlikely event that the country has no desire to develop national production.

Dumping becomes a matter of real concern when there is national production of the product or desire to initiate production and the foreign producer offers his product at a lower price to the customer than is available from the national producer or would be available from such a potential producer. It becomes especially destructive whenever the political regulations are strong enough to prevent any retaliatory importation into a producer's home market. In such instances, the home-market price may be artificially held at a high level to enable the excess production to be dumped at destructively low prices in overseas markets. Obviously, dumping is a practice which can be profitable only if one or a few firms can engage in it or if the firms in one country can dump in foreign markets but prevent dumping from foreign producers in their own market.

Dumping practices disrupt markets and, in the end, are disadvantageous to consumer as well as to producer. For this reason, most industrial nations have procedures designed to prevent the practice of dumping. The GATT charter, in Article 4, recognizes the disruptive influence of dumping and proposes duty penalties to prevent it.

The first step is to develop a definition of "dumping" that matches the realities of the business world. This then needs to be applied objectively by all trading partners so as to eliminate the evils of dumping, but at the same time not thwart international trade and competition.

The negotiation in Geneva, authorized by the Trade Expansion Act of 1962, sought across-the-board tariff reductions of 50% on a reciprocal basis. When the United States has completed the cuts (1972), most tariff levels will be so low that they will offer little impediment to trade. In fact, they may invite practices of dumping, because the tariff levels that will remain will add little to the border-crossing charges.

Based on our experience with competition from imported chemicals and with extensive experience in export of chemicals from the United States, we believe that international trade will grow on a sound basis in proportion as dumping practices can be minimized. To this end, it would be desirable to harmonize and make uniform the language and practices relative to antidumping. A fair system is needed that takes into account the legitimate interests of both the developed and the underdeveloped countries.

We concur in the basic concept embodied not only in the U.S. antidumping law, but also in Article 4 of GATT, namely, that there ought to be a dual criteria as a basis for any dumping penalties: (1) that there be, in fact, sales below fair-market value; and (2) that there be injury to producers in the market of import.

Definitions and interpretations have varied widely from country to country. In the recent GATT session, an attempt was made to harmonize antidumping procedures. Unfortunately, the result weakened, not strengthened, our antidumping defenses. We should take leadership in developing and pressing for greatly improved antidumping provisions.

A DEFINITION OF "FAIR MARKET VALUE"

There are wide variations in the definition which different countries use for the term "fair market value" or "normal value" as stated in Article 4 of GATT. If dumping is to be minimized, without at the same time injuring normal international trade and competition, careful attention must be given to the defintion of fair market value.

This problem is especially difficult in the chemical industry, where a product may be sold into a variety of different uses under different conditons of sale. Our experience leads us to believe that the following statements represent important criteria in defining fair market value:

1. That it should represent a price at which the product is freely offered by national producers in their home market;
2. That the price should be for normal wholesale quantities, unless the import is similar to a level of trade in the product for which there is special pricing and condition of sale in the home market ("condition of sale" here referring to end use, grade, type of shipment, duration and volume of the commitment, etc.);
3. That the price be taken as F.A.S. (free alongside) or F.O.B. ship's rail (depending on whether packaged or bulk cargo) at the time and place of shipment or at the nearest port; and
4. That calculations of currency exchange rates used in any antidumping case be the actual involved in trade transactions where it is different from official rates.

INJURY TEST

The diversity in the definition and treatment of the question of "injury" is even greater than that of fair value. In the United States and Germany, the test is so restrictive that injury is seldom found. In an 11-year period (1955–65), out of 345 U.S. dumping cases only 10 showed injury; of this, only 2 were chemicals. By contrast, some countries—notably Commonwealth countries—may claim injury even if the import is sold at or even above their domestic price.

The present U.S. approach to determining injury gives important weight to the corporate or industry level of profits. The presumption appears to be that if a company and/or an industry are making profits equal to or better than the national average, it is therefore not disadvantaged by any dumping that might have occurred. This approach avoids dealing with the specific injury which it the basis for the complaint. It is especially unfair in the modern business world where the business of so many companies is highly diversified. The inappropriateness of profit as a criterion is discussed in the attached appendix.

Clearly, a standardization of the injury test is needed. The United States should propose, through GATT, criteria that will make the test more specific and less judgmental. We believe that a suitable definition should include the following criteria:

1. An antidumping statute should recognize no injury for products that are noncompetitive. For this, the U.S. criteria of "like and similar" in defining competitive products seems to be a good one.
2. There should be a presumption of no injury where import sales are not below the prevailing price in the country of importation.
3. There *should* be the presumption of injury if domestic production equals 10% or more of demand and the import is being sold below fair value and below the price in the country of import. This is the test that was so effective in preventing a destructive type of competition in Canada.
4. Each product or product line be considered an industry in and of itself. An injury test that looks to averages for an industry, or multiproduct company therein, is meaningless. Actual losses in a particular product or narrow product line may be concealed by profits from patented or other products. This product concept is vital in the chemical industry because so many products are tied together as co-products and by-products.
5. Experience has also shown that in a large, diversified country like the United States, regional considerations may be important. A major segment of a market may be demoralized by dumping in regional areas without completely disrupting the rest of the market. Accordingly, the definition of "industry" should include a provision for regional injury.
6. Special consideration should be given to the co-producer transactions. In many instances, co-producer sales will be made at a special price. Since the co-producer buyer is not interested in destroying his own price structure, and in any case he himself makes the market, such a sale, even though technically dumping, will not tend to injure the market of the country of destination.

PROCEDURES

It is well recognized that the rules of procedure and the way in which they are applied can greatly influence the effectiveness of an antidumping law. Recognizing that this is a highly technical field and not wishing to recommend specifics, we nevertheless urge that any common procedures incorporate these principles.

(1) a chance for interested parties to be heard;
(2) prompt disposition of the case;
(3) safeguards for confidentiality of data; and
(4) a requirement that complainant and defendent supply necessary data promptly. (Failure of the former to comply within a specified time would dismiss the case, and of the latter would automatically constitute a finding of dumping.)

In the matter of procedures, it is important that the findings be prompt and not delayed, and that they be as specific as possible with a minimum of judgmental leeway. Only if both the regulations and procedures are specific and clear can either the exporter or domestic industry judge what is dumping and what is not.

Respectfully submitted.

THE DOW CHEMICAL CO.,
[SEAL] C. B. BRANCH.
Executive Vice President.

Subscribed and sworn to before me, a notary public, this 27th day of June 1968.

[SEAL] KATHLEEN WILLIAMS,
Notary Public, Midland County, Mich.

My commission expires Mar. 29, 1971.

Appendix

The accounting procedure for calculating and reporting profits conceals more than it reveals about the nature and source of profits. In a free-market society, "hoped-for" profits are the incentive for innovation and "realized" profits are the reward for it.

In reality, business profit as normally reported consists of three separate items and each is a payment or a wage, if you will, for a certain service. These three items are:

(1) Interest on capital
(2) Risk insurance
(3) Wages for inovation—entrepreneurship

As normally reported, the profit figure includes the equivalent of interest on the invested capital. In stock companies this is actually paid as "dividends", but it is really payment for the use of the capital. Since there are risks in doing business, the investment may be lost if the business should fail. Accordingly, investors in business enterprise require somewhat larger returns than they could get in the form of interest—let's say from government bonds. The profit figure also includes, then, an insurance cost to cover this risk factor.

These first two are easily understood. The third—wages for entrepreneurship—is a little more involved but is of special importance because it is the catalyst that stimulates economic growth and so it merits careful analysis. To fully understand its meaning and role, we shall need to review some fundamentals.

Man is, by nature, purposeful and directs his energy toward satisfying his needs and wants. In addition to the physiological needs to sustain life, man is constantly building for himself mental images of things that he would like to have. These ideas become goals or objectives that he tries to satisfy. Since man's ability to conceive new desires is limitless, and since available resources are limited, he must economize his time and effort if he is to enlarge his satisfactions. Entrepreneurship is the economizing function. The entrepreneur performs this function by thinking up and applying ways to increase efficiency.

Entrepreneur's Contribution

It is normal to think of a manufacturing firm as having three key functions: production, sales, and finance.

Fundamental consideration shows that a fourth essential function is involved. A firm can't even get started until it has an objective—an idea toward which the resources are organized. It is the function of the entrepreneur to select the best ideas and maximize efficiency in applying them.

Useful Idea

In seeking good ideas, the entrepreneur notes that man prefers to satisfy his wants with the least human effort and that there is such a thing as "human inertia"—that we all resist change. Accordingly, the entrepreneur seeks and applies ideas that improve efficiency enough to induce human change. An idea is a good one only if it is a better way to satisfy some human need. A new product, a new service, or a cheaper way to furnish an old product or service, is what is sought.

The increase in economic efficiency is the driving force that overcomes the consumer's inertia to change and causes him to buy the new product. The saving in human energy that new product or process yields is shared by the customer and the supplier. It is by offering the consumer a better bargain that a supplier earns that part of the profit that we have indicated as "entrepreneurial wage." The greater the improvement in efficiency, the larger this part of the profit may be. This is the reward that society (the customer) is willing to pay for an increase in overall efficiency in the satisfaction of his wants and needs. This portion of what is normally called "profit" disappears as soon as the new technology has become widely applied or a newer and still better product has become avaallable.

If a company is innovating and serving the customer with better products and/or lower costs, it can earn a better-than-average profit. The company that is not innovating will show a profit about equal to interest rates. The following table shows the profit for manufacturing corporations in the United States for a 10-year period. It also shows the average interest rate on good corporate bonds.

	10-year average, 1957–66 (percent)
Profit as a percent of sales	[1] 4.92
Profit as a percent on capital	[1] 6.38
Average interest rate on corporate bonds: Aaa and Baa	[2] 4.67
Payment for risk insurance plus the wages for entrepreneurship: Income on equity capital less interest rate on bonds	1.71

[1] Quarterly Financial Report for Manufacturing Corporations (Federal Trade Commission).
[2] Federal Reserve Bulletin.

This shows that, on the average during a period of rapid growth, the "wages of efficiency" that corporations earned by their innovative efforts represented oiny 1¾% on capital invested. If, through dumping, prices or market position are eroded, it need affect the average profit only very little to cut deeply into the wages of efficiency.

The chemical industry has been a leader in innovative changes. This is not surprising, since it spends a higher percent of sales income on research than most other industries. It is, therefore, only natural that the chemical industry generally shows a higher rate of profit than the average for industry. If a profit criterion is applied as an injury test in the chemical industry, no injury would ever be found until profits had eroded to the point that research would be cut back and innovation stinted. Thus, criteria for dumping injury, other than loss of profits, are required if a healthy, growing, innovative chemical industry in the United States is to be maintained.

The genius of the free-market system is that it offers the possibility of large entrepreneurial rewards for very important and rapid innovation, while at the same time the customer gets his wants satisfied with less money (less human effort). To assume that a firm that is making average or better-than-average profits, even on a product that is affected by dumping, has not been injured by dumping is to confuse two separate factors. If we want to continue to have innovative industry in the U.S., we must prevent dumping from eroding the incentive for innovation. A better and more rational approach to the question of injury from dumping needs to be applied.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., July 3, 1968.

Hon. RUSSELL B. LONG,
Chairman, Finance Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: At the hearings before your Committee on Thursday, June 27, 1968, on the International Antidumping Code, you requested a statistical breakdown of dumping cases that the Treasury Department handled on a de minimis basis and those handled on a price revision basis during the period January 1, 1955, through December 31, 1967.

In response to that request, I am pleased to submit the enclosed table giving the statistical breakdown you requested and a statement explaining the Treasury's practice in this type of case. You will note the table lists 101 cases instead of the 89 referred to at the hearings.

I respectfully request that the table and the explanatory statement be included together as part of the record of the June 27 hearings.

Sincerely yours,

FRED B. SMITH,
General Counsel.

EXPLANATION OF TREASURY PRACTICE IN CLOSING OUT "DUMPING" CASES WHEN THERE HAS BEEN PRICE REVISION

The question has been raised as to what right Treasury has to close out cases without reference to the Tariff Commission when there has been price revision (or—which accomplishes the same result—an end put to exports). Critics of this procedure have urged that any case involving exports to the United States at less than home price should be considered from the standpoint of injury, and, if injury is found, a dumping finding should be made.

The theory justifying the closing out of dumping cases after price revision is that the complainant has obtained the relief he was after—he wanted to stop dumping and the dumping has been stopped. However, Treasury has no requirement that a case be closed on price revision. Nor does the International Code, which merely states in Article 7(a) that antidumping proceedings "may" be terminated on price revision. A substantial number of price revision cases have been sent to the Tariff Commission, of which the following are examples.

Canadian cement, 24 Fed. Reg. 10267 (1960)
French rayon staple fiber, 24 Fed. Reg. 10092 (1959)
French rayon staple fiber, 26 Fed. Reg. 4428 (1961)
Belgian rayon staple fiber, 26 Fed. Reg. 4477 (1961)
Canadian nepheline syenite, 25 Fed. Reg. 8394 (1960)
Canadian nepheline syenite, 26 Fed. Reg. 956 (1961)
Canadian peat moss, 29 Fed. Reg. 4843 (1964)
Dominician cement, 27 Fed. Reg. 3872 (1962)
Canadian vital wheat gluten, 29 Fed. Reg. 5921 (1964)
Japanese white portland cement, 29 Fed. Reg. 9636 (1964)
Japanese titanium dioxide, 31 Fed. Reg. 7495 (1966)

As a rule it can be said that Treasury would be willing to send any price revision case to the Tariff Commission if the complainant so desires. But the fact is that in practically every case which has so far been closed out on a price revision basis, this was done with the complainant's consent, either expressed or implied.

Treasury's practice in closing out cases when there has been price revision was encouraged by the Tariff Commission decision in the first French rayon staple fiber case, 24 Fed. Reg. 10092 (1959) in which it was stated after noting the price revision, and the complainant's lack of interest in pursuing the case, "The Commission is of the view that a case of this kind should not be presented to the Tariff Commission for determination of injury." In due course, as a result of this statement, Treasury began to decrease the number of price revision cases referred to the Commission and increase the number closed out without such reference.

In the French rayon staple fiber case the Commission adopted as its view a statement that "the Antidumping Act was intended to be preventive rather than punitive." Such a view is consistent with the Report of the Secretary of the Treasury to the Congress on the Operation and Effectiveness of the Antidumping Act dated February 1, 1957, which formed the basis for the 1958 amendments to the Antidumping Act (see pages 16, 17, Hearings before the House Committee on Ways and Means on Amendments to the Antidumping Act, July 29, 1957). It is consistent also with testimony of Treasury Assistant Secretary Kendall during the presentation of the legislation which was passed in 1958 (Hearings as above, pp. 43, 44). In Czech Leather Work Shoes, 31 Fed. Reg. 10906 (1966), the Tariff Commission stated that sales at less than fair value are "not made unlawful by the Antidumping Act. They are subject to additional duty if they are found to be injurious by the Tariff Commission." Further Commission decisions note that dumped imports are not *ipso facto injurious* (German Rayon Staple Fiber, 26 Fed. Reg. 6537 (1961)). They are not *malum in se* (French Titanium Dioxide, 28 Fed. Reg. 10467 (1963)), nor do they involve even a presumption of injury (Japanese White Portland Cement, 29 Fed. Reg. 9636 (1964)).

With this background in mind, it can be seen that there is a real difference between the civil Antidumping Act on the one hand, and criminal laws such as the 1916 Antidumping Law or the Anti-Trust Law, on the other. With a criminal law it might be questionable to allow dismissal once the complainant withdrew his charge, although with our crowded courts some cases are thus "nol. pros'd". But under the Antidumping Act withdrawal of the complaint after price revision should ordinarily justify closing the case forthwith rather than sending it to the already overburdened Tariff Commission.

Indeed there is serious doubt as to what if any advantage would accrue from sending these cases to the Commission in the interest of tougher enforcement of the law. Once the importer is on notice that appraisement has been withheld, the natural tendency is to cut down on imports which can subject him to dumping duties. Consequently the amount of the duties, if there is a determination of injury and a finding of dumping, can be minimal or nonexistent, and the dumping investigation prolonged to no useful purpose.

It is perhaps fair to criticize Treasury for not having up to now spelled out in more detail the reasons in each price revision case for either closing it out or sending it to the Tariff Commission despite the revision. In one of the last of such cases sent to the Commission, the Treasury Department determination of sale at less than fair values does spell out the reasons, as follows:

"The November 24, 1965, Notice of Intent was based on the theory that these had been price revisions and cessation of shipments which brought the case within the purview of 19 CFR 14.7(b)(9). This provision of the regulations is not construed to prevent the Secretary of the Treasury from making determinations of sales at less than fair value where the sales to the United States which are complained of, made before the price revision or cessation of shipments, are considered sufficiently substantial so as to constitute "hit and run" dumping. Under the circumstances of this case, it is determined that sufficient evidence is present in connection with the sales made prior to the price revision to justify referring the case to the United States Tariff Commission for a determination as to whether or not such sales injured an industry in the United States."

(Japanese Titanium Dioxide, cited above, Tariff Commission found no injury in this case). Treasury will undertake in future cases to give in similar detail its reasons for the disposition.

A table showing a breakdown of the cases closed out on a de minimis, price revision, or cessation of sales basis from January 1, 1955 through December 31, 1967, is attached.

Table showing dumping cases closed on de minimis, price revision or cessation-of-sales basis from Jan. 1 1955, through Dec. 31, 1967

De minimis	27
Price revisions	59
Cessation of shipments	15
Grand total	101

NOTE.—Current search of the records of "dumping" cases discloses there were 101, not 89, cases which were closed on a de minimis, price revision or cessation of shipments basis during the period Jan. 1, 1955, through Dec. 31, 1967.

COVINGTON & BURLING,
Washington, D.C. July 3, 1968.

Hon. RUSSELL LONG,
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

Dear SENATOR LONG: In the course of the hearing by the Senate Finance Committee on June 27 on the relationship between the International Antidumping Code and the Antidumping Act of 1921, as amended, you requested me to analyze the position taken by Chairman Metzger of the Tariff Commission in its report to the Senate Finance Committee on Senate Concurrent Resolution 38. We have made such an analysis, and I am enclosing a memorandum setting forth our analysis and conclusion on this matter. In brief, we are satisfied that Chairman Metzger's position is without any legal support.

Again let me take this opportunity to express my appreciation and the appreciation of my firm and the Cement Industry on being allowed to testify before your Committee on this subject.

With every good wish, I am,
Respectfully yours,

DONALD HISS.

MEMORANDUM RE ANALYSIS OF POSITION TAKEN BY CHAIRMAN METZGER OF TARIFF COMMISSION REGARDING CONFLICT BETWEEN EXECUTIVE AGREEMENT MADE WITHOUT CONGRESSIONAL AUTHORIZATION AND AN ACT OF CONGRESS

PROBLEM AND CONCLUSION

The United States, by "executive agreement", has joined other nations in establishing an International Antidumping Code. A number of provisions of this Code are in conflict with the Antidumping Act of 1921, as amended. Congress has not given its approval to the Code. In fact, it earlier indicated its disapproval of negotiations directed at creating such a code, S. Con. Res. 100, 89th Cong., 2d Sess. (1966), and has presently before it a "sense of Congress" resolution which would express its opposition. The result of adoption of the Code will be to emasculate the Antidumping Act by an executive agreement that is not approved, but actively opposed, by Congress. The narrow question presented by these circumstances is whether it is within the Executive's power thus to override Congressional domestic policy.

The answer is no. In a recent report dealing with the Code of the U.S. Tariff Commission, by a 3-2 majority, found that the Code was inconsistent with the Act and that the Act must prevail. In a separate statement, Commissioner Clubb of the majority of the Tariff Commission discussed the law which exists on the subject of conflict between an executive agreement and existing domestic law. A separate statement by Chairman Metzger differed. Mr. Metzger contended that the Code and the Act could coexist. He admitted that in cases of conflict, domestic law would prevail, but insisted that (1) the Commission should wait until a specific case arose to determine whether there was a conflict and (2) wherever possible, *inconsistencies* should be resolved in favor of the Code. An examination of the legal authority relied upon by Messrs. Clubb and Metzger indicates the former is correct; Mr. Metzger's position is totally unsupportable.

DISCUSSION

I. Executive Agreements in the Context of International Agreements

In analyzing executive agreements made on the basis of the President's independent Constitutional authority, some confusion may develop from the use of false analogies to other types of international agreements into which the United States may enter. Broad language which has been employed in discussing such other agreements may add confusion.

Two types of agreements have been frequently employed by the United States—treaties and executive agreements that have Congressional approval. In discussing one Presidential measure taken pursuant to Congressional authorization, the Supreme Court described the President as "the sole organ of the Nation in its external relations, and its sole representative with foreign nations". *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). It must be emphasized that the Congress and the President were in agreement in that context. The

power which was being exercised was in fact the total foreign relations power of the United States.

The Constitution divides this power between Congress and the President. Congress, for example, is given power over international commerce, while the President is Commander-in-Chief of the Armed Forces. In the exercise of its Constitutional powers, each can take measures affecting our foreign relations. It has therefore been recognized that the President, as Commander-in-Chief or pursuant to his power to recognize governments, may make independent executive agreements. *See, e.g.*, Wright, *The United States and International Agreements*, 38 *Am. J. Int. L.* 341, 345 (1944).

The President may also make agreements dealing with matters relating to his explicit power which are necessary to make it effective. Thus, in an agreement recognizing the Soviet Union, an arrangement for settling claims of United States citizens against Russia was also valid. *See, U.S.* v. *Pink*, 315 U.S. 203 (1942); *U.S.* v. *Belmont*, 301 U.S. 324 (1937). In those cases, the Court embellished its position with references to the importance of executive agreements. The agreements were in conflict with *state* law. The Court held that executive agreements overrode such state policies, but it did not express an opinion concerning a conflict between independent executive agreements, not authorized or not later approved by Congress, and *national* policy.

II. Conflicts Between Presidential and Congressional Power

Because both Congress and the President exercise power in foreign relations, there is a possibility of conflict between an executive agreement and Congressional domestic policy. Commentators have suggested that the possibility is more theoretical than real. Indeed, no case involving such a conflict has been decided by the Supreme Court. *Cf. U.S.* v. *Guy W. Capps, Inc.*, 204 F. 2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

In its proposed official draft of the Restatement of the Foreign Relations Law of the United States, the American Law Institute emphasized the rarity of conflict:

"An act of Congress dealing with a matter within its power under the Constitution and a self-executing agreement made by the President solely on the basis of his independent powers under the Constitution and having effect as domestic law, might contain inconsistent provisions. In such a situation, the exercise by Congress of its own power would remain unaffected by the exercise by the President of his own independent powers. It is practically impossible to find situations in which this conflict has arisen, since so few executive agreements made by the President on the basis of his independent powers ever take effect as domestic law in the United States. Moreover, the likelihood of conflict in the exercise of their respective powers is minimal in view of the practice of the President and Congress to accommodate to each other in cases in which an overlap of power might arise." *Restatement of the Foreign Relations Law of the United States*, § 147, Comment b. (Proposed Official Draft, 1962).

There may in fact be no conflict between Executive and Congressional power, because the Executive lacks any authority in the instance under consideration. It is at least arguable that the President was completely without power to enter into this executive agreement. The power cannot logically be said to derive from the expressed powers of the President as Commander-in-Chief or to recognize foreign governments, nor is it necessary to make them effective. If it exists, therefore, the power must be a part of the general executive power of the President. Except for Chairman Metzger's apparent adherence to this position, there is no support for it from courts or commentators. Dicta from such cases as *Curtiss-Wright*, *supra*, *Belmont*, *supra*, and *Pink*, *supra*, simply cannot be stretched to apply in this context.

Assuming *arguendo* that the Executive has power to make an executive agreement such as this one, it is clear that if the agreement conflicts with domestic policy, it must yield to that policy. There has been some disagreement on the scope of executive agreements and the propriety of use, with or without Congressional consent, as a substitute for treaties. *Compare* McDougal & Lans, *Treaties, Congressional—Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181 (1945) *with* Borchard, *Treaties and Executive Agreements—A Reply*, 54 Yale L.J. 616 (1945).

Even the most strident advocates of the use of executive agreements do not go so far as to suggest that Executive action under its general executive power

under the Constitution should supersede Congressional regulation in an area, such as international commerce, where Congress has been given specific powers.

"A direct Presidential agreement will not ordinarily be valid if contrary to previously enacted legislation. . . . [I]f the subject of the agreement is a matter within the President's *special* Constitutional competence—related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander-in-Chief—a realistic application of the separation of powers doctrine might in *some* situations appropriately permit the President to disregard the statute as an unconstitutional invasion of his own power." McDougal & Lans, *supra*, 317. [Emphasis added.]

Borchard, whose more conservative view was that "the executive agreement was only a supplementary device designed to accomplish minor arrangements within the limited powers of the Executive to deal with diplomatic affairs and as Commander-in-Chief," Borchard, *supra*, at 648, called McDougal's position "extraordinary", *id* at 643. McClure, generally an advocate of the use of executive agreements, opined:

"It seems out of harmony with the entire tenor of the Constitution to hold that the President, even when dealing with international matters, may in the absence of express Constitutional declaration, achieve results which overrule the national legislature. To do so, is no part of even the most plenary executive power." W. McClure, *International Executive Agreements*, 343 (1941).

The Restatement is also quite clear on the question of the effect on domestic law of independent executive agreements. It asserts flatly that while such an agreement "supersedes inconsistent provisions of the law of the several states, . . . [I]t does not supersede inconsistent provisions of earlier acts of Congress." American Law Institute, *Restatement (Second) of the Foreign Relations Law of the United States*, § 144 (1965).

The one case which has decided the question of an inconsistency between an executive agreement and an existing law asserts that the law must prevail. *United States v. Guy W. Capps, Inc.*, *supra*. The case dealt with conflict between provisions of the Agriculture Act of 1948 dealing with procedures to prevent excessive imports of eating potatoes and an executive agreement with Canada to accomplish the same purposes by different means. The Court of Appeals concluded:

". . . that the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related and that the contract relied on, which was based on the executive agreements, was unenforceable in the courts of the United States for like reason. . . . The power to regulate foreign commerce is vested in Congress, not in the executive or the courts; and the executive may not exercise the power by entering into executive agreements. *Id.* at 658.

* * *

". . . [W]hile the President has certain inherent powers under the Constitution such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress." *Id.* at 650.

Chairman Metzger obviously could not ignore the overwhelming legal authority to the effect that an executive agreement must give way to conflicting domestic law. Rather, he asserted that both the law and the agreement were valid and that in cases where they were *inconsistent*, the agreement should prevail. Mr. Metzger's deference to the rule that the agreement must give way in cases of *conflict* is merely semantic. He cites three irrelevant cases and begs the relevant question in supporting his outcome—determinative position. The cases, as Commission Clubb correctly pointed out, stand at best for the proposition that a valid act or treaty—which is inconsistent with a prior act, treaty or recognized rule of international law—must be interpreted to resolve inconsistencies in favor of the *prior* rule of law. Mr. Metzger assumes that the rule of law established by the executive agreement is valid, the very question before him. Even assuming that, the cases he relies upon would dictate the latter act's deference to the prior one in cases of inconsistencies. Thus, as Mr. Clubb intimates, the proper result from Mr. Metzger's position, granting the assumption that the executive agreement is valid, is that it must give way whenever there is an inconsistency with the earlier act. In this case, therefore, the International Antidumping Code must give way to the Antidumping Act of 1921.

U.S. TARIFF COMMISSION,
Washington, D.C., July 3, 1968.

Hon. RUSSELL B. LONG,
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: It has come to my attention that at the hearings on June 27, 1968 before the Committee on Finance on the International Anti-Dumping Code, certain portions of the Separate Views filed by Commissioner Thunberg and me in the March 8, 1968 Report of the Tariff Commission to the Committee on S. Con. Res. 38 were called into question.

In those Separate Views we expressed ourselves in the following terms, at the conclusion of our discussion of the question of the consistency of the Anti-Dumping Act and the Code:

"Accordingly, having examined those provisions of the Code and of the Act relating to the direct functions of the Commission under the Act, we limit ourselves to the statement that a) they are founded upon common basic concepts, b) they obviously differ in language, and c) these differences in language do not appear obviously or patently to call for differing results in future cases regardless of their inevitably differing facts and circumstances. Indeed, we are unable, in the absence of the particular combination of facts and circumstances involved in each injury determination, to assert categorically that in such cases their application would lead to identical or to differing results.

"If, folowing July 1, 1968, the Commission has occasion to perform its statutory duties under the Anti-Dumping Act (there are presently no cases thereunder pending before the Commission), and a question of consistency between a provision or provisions of the Code and of the Act is a relevant issue and there has been no intervening new American legislative action, the Commission should apply the principles of American law to the task of interpretation of the Act as it affects the facts of the investigation, including those principles relating to interpreting the Act so as to avoid inconsistency between it and the international obligations of the United States. If this proved not to be possible, the Commission should apply the provisions of the Act of the facts found, not those of the Code.[1]"

As authority for the principle of interpretation to which we have adverted, we referred to the following:

At the hearing, counsel for one of the trade associations interested in S. Con. Res. 38 (Mr. Hiss) first denied that any authority had been cited by us (Tr. p. 156). After the above authorities had been mentioned, he then sought to maintain that an agreement entered into on behalf of the United States by the President could be modified unilaterally if it had been executed upon the basis of the President's constitutional authority, whilst presumably this could not be done if it had been based upon other domestic sources of power, such as through the domestic treaty process or through legislation prior or subsequent to its execution. He also sought to convey the impression that the time when the international agreement was entered into altered the interpretative principle specified in the Restatement.

A reading of the cited portions of the Restatement will make clear that he was wrong on all counts, if the Restatement represents a fair statement of American law on the subject, which I believe it does. Neither the flat statement of the Restatement's black-letter rule itself, nor any of its comments, nor anything else in the Restatement, suggests that this interpretative rule is affected by any of

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[1] See *Restatement of the Law, Second, Foreign Relations Law of the United States* (American Law Institute, 1965) Secs. 1, 3(3), and Comment j. to Sec. 3. Section 3(3) states that, "If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law." Section 1 defines "international law" to mean those rules of law applicable to a state or international organization "that cannot be modified unilaterally by it." After July 1, 1968, the International Anti-Dumping Code will contain rules of law applicable to the United States in its relations with other States which "cannot be modified unilaterally by it." The fact that it is an executive agreement, made by the President under his own authority, makes it no less binding upon the United States in this regard as an internationaol obligation (Sections 122, 131). See also *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804); *Lauritsen* v. *Larsen*, 345 U.S. 571, 578 (1952).

the circumstances to which he refers. The reason why the Restatement did not consider the rule to be changed by any such circumstances is the same as that for the rule itself. Throughout this discussion it must be recalled that we are here talking about international obligations which have *not* been made part of our domestic law.

The United States subjects itself to international legal obligations in two ways, through explicit agreement on its part, in the form of international agreements voluntarily assumed through execution by the President on behalf of our country; or implicitly through the operation of customary international law rules to which our country has tacitly agreed through conformity of its conduct over a sufficient period of time and under such circumstances as to lead to the conclusion that the rule was accepted as obligatory. The first kind—explicit agreements—are set forth in specific agreed-upon language in negotiated instruments, designed to record mutual obligations of the parties and to achieve a balancing of their interests in a fair and even-handed way.

The second kind—those established through customary law, are more likely to be expressed in broad, less specific terms, and hence to be more difficult to establish, both as to their existence (has there been the necessary consensus to establish the rule as customary law?), and their precise scope or coverage.

Whatever the domestic source of the President's authority to create or declare on behalf of the United States an international obligation in an international agreement—whether it be his constitutional authority (see *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304) acting on his own, or the domestic treaty-making process involving Senate consent, or advance authorization by Act of the whole Congress, or subsequent approval by Act or Joint Resolution of the whole Congress—in the first kind of situation—the specific agreement—the rule is stated in relatively precise terms, in an agreement to which the United States is bound by the pledged word of its Chief Executive, speaking for the country. So long as that agreement exists—until it is terminated or denounced—the United States must honor it if it expects others to respect their obligations to us in turn and, if it otherwise places value upon reliable contractual system as an aid to sensible international relationships. The United States can no more legally modify the terms to its advantage unilaterally during the existence of the agreement than Jones can on his own cut his rent payments from $100 to $50 per month, or Smith can on his own require $200 instead of $100, during the one-year lease in which they had both agreed to $100 per month.

The situation has to be the same legally under the second kind of rule—the customary international law rule—even though such rules are harder to establish and define, for otherwise any legal obligation would rest on a slender reed, if any—whether a country found it convenient to do what it promised.

Whether or not a domestic statute was enacted before or after the creation or declaration of an international obligation binding the United States, whether that obligation, not having the status of domestic law, was assumed pursuant to the President's constitutional authority or through other methods, is likewise irrelevant to the consideration that the United States should not *unnecessarily* be thrown into a situation whereby it must violate its international obligations.

That is the reason for the rule of the Restatement—to avoid, if one can reasonably do so, interpreting a domestic law of the United States so as to be in conflict with a subsisting international obligation of the United States. It is no less a violation of our pledged international obligation whether that obligation rests domestically upon one or another of the sources of the agreement-making power. If anything, the customary international law rule would rest upon less firm consensual underpinnings than those founded on specific international agreements.

That the Restatement's unqualified interpretative rule is sound appears also from certain additional considerations, one internal to it, and one external. Internally, it is noteworthy that the Restatement's rule is that if a domestic law "may be interpreted *either* in a manner consistent with international law *or* in a manner that is in conflict with international law" (emphasis added), then a United States court "will interpret it in a manner that is consistent with international law." Any idea that the Restatement's authors meant that a court, or an administrative body, is required or permitted to "torture" the construction of a domestic law in order to make it appear to conform to an international agreement, rather than fairly and reasonably to interpret it, is an obvious and an egregious error. That it should have been advanced by one who attended classes of mine would be painful but for the circumstances that no law school holds teachers, and few teachers hold themselves, fully responsible for all of the

students who sleep or are otherwise in constructive non-attendance! The Restatement makes clear that it is only if a fair and reasonable interpretation of the Act can render it consistent with the Code that one should adopt it.

External to the Restatement's rule, but important to it, is the remedy in the event that the Congress considers nonetheless that the application of the Restatement's rule will result or has resulted in determinations distasteful to it. Congress can change the domestic law so as to avoid or overturn the distasteful determination. If and when it does, the result is conclusive—the United States is then thrown into a violation of its international obligation, from which predicament the President must extricate us either through denunciation of the agreement of which the obligation was a part, or through renegotiation, or in other suitable diplomatic ways. This would be understood, if not enthusiastically welcomed, as part of the perpetual problem of accommodation between those interests of a country which are more internal and those which are more external. In an era when all countries have both interests, the Restatement's rule strikes a balance which I believe to be sound law, realistic, and consistent with America's national interest.

The Supreme Court cases cited by Commissioner Thunberg and me illustrate and support the Restatement's rule. Indeed, the latest case, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), may properly be characterized as an illustration and even as an extension of the Restatement's rule. In that case, Mr. Justice Clark, speaking for the Court which decided the case unanimously, held that a domestic statute, the National Labor Relations Act, had not been intended by Congress to apply to a Honduran flag vessel, owned by American interests, manned by a foreign crew, which plied regularly to and from American ports, even though there was no doubt that Congress had constitutional power to do so, and even though the jurisdictional provision of the Act was expressed in language which indicated that Congress had intended to exercise fully its constitutional power.

The Court adverted to the "admonition of Mr. Chief Justice Marshall in *The Charming Betsy*, 2 Cranch 64, 118 (1804), that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .'" It mentioned an article in a treaty with Honduras, and a rule of customary international law that the law of the flag state "ordinarily" governs the internal affairs of a ship, but it did not argue that these amounted to clear and relevant international obligations of the United States which were inconsistent with an assertion of jurisdiction by the Congress in the Act, and that such an assertion would throw us into a violation of law situation. Indeed, the holding of the Court was couched in terms which precluded the application of the statute to vessels of countries with which the United States was not in any relevant treaty relationship. Rather, the Court stressed a different kind of "highly charged international circumstances", flowing from dual regulation of the labor relations on the Honduran vessel by two countries:

"The possibility of international discord cannot therefore be gainsaid. Especially is this true on account of the concurrent application of the Act and the Honduran Labor Code that would result with our approval of jurisdiction. Sociedad, currently the exclusive bargaining agent of Empresa under Honduran law, would have a head-on collision with N.M.U. should it become the exclusive bargaining agent under the Act. This would be aggravated by the fact that under Honduran law N.M.U. is prohibited from representing the seamen on Honduran-flag ships even in the absence of a recognized bargaining agent. Thus even though Sociedad withdrew from such an intramural labor fight—a highly unlikely circumstance—questions of such international import would remain as to invite retaliatory action from other nations as well as Honduras."

The Court therefore interpreted the jurisdiction language of the Act to exclude coverage of the vessel since, under the circumstances, it found that it was difficult to believe that Congress had "clearly expressed" an "affirmative intention" to cover such cases despite the use of the widest jurisdictional language in the Act. Contrary arguments "should be directed to the Congress rather than to us."

I think that it is fair to say that the Court's opinion in *McCulloch* v. *Sociedad Nacional* represents an illustration and even an extension—what lawyers call an *a fortiori* case—of the Restatement's interpretative principle.

* * *

At one point in the June 27 hearings, it was suggested (Tr. pp. 156–157) that Mr. Hiss, of the law firm representing an interested trade association, and I research the authorities and render an opinion. Since the law firm is clearly an

interested party, and since I may have become so, at least on the matter of legal interpretation, by virtue of our March 8 views and this letter, would it not be appropriate for the Committee to ask outsiders—knowledgeable and disinterested lawyers of acknowledged standing—for their opinions?

I would suggest a reasonable selection from among the following knowledgeable persons:

(1) the Reportorial Staff of the American Law Institute's Restatement, comprising these well-known American international law authorities: Adrian S. Fisher Chief Reporter, former Legal Adviser, Department of State; Covey T. Oliver; I. N. P. Stokes; Joseph M. Sweeney, presently Dean of Tulane Law School;

(2) the Advisory Committee of the Restatement, comprising these knowledgeable persons: Robert Amory, Jr.; William W. Bishop, Jr.; Robert R. Bowie; John G. Buchanan; R. Ammi Cutter; Eli Whitney Debevoise; Alwyn V. Freeman; George Winthrop Haight; John B. Howard; James N. Hyde; Philip C. Jessup; Joseph E. Johnson; Milton Katz; Archibald King; Monroe Leigh; Brunson MacChesney; Herman Phleger; Louis B. Sohn; John R. Stevenson; and

(3) the Council of the American Law Institute consisting of the following distinguished lawyers: Dillon Anderson, Houston, Texas; Francis M. Bird, Atlanta, Georgia; Charles D. Breitel, New York, N.Y.; Howard F. Burns, Cleveland, Ohio; Homer D. Crotty, Los Angeles, Calif.; Norris Darrell, N.Y.; Edward J. Dimock, N.Y., N.Y.; Arthur Dixon, Chicago, Ill.; Gerald F. Flood, Philadelphia, Pa.; Henry J. Friendly, New York, N.Y.; Edward T. Gignoux, Portland, Maine; H. Eastman Hackney, Pittsburgh, Pa.; Laurance M. Hyde, Jefferson City, Mo.; William J. Jameson, Billings, Mont.; Joseph F. Johnston, Birmingham, Ala.; Edward H. Levi, Chicago, Ill.; William B. Lockhart, Minneapolis, Minn.; Ross L. Malone, Roswell, N.M.; William L. Marbury, Baltimore, Md.; Carl McGowan, Washington, D.C.; Charles M. Merrill, San Francisco, Calif.; Robert N. Miller, Washington, D.C.; Timothy N. Pfeiffer, New York, N.Y.; Walter V. Schaefer, Chicago, Ill.; Bernard G. Segal, Philadelphia, Pa.; Eugene B. Strassburger, Pittsburgh, Pa.; Roger J. Traynor, Berkeley, Calif.; Harrison Tweed, New York, N.Y.; John W. Wade, Nashville, Tenn.; Lawrence E. Walsh, New York, N.Y.; Raymond S. Wilkins, Boston, Mass.; Charles H. Willard, New York, N.Y.; Laurens Williams, Washington, D.C.; John Minor Wisdom, New Orleans, La.; Charles E. Wyzanski, Jr., Boston, Mass.

To this list might be added two elder statesmen from Mr. Hiss' law firm, whose reputation and ability would grace this list, and whose integrity is bounded by no parochial commercial interests—Mr. Dean G. Acheson and Mr. John Lord O'Brian.

I believe the views of a representative selection of such persons would command the attention of all and enlist the confidence of many. I should welcome them eagerly.

I would appreciate it if this letter could be made a part of the record of the hearings.

Sincerely yours,

STANLEY D. METZGER.

SUPPLEMENTARY MATERIAL PROVIDED BY EXECUTIVE BRANCH

Following the hearing on June 27, 1968, the Executive Branch provided supplementary material which is set out below and which concerns—

(1) Price revision policy of the Department of the Treasury;
(2) Judicial test of consistency of Code with U.S. law;
(3) Inapplicability of *Oappa* case to the Code;
(4) Authority under which the Code was negotiated; and
(5) Implementation of the Code by the United Kingdom.

EXPLANATION OF TREASURY PRACTICE IN CLOSING OUT "DUMPING" CASES WHEN THERE HAS BEEN PRICE REVISION

The question has been raised as to what right Treasury has to close out cases without reference to the Tariff Commission when there has been price revision (or—which accomplishes the same result—an end put to exports). Critics of this procedure have urged that any case involving exports to the United States at less

than home price should be considered from the standpoint of injury, and, if injury is found, a dumping finding should be made.

The theory justifying the closing out of dumping cases after price revision is that the complainant has obtained the relief he was after—he wanted to stop dumping and the dumping has been stopped. However, Treasury has no requirement that a case be closed on price revision. Nor does the International Code, which merely states in Articles 7(a) that antidumping proceedings "may" be terminated on price revision. A substantial number of price revision cases have been sent to the Tariff Commission, of which the following are examples.

Canadian cement, 24 Fed. Reg. 10267 (1960)
French rayon staple fiber, 24 Fed. Reg. 10092 (1959)
French rayon staple fiber, 26 Fed. Reg. 4428 (1961)
Belgian rayon staple fiber, 26 Fed. Reg. 4477 (1961)
Canadian nepheline syenite, 25 Fed. Reg. 8394 (1960)
Canadian nepheline syenite, 26 Fed. Reg. 956 (1961)
Canadian peat moss, 29 Fed. Reg. 4843 (1964)
Dominican cement, 27 Fed. Reg. 3872 (1962)
Canadian vital wheat gluten, 29 Fed. Reg. 5921 (1964)
Japanese white portland cement, 29 Fed. Reg. 9636 (1964)
Japanese titanium dioxide, 31 Fed. Reg. 7495 (1966)

As a rule it can be said that Treasury would be willing to send any price revision case to the Tariff Commission if the complainant so desires. But the fact is that in practically every case which has so far been closed out on a price revision basis, this was done with the complainant's consent, either expressed or implied.

Treasury's practice in closing out cases when there has been price revision was encouraged by the Tariff Commission decision in the first French rayon staple fiber case, 24 Fed. Reg. 10092 (1959) in which it was stated after noting the price revision, and the complainant's lack of interest in pursuing the case. "The Commission is of the view that a case of this kind should not be presented to the Tariff Commission for determination of injury." In due course, as a result of this statement, Treasury began to decrease the number of price revision cases referred to the Commission and increase the number closed out without such reference.

In the French rayon staple fiber the Commission adopted as its view a statement that "the Antidumping Act was intended to be preventive rather than punitive." Such a view is consistent with the Report of the Secretary of the Treasury to the Congress on the Operation and Effectiveness of the Antidumping Act dated February 1, 1957, which formed the basis for the 1958 amendments to the Antidumping Act (see pages 16, 17, Hearings before the House Committee on Ways and Means on Amendments to the Antidumping Act, July 29, 1957). It is consistent also with testimony of Treasury Assistant Secretary Kendall during the presentation of the legislation which was passed in 1958 (Hearings as above, pp. 43, 44). In Czech Leather Work Shoes, 31 Fed. Reg. 10906 (1966), the Tariff Commission stated that sales at less than fair value are "not made unlawful by the Antidumping Act. They are subject to additional duty if they are found to be injurious by the Tariff Commission." Further Commission decisions note that dumped imports are not *ipso facto* injurious (German Rayon Staple Fiber, 26 Fed. Reg. 6537 (1961)). They are not *malum in se* (French Titanium Dioxide, 28 Fed. Reg. 10467 (1963)), nor do they involve even a presumption of injury (Japanese White Portland Cement, 29 Fed. Reg. 9636 (1964)).

With this background in mind, it can be seen that there is a real difference between the civil Antidumping Act on the one hand, and criminal laws such as the 1916 Antidumping Law or the Anti-Trust Law, on the other. With a criminal law it might be questionable to allow dismissal once the complainant withdrew his charge, although with our crowded courts some cases are thus "nol. pros'd". But under the Antidumping Act withdrawal of the complaint after price revision should ordinarily justify closing the case forthwith rather than sending it to the already overburdened Tariff Commission.

Indeed there is serious doubt as to what if any advantage would accrue from sending these cases to the Commission in the interest of tougher enforcement of the law. Once the importer is on notice that appraisement has been withheld, the natural tendency is to cut down on imports which can subject him to dumping duties. Consequently the amount of the duties, if there is a determination of injury and a finding of dumping, can be minimal or nonexistent, and the dumping investigation prolonged to no useful purpose.

It is perhaps fair to criticize Treasury for not having up to now spelled out in more detail the reasons in each price revision case for either closing it out or sending it to the Tariff Commission despite the revision. In one of the last of such cases sent to the Commission, the Treasury Department determination of sale at less than fair value does spell out the reasons, as follows:

"The November 24, 1965, Notice of Intent was based on the theory that there had been price revisions and cessation of shipments which brought the case within the purview of 19 CFR 14.7(b)(9). This provision of the regulations is not construed to prevent the Secretary of the Treasury from making determinations of sales at less than fair value where the sales to the United States which are complained of, made before the price revision or cessation of shipments, are considered sufficiently substantial so as to constitute "hit and run" dumping. Under the circumstances of this case, it is determined that sufficient evidence is present in connection with the sales made prior to the price revision to justify referring the case to the United States Tariff Commission for a determination as to whether or not such sales injured an industry in the United States."

(Japanese Titanium Dioxide, cited above, Tariff Commission found no injury in this case). Treasury will undertake in future cases to give in similar detail its reasons for the disposition.

A table showing a breakdown of the cases closed out on a de minimis, price revision, or cessation of sales basis for January 1, 1955 through December 31, 1967, is attached.

Table showing dumping cases closed on a de minimis, price revision or cessation-of-sales basis from Jan. 1, 1955, through Dec. 31, 1967

De minimis	27
Price revisions	59
Cessations of shipments	15
Grand total	101

NOTE.—Current search of the records of "dumping" cases discloses there were 101, not 89, cases which were closed on a de minimis, price revision or cessation of shipments basis during the period Jan. 1, 1955, through Dec. 31, 1967.

JUDICIAL TEST OF CONSISTENCY OF INTERNATIONAL ANTIDUMPING CODE WITH UNITED STATES LAW

No one has expressed any doubt about an importer's ability to obtain a judicial test in the United States Customs Courts of questions involving consistency of the International Antidumping Code with the United States law (See 19 U.S.C. 1501 and 1514 and 28 U.S.C. Chs. 93 and 95).

It cannot be stated categorically that the Customs Courts would or would not have jurisdiction over actions brought by domestic producers to challenge the consistency of the Code with the Act. As far as we are able to determine, no domestic producer has ever attempted to invoke the jurisdiction of the Customs Court under 19 U.S.C. 1516 in a dumping proceeding. The Court, therefore, has never had occasion to pass on the question of jurisdiction.

Absent a decision by the Customs Courts on the issue, however, there is no apparent reason to doubt that the Court does have such jurisdiction, bearing in mind the issue of consistency of the Code with the statute would raise questions relating to whether the administrative action was taken within the framework of the statute. Section 210 of the Antidumping Act, 1921, itself appears to provide that the Customs Courts shall have the same jurisdiction, powers, and duties in connection with appeals and protests relating to dumping duties as those courts have in the case of appeals and protests relating to customs duties under existing law. And section 516 of the Tariff Act of 1930 (19 U.S.C. 1516) gives domestic producers the right to contest in the Customs Courts administrative decisions relating to appraised value and classification of imported merchandise.

A domestic cement producer brought an action for a declaratory judgment and injunctive relief in the United States District Court for the District of Columbia in connection with a proposed negative determination of the Treasury Department that cement from Norway was not being sold at LTFV. In affirming the District Court's dismissal of the action, the United States Court of Appeals for the District of Columbia Circuit observed in *North American Cement Corp. v. Anderson*, 284 F. 2d 591 (D.C. Cir., 1960), "The District Court dismissed the

complaint for lack of jurisdiction, on the ground that the plaintiffs had an adequate remedy in the United States Customs Court." The appellate court went on to refer to 19 U.S.C. 1516 (relating to appeal or protest by American producers) and *rejected* the appellant North American Cement Corporation's argument that, since section 1516 was not passed until after the Antidumping Act was enacted, the section was inapplicable to dumping proceedings.

While the Court of Appeals did not, and indeed could not, presume to decide the scope of the jurisdiction of the Customs Court in relation to challenges brought by domestic producers against official actions in dumping proceedings—only the Customs Court can decide this question initially—neither can the Court of Appeals opinion be read as an expression of view that the Customs Court does not have jurisdiction. Quite the contrary, a fair reading of the opinion suggests that the Court of Appeals for the District of Columbia believed that the Customs Court does have jurisdiction over domestic producers' suits involving official dumping decisions brought in appropriate proceedings.

Inapplicability of Capps Case

During the hearing, reference was made to the decision of the United States Court of Appeals for the Fourth Circuit in the *Capps* case—*United States* v. *Guy W. Capps, Inc.* (204 F. 2d 655 (4th Cir., 1953)).

That case involved an executive agreement in which Canada undertook to limit exports of potatoes to the United States at a time when the United States Government was supporting the price of potatoes through a purchase program. The President entered into the agreement as an alternative to utilizing the procedure of section 22 of the Agricultural Adjustment Act of 1933, as amended by section 3 of the Agricultural Act of 1948.

The holding of the court appears to be in the following statement:

"We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress." (pp. 659–660)

There is no such question involved in the International Antidumping Code. The Code does not purport to set up its own alternative standards outside the scope of the Antidumping Act. The Code parallels the Act and is in the nature of a regulation under it. The Act, together with the Code, will be fully applicable to any future dumping actions. The holding of the *Capps* case is therefore inapplicable to the Code.

In appealing the *Capps* case to the Supreme Court, the United States argued that the executive agreement with Canada constituted a separate action which was validly undertaken pursuant to the President's concurrent constitutional authority and which carried out the purposes of section 22 through the more expeditious means of immediate Canadian control of exports.

In its opinion, the Supreme Court stated that it had granted certiorari "to determine whether the significant constitutional and statutory questions discussed by the Court of Appeals were necessary for the decision of the case and, if so, to give them consideration." (*United States v. Guy W. Capps, Inc.*, 348 U.S. 296, 301 (1955)). After deciding the case on other grounds, the Supreme Court stated the following at the end of its opinion:

"In view of the foregoing, there is no occasion for us to consider the other questions discussed by the Court of Appeals. The decision in this case does not rest upon them."

Accordingly, the Supreme Court undertook to review the opinion of the Court of Appeals on the constitutional questions, if a determination of these questions was necessary for the disposition of the case. Having found that this was not necessary, it deliberately chose not to affirm or even to give weight to the holding of the *Capps* case. Nor has it done so in any later case.

Authority Under Which Code Was Negotiated

There follow six letters, enclosing legal memoranda, which were exchanged in 1966 between the Cement Industry Committee for Tariff and Antidumping and the Office of the Special Representative for Trade Negotiations concerning the authority under which the Code was negotiated.

Cement Industry Committee for Tariff & Antidumping,
Washington, D.C., July 21, 1966.

Hon. Christian A. Herter,
Special Representative for Trade Negotiations,
Washington, D.C.

Dear Mr. Herter: Enclosed is the memorandum referred to in our telegram concerning the legal invalidity of the proposed hearings on the negotiation of an international antidumping code. We think that the legal authority supporting our position on each of the three points is quite clear. If you have any questions on any of them, however, please feel free to contact Donald Hiss of the Washington, D.C. firm of Covington & Burling, who is serving as counsel to our Committee.

Sincerely yours,

John H. Mathis, *Chairman.*

Memorandum Re Legal Invalidity of Proposed Hearings on an International Antidumping Code

On July 15, 1966 the Office of the Special Representative for Trade Negotiations announced that hearings have been scheduled for September 12, 1966 to receive comment by United States industry, labor and other members of the public on the negotiation of an international antidumping code. These negotiations have already been started by the United States representatives at the current Kennedy Round of trade negotiations in Geneva under the auspices of the General Agreement on Tariffs and Trade.

This memorandum analyzes the legal authority for holding such hearings or for conducting such negotiations. It concludes first that there is no legal authority for the negotiation of an international antidumping code under the Trade Expansion Act of 1962, and such negotiations are in clear defiance of a resolution recently passed by the United States Senate. It concludes second that even assuming there were legal authority for the negotiation of an international antidumping code under the Trade Expansion Act of 1962, there has been a total failure to comply with the requirements of the Act. It concludes third that in any event, the proposed hearings will be meaningless because no draft code or frame of reference has been provided on which comments or constructive criticism could be made.

1. There Is No Legal Authority for the Negotiations of an International Antidumping Code

The authority of the Office of the Special Representative for Trade Negotiations, which announced the public hearings on an international antidumping code, derives solely from the Trade Expansion Act of 1962. Under that Act, the President and his representatives were given authority to negotiate trade agreements concerning "existing duties or other import restrictions." The Act makes it clear that this authority concerns only tariff duties or other import restrictions (such as quotas) relating to specific articles of merchandise. There is no authority to negotiate trade agreements with respect to non-tariff legislation, such as the Antidumping Act of 1921, which is not a tariff act and which does not relate to specific articles of merchandise.

The Antidumping Act is an integral part of the unfair trade laws of the United States. It is not designed to impose tariff duties upon specific articles of merchandise but rather to prevent unfair price discrimination by foreign sellers in their exports to the United States. As early as 1916 the Congress of the United States recognized that the "dumping" of goods in this market was an unfair trade practice, and made the practice punishable by criminal penalties and the subject of civil treble damage actions. 15 U.S.C. § 72.

The United States Senate has recently reaffirmed in Senate Concurrent Resolution 100 that there is no authority in the Trade Expansion Act of 1962 for any negotiations concerning antidumping. The Resolution states it is the sense of the Congress that no trade agreement or other arrangement under the Trade Expansion Act of 1962 should be entered into except in accordance with legislative authority delegated by Congress. The report filed by the Senate Finance Committee, recommending passage of the Resolution, concluded as follows:

"The Committee on Finance has been disturbed over reports that the current Kennedy Round of tariff negotiations may be broadened to include U.S. offers of concessions with respect to matters for which there is no existing delegated authority . . .

"It has been reported that one area in which our negotiators may offer concessions concerns the American selling price method of evaluation . . .

"Another area may involve the treatment of 'dumped' goods by the country in which the dumping occurs. This problem concerns unfair trade practices in a domestic economy and it is difficult for us to understand why Congress should be bypassed at the crucial policymaking stages, and permitted to participate only after policy has been frozen in an international trade agreement."

It is thus clear that the negotiation of an international dumping code would be without legal authority and in clear defiance of the Senate Resolution. An international antidumping code would require revisions or amendments in the Antidumping Act of 1921, and this can be legally accomplished only by the Congress. This raises the alarming prospect that concessions will be made concerning an unfair trade law vital to the protection of United States industry without the prior deliberation and consent of the Congress as to whether such negotiations should be undertaken.

2. The Proposed Negotiation of an International Antidumping Code Fails to Comply with the Requirements of the Trade Expansion Act of 1962

Even assuming that it conceivably could be concluded that authority to negotiate an international antidumping code is provided by the Trade Expansion Act of 1962, there has been a total failure to comply with the requirements of the Act.

Section 221 of the Act requires the President to publish and furnish the Tariff Commission with lists of articles which may be the subject of any proposed trade agreement. Within six months after receipt of such a list, the Tariff Commission is required to advise the President with respect to the probable economic effect of the proposed trade agreement. There has been submitted to the Tariff Commission no list or directive which directs the Tariff Commission to advise the President as to the probable economic effect of an international antidumping code modifying the Antidumping Act of 1921. Hence, there has been no compliance with this mandatory requirement of the Act.

Section 221 of the Act also requires the Tariff Commission to advise the President on the probable economic effect on domestic industries of modifications of tariff duties or other import restrictions on specific *articles*. The Tariff Commission has not done this with respect to any change in the Antidumping Act of 1921. To do so, the Commission would have the impossible task of advising on the probable economic effect on practically every industry in the United States since antidumping duties can be assessed on all articles of merchandise entering this country as long as the unfair trade practices which the Act encompasses are alleged and proved in a fair and open hearing.

The language of Section 221 clearly does not contemplate trade agreements concerning antidumping, and in any case its terms have not been complied with. Any antidumping code resulting from the negotiations would hence be illegal.

3. No Frame of Reference Has Been Provided Which Would Permit Meaningful Comments or Dialogue on a Proposed International Antidumping Code

The stated purpose of the hearings announced for September is to elicit from American industry, labor and other members of the public their opinions on an international antidumping code. The U.S. negotiators at the Kennedy Round have already begun such discussions with representatives from the other member countries of GATT. Thus, any opinions expressed in the September hearings would only come well after negotiations and discussions have already begun.

With such discussions having already begun, at the very least the Special Representative's Office should have provided those interested in testifying at the September hearings with the current draft of such an international antidumping code or with an identification of those antidumping standards or procedures whose modification is being considered. Lacking either of these, domestic

interests will have no frame of reference which would permit any meaningful comment or constructive criticism. Under these circumstances the hearings can hardly be more than an attempt to appease the Senate and others who have criticized the Special Representative's attempt to interject into the Kennedy Round negotiations a subject which is clearly beyond his authority.

COVINGTON & BURLING,
Counsel to Cement Industry Committee for Tariff & Antidumping.

OFFICE OF THE SPECIAL REPRESENTATIVE
FOR TRADE NEGOTIATIONS,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., August 17, 1966.

Mr. JOHN MATHIS,
Chairman, Cement Industry Committee for Tariff & Antidumping,
Washington, D.C.

DEAR JOHN: In Governor Herter's absence, thank you for your recent letters and telegram concerning the possibility of negotiations on an international antidumping agreement and the hearing called by the Trade Information Committee (TIC) on this issue.

In your letter of July 21, 1966, following your telegram of that date, you enclosed a memorandum which raises a number of questions regarding the President's authority to enter into negotiations on an international antidumping agreement through the Special Representative for Trade Negotiations.

I am enclosing for your consideration a response prepared by the General Counsel of this Office. In substance, this response concludes that the President has clear authority to enter into antidumping negotiations through the Special Representative, that the procedural requirements of the Trade Expansion Act of 1962 are inapplicable to such a negotiation, and that the TIC hearing is legally valid by Executive Order.

Aside from such legal considerations, I shall like to emphasize the following five points—about which there has been some confusion lately:

1. To date in Geneva the United States has been engaged in purely exploratory discussions of the issues involved in dealing with dumping. Neither the United States nor any other country has taken a formal position on any issue.

2. The GATT Secretariat is currently preparing a paper which will draw upon these discussions and outline under appropriate headings the possible elements of an antidumping agreement. This paper is designed to facilitate consideration by the countries concerned of the possibility of negotiating such an agreement and by their unanimous decision will in no sense represent a draft agreement.

3. The TIC hearing has been called for the explicit purpose of soliciting the views of interested persons regarding any possible antidumping agreement. The notice of this hearing identifies all of the basic areas which would have to be dealt with in negotiating such an agreement.

4. No formal position will be taken by the United States on any issue relating to a possible antidumping agreement until after the views expressed at the TIC hearing have been fully considered and approval has been given by the President.

5. Any antidumping agreement would be evaluated on the basis of its intrinsic merits and would be concluded separately from the overall Kennedy round agreement.

I would add that the TIC hearing is, in our judgment, fully responsive to your request in your letter of July 6, 1966, for an opportunity to be heard and to give us the benefit of your experience and counsel regarding antidumping. Moreover, I assure you that we are available at any time to meet with you and other members of your Committee to discuss any issue relating to the possibility of negotiating an international antidumping agreement.

I am taking the liberty of sending copies of this letter, together with its enclosure, to our Congressional Delegates as well as to other members of the Congress who have requested our comments on the memorandum enclosed in your letter of July 21, 1966.

Sincerely yours,

WILLIAM M. ROTH,
Acting Special Representative.

OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS

This memorandum is in response to a memorandum, dated July 21, 1966, prepared by counsel to the Cement Industry Committee for Tariff and Antidumping. The Cement Industry Committee memorandum raises a number of questions regarding the President's authority to enter into international negotiations on antidumping, through the Special Representative for Trade Negotiations.

BACKGROUND

During the past several months, as part of the general discussions on nontariff barriers in the Kennedy Round of trade negotiations, discussions have been taking place in Geneva regarding Article VI of the General Agreement on Tariffs and Trade (GATT) and the content and administration of national antidumping laws. Other countries have criticized aspects of the U.S. antidumping law. The United States, in turn, has pointed to difficulties encountered by U.S. exporters in the application of foreign antidumping laws, and has expressed concern that such laws will increasingly be used as unjustifiable non-tariff barriers to trade. As a consequence of these discussions, the United States and the other countries concerned have indicated interest in a possible international antidumping agreement, which would elaborate and perhaps alter the present provisions of Article VI of the GATT. To assist the United States in preparing its position on this question, public hearings have been set for September 12, 1966 by the Trade Information Committee (TIC) in the Office of the Special Representative for Trade Negotiations.

SUMMARY OF CONCLUSIONS

After consideration of the questions raised in the Cement Industry Committee memorandum, we have reached the following conclusions:

1. The President has clear Constitutional authority to enter into negotiations looking toward a possible international agreement on antidumping.

2. Both as a matter of Constitutional law, and under the Trade Expansion Act of 1962 (TEA), it is clear that the President may authorize the Special Representative to enter into negotiations on an international antidumping agreement.

3. If any international antidumping agreement is concluded which envisions amendments to the U.S. Antidumping Act of 1921, the President would have to seek legislation from the Congress. The President has no statutory authority to amend the 1921 Antidumping Act pursuant to a trade agreement. Consequently the procedural requirements of sections 221–224 of the TEA, including publication of lists of articles whose duties may be reduced in trade agreements and Tariff Commission hearings and advice, are inapplicable.

4. Because it is not clear that any international agreement would entail amendments to the 1921 Antidumping Act, the concerns expressed in the Senate Finance Committee report accompanying S. Con. Res. 100 are not wholly opposite and, in any case, would be fully met in the conduct of any negotiations.

5. The public hearing of the Trade Information Committee (TIC) is clearly legal, being expressly authorized by Executive Order.

6. The Trade Information Committee (TIC) hearings will serve a useful function by providing a forum in which interested parties can present their views on antidumping so that those views may be taken into account if any international antidumping agreement is negotiated.

DISCUSSION

1. Under the Constitution, the President has the authority to conduct foreign relations. It is clear that the President may exercise this authority to ener into agreements with foreign nations, such as an international antidumping agreement. The Cement Industry Committee memorandum does not appear to question the existence of this clear Constitutional authority.

Moreover, the President has expressly given to the Special Representative for Trade Negotiations the responsibility not only of advising him with respect to non-tariff barriers but also of assisting him in the negotiation of trade agreements which rest upon his Constitutional authority. This the President has done by sections 3(b) and 1(b) of Executive Order No. 11075, as amended (48 CFR 1.3(b) and 1.1(b)).

2. The Cement Industry Committee memorandum states that the "authority of the Office of the Special Representative for Trade Negotiations . . . derives solely from the Trade Expansion Act of 1962," and that this Act gives the President authority only to "negotiate trade agreements concerning 'existing duties or other import restrictions'" but gives no negotiating authority regarding a non-tariff trade issue such as antidumping. From this premise, the memorandum argues that the Special Representative cannot enter into negotiations, at the direction of the President, on a possible international agreement on antidumping. This argument is incorrect.

The TEA in no way restricts the President from exercising his Constitutional prerogative to enter into negotitions with foreign countries regarding any subject affecting international trade. Nor does the TEA restrict the functions which the President may delegate to the Special Representative regarding such negotiations. Indeed, section 241(a) of the TEA (19 U.S.C. 1871 (a)) explicitly provides that the Special Representative shall be the chief representative of the United States for negotiations under the TEA "and for such other negotiations as in the President's judgment require that the Special Representative be the chief representative of the United States."

Moreover, in the exercise of his Constitutional authority to conduct foreign relations, the President must necessarily be free to secure assistance from any source he chooses. Pursuant to this authority, section 3(a) of Executive Order 11075, as amended (48 CFR 1.3 (a)), provides that the Special Representative for Trade Negotiations shall have such functions as the President may direct from time to time, in addition to those functions conferred by the TEA and the Executive Order.

Thus, as a matter of both Constitutional and statutory law, it is clear that the President may authorize the Special Representative for Trade Negotiations to negotiate an antidumping agreement.

3. Under the TEA, the President is authorized to modify "duties and other import restrictions" pursuant to trade agreements. In our judgment, this authority does not permit the President to amend the Antidumping Act of 1921, purusuant to a trade agreement. If the President entered into an international agreement which envisioned amendments to the 1921 Act, only Congress could enact such amendments. (If an international agreement was limited to changes which did not require amendment of the 1921 Act, the Executive could implement the agreement without Congressional action.)

The Cement Industry Committee memorandum states that consideration of an international antidumping agreement must be preceded, under section 221 of the TEA, by "publication of lists of articles which may be the subject of any proposed trade agreements" and Tariff Commission hearings and advice to the President. This argument is incorrect.

The prenegotiation requirements of section 221 of the TEA apply regarding "articles which may be considered for modification or continuance of United States duties or other import restrictions. . . ." As noted above, the Presidential authority to alter "duties or other import restrictions" pursuant to a trade agreement does not apply to the Antidumping Act of 1921. Since this authority does not apply to the Antidumping Act, the statutory prenegotiation requirements in section 221 of the TEA also do not apply.

4. The Cement Industry Committee memorandum states that "the negotiation of an international antidumping code would be . . . in clear defiance" of Senate Concurrent Resolution 100. This Concurrent Resolution (which has not been passed by the House of Representatives and is therefore not in effect) expresses the sense of Congress that the President should only enter into trade agreements in the Kennedy Round which would not require subsequent Congressional implementation. With regard to an antidumping agreement, the Senate Finance Committee Report notes concern that Congress would "be bypassed at the crucial policymaking stages, and permitted to participate only after policy has been frozen in an international trade agreement."

Further consideration by the Executive Branch of the possibility of an international antidumping agreement, including the TIC hearing, would not be "in clear defiance" of this Senate Concurrent Resolution. It is clear that an international agreement may be concluded which would not require changes in the 1921 Antidumping Act, and such an agreement would not involve the policymaking functions of the Congress.

If, however, any agreement envisioning changes in the 1921 Antidumping Act were concluded, the interests of the Congress would be respected and the con-

cerns expressed in the Senate Finance Committee report would be met. First, the Congress would be kept fully informed at every step of any antidumping negotiation—indeed, whether or not Congressional action would be required. The September 12 TIC hearing will inform the Congress, as well as the Executive, regarding the views of interested persons. Moreover, the Congressional Delegates to the Kennedy Round would be able to observe the conduct of any negotiation in Geneva. Second, if any agreement were in fact concluded envisioning changes in the 1921 Act, the Congress would be free to accept or reject any proposed amendment to the 1921 Act based on its evaluation of the intrinsic merits of any such antidumping agreement. Any antidumping agreement will be concluded in an agreement separate from the overall results of the Kennedy Round, which Congress could accept or reject without affecting the overall Kennedy Round agreement.

5. The Cement Industry Committee memorandum asserts, without elaboration, that the proposed hearing of the TIC is legally invalid. This assertion is incorrect.

As noted above, by Executive Order No. 11075, as amended, the President has given to the Special Representative the responsibility of advising him with respect to non-tariff barriers and of assisting him in all activities related to the negotiation of trade agreements which rest upon his Constitutional authority. In discharging this responsibility, section 3(c) of this Order (48 CFR 1.3(c)) provides that the Special Representative shall, as he may deem to be necessary, draw upon the resources of bodies established by or under the provisions of the same Order. These bodies include the TIC. In addition, a TIC hearing concerning the possible negotiation of an antidumping agreement is clearly envisaged by section 3(b)(3) of Directive No. 1 (48 CFR 202.3(b)(3)), which established the TIC, and by section 2(d) itself of the TIC regulations (48 CFR 211.2(d)).

6. The Cement Industry Committee memorandum states, in effect, that "negotiations have already begun" and therefore interested persons will not be able to make meaningful comments at the TIC hearing unless they are provided "with the current draft of an international antidumping code or with an identification of those antidumping standards or procedures whose modification is being considered".

First, no negotiations on an antidumping agreement have taken place. The meetings to date in Geneva have been devoted only to exploratory discussions of substantive and procedural issues involved in dealing with dumping. These discussions have in no way committed the United States or any other country to any position on any possible provision of an antidumping agreement. Indeed, no formal position will be taken by the United States on any issue until after the views expressed at the TIC hearing have been fully considered within the Executive Branch and approval has been given by the President.

Second, there is no document in existence which is regarded by the participating countries as the draft of an antidumping agreement. The papers submitted by many countries, which have been the subject of the discussions in Geneva, were tentative and exploratory. In the light of these discussions, the GATT Secretariat is currently preparing a paper which will outline under appropriate headings the possible elements of an antidumping agreement. This latter paper is intended to facilitate consideration by the participating countries of the possibility of negotiating such an agreement. It has been expressly agreed by all that this paper would in no sense represent a draft agreement. It should be noted that, under GATT procedures, none of these papers is available for public circulation.

Third, we believe that the terms of the notice of the TIC hearing to provide an adequate frame of reference for meaningful contributions by interested persons. Paragraphs (i)–(v) of section 2 of the TIC notice (31 F.R. 9619—July 15, 1966) identify all of the basic areas which have been dealt with to date in the discussions in Geneva. In addition, these paragraphs set out some of the major subsidiary questions which must be dealt with in considering a possible antidumping agreement and which may lead to a modification of existing antidumping standards or procedures. Moreover, section 3 of the TIC notice expressly provides that additional information regarding the coverage of the hearing may be requested from the TIC. Finally, the staff of this Office is available to meet at any time with interested persons to discuss the issues which will be the subject of any possible negotiation of an antidumping agreement.

CEMENT INDUSTRY COMMITTEE FOR TARIFF & ANTIDUMPING,
Washington, D. C., August 23, 1966.

Hon. CHRISTIAN A. HERTER,
Special Representative for Trade Negotiations, Trade Information Committee, Washington, D. C.

Dear Mr. Herter: Several weeks ago I sent you a legal memorandum concerning our Committee's position that the Office of the Special Representative for Trade Negotiations has no authority to negotiate an international antidumping code.

Enclosed is a supplementary memorandum which sets forth additional support for this position on the basis of the legislative history of the Trade Expansion Act of 1962.

Sincerely yours,

JOHN MATHIAS, *Chairman.*

MEMORANDUM RE LEGISLATIVE HISTORY OF THE TRADE EXPANSION ACT OF 1962 AS IT BEARS UPON THE LEGAL INVALIDITY OF THE PROPOSED NEGOTIATION OF AN INTERNATIONAL ANTIDUMPING CODE

On July 15, 1966 the Office of the Special Representative for Trade Negotiations announced that hearings have been scheduled for September 12, 1966 to receive comment by United States industry, labor and other members of the public on the negotiation of an international antidumping code. These negotiations have already been started by the Office of the Special Representative at the current Kennedy Round of trade negotiations in Geneva under the auspices of the General Agreement on Tariffs and Trade.

This memorandum analyzes the legislative history of the Trade Expansion Act of 1962 with respect to the legal authority of the Office of the Special Representative to hold such hearings or to conduct such negotiations. The authority of the Office of the Special Representative derives solely from the Trade Expansion Act of 1962. The legislative history demonstrates clearly that there is no legal authority under the Trade Expansion Act for the negotiation of an international antidumping code. The United States Senate, in S. Con. Res. 100, recently reaffirmed that the Trade Expansion Act was not intended to and did not encompass the area of antidumping.

Even assuming that it conceivably could be concluded that authority to negotiate an international antidumping code is provided by the Trade Expansion Act of 1962, there has been a total failure to comply with the requirements of the Act. The legislative history demonstrates clearly that the negotiation of an international antidumping code is legally invalid for this failure to follow the procedural safeguards. These procedural safegurads were viewed as vital and essential to the Act since they provided the only restraint from the otherwise broad authority delegated to the President.

1. The Legislative History of the Trade Expansion Act of 1962 Demonstrates Clearly That There is no Legal Authority for the Negotiation of an Antidumping Code

An international antidumping code would necessarily require modification or revision of the Antidumping Act of 1921. Legislative history of the 1962 Trade Expansion Act understandably is meager on the relationship of this statute to the Antidumping Act since the latter clearly dealt with matters of domestic economic regulation of unfair competition that fall beyond the purview of the former.

". . . the purpose of the proposed bill (forerunner of the Antidumping Act) is to prevent the stifling of domestic industries by the dumping of foreign merchandise. . . . Over 20 years ago, by the enactment of the Sherman Antitrust Law, Congress recognized the necessity of legislation to prevent unfair methods of competition and monopoly within the United States, but effective legislation to prevent discriminations and unfair practices from abroad, to [sic] destroy [sic] competition and control [sic] prices, has not been enacted." H.R. Rep No. 479, 66th Cong., 1st Sess., 1 (1919).

However, the references that do appear demonstrate conclusively that Congress did not contemplate any implicit revision of or capacity to revise the Anti-

dumping Act in the 1962 act or within the authority delegated to the President thereunder. The Senate Finance Committee Report specifically stated:

"Section 257(h) provides that section 22 of the Agricultural Adjustment Act and import restrictions imposed thereunder shall be unaffected by the bill. *Other laws not to be affected include the Antidumping Act* and section 303 of the Tariff Act of 1930, which relates to countervailing duties" (S. Rep. No. 2059, 87th Cong., 2d Sess. 19 (1962). [Emphasis added.]

It thus becomes clear that "special dumping duties" imposed pursuant to the Antidumping Act are not comprehended within the phrase "duty or other import restriction" found throughout the Trade Expansion Act.

An exchange between Secretary of Treasury Dillon and Congressman Utt in the Hearings Before the House Committee on Ways and Means considering the proposed 1962 act reinforces the view that, in the contemplation both of the Administration which proposed the bill, and of the Congress which enacted it into law, the Trade Expansion Act did not in any way touch upon the Antidumping Act:

"Secretary DILLON. Treasury is responsible for carrying out antidumping activities. I do not think this bill affects the antidumping legislation at all.

"Mr. UTT. I was wondering if you could point out to me where the antidumping legislation is still in force?

"Secretary DILLON. I think that is a totally separate piece of legislation. It never was part of the trade agreements legislation. It is a separate piece.

"Mr. UTT. We have several sections entitled 'Repeals'. I am wondering if any of those sections on antidumping are repealed by reference?

"Secretary DILLON. So far as I know, nothing is. I cannot give you a positive answer, but as far as I am informed, it is my understanding there is no change at all in the antidumping procedures so far as this bill is concerned." Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 2, at 897–98 (1962).

Another Administration spokesman, Secretary of Commerce Luther H. Hodges, gave broad assurances that the government would not act under the 1962 legislation so as to undermine other statutory protection against unfair foreign competition:

"And I am resolved that the Government shall take no action in the field of tariff policy that will work undue hardship to U.S. industry, workers, and farmers through *unfair foreign competition.*" Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 1, at 81 (1962). [Emphasis added.]

Section 201 of the 1962 Act confers authority upon the President to modify "other import restrictions" as well as duties under specified circumstances but the legislative history suggests that the term "other import restrictions" refers primarily to quotas:

"He [the President] can also impose additional import restrictions (e.g. quotas)" H.R. Rep. No. 1818, 87th Cong., 2d Sess. 2 (1962).

"The basic grant of authority also permits the modification of existing import restrictions other than duties, while at the same time authorizing the imposition of additional import restrictions (*e.g.*, quotas)." *Id.* at 14.

Although there are occasional instances within the legislative history of efforts to expand the term "other import restrictions" beyond mere quotas, it is significant that no such effort can be found which alludes to antidumping regulations:

"What are they [other import restrictions]? Embargoes, quotas, import licenses, currency manipulations, quarantines, and a decision that goods must be delivered within 5 days after they are manufactured." 108 Cong. Rec. 18674 (daily ed. Sept. 18, 1962) (remarks of Senator Curtis).

A memorandum on the 1962 act prepared by the United States Tariff Commission and submitted to the House Ways and Means Committee suggests a very limited delegation of authority to the President to modify duties or other import restrictions. This limited authority is inconsistent with the bald assertion of power by the Office of the Special Representative for Trade Negotiations to revise or modify the Antidumping Act of 1921 even if some justification could be found for treating antidumping regulations as coming within the scope of "duty or other import restriction:"

"The existing authority to proclaim modifications of existing duties is apparently intended to permit the President to make rate and classification changes *within and subordinate to the statutory structure* of the tariff classification schedules, and not to permit him to change the scope of *any statutory provisions.*

In any event, whatever the President's ultimate authority under section 350(a)(1) may be, he has so confined his proclaimed 'modifications.' It is assumed that there would be no departure from past practice in exercising the authority under the new legislation." Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 2, at 923 (1962). [Emphasis added.]

2. The Legislative History of the Trade Expansion Act of 1962 Demonstrates Clearly That Negotiation of an International Antidumping Code Is Illegal Because the Procedural Safeguards Provided by the Statute Have Not Been Followed

Apart from the fact that there is no authority under the 1962 act for the Proposed Hearings on an International Antidumping Code, these hearings are legally invalid for the additional reason that statutorily imposed procedural safeguards have not been followed. The legislative history fully confirms the importance impliedly attached to these safeguards by their explicit prescription in section 221 of the act. The President acknowledged retention of most of the "peril point" procedural safeguards in his proposed legislation:

". . . the four basic stages of the traditional peril point procedures and safeguards will be retained and improved:

"the President will refer to the Tariff Commission the list of proposed items for negotiations;

"the Tariff Commission will conduct hearings to determine the effect of concessions on these products;

"the Commission will make a report to the President, specifically based, as such reports are based now, upon its findings of how new imports might lead to the idling of productive facilities, the inability of domestic producers to operate at a profit, and the unemployment of workers as the result of anticipated reductions in duties; . . ." Message from the President of the United States Relative to the Reciprocal Trade Agreement Program, Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 1, at 7 (1962).

Not one of these procedural requirements has been satisfied with respect to the proposed negotiation of an international antidumping code.

Congress was apprised of the fact that the support of organized labor for the 1962 act was dependent upon strict adherence to these procedural safeguards:

"The tariff-cutting authority the President would use is discretionary and flexible, but the safeguards which the bill establishes against injury to American workers, business, and farmers who may be affected by increased imports are mandatory and inflexible. These safeguards are provided at every stage of the tariff-negotiating process. We regard these safeguards as essential features of the trade expansion program without which it would not have our support." Supporting Memorandum of AFL–CIO on the Trade Expansion Program (H.R. 9900), Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 2, at 1159 (1962).

The statutory language ought to be sufficient to make the point, but the legislative history removes any conceivable doubt on whether Congress shared labor's view as to the mandatory nature of the procedural safeguards incorporated in the statute:

"This authority [to make changes in the import restrictions of the United States] is circumscribed and conditioned by certain required determinations the President *must* make and procedural steps he must follow (sec. 201(a)(2)" H.R. Rep. No. 1818, 87th Cong., 2d Sess. 14 (1962) [Emphasis added.]

Similarly, testimony of Acting Secretary of State George W. Ball before the House Committee on Ways and Means makes it clear beyond peradventure that the Administration that proposed this bill joined Congress in complete consensus on the essential prerequisite status of these procedures:

"The new law contemplates that the Tariff Commission would be consulted and that it would make an economic study and that the advice would be available to the President as a condition to his *proposing to enter* into any trade agreement." Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 6, at 3883 (1962). [Emphasis added.]

It would be redundant to recite the numerous expressions found in the legislative history voicing concern that the procedural safeguards serve as essential restraints upon the broad authority delegated to the President under this act. However, one statement admirably exemplifies the tenor of all in focusing upon the ultimate act of faith on the part of the legislature that the Executive will respect the democratic concept of government by law:

". . . we come to a basic point, are we going to trust the Executive or are we not? I grant that that lies at the base of a great deal of the problems that face all of us today. I myself say that we must look at the Executive not from the standpoint of the individual or his political party but we must look at it from the standpoint of government by law, if you please: What are the correct procedures, the functions of this grant of executive authority? Where does the Congress fit in? In my judgment there is no question but what we in Congress must delegate authority to the Executive, and what we should be paying attention to, as I think this committee has done, is the guide lines that we have put in to restrict or confine the Executive in the exercise of the authority." 108 Cong. Rec. 11151 (daily ed. June 28, 1962) (remarks of Congressman Curtis).

COVINGTON & BURLING,
Counsel to Cement Industry Committee for Tariff and Antidumping.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF THE SPECIAL REPRESENTATIVE
FOR TRADE NEGOTIATIONS,
Washington, D.C., August 30, 1966.

Mr. JOHN MATHIS,
Chairman, Cement Industry Committee for Tariff and Antidumping, Washington, D.C.

DEAR MR. MATHIS: Thank you for your letter of August 23, 1966, with which you enclose a supplementary legal memorandum concerning the negotiation of an antidumping agreement. This memorandum repeats the arguments put forward in the legal memorandum you sent me on July 21, 1966—that the Trade Expansion Act of 1962 (TEA) gives the President no authority to change the Anti-Dumping Act, 1921 pursuant to a trade agreement and that, if such authority existed, any negotiation of such agreement must be preceded by the so-called prenegotiation procedures under the TEA.

We are frankly puzzled by your supplementary memorandum. Ambassador Roth's letter to you of August 17, 1966, enclosed a legal memorandum which stated that the TEA provided no authority to change the Anti-Dumping Act, 1921 pursuant to a trade agreement and therefore concluded that the prenegotiation procedures of the TEA would not be applicable if the negotiation of an antidumping agreement were undertaken. The main point of our memorandum was that the President has the Constitutional authority to negotiate an antidumping agreement—which may or may not require new implementing legislation, and that the President also has the authority both under the Constitution and in the TEA to authorize the Special Representative for Trade Negotiations to negotiate such an agreement.

The points made in your supplementary legal memorandum do not raise any new issues, and, indeed, are not responsive to our legal memorandum. I can only conclude that you did not receive Ambassador Roth's letter of August 17 before sending me this supplemental memorandum. We would still be interested in any pertinent comments you or your counsel might have on our legal memorandum.

Most sincerely yours,

CHRISTIAN A. HERTER,
Special Representative.

CEMENT INDUSTRY COMMITTEE FOR TARIFF AND ANTIDUMPING,
Washington, D.C., September 1, 1966.

Hon. CHRISTIAN A. HERTER,
Special Representative for Trade Negotiations, Trade Information Committee, Washington, D.C.

DEAR MR. HERTER: Thank you for your letter of August 30, 1966. You were correct in your assumption that we had not received your office's memorandum of August 17 at the time that our supplementary memorandum of August 22 was mailed out.

Enclosed is a memorandum prepared by counsel to our Committee which responds to the memorandum of August 17 prepared by your office. After review of the memorandum, prepared by the Office of the Special Representative, the

Cement Industry Committee's position remains that there is no authority for the negotiation of an international antidumping code.

Sincerely yours,

JOHN MATHIS, *Chairman.*

REPLY OF THE CEMENT INDUSTRY COMMITTEE FOR TARIFF & ANTIDUMPING TO THE ANSWERING MEMORANDUM OF THE OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS, DATED AUGUST 17, 1966

On July 15, 1966, the Office of the Special Representative for Trade Negotiations announced that it would hold hearings on September 12 to seek the views of American industry on the proposed negotiation of an international code on antidumping. The announcement stated that negotiation of such a code had been under discussion by representatives of the United States and of other countries in connection with the current Sixth or Kennedy Round of Trade Negotiations in Geneva.

On July 21 and August 22, 1966, the Cement Industry Committee for Tariff and Antidumping delivered to the Office of the Special Representative and to various Senators and Congressmen memoranda questioning the authority of the Office of the Special Representative to schedule these hearings and to proceed with the negotiation of an international antidumping code. These memoranda took the position (1) that the legislative history of the Trade Expansion Act of 1962 demonstrated conclusively that the Special Representative had no authority to negotiate such a code, (2) that even if the Office did have such authority both the present negotiations and the scheduling of the September 12 hearing were illegal because the procedural safeguards provided by the Trade Expansion Act of 1962 had not been followed, and (3) that the actions of the Office of the Special Representative in any case were in clear violation of the wishes of the Senate as expressed in Senate Concurrent Resolution 100 (hereafter cited as S. Con. Res. 100). These memoranda have been consolidated and are attached hereto for reference.

The Cement Industry Committee has now received an answering memorandum from the Office of the Special Representative. This memorandum is dated August 17 but was not received by the Cement Industry Committee until after the Committee's memorandum of August 22, referred to above, had been mailed out. This memorandum takes the position that the President does have the authority under the Constitution and under the Trade Expansion Act to authorize the Special Representative to negotiate an international antidumping code. Second, the memorandum takes the position that the procedural safeguards of the Trade Expansion Act are not applicable to the negotiation of an antidumping code. Finally, the memorandum takes the preposterous position that an international antidumping agreement may not involve any changes in the Antidumping Act of 1921 and that S. Con. Res. 100 is, therefore, "not wholly apposite."

This memorandum, prepared by counsel to the Cement Industry Committee, replies to the above answering arguments of the Office of the Special Representative. The memorandum concludes that: (1) neither the President's Constitutional authority nor the Trade Expansion Act of 1962 authorizes the negotiation of an international antidumping code; (2) the Office cannot justifiably maintain the inconsistent positions that the President has authority under the Trade Expansion Act to negotiate an antidumping code and yet he is not bound by the procedural safeguards of the Act because they are not applicable to antidumping; and (3) the negotiation of an international antidumping code would assuredly require amendment of the Antidumping Act of 1921, would clearly be in defiance of Senate Concurrent Resolution 100, and would usurp a Constitutional function of Congress.

I. Neither the President's Constitutional Authority Nor the Trade Expansion Act of 1962 authorizes the Negotiation of an International Antidumping Code.

The memorandum of the Office of the Special Representative argues that (1) the President has Constitutional authority to negotiate an international antidumping code, and (2) the President may delegate this authority to the Special Representative both as a matter of Constitutional law and under the Trade Expansion Act of 1962.

First of all, this reliance by the Office upon the Constitutional authority of the President to justify its undertaking of such negotiations comes at a very late date. All previous actions and statements by the Office have led both industry and Congress to believe that the negotiations of an antidumping code were being

conducted pursuant to the Trade Expansion Act, which provides the sole authority of the U.S. representatives in the current Kennedy Round at Geneva. The Office's Press Release of July 15, announcing the hearings, stated that an antidumping code was under discussion as part of the "non-tariff barrier phase of the current trade negotiations in Geneva, known as the Kennedy Round." On August 10, the Special Representative himself described the negotiation of an international antidumping code as a "Kennedy Round objective" in a statement before a House Subcommittee.

S. Con. Res. 100 demonstrates that the Congress has certainly been misled up until this point into believing the antidumping discussions in Geneva were being conducted under the authority of the Trade Expansion Act. The report filed by the Senate Finance Committee, recommending passage of the Resolution, concluded as follows:

"The Committee on Finance has been disturbed over reports that *the current Kennedy Round of tariff negotiations* may be broadened to include U.S. offers of concessions with respect to matters for which there is no existing delegated authority. . . .

"It has been reported that one area in which our negotiators may offer concessions concerns the American selling price method of evaluation. . . .

"Another area may involve the treatment of "dumped" goods by the country in which the dumping occurs." [Emphasis added.]

Secondly, it is by no means clear that an antidumping code is within the sphere of the President's Constitutional authority to conduct foreign relations. The Antidumping Act of 1921 was clearly intended to apply the domestic antitrust laws to imported goods in competition with domestic products. That this was the intention of the Congress is clear from the legislative history of the Antidumping Act.

". . . the purpose of the proposed bill (forerunner of the Antidumping Act) is to prevent the stifling of domestic industries by the dumping of foreign merchandise. . . . Over 20 years ago, by the enactment of the Sherman Antitrust Law, Congress recognized the necessity of legislation to prevent unfair methods of competition and monopoly within the United States, but effective legislation to prevent discriminations and unfair practices from abroad, to destroy competition and control prices, has not been enacted." H.R. Rep. No. 479, 66th Cong., 1st Sess., 1 (1919).

Similarly, the Senate Finance Committee Report on S. Con. Res. 100, referred to above, concluded that antidumping "concerns unfair trade practices in a domestic economy."

Every law regulating our domestic economy can be said to affect our foreign relations in the sense that foreign competitors who enter our domestic markets must abide by our laws, but it would be an absurd and fundamental reallocation of Constitutional authority if this fact justified the subsection of regulation of our domestic economy by Presidential fiat for Congressionally enacted law. Under the guise of foreign affairs, the President could just as well purport to negotiate an international criminal code with respect to crimes committed by importers, even though it is unquestionable that Congress and the States would view this as a clear usurpation of their legislative perogatives.

Hence, it is very questionable whether the Constitutional authority of the President includes the power to alter or affect domestic antidumping legislation relating to unfair trade practices. Nothing in the Constitution or the Trade Expansion Act justifies such an extension of the powers of the Executive Branch.

With respect to the second argument of the Office's memorandum, the Cement Industry Committee submits that even assuming, arguendo, that the President has authority to negotiate an international antidumping agreement, the authority of the Special Representative for Trade Negotiations is not coextensive with that of the President. It is undoubtedly true that the President must be free to secure assistance in the exercise of his Constitutional authority from any source he chooses. It does not follow, however, that a Special Presidential Representative, appointed for a specific and limited purpose—to fill an office created by a Congress deeply concerned with the imposition of proper limitations upon its delegation of authority—should be permitted to act, on his own initiative and without express Presidential bidding, beyond the scope of the Act creating his office.

The Office of the Special Representative is solely a creature of the Congress, and, more particularly, a creation of the Trade Expansion Act of 1962. The legislative history of that Act, as set forth in the memorandum dated July 21

attached hereto, is conclusive that Congress intended to delegate only very limited authority to the Office of the Special Representative, and even this limited authority was conditioned upon mandatory procedural restraints. Further, this history is conclusive that Congress did not intend for the Act to affect the Antidumping Act in any way. (Attached Memorandum, pp. 4–7.)

In light of this legislative history, it is presumptuous of the Office of the Special Representative to construe in a broad and sweeping manner its delegation of authority under the vague and general language of the Executive Order which established the Office (E.O. 11075) and of the Trade Expansion Act. The Office's memorandum fails to identify any language expressly authorizing it to negotiate an antidumping code or directing it where or how to do so.

The Office's memorandum relies on Section 3(a) of the E.O. 11075, as amended (48 CFR 1.3(a)) which provides that the Special Representative shall have "such other functions as the President may from time to time direct", in addition to functions specifically conferred by the Trade Expansion Act and the Executive Order. Nowhere has the President directed the Special Representative to hold hearings on, or to negotiate a revision of, the domestic antidumping laws as part of an international antidumping code.

The Office's memorandum also relies on Section 3(b) of E.O. 11075, as amended (48 CFR 1.3(b)), which provides that the Special Representative shall advise the President with respect to "nontariff barriers to international trade", and on the language of Section 241(a) of the Trade Expansion Act, which authorizes the Special Representative to be the chief representative of the United States "for such other negotiations as in the President's judgment require that the Special Representative be the chief representative of the United States." It is submitted that where such vague and general language is used either in an act or in an Executive Order implementing, and issued under, the act, its meaning must be interpreted in light of the rest of the language of the act and in light of the act's legislative history.

Taken as a whole, the Trade Expansion Act of 1962 deals solely with the United States "trade agreements program" and with tariff adjustment and other adjustment assistance procedures to be invoked following execution of "trade agreements." The "other negotiations" language of Section 241(a) and the "other functions" language of E.O. 11075 must be read as referring to an aspect of the "trade agreements program" or to an aspect of tariff adjustment and other adjustment assistance procedures, and must be limited by the scope of the latter terms as they have been used in the Trade Expansion Act and its predecessors.

The legislative history of all previous trade agreements acts makes perfectly clear that the U.S. antidumping laws were never included in the negotiation authority which those acts conferred upon the President or his representatives. Then Secretary of Treasury Dillon pointed this out in his testimony on the Trade Expansion Act, where he said:

"I think that [the U.S. antidumping legislation] is a totally separate piece of legislation. *It never was part of the trade agreements legislation.*" Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess., pt. 2, at 897 (1962). [Emphasis added.]

The legislative history of the Trade Expansion Act also makes patently clear that the Act did not encompass antidumping. The Senate Finance Committee Report specifically stated that:

"Other laws *not to be affected* include the Antidumping Act and section 303 of the Tariff Act of 1930, which relates to countervailing duties." S. Rep. No. 2059, 87th Cong., 2d Sess. 19 (1962) [Emphasis added.]

Secretary Dillon and others were also conclusive on this point (attached Memorandum, pp. 4–7).

The vague language "such other negotiations" in the Act can only be read in the context of this legislative history and therefore cannot conceivably be construed to encompass antidumping. Moreover, the fact that the mandatory procedural safeguards of the Act are not applicable to antidumping, which is discussed in Part II, *infra*, also negates any possible construction of the Act which would extend it to antidumping.

For the same reasons the general language contained in the Executive Order implementing and issued under the Act must also be read with the same limitations of meaning in mind. The criminal laws directed at the narcotics traffic represent "nontariff barriers to international trade," but clearly the Executive Order was not intended to serve as carte blanche for the Office of the Special

Representative so that it could barter off the narcotics laws or negotiate in similar areas of domestic regulation which have some effect on international trade. Reasonableness must be the touchstone in the construction of Executive Orders as well as of statutes.

In light of the clear legislative history that the Trade Expansion Act was not intended to and did not encompass antidumping, it is difficult to understand the Office's assertion that the broad general reference in the Act to "such other negotiations" extends to the antidumping area. Further, it cannot be assumed that the President intended to defeat the understanding of Congress by the use of ambiguous language when he promulgated Executive Order 11075 in execution of the Trade Expansion Act.

II. The Office Cannot Justifiably Maintain the Inconsistent Positions That the President Has Authority Under the Trade Expansion Act to Negotiate an Antidumping Code and Yet He Is Not Bound by the Procedural Safeguards of the Act Because They Are Not Applicable to Antidumping

The memorandum of the Office of the Special Representative correctly concedes that the authority delegated to the President by the Trade Expansion Act to alter existing duties or other import restrictions "does not apply to the Antidumping Act." It draws from this the conclusion that "the procedural safeguards in Section 221 of the Trade Expansion Act also do not apply." Nevertheless, it goes on to make the remarkable assertion that the President does have the authority under the Trade Expansion Act to enter into negotiations on an international antidumping agreement. Although some confusion arises because these first two propositions are logically reversed, the inconsistency of the trilogy would, nevertheless, seem to be inescapable even to the most jaded eye.

In effect, the memorandum apparently seeks to draw a distinction between the agreements which the Representative negotiations under the "such other negotiations" language of Section 241(a) of the Act and agreements which he negotiations modifying existing U.S. duties or other import restrictions.

It is submitted that the legislative history of the Act makes clear that negotions relating to antidumping are not encompassed by the "such other negotiations" clause of Section 241(a), as set out more fully in Part I, *supra*. Furthermore, there is no basis whatsoever for asserting that if the "such other negotions" language of Section 241(a) does extend to antidumping, the procedural safeguards of the Act are not to apply to agreements made pursuant to that language also. The Office of the Special Representative could just as logically assert that any of the other restrictions on its authority set out in Title II of the Act—such as the requirements that it extend the benefits of any resuling agreements to other countries on a most-favored-nation basis but that it not do so with respect to countries dominated or controlled by Communism—would also not apply if it chose to assert that it had negotiated these agreements pursuant to the "such other agreements" language.

In fact, the legislative history of the Act makes abundantly clear that the Congress' willingness to delegate authority to the Executive was conditioned upon the mandatory nature of the procedural safeguards. (Attached Memorandum, pp. 10–12.) Nowhere does the language of the Act state that these safeguards or restrictions do not extend to all of the activities of the Special Representative pursuant to the Act. Hence they must be considered applicable to all agreements negotiated by the Representative, not merely to some of them.

The Cement Industry Committee concurs in the Special Representative's observation that the procedural safeguards specificed in the Trade Expansion Act seem totally inappropriate to revision of the Antidumping Act. Far from viewing this as an invitation to a holiday from all legal restraint, however, it is submitted that this is the clearest indication that negotiation of an international antidumping code not come within the conceivable boundaries of the authority conferred by any portion of the Trade Expansion Act. In seeking to amend the Antidumping Act under the authority of the Trade Expansion Act, the Special Representative would have us believe that just because a bulldozer exceeds the legal load limit of a road, it can race down that road without obeying the traffic rules.

III. The Negotiation of an International Antidumping Code Would Assuredly Require Amendment of the Antidumping Act of 1921, Would Clearly be in Defiance of S. Con. Res. 100, and Would Usurp a Constitutional Function of Congress.

The memorandum of the Office of the Special Representative asserts that it is "clear" that an international antidumping code might not require any change

of the Antidumping Act of 1921 and that S. Con. Res. 100 is therefore "not wholly apposite." These statements are either deceptive or naive.

The numerous press reports on the Kennedy Round negotiations have uniformly indicated that the practice of withholding appraisements where dumping is suspected, as provided for by the Antidumping Act, is the chief concern of foreign countries. See, *e.g.*, *Journal of Commerce*, July 15, 1966. Knowledgeable members of the Congressional delegation to the Kennedy Round negotiations have also flatly made this statement. See, *e.g.*, Statement of Congressman Curtis, 112 *Congressional Record* 11292 (daily ed.) (May 31, 1966).

Thus, while it is true that the U.S. negotiators are primarily interested in the procedural aspects of foreign dumping laws, it is quite clear that the subject of concern of foreign countries is with the substantive provisions of the U.S. Act. Any change in these substantive provisions, as opposed to minor changes in the way the Act is administered by the Treasury Department, would clearly require amendment of the statute.

Secondly, the memorandum of the Office itself states that an antidumping code "would elaborate and perhaps alter" the provisions of Article VI of GATT. Since Article VI deals with sales at less than fair value and material injury, as do the substantive provisions of the Antidumping Act, any elaboration or alteration of these provisions would require the same alteration or revision of the statute.

Thirdly, the Office of the Special Representative has on other occasions made clear that it wants to obtain concessions from foreign countries in the administration of their antidumping laws. It will obviously have to bargain something in the way of a concession or change in the Antidumping Act in return. Since the U.S. Act already provides for open and fair proceedings prior to the issuance of a withholding order or prior to the assessment of dumping duties, any concessions by the U.S. could only pertain to the substantive provisions of its Act dealing with when appraisement will be withheld, what constitutes sales at less than fair value, or what constitutes material injury.

Finally, that the substantive aspects of the antidumping laws will in fact be up for negotiation is also made abundantly clear by the list of topics which the Office has suggested for comment by interested members of the public in the September 12 hearings. These include the following: "What should constitute actionable dumping in an international agreement", "Determination of sales at less than normal values", "Determination of injury", and "Determination of industry", as well as topics under "Procedures." Only changes in the last category could possibly be accomplished without making necessary parallel changes in the Antidumping Act.

Since it cannot be assumed that the Special Representative's Office is naive on this subject, it is submitted that the suggestion that an international code may require no revision of the Antidumping Act is merely camouflage and an effort to delude Congressmen into believing that their legislative function has not been usurped. It would be senseless to hold the proposed hearings if the only international antidumping agreement expected to result would not deviate from the present domestic law. It borders on the ingenuous for the Special Representative to suggest that such a wasted effort is truly contemplated. Realistically, one must attribute rational purpose to the action of the Special Representative. Surely, significant alteration of the 1921 Antidumping Act is contemplated and the authority of the Special Representative must stand or fall on this premise.

The Special Representative's memorandum also argues that if a code were to require changes in the Antidumping Act, the concern expressed in S. Con. Res. 100 "would be fully met." The basic point made in that Congress would have the "last say" on whether to approve or disapprove provisions of a code requiring amendment of the Antidumping Act.

The Cement Industry Committee submits that if a code is negotiated, Congress would hardly be in a position to engage in its normal function of full legislative debate and deliberation. The code would be presented to it as a *fait accompli* and most assuredly as a moral commitment made by the Executive Branch of the government. It is hardly realistic to assume that the Special Representative would be willing to engage in extensive and prolonged negotiations without anticipation that any code would be presented to Congress at the least as a moral obligation of the President, or more likely, as part of an overall package which has been obtained through the Kennedy Round negotiations. Under these circumstances the Congress would hardly be in a position to perform its legislative and policymaking function.

The Special Representative's memorandum further asserts that any code would be negotiated separately without affecting the overall Kennedy Round agreements. This is very difficult to swallow indeed. The discussions and negotiations to date on an international code have been conducted on behalf of the U.S. by the office responsible for the Kennedy Round negotiations. The "special GATT working group on dumping" was established "as a part of the present sixth round of tariff negotiations." (Statement of Congressman Curtis, 112 *Congressional Record* 5112, daily ed. March 8, 1966). The GATT Secretariat also has been given the responsibility for preparing a first draft of the code by late September (*Journal of Commerce*, Aug. 12, 1966.) Thus all discussion and negotiations have been intricately and intimately tied into the Kennedy Round.

As recently as August 10 the Special Representative reported on the Kennedy Round to a House Subcommittee and stated that the participants had agreed that "reduction or elimination of the protection afforded by . . . anti-dumping regulations" was a "Kennedy Round objective." It is difficult to foresee any circumstances under which an international antidmping code could be viewed by other nations at Geneva as being completely separate and detached from the overall negotiations, and subject to separate and absolute rejection by the United States Congress.

As pointed out by the Cement Industry's attached memorandum, this is precisely the position of the U.S. Senate as expressed in S. Con. Res. 100 and in the Senate Finance Committee Report accompanying that Resolution. That Report stated:

"This problem [the treatment of 'dumped' goods] concerns unfair trade practices in a domestic economy and it is difficult for us to understand *why Congress should be bypassed at the crucial policymaking stages*, and permitted to participate only *after policy has been frozen in an international trade agreement*." [Emphasis added.]

Thus, the Cement Industry Committee submits that, contrary to the argument in the memorandum of the Office of the Special Representative, the negotiation of an international antidumping code by the Office would require amendment of the Antidumping Act of 1921, would be in clear defiance of S. Con. Res. 100, and most importantly, would be a flagrant usurpation of Congressional authority.

Respectfully submitted.

COVINGTON & BURLING,
Counsel to Cement Industry Committee for Tariff and Antidumping.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF THE SPECIAL REPRESENTATIVE
FOR TRADE NEGOTIATIONS,
Washington, D.C., September 16, 1966.

Mr. JOHN MATHIS,
Chairman, Cement Industry Committee for Tariff and Antidumping, Washington, D.C.

DEAR MR. MATHIS: In Governor Herter's absence, let me thank you for your letter of September 1, 1966, with which you enclosed a memorandum in reply to our memorandum of August 17, 1966, concerning the question of the President's authority to negotiate an international antidumping agreement through the Special Representative for Trade Negotiations.

I am enclosing a memorandum prepared by our General Counsel which addresses itself to the three arguments made in your memorandum of September 1. We remain confident of the legality of any negotiation of an international antidumping agreement which the President may authorize the Special Representative for Trade Negotiations to undertake.

Sincerely yours,

JOHN B. REHM,
Acting Special Representative.

OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS

SEPTEMBER 16, 1966.

On July 21, 1966, the Cement Industry Committee for Tariff and Antidumping issued a memorandum raising a number of questions regarding the President's authority to enter into international negotiations on antidumping through the Special Representative for Trade Negotiations.

On August 17, this Office issued a memorandum in reply. On August 22, the Cement Industry Committee issued a memorandum supplementing its first memorandum, to which this Office replied on August 30, noting that the supplemental memorandum did not raise any new issues and was not responsive to our memorandum.

In response to our memorandum of August 30, the Cement Industry Committee issued a third memorandum on September 1, to which this memorandum now replies.

DISCUSSION

The Cement Industry Committee memorandum of September 1, 1966, is seriously deficient in at least the following four respects:

1. It consistently confuses the question whether the President has the Constitutional authority to negotiate an antidumping agreement and the question whether the Congress has given the President power to amend the Anti-Dumping Act, 1921 pursuant to a trade agreement.

2. It repeatedly obscures the distinctions—both procedural and substantive—between the President's authority in section 201(a) of the Trade Expansion Act of 1962 (TEA) to change duties and other import restrictions pursuant to a trade agreement, and the President's authority in section 241(a) of the TEA to appoint the Special Representative for Trade Negotiations as the chief representative of the United States for "such other negotiations as in the President's judgment require that the Special Representative be the chief representative of the United States".

3. It asserts without any supporting evidence whatsoever that the President cannot, pursuant to section 241(a) of the TEA, authorize the Special Representative for Trade Negotiations to negotiate an antidumping agreement.

4. It wholly disregards the fact that to date in Geneva the United States has only engaged in exploratory discussions of the issue of antidumping, and that the Special Representative for Trade Negotiations will not negotiate the specific provisions of an antidumping agreement without the express authorization of the President.

Given these basic deficiencies, the invalidity of the three major arguments made in the Cement Industry Committee memorandum of September 1, 1966, becomes clear.

1. The memorandum's *first argument* on page 4 is that "Neither the President's Constitutional authority nor the TEA authorizes the negotiation of an international antidumping code".

With respect to the argument concerning the Constitution, the memorandum states on page 5 that "it is by no means clear that an antidumping code is within the sphere of the President's Constitutional authority to conduct foreign relations".

This statement appear to be based on two quite different premises. One premise appears to be that the Anti-Dumping Act, 1921 is designed to regulate domestic unfair trade practices and is not sufficiently related to any matter of international concern to permit negotiation of any international antidumping agreemet. In our view, antidumping laws clearly affect both domestic and international concerns. The Anti-Dumping Act, 1921 regulates the conduct of importers in the U.S. market; the antidumping laws of other countries regulate the conduct of U.S. and other importers in their domestic markets. The Cement Industry Committee memorandum in effect asserts that the international concerns must be wholly ignored because domestic concerns are also present. This assertion is patently without merit. It is a truism that "Matters of international concern are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern". (Restatement of the Law (Second), Foreign Relations Law of the United States § 117—Comment b (1965)).

The second—quite distinct—premise appears to be that any negotiation of an international antidumping agreement would, as the memorandum states on page 6, "substitut[e] . . . regulation of our domestic economy by Presidential fiat for Congressionally enacted law". This argument is mere rhetoric. If the President entered into an international antidumping agreement which required no change in U.S. law, the agreement would then obviously be consistent with U.S. law and would in no way substitute "Presidential fiat for Congressionally enacted law". If, on the other hand, the President entered into an agreement which envisioned

changes in the U.S. law, then only the Congress could implement the agreement by amending the law. If the Congress refused to amend the law, then such agreement could not be implemented and similarly would in no way substitute "Presidential fiat for Congressionally enacted law".

With respect to the argument concerning the TEA, the memorandum is deficient on a number of grounds. First, on page 7 the memorandum states that the Office of the Special Representative for Trade Negotiations "is solely a creature of the Congress". In fact, however, in Executive Order No. 11075, as amended, the President exercised his Constitutional authority to establish the Office of the Special Representative as an agency of the U.S. Government. Moreover, in that Executive Order, the President significantly supplemented the responsibilities of the Special Representative as laid down in the TEA. In particular, the President expressly gave to the Special Representative the task of assisting him in the negotiation of agreements which rest upon the President's Constitutional authority.

Second, on page 7 the memorandum states that certain legislative history of the TEA (cited on page 10 of the memorandum) "is conclusive that Congress did not intend for the Act to affect the Antidumping Act in any way". This legislative history clearly supports our conclusion that the President's power to alter duties and other import restrictions pursuant to section 201(a) of the TEA does not include the Anti-Dumping Act, 1921. But this legislative history is in no way relevant to the question whether the President has the Constitutional authority to negotiate an antidumping agreement, which could not in itself alter the Anti-Dumping Act, 1921.

Third, on page 9 the memorandum states that the "other negotiations" language of section 241(a) of the TEA and the "other functions" language of section 3(a) of Executive Order No. 11075, as amended, "must be read as referring to an aspect of tariff adjustment and other adjustment assistance procedures". Setting aside the erroneous arguments (e.g., the Office of the Special Representative is solely a creature of the Congress) and the irrelevant arguments (e.g., the TEA does not authorize the amendment of the Anti-Dumping Act, 1921 pursuant to a trade agreement), the memorandum cites absolutely no material which would even suggest that the "other negotiations" language in section 241(a) of the TEA cannot embrace such an obvious international trade issue as dumping.

Fourth, on pages 7 and 8 the memorandum asserts that the President has not authorized or directed the Special Representative to negotiate an antidumping agreement. But this is wholly beside the point. We agree that the Special Representative cannot negotiate the specific provisions of an antidumping agreement without prior authorization from the President pursuant to section 241(a) of the TEA, but the negotiation of such provisions has not been undertaken to date.

2. The memorandum's *second argument* on page 12 is that "Th[is] Office cannot justifiably maintain the inconsistent positions that the President has authority under the TEA to negotiate an antidumping code and yet he is not bound by the procedural safeguards of the Act because they are not applicable to antidumping". In support of this argument, the memorandum states on page 13 that "Nowhere does the language of the Act state that these safeguards or restrictions do not extend to all of the activities of the Special Representative pursuant to the Act. Hence they must be considered applicable to *all* agreements negotiated by the Representative, not merely to some of them".

This argument completely ignores the explicit language which establishes the basic procedural requirements in question. Section 221 of the TEA clearly provides that the President shall publish and furnish to the Tariff Commission lists of articles for which he is considering exercise of his authority in section 201(a) of the TEA to change duties and other import restrictions pursuant to a trade agreement. Section 221 says nothing about Presidential consideration of agreements which fall outside the authority of section 201(a), such as an antidumping agreement.

3. The memorandum's *third argument* on page 15 is that "The negotiation of an international antidumping code would assuredly require amendment of the Antidumping Act of 1921, would clearly be in defiance of S. Con. Res. 100, and would usurp a Constitutional function of Congress".

Whether an international antidumping code would or would not require amendment of the Anti-Dumping Act, 1921 is at this point simply unknown. Since this is so, negotiation of such an agreement would not clearly be in defiance of S. Con. Res. 100. Moreover, even if an amendment were required, the negotiation would not be in defiance of S. Con. Res. 100, since that concurrent resolution has not been passed by the House and therefore is not known by its own terms in

effect. One can no more defy a concurrent resolution as passed only by the Senate than one can violate a bill passed by one House of the Congress.

But the more important issue is whether the concern which underlies S. Con. Res. 100 will be met. Setting aside the unsupported assumptions set out on pages 18 and 19 of the memorandum, it is the firm policy of this Office to keep the Congressional Delegates fully informed of the conduct of any antidumping negotiations, to conclude any antidumping agreement separately from the overall Kennedy Round agreement, and to ensure that the Congress could freely appraise the agreement on the basis of its intrinsic merits without being confronted with a *fait accompli*.

Finally, the claim that the negotiation of an international antidumping code would usurp a Constitutional function of the Congress is clearly contradicted by the report of the Senate Finance Committee on S. Con. Res. 100:

"The committee recognizes that our Constitution empowers the President alone to enter into international agreements and treaties. We do not question the legality of an agreement involving a trade matter for which no prior authority has been delegated." (S. Rep. 1341, 89th Cong., 2d Sess. p. 3 (1966).)

IMPLEMENTATION OF CODE BY UNITED KINGDOM

During the hearing, it was asserted that the United Kingdom is toughening up its antidumping law and it was suggested that the United States can expect no immediate benefits from adherence to the Code by the United Kingdom between now and January 1.

The fact is that the British Parliament has recently passed a law—and royal assent is expected shortly—which will permit the United Kingdom to take provisional measures during an antidumping proceeding. This will simply parallel our own authority to take provisional measures under the Antidumping Act, 1921, in the form of withholding of appraisement—which the United States has used since 1921.

Adherence to the Code by the United Kingdom will bring benefits to the United States with the first dumping complaint brought by British authorities against a U.S. exporter after July 1, 1968. In the first place, the U.S. exporter will for the first time be protected by the procedural safeguards in Article 5 of the Code—safeguards to which neither the United Kingdom nor any other country has ever committed itself before. In the second place, the U.S. exporter will know—in far clearer terms than ever before—what substantive tests must be met before dumping duties may be imposed on his product.

U.S. TARIFF COMMISSION,
Washington, D.C., June 28, 1968.

Hon. RUSSELL B. LONG,
Chairman, Senate Finance Committee,
New Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Following yesterday's hearings on the International Dumping Code the Committee's counsel, Mr. Vail, informed me that other witnesses at the hearing had asked for and been granted by the Committee an opportunity to respond to certain portions of my testimony. Mr. Vail informed me that in view of this the Committee would accord me a similar right to respond.

I very much appreciate the Committee's offer, but I decline to accept it. As you know, the Tariff Commission is an impartial body which has a responsibility to supply objective information to the Congress, but it does not urge the Committee or the Congress to adopt any particular position with respect to any issue. Accordingly, since neither the Commission nor I have any partisan position to protect, I do not feel it is necessary to accept the Committee's generous offer to respond to criticisms of my testimony filed by other parties. On the contrary, the Committee will only be better served if some other party can add to, or correct, any information the Commission, or an individual Commissioner, has supplied.

On the other hand, if the rebuttal information filed by other parties raises issues which the Committee feels are not fully developed in the record, I shall be happy to respond to any request from the Committee for additional information.

Sincerely yours,

BRUCE E. CLUBB, *Commissioner.*

AMERICAN IRON AND STEEL INSTITUTE,
Washington, D.C., July 2, 1968.

Mr. THOMAS VAIL,
Chief Counsel, Senate Committee on Finance,
New Senate Office Building, Washington, D.C.

DEAR MR. VAIL: We very much appreciate the oportunity you afforded us to respond to statements on the International Antidumping Code which may be presented to the committee for the record by the Office of the Special Trade Representative.

Since the record of the hearing itself should be sufficient, we don't believe it necessary to file possible responses.

Sincerely yours,

JACK ROCHE, *President.*

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., July 5, 1968.

Hon. RUSSELL B. LONG,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: I thought your Committee would be interested in the attached letter and report furnished me by the Chairman of the Ways and Means Committee of the House. The contents of the report will, I am sure, be of interest to your Committee in connection with the recent hearings on antidumping matters. I am, therefore, glad to make it available to your Committee.

With kindest regards,

Sincerely,

JOHN H. BUCHANAN, Jr.,
Member of Congress.

MAY 21, 1968.

Hon. JOHN H. BUCHANAN, Jr.,
House of Representatives.

DEAR JOHN: This is in further reply to your letter of February 18 in which you raised certain questions concerning the proposed changes in the Treasury Department's antidumping regulations.

As I indicated at the time I acknowledged your letter, I requested both the Secretary of the Treasury and the Chairman of the Tariff Commission to give me their views and comments on the questions raised in your letter. At that time, I also sent a copy of your letter to Mr. William M. Roth, the President's Special Representative for Trade Negotiations. I have only recently received a letter from the Chairman of the Tariff Commission enclosing a memorandum setting forth the Commission's comments on the "questions of law" raised in your letter and also a copy of the Tariff Commission's report to the Senate Finance Committee on S. Con. Res. 38 regarding the International Antidumping Code signed at Geneva on June 30, 1967. For your information, I also enclose a copy of the Secretary of Treasury's reply to my request for comments on your letter as well as the response on these questions from Ambassador Roth.

I would hope that you understand that I have not as yet had the opportunity to analyze these materials and to reflect on the points at issue with regard to the implementation of the International Antidumping Code.

Sincerely yours,

WILBUR D. MILLS, *Chairman.*

U.S. TARIFF COMMISSION,
Washington, D.C., May 13, 1968.

Hon. WILBUR D. MILLS,
Chairman, Committee on Ways and Means,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: In response to the request in your letter of February 16, 1968, I am enclosing copies of a memorandum setting forth the Commission's comments on the "questions of law" raised by Congressman John Buchanan in his letter to you of February 13, 1968, with respect to proposed regulations of the Treasury Department issued under authority of the Antidumping Act, 1921, as amended, and the International Antidumping Code.

I am also enclosing for your information copies of the Commission's report to the Senate Finance Committee on S. Con. Res. 38 regarding the International Antidumping Code signed at Geneva on June 30, 1967. H. Con. Res. 447, which is the companion resolution in the House, was referred to your Committee on August 2, 1967.

Sincerely yours,

STANLEY D. METZGER, *Chairman.*

MEMORANDUM TO HON. WILBUR D. MILLS, CHAIRMAN, HOUSE COMMITTEE ON WAYS AND MEANS, REGARDING THE PROPOSED REGULATIONS OF THE TREASURY DEPARTMENT WITH RESPECT TO DUMPING

This memorandum is in response to the request of February 16, 1968 that the Commission furnish comments on the "question of law" mentioned by Representative John Buchanan in a letter of February 13 to the Honorable Wilbur D. Mills, Chairman, House Committee on Ways and Means.

Representative Buchanan expresses his understanding that the Treasury Department has published in the Federal Register (32 F.R. 14955 of October 28, 1967) proposed changes in their regulations which would have the effect of amending the Antidumping Act, 1921, as amended, without such "amendments" being subject to congressional review. He states that the proposed changes in the regulations "would appear to extend the Treasury Department into the area of injury," a jurisdiction vested by the statute in the Tariff Commission.

MEMORANDUM OF THE MAJORITY [1]

Origin of Tariff Commission's Jurisdiction and Reason Therefor

In 1954 the Congress, at the request of the Treasury Department, with the concurrence of the Tariff Commission, transferred from the Treasury Department to the Tariff Commission the responsibility for making injury determinations under the Antidumping Act, 1921 [Customs Simplification Act of 1954, Public Law 768, 83d Cong., 68 Stat. 1138].

The Assistant Secretary of the Treasury, in support of the Department's request, stated:

> As to the findings of injury, after a very considerable study we have concluded and the President has recommended in his economic message of March that the Treasury, in the ordinary course of its duties, is not properly staffed to make those injury determinations and would have to specially staff itself for that purpose; whereas this type of activity relates very closely to a substantial part of the regular activities of the Tariff Commission. Title III therefore recommends that the job of finding injury under the Antidumping Act be transferred to the Tariff Commission.[2]

The Antidumping Act as amended requires two determinations to be made before dumping duties are assessed. First, it must be determined that specific imported merchandise is being, or is likely to be, sold at less than fair value (LTFV) and, second, that "an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States". The Act directs that the first determination is to be made by the Treasury Department and the second by the Tariff Commission.

TREASURY ACTIONS WHICH AFFECT COMMISSION JURISDICTION

In the period since the transfer of function was made in 1954, the Treasury Department in its practices and regulations relating to dumping has made determinations which affect the injury determining responsibility of the Commission. The proposed regulations, if promulgated, would appear to project the Treasury Department further into this area.[3] Specific examples are discussed below:

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[1] Vice Chairman Sutton and Commissioners Culliton and Clubb comprise the majority. The "Separate Views of Chairman Metzger and Commissioner Thunberg" appear following page 6.

[2] Page 14, Hearings Before the Committee on Ways and Means, House of Representatives, on H.R. 9470 of the 83d Cong., 2d Sess., titled the "Customs Simplification Act of 1954." A clean bill, H.R. 10009, was subsequently enacted.

[3] A comparison of the proposed regulations of the Treasury Department with those currently in force under the Antidumping Act, as amended, is attached to facilitate the identification of the Treasury practice and proposed revisions in issue.

Evidence of injury required to initiate investigation

Sections 53.27 and 53.28 [4] of the proposed regulations, considered together, state in effect that the Treasury Department will not initiate a dumping investigation unless the complainant has submitted information which is satisfactory to the Commissioner of Customs "indicating that an industry of the United States is being injured, or is likely to be injured, or prevented from being established". Thus the Commissioner of Customs would be making a determination of what constitutes evidence of injury and the minimum amount of injury required under the Antidumping Act. Section 53.34 provides that unless the Commissioner of Customs is satisfied that "there is evidence on record concerning injury or likelihood of injury to or prevention of the establishment of an industry of the United States" he is not to impose any interim safeguards against dumping. The Act provides that appraisement is to be withheld when there is reason to believe or suspect that there are, or are likely to be, LTFV sales.

Effect of proposed simultaneous procedures

Sections 53.34–.39 [5] considered in conjunction with each other, would require each affirmative determination to be made and published within three months of the time there is reason to suspect LTFV sales and would provide for continuation of the investigation, including the holding of public hearings if requested, to ascertain whether the determination should be sustained, modified, or revoked. Thus, under the proposed regulations, affirmative determinations of LTFV sales would be made by Treasury prior to the completion of its investigation, which indicates that they would have an "interim" or "tentative" status.

It is our view that the Tariff Commission cannot institute an investigation until the Treasury furnishes the formal determination of LTFV sales provided for in the Act, as amended. Inasmuch as the proposed regulations would seem to give Treasury's determination only a tentative status, the question arises as to whether the Commission's jurisdiction would be properly invoked.

In addition to these two specific changes, the regulations tend to solidify and extend past practices which affect the Tariff Commission's injury determining function. For instance:

Excusing dumpers where Treasury feels injury determination is unwarranted [6]

The Treasury since 1954 has developed a practice of excusing the dumper in those cases where it has deemed the injury to be too small to warrant a dumping finding. For example, the Treasury issued a determination of no sales at LTFV with respect to Polish bicycles—

> because of changed circumstances. This resulted from the Tariff Commission's "no injury" determination in the case concerning Hungarian bicycles involving analogous circumstances with respect to bicycles imported from Poland, which made it no longer appropriate to continue the instant investigation. (30 F.R. 8493, July 2, 1965.)

The Treasury thus in effect made a determination of "no injury" but closed this case officially by making determination of no sales at less than fair value. The Commission has no way of knowing whether or not it would have found injury in that case, or whether it would have considered the same evidence of injury considered by the Treasury.

Excusing of dumpers on promise to cease dumping [6]

Since 1954 the Treasury has made numerous determinations of no sales at LTFV in which the published statements of reasons therefor clearly state that there were in fact sales at less than fair value. The rationale for the negative determinations which conflict with the acknowledged fact of dumping prices is usually that the dumper has agreed to raise his prices to a level where they are

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[4] These sections are intended to bring Treasury Regulations into conformity with article 5(a) of the Code which requires in effect that Treasury must not initiate a dumping investigation until the U.S. Government has evidence at hand of sales at less than fair value (LTFV) and of injury, and that there must be a simultaneous consideration (by some agency of the Government) of such evidence on each question to determine whether an investigation is warranted.

[5] The proposed amendments are designed to meet the terms of the Code that determinations of sales at LTFV and of injury should be made simultaneously (Article 5(b)).

[6] See sec. 53.15 of proposed regulations which deals with this practice.

no longer below fair value or he has promised to cease exporting to the United States. This practice generally permits dumping for periods of several years with impunity.

It is our view that the practice of forgiving dumping frustrates the intended operation of the Act. The Act contemplates that where LTFV sales and injury therefrom exist a formal dumping finding should be issued and dumping duties assessed.

Revocations of dumping findings

Section 53.41 of the proposed regulations and section 14.12 of the current regulations provide that Treasury will modify or revoke a dumping finding whenever it believes the criteria for such finding are no longer met with respect to some or all the merchandise covered by the finding (Section 53.41). The Anti-dumping Act is silent as to whether dumping findings may be modified or revoked: the Code requires their modification or revocation when the continuation of a finding is no longer warranted.

Inasmuch as the issuance of a dumping finding is dependent upon substantive determinations of both the Treasury and the Tariff Commission, it would appear, in principle, that a modification or revocation thereof should also necessarily involve the coordinated action of both agencies.

SEPARATE VIEWS OF CHAIRMAN METZGER AND COMMISSIONER THUNBERG

The Tariff Commission has been requested by Chairman Mills of the House Ways and Means Committee to comment upon a letter to him from Congressman Buchanan, concerning the effects of proposed changes in Treasury Department regulations "pertaining to anti-dumping as they relate to the role of the Tariff Commission in conducting injury investigations."

The only changes in the proposed Treasury regulations which could relate to the role of the Commission in conducting injury investigations are those which provide for 1) the filing with the Treasury Department of information concerning injury, and 2) the revocation of a determination of sales at less than fair value. Neither appears to require any change in the existing procedures or practices of the Commission in the performance of its statutory function of determining whether injury to an industry has occurred or is likely by reason of imports which the Treasury Department determines have been sold at less than fair value.

1. The Proposed Treasury Regulations of October 26, 1967, require that "information indicating that an industry of the United States is being injured, or is likely to be injured, or prevented from being established", be furnished to the extent feasible (Sec. 53.27). It is our understanding that the Treasury Department would require that this evidence be furnished, and would examine it, not with a view to determining whether there has in fact been injury (a question which under statute is within the province of the Commission), but with the purpose of assuring itself that initiation of the investigation would not be futile, in the sense that it would be a waste of taxpayers' money for the Government to initiate a full anti-dumping investigation in the absence of any indication that it would possibly result in an assessment of anti-dumping duties.

If the Act is administered in this manner, as it is our understanding that the Treasury Department intends that it shall be, it is our view that the Commission's statutory function of determining the question of injury within three months of a determination by the Secretary of the Treasury that there have been sales of less than fair value, can continue to be performed by it as in the past.

2. The proposed Treasury Regulations contain a provision (Sec. 53.39) concerning revocation by the Treasury Department of a prior determination of sales at less than fair value, which would result in the discontinuance of a Commission injury investigation which had been begun but not completed at the time of the Treasury Department notice of revocation. Past practice of the Commission in these circumstances has been consistent with such a discontinuance, since the Tariff Commission cannot initiate an injury investigation until notified of a determination of sales at less than fair value by the Treasury Department and since continuation of the injury investigation after revocation of the Treasury determination would serve no useful purpose and would waste taxpayers' money.

Other aspects of the Proposed Regulations do not relate to the Commission's functions under the Anti-Dumping Act, nor has Chairman Mills sought the Commission's views on them. This is entirely understandable. Since they involve the administration of provisions of the Act which have never been the responsibility of the Tariff Commission, the Commission possesses no special competence

in respect of interpreting those provisions or regulations or practices implementing them. We think it would be as inappropriate for us to make judgments in these areas as it would were we to do so in respect of the Treasury Department's administration of any other laws for which it is responsible.

THE SECRETARY OF THE TREASURY,
Washington, D.C., March 27, 1968.

Hon. WILBUR D. MILLS,
Chairman, Committee on Ways and Means,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of February 16, 1968, enclosing a copy of a letter dated February 13, 1968, from Congressman John H. Buchanan, Jr., concerning the proposed changes in the Customs' Antidumping Regulations. In a letter to me, also dated February 13, 1968, Congressman Buchanan raised the same points. I trust, therefore, that our reply to him, a copy of which is attached, will suffice to answer the question he raised in his letter to you.

Please advise us if there are any further questions concerning the proposed changes or the administration of the Antidumping Act, 1921, as amended (19 U.S.C. 160 *et seq.*).

Sincerely yours,

HENRY M. FOWLER.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., March 27, 1968.

Hon. JOHN H. BUCHANAN, Jr.,
House of Representatives,
Washington, D.C.

DEAR MR. BUCHANAN: Thank you for your letter of February 13, 1968, concerning the proposed changes in the Customs Regulations as they relate to the administration of the Antidumping Act, 1921, as amended (19 U.S.C. 160 *et seq.*). The Bureau of Customs has received many comments from interested parties in response to the proposals published in the Federal Register on October 28, 1967, and is currently in the process of analyzing them. When this analysis is completed we shall be able to arrive at a decision as to the final form which the amended regulations will take.

In answer to the specific problems which you discussed in your letter, I would like to make the following comments. The Treasury Department does not intend to make it more difficult for complainants to initiate antidumping investigations. It is appropriate, however, for the Treasury to require the complainant to submit such information concerning injury as is available to him to insure that the fair value investigation will not be a futile exercise, as it would be if the complainant had no case for injury to present to the Tariff Commission. In this regard, it is of interest to note that the current regulations on this subject require that such information regarding the total value and volume of domestic production of the merchandise in question as is reasonably available be submitted with the initial complaint.

Under the proposed Customs Regulations, the Treasury would continue to accept information bearing on fair value even after the case had been referred to the Tariff's Commission for an injury investigation. This determination of sales at less than fair value, however, will be final in every sense. This review of the data which led the Treasury to conclude that sales at less than fair value were taking place will reduce the possibility that a finding of dumping will be issued on the basis of data subsequently proved incomplete or erroneous. It should be pointed out that while no formal procedures for revoking a final determination of sales at less than fair value is present in the regulations currently in force, in at least one instance the Treasury did revoke its determination subsequent to referral of the case to the Tariff Commission.

Finally, the Department does not intend to weaken its administration of the Antidumping Act. The proposed changes are procedural in nature and should have the effect of speeding up the processing of these cases. This is a goal which we believe is in the best interests of all concerned.

Thank you for your interest in the matter.

Sincerely yours,

FRED B. SMITH,
General Counsel.

OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, February 21, 1968.

Hon. WILBUR D. MILLS,
Chairman, Committee on Ways and Means,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of February 13, 1968, in which you enclose a letter from Congressman Buchanan questioning the consistency of two aspects of the Treasury Department's proposed dumping regulations with the Antidumping Act, 1921.

As you know, these proposed regulations are designed to implement the Antidumping Code which the United States and other countries signed as part of the Kennedy Round on June 30, 1967. Congressman Buchanan is therefore questioning the consistency of the Code with the Act. In this regard, I am enclosing a statement issued by this Office last year which attempts to answer on pages 7–9 the very same questions then raised by Senator Hartke.

With respect to your own request of August 24, 1967, as my staff then explained to Mr. Lamar, we were fully prepared to make such an analysis but it would take some time. In particular, we had in mind the fact that the new dumping regulations of the Treasury Department would have a considerable bearing upon the relationship in practice between the Code and the Act. For this reason, we wanted our analysis to take these regulations into account in the form that they would take effect on July 1, 1968.

We are now in a position to do so, and I am reasonably confident that our analysis will be available by early April.

Sincerely yours,

WILLIAM M. ROTH,
Special Representative.

FEBRUARY 16, 1968.

Hon. WILLIAM M. ROTH,
Special Representative for Trade Negotiations,
Executive Office of the President,
Washington, D.C.

MY DEAR MR. AMBASSADOR: For your information, I am enclosing a letter I received from The Honorable John H. Buchanan, Jr., concerning the implications of recently proposed Treasury regulations on antidumping for the authority of the U.S. Tariff Commission to conduct injury investigations in antidumping cases.

You may recall I wrote you on August 24, 1967, requesting certain information on essential factors of law and administrative regulation involved in the implementation of the Antidumping Code. According to our records, no response has been made.

I have requested that the Secretary of the Treasury and the Chairman of the U.S. Tariff Commission comment on Representative Buchanan's letter. However, it would still be most helpful to have your response to our earlier request for information on the proposed implementation of the Antidumping Code.

Therefore, I renew my request for the information detailed in my letter of August 24, 1967.

Sincerely yours,

WILBUR D. MILLS, *Chairman.*

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., February 13, 1698.

Hon. WILBUR D. MILLS,
Chairman, Committee on Ways and Means,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: It is my understanding that the Treasury Department has published in the Federal Register proposed changes in regulations pertaining to anti-dumping which will have the effect of amending the Anti-Dumping Law as enacted by the Congress without such amendment being subject to Congressional review.

The proposed changes would appear to extend the Treasury Department into the area of injury to industry resulting from anti-dumping in which jurisdiction was previously vested in the Federal Tariff Commission, and of giving the Treasury Department the authority to refer an anti-dumping case to the Tariff Commission, and then continue consideration of the case and, if desired, rescind its previous decision while the Tariff Commission is in the process of investigation in its area of jurisdiction in the same case.

While the effect on our domestic industries, which are threatened by the rising tide of low cost imports, of these changes is serious, the action of the Treasury Department in apparently seeking to use regulatory authority for the purpose of amending law is a matter which I am sure is of grave concern to the Congress.

Your review and consideration of this action by the Treasury Department will be sincerely appreciated.

With all best wishes,

Sincerely,

JOHN H. BUCHANAN, Jr.,
Member of Congress.

APPENDIXES

APPENDIX A

Antidumping Act, 1921, as Amended

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ANTIDUMPING ACT, 1921[1]

DUMPING INVESTIGATION

SEC. 201. (a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in this Act called a "finding") of his determination and the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers. 19 U.S.C. 160

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him or to any person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value), he shall forthwith publish notice of that fact in

[1] (See page 12 for footnotes.)

the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to him or any person to whom authority under this section has been delegated, until the further order of the Secretary, or until the Secretary has made public a finding as provided for in subdivision (a) in regard to such merchandise.

(c) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the United States Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative. (As amended by § 301, Act of Sept. 1, 1954 (68 Stat. 1138), and §§ 1, 4(b), Act of Aug. 14, 1958 (72 Stat. 583, 585).)

SPECIAL DUMPING DUTY

19 U.S.C. 161

SEC. 202. (a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 201, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under section 201 has been delegated, and as to which no appraisement report has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

(b) In determining the foreign market value for the purposes of subsection (a), if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—

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

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 212 (3) is used in determining foreign market value,

then due allowance shall be made therefor.

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

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

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 212(3) is used in determining foreign market value,

then due allowance shall be made therefor. (As amended by § 302, Act of Sept. 1, 1954 (68 Stat. 1139), and §§ 2, 4(b), Act of Aug. 14, 1958 (72 Stat. 583, 585).)

PURCHASE PRICE

19 U.S.C. 162 SEC. 203. That for the purposes of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and plus the amount, if not included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

EXPORTER'S SALES PRICE

19 U.S.C. 163 SEC. 204. That for the purpose of this title the exporter's sales price of imported mechandise shall be the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less (1) the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the mer-

chandise from the place of shipment in the country of exportation to the place of delivery in the United States, (2) the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration, (3) an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and (4) the amount of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

FOREIGN MARKET VALUE

SEC. 205. For the purposes of this title, the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, or if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of

19 U.S.C. 164

the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 207, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value. (As amended by § 3, Act of Aug. 14, 1958 (72 Stat. 584).)

CONSTRUCTED VALUE

19 U.S.C. 165

SEC. 206. (a) For the purposes of this title, the constructed value of imported merchandise shall be the sum of—

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

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

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

(b) For the purposes of this section, a transaction directly or indirectly between persons specified in any one of the paragraphs in subsection (c) of this section may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise of the same general class or kind as the merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the paragraphs in subsection (c).

(c) The persons referred to in subsection (b) are:

(1) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants;

(2) Any officer or director of an organization and such organization;

(3) Partners;

(4) Employer and employee;

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

(6) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person. (As amended by § 4(a), Act of Aug. 14, 1958 (72 Stat. 584).)

EXPORTER

SEC. 207. That for the purposes of this title the exporter of imported merchandise shall be the person by whom or for whose account the merchandise is imported into the United States: 19 U.S.C. 166

(1) If such person is the agent or principal of the exporter, manufacturer, or producer; or

(2) If such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer; or

(3) If the exporter, manufacturer, or producer owns or controls, directly or indirectly, through stock ownership

or control or otherwise, any interest in any business conducted by such person; or

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

OATHS AND BONDS ON ENTRY

19 U.S.C. 167 SEC. 208. That in the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has made public a finding as provided in section 201, and delivery of which has not been made by the collector [2] before such finding has been so made public, unless the person by whom or for whose account such merchandise is imported makes oath before the collector, under regulations prescribed by the Secretary, that he is not an exporter, or unless such person declares under oath at the time of entry, under regulations prescribed by the Secretary, the exporter's sales price of such merchandise, it shall be unlawful for the collector to deliver the merchandise until such person has made oath before the collector, under regulations prescribed by the Secretary, that the merchandise has not been sold or agreed to be sold by such person, and has given bond to the collector, under regulations prescribed by the Secretary, with sureties approved by the collector, in an amount equal to the estimated value of the merchandise, conditioned: (1) that he will report to the collector the exporter's sales price of the merchandise within 30 days after such merchandise has been sold or agreed to be sold in the United States, (2) that he will pay on demand from the collector the amount of special dumping duty, if any, imposed by this title upon such merchandise, and (3) that he will furnish to the collector such information as may be in his possession and as may be necessary for the ascertainment of such duty, and will keep such records as to the sale of such merchandise as the Secretary may by regulation prescribe.

DUTIES OF APPRAISERS [2]

SEC. 209. That in the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has made public a finding as provided in section 201, and as to which the appraiser or person acting as appraiser has made no appraisement report to the collector before such finding has been so made public, it shall be the duty of each appraiser or person acting as appraiser, by all reasonable ways and means to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of constructed value to the contrary notwithstanding) and report to the collector [2] the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and any other facts which the Secretary may deem necessary for the purposes of this title. (As amended by § 4(b), Act of Aug. 14, 1958 (72 Stat. 585).) 19 U.S.C. 168

APPEALS AND PROTESTS

SEC. 210. That for the purposes of this title the determination of the appraiser [2] or person acting as appraiser as to the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector [2] in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; and the general appraisers, the Board of General Appraisers,[3] and the Court of Customs Appeals [4] shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law. (As amended by § 4(b), Act of Aug. 14, 1958 (72 Stat. 585).) 19 U.S.C. 169

DRAWBACKS

SEC. 211. That the special dumping duty imposed by this title shall be treated in all respects as regular customs duties within the meaning of all laws relating to the drawback of customs duties. 19 U.S.C. 170

DEFINITIONS

SEC. 212. For the purposes of this title—

19 U.S.C. 170a

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

(A) to all purchasers at wholesale, or

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

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

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

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

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

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise under consideration.

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

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

(E) Merchandise (i) produced in the same country and by the same person and of the same general class or kind as the merchandise under consideration, (ii) like the merchandise under consideration in the purposes for which used, and (iii) which the Secretary or his delegate determines may reasonably be compared for the purposes of this title with the merchandise under consideration.

(F) Merchandise which satisfies all the requirements of subdivision (E) except that it was produced by another person.

(4) The term "usual wholesale quantities", in any case in which the merchandise in respect of which value is being determined is sold in the market under consideration at different prices for different quantities, means the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity. (Added by § 5, Act of Aug. 14, 1958 (72 Stat. 585).)

SHORT TITLE

SEC. 213. That this title may be cited as the "Antidumping Act, 1921." (Renumbered by § 5, Act of Aug. 14, 1958 (72 Stat. 585).) 19 U.S.C. 171

DEFINITIONS[5]

SEC. 406. That when used in Title II or Title III or in this title— 19 U.S.C. 172

The term "person" includes individuals, partnerships, corporations, and associations; and

The term "United States" includes all Territories and possessions subject to the jurisdiction of the United States, except the Philippine Islands,[6] the Virgin Islands, the islands of Guam and Tutuila, and the Canal Zone.

RULES AND REGULATIONS

19 U.S.C. 173 SEC. 407. That the Secretary shall make rules and regulations necessary for the enforcement of this Act.

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[1] Title II of the Act of May 27, 1921 (42 Stat. 9, 11–15, Public Law 10—67th Congress, H. R. 2435, H. Rep. 1, S. Rep. 16), as amended—

(A) by title III of the Customs Simplification Act of 1954 (68 Stat. 1136, 1138–39, Public Law 768—83d Congress, H.R. 10009, H. Rep. 2453, S. Rep. 2326), and

(B) by the Act of August 14, 1958 (72 Stat. 583, Public Law 85–630, H.R. 6006, H. Rep. 1261, S. Rep. 1619, Conf. Rep. 2352).

[2] Since the functions of the offices of collector of customs and appraiser of merchandise were transferred to the Secretary of the Treasury under Reorganization Plan No. 26 of 1950 (15 Fed. Reg. 4935), each reference in the Act to the collector or the appraiser should be a reference to the Secretary.

[3] The name of the Board of General Appraisers was changed to the United States Customs Court by the first section of the Act of May 28, 1926 (44 Stat. 669).

[4] The name of the Court of Customs Appeals was changed to the Court of Customs and Patent Appeals by the first section of the Act of March 2, 1929 (45 Stat. 1475).

[5] Although the provisions of the Antidumping Act, 1921, are contained in title II of the Act of May 27, 1921, sections 406 and 407 of title IV of that Act are applicable to the Antidumping Act, 1921.

[6] The independence of the Philippine Islands was recognized by the United States after the date of the enactment of the Act of May 27, 1921, thus the reference to the Philippine Islands in the definition of the term "United States" should be omitted.

NEW DUMPING REGULATIONS OF THE TREASURY DEPARTMENT

TITLE 19—CODE OF FEDERAL REGULATIONS

Title 19—CUSTOMS DUTIES

Chapter I—Bureau of Customs

[T.D. 68-148]

ANTIDUMPING REGULATIONS

Notice of a proposal to amend the Customs Regulations providing procedures under the Antidumping Act, 1921, was published in the FEDERAL REGISTER for October 28, 1967 (32 F.R. 14955). Interested persons were given an opportunity to submit relevant data, views, or arguments in writing regarding the proposed amendments.

Due consideration has been given to all comments, views, and other data received. In response to those comments or for editorial purposes, changes have been made in §§ 53.15, 53.23, 53.26, 53.29, 53.30, 53.31, 53.33, 53.34, 53.35, 53.36, 53.38 (renumbered § 53.37), 53.48, and 53.52.

Accordingly, the Customs Regulations are amended, to add a new Part 53, Antidumping, and to delete §§ 14.6 through 14.13, 16.21, 16.22, and 17.9 of the regulations as follows:

PART 14—APPRAISEMENT

§§ 14.6–14.13 [Deleted]

Part 14 is amended by deleting therefrom §§ 14.6 through 14.13, entitled "Procedure under Antidumping Act" and footnotes 14 and 15 thereto.

(Sec. 407, 42 Stat. 18; 5 U.S.C. 301, 19 U.S.C. 173)

PART 16—LIQUIDATION OF DUTIES

§§ 16.21 and 16.22 [Deleted]

Part 16 is amended by deleting therefrom §§ 16.21 and 16.22 and footnote 16.

(Sec. 407, 42 Stat. 18; 5 U.S.C. 301, 19 U.S.C. 173)

PART 17—PROTESTS AND REAPPRAISEMENTS

§ 17.9 [Deleted]

Part 17 is amended by deleting therefrom § 17.9 and footnote 10 thereto, and by amending the center heading preceding § 17.9 to read: "American Producers' Appeals and Protests."

(Sec. 407, 42 Stat. 18; 5 U.S.C. 301, 19 U.S.C. 173)

PART 53—ANTIDUMPING

A new Part 53, entitled "Antidumping," is added to read as follows:

Sec.

AUTHORITY: The provisions of this Part 53 issued under secs. 201-212, 407, 42 Stat. 11 et seq., as amended, sec. 5, 72 Stat. 585, secs. 406, 407, 42 Stat. 18; 5 U.S.C. 301, 19 U.S.C. 160-173. Other authorities are cited to text in parentheses.

§ 53.1 Scope.

This part sets forth procedures and rules applicable to proceedings under the Antidumping Act, 1921, as amended, the assessment of the special dumping duty, appeals for reappraisement, applications for review of reappraisements, and protests relating to matters under the Antidumping Act, 1921, as amended.

Subpart A—Fair Value

§ 53.2 Fair value; definition.

For the purposes of section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), the fair value of the imported merchandise shall be determined in accordance with §§ 53.3 to 53.5.

§ 53.3 Fair value based on price in country of exportation; the usual test.

(a) *General.* Merchandise imported into the United States will ordinarily be considered to have been sold, or to be likely to be sold, at less than fair value if the purchase price or exporter's sales price (as defined in sections 203 and 204, respectively, of the Antidumping Act, 1921, as amended (19 U.S.C. 162, 163)), as the case may be, is, or is likely to be, less than the price (as defined in section 205, after adjustment as provided for in section 202 of the Antidumping Act, 1921, as amended (19 U.S.C. 164, 161)), at which such or similar merchandise (as defined in section 212(3) of the Antidumping Act, 1921, as amended (19 U.S.C. 170a(3))) is sold for consumption in the country of exportation on or about the date of purchase or agreement to purchase of the merchandise imported into the United States if purchase price applies, or on or about the date of exportation thereof if exporter's sales price applies.

(b) *Restricted sales.* When home market sales form the appropriate basis of comparison, they will be used for this purpose whether or not they are restricted. If there should be restrictions which affect the value of the merchandise, appropriate adjustment of the home market price will be made.

§ 53.4 Fair value based on sales for exportation to countries other than the United States.

(a) *General.* If it is demonstrated that during a representative period the quantity of such or similar merchandise sold for consumption in the country of exportation is so small, in relation to the quantity sold for exportation to countries other than the United States, as to be an inadequate basis for comparison, then merchandise imported into the United States will ordinarily be deemed to have been sold, or to be likely to be sold, at less than fair value if the purchase price or the exporter's sales price (as defined in sections 203 and 204, respectively, of the Antidumping Act, 1921, as amended (19 U.S.C. 162, 163)), as the case may be, is, or is likely to be, less than the price (as defined in section 205, after adjustment as provided for in section 202 of the Antidumping Act, 1921, as amended (19 U.S.C. 164, 161)), at which such or similar merchandise (as defined in section 212(3) of the Antidumping Act, 1921, as amended (19 U.S.C. 170a(3))) is sold for exportation to countries other than the United States on or about the date of purchase or of agreement to purchase the merchandise imported into the United States if purchase price applies, or on or about the date of exportation thereof if exporter's sales price applies.

(b) *Twenty-five percent rule.* Generally, the quantity of such or similar merchandise sold for consumption in the country of exportation will be considered to be an inadequate basis for comparison if it is less than 25 percent of the quantity sold other than for exportation to the United States.

(c) *Restricted sales.* When third country sales form the appropriate basis of comparison, they will be used for this purpose whether or not they are restricted. If there should be restrictions which affect the value of the merchandise, appropriate adjustment of the third country price will be made.

§ 53.5 Fair value based on constructed value.

(a) *General.* If the information available is deemed by the Secretary insufficient or inadequate for a determination under § 53.3 or § 53.4, he will determine fair value on the basis of the constructed value as defined in section 206 of the Antidumping Act, 1921, as amended (19 U.S.C. 165).

(b) *Merchandise from controlled economy country.* Ordinarily, if the information available indicates that the economy of the country from which the merchandise is exported is controlled to an extent that sales or offers of sales of such or similar merchandise in that

country or to countries other than the United States do not permit a determination of fair value under § 53.3 or § 53.4, the Secretary will determine fair value on the basis of the constructed value of the merchandise determined on the normal costs, expenses, and profits as reflected by the prices at which such or similar merchandise is sold by a non-state-controlled-economy country either (1) for consumption in its own market; or (2) to other countries, including the United States.

§ 53.6 Calculation of fair value.

In calculating fair value under section 201(a), Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), the criteria in §§ 53.7 through 53.16 shall apply.

§ 53.7 Fair value; differences in quantities.

(a) *General.* In comparing the purchase price or exporter's sales price, as the case may be, with such applicable criteria as sales or offers, on which a determination of fair value is to be based, reasonable allowances will be made for differences in quantities if it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. In determining the question of allowances for differences in quantity, consideration will be given, among other things, to the practice of the industry in the country of exportation with respect to affording in the home market (or third country markets, where sales to third countries are the basis for comparison) discounts for quantity sales which are freely available to those who purchase in the ordinary course of trade.

(b) *Criteria for allowances.* Allowances for price discounts based on sales in large quantities ordinarily will not be made unless:

(1) *Six-month rule.* The exporter during the 6 months prior to the date when the question of dumping was raised or presented (or during such other period as investigation shows is more representative) had been granting quantity discounts of at least the same magnitude with respect to 20 percent or more of such or similar merchandise which he sold in the home market (or in third country markets when sales to third countries are the basis for comparison) and that such discounts had been freely available to all purchasers; or

(2) *Cost justification.* The exporter can demonstrate that the discounts are warranted on the basis of savings specifically attributable to the quantities involved.

(c) *Price lists.* In determining whether a discount has been given, the presence or absence of a published price list reflecting such a discount is not controlling. In certain lines of trade, price lists are not commonly published and in others although commonly published they are not commonly adhered to.

§ 53.8 Fair value; circumstances of sale.

(a) *General.* In comparing the purchase price or exporter's sales price, as the case may be, with the sales, or other criteria applicable, on which a determination of fair value is to be based, reasonable allowances will be made for bona fide differences in circumstances of sale if it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a reasonably direct relationship to the sales which are under consideration.

(b) *Examples.* Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances will also generally be made for differences in commissions. Except in those instances where it is clearly established that the differences in circumstances of sale bear a reasonably direct relationship to the sales which are under consideration, allowances generally will not be made for differences in research and development costs, production costs, and advertising and other selling costs of a seller unless such costs are attributable to a later sale of merchandise by a purchaser: *Provided,* That reasonable allowances for selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual selling expense incurred in the one market or the total amount of the commission allowed in such other market, whichever is less.

(c) *Relation to market value.* In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the effect of such differences upon the market value of the merchandise but, where appropriate, may also consider the cost of such differences to the seller, as contributing to an estimate of market value.

§ 53.9 Fair value; similar merchandise.

In comparing the purchase price or

exporter's sales price, as the case may be, with the selling price in the home market, or for exportation to countries other than the United States, in the case of similar merchandise described in subdivisions (C), (D), (E), or (F) of section 212(3), Antidumping Act, 1921, as amended (19 U.S.C. 170a(3)), due allowance shall be made for differences in the merchandise. In this regard 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.

§ 53.10 Fair value; offering price.

In the determination of fair value, offers will be considered in the absence of sales, but an offer made in circumstances in which acceptance is not reasonably to be expected will not be deemed to be an offer.

§ 53.11 Fair value; sales agency.

If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 207 of the Antidumping Act, 1921 (19 U.S.C. 166), the price at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in the determination of fair value.

§ 53.12 Fair value; fictitious sales.

In the determination of fair value, no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

§ 53.13 Fair value; sales at varying prices.

Where the prices in the sales which are being examined for a determination of fair value vary (after allowances provided for in §§ 53.7, 53.8, and 53.9), determination of fair value will take into account the prices of a preponderance of the merchandise thus sold or weighted averages of the prices of the merchandise thus sold. Unless there is a clear preponderance of merchandise sold at the same price, weighted averages of the prices of the merchandise sold normally will be used.

§ 53.14 Fair value; quantities involved and differences in price.

Merchandise will not be deemed to have been sold at less than fair value unless the quantity involved in the sale or sales to the United States, or the difference between the purchase price or exporter's sales price, as the case may be, and the fair value, is more than insignificant.

§ 53.15 Fair value; revision of prices or other changed circumstances.

(a) *Discontinuance of investigation.* Whenever the Secretary of the Treasury is satisfied during the course of an antidumping investigation that either

(1) Price revisions have been made which eliminate the likelihood of sales at less than fair value and that there is no likelihood of resumption of the prices which prevailed before such revision; or

(2) Sales to the United States of the merchandise have terminated and will not be resumed;

or whenever the Secretary concludes that there are other changed circumstances on the basis of which it may no longer be appropriate to continue an antidumping investigation, the Secretary may publish a notice to this effect in the FEDERAL REGISTER.

(b) *Notice.* The notice shall state the facts relied on by the Secretary in publishing the notice and that those facts are considered to be evidence that there are not and are not likely to be sales at less than fair value. The notice shall also state that unless persuasive evidence or argument to the contrary is presented within 30 days the Secretary will determine that there are not and are not likely to be sales at less than fair value. The acceptance of assurances to revise prices or the termination of sales at less than fair value will not prevent the Secretary from making a determination of sales at less than fair value in any case where he considers such action appropriate or if the exporters have requested such action.

§ 53.16 Fair value; shipments from intermediate country.

If the merchandise is not imported directly from the country of origin, but is shipped to the United States from another country, the price at which such or similar merchandise is sold in the country of origin will be used in the determination of fair value if the merchandise was merely transshipped through the country of shipment.

Subpart B—Availability of Information

NOTE: For Bureau of Customs general provisions relating to availability of information see Part 26 of this chapter.

§ 53.23 Availability of information in antidumping proceedings.

(a) *Information generally available.* In general, all information but not necessarily all documents, obtained by the Treasury Department including the Bureau of Customs, in connection with any antidumping proceeding will be available

for inspection or copying by any person. With respect to documents prepared by an officer or employee of the United States, factual material, as distinguished from recommendations and evaluations, contained in any such document will be made available by summary or otherwise on the same basis as information contained in other documents. Attention is directed to § 24.12 of this chapter relating to fees charged for providing copies of documents.

(b) *Requests for confidential treatment of information.* Any person who submits information in connection with an antidumping proceeding may request that such information, or any specified part thereof, be held confidential. Information covered by such a request shall be set forth on separate pages from other information; and all such pages shall be clearly marked "Confidential Treatment Requested." The Commissioner of Customs or the Secretary of the Treasury or the delegate of either will determine, pursuant to paragraph (c) of this section, whether such information, or any part thereof, shall be treated as confidential. If it is so determined, the information covered by the determination will not be made available for inspection or copying by any person other than an officer or employee of the U.S. Government or a person who has been specifically authorized to receive it by the person requesting confidential treatment. If it is determined that information submitted with such a request, or any part thereof, should not be treated as confidential, or that summarized or approximated presentations thereof should be made available for disclosure, the person who has requested confidential treatment thereof shall be promptly so advised and, unless he thereafter agrees that the information, or any specified part or summary or approximated presentations thereof, may be disclosed to all interested parties, the information will not be made available for disclosure, but to the extent that it is self-serving it will be disregarded for the purpose of the determination as to sales at less than fair value and no reliance shall be placed thereon in this connection, unless it can be demonstrated from other sources that the information is correct.

(c) *Standards for determining whether information will be regarded as confidential*—(1) *General.* 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. Further, if disclosure of information in specific terms or with identifying details would be inappropriate under this standard, the information will ordinarily be considered appropriate for disclosure in generalized, summary or approximated form, without identifying details, unless the Commissioner of Customs or the Secretary of the Treasury or the delegate of either determines that even in such generalized, summary or approximated form, such disclosure would still be of significant competitive advantage to a competitor or would still have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information. As indicated in paragraph (b) of this section, however, the decision that information is not entitled to protection from disclosure in its original or in another form will not lead to its disclosure unless the person supplying it consents to such disclosure.

(2) *Information ordinarily regarded as appropriate for disclosure.* Information will ordinarily be regarded as appropriate for disclosure if it

(i) Relates to price information;

(ii) Relates to claimed freely available price allowances for quantity purchases; or

(iii) Relates to claimed differences in circumstances of sale.

(3) *Information ordinarily regarded as confidential.* Information will ordinarily be regarded as confidential if its disclosure would

(i) Disclose business or trade secrets;

(ii) Disclose production costs;

(iii) Disclose distribution costs, except to the extent that such costs are accepted as justifying allowances for quantity or differences in circumstances of sale;

(iv) Disclose the names of particular customers or the price or prices at which particular sales were made.

(5 U.S.C. 552)

Subpart C—Procedure Under Antidumping Act, 1921

§ 53.25 Suspected dumping; information from customs officer.

If any district director of customs has knowledge of any grounds for a reason to believe or suspect that any merchandise is being, or is likely to be, imported into the United States at a purchase price or exporter's sales price less than the foreign market value (or, in the absence of such value, than the constructed value), as contemplated by section 201(b) Antidumping Act, 1921, as amended (19 U.S.C. 160(b)), or at less than its "fair value" as that term is defined in § 53.2, he shall communicate his belief or suspicion promptly to the Commissioner of Customs. Every such communication shall contain or be accompanied by a statement of substan-

tially the same information as is required in § 53.27, if the district director has such information or if it is readily available to him.

§ 53.26 Suspected dumping; information from persons outside Customs Service.

Any person outside the Customs Service who has information that merchandise is being, or is likely to be, imported into the United States under such circumstances as to bring it within the purview of the Antidumping Act, 1921, as amended, may, on behalf of an industry in the United States, communicate such information in writing to the Commissioner of Customs.

§ 53.27 Suspected dumping; nature of information to be made available.

Communications to the Commissioner pursuant to § 53.26, regarding suspected dumping should, to the extent feasible, contain or be accompanied by the following:

(a) A detailed description or sample of the merchandise; if no sample is furnished, the Bureau of Customs may call upon the person who furnished the information to furnish samples of the imported and competitive domestic articles, or either;

(b) The name of the country from which it is being, or is likely to be, imported;

(c) The name of the exporter or exporters and producer or producers, if known;

(d) The ports or probable ports of importation into the United States;

(e) Information indicating that an industry in the United States is being injured, or is likely to be injured, or prevented from being established;

(f) Such detailed data as are available with respect to values and prices indicating that such merchandise is being, or is likely to be, sold in the United States at less than its fair value, within the meaning of the Antidumping Act, 1921, as amended, including information as to any differences between the foreign market value or constructed value and the purchase price or exporter's sales price which may be accounted for by any difference in taxes, discounts, incidental costs such as those for packing or freight, or other items.

(g) Such material as is available indicating the market price for similar merchandise in the country of exportation and in any third countries in which merchandise of the producer complained of is known to be sold.

(h) Such information as is available as to sales made for consumption in the country of exportation or for exportation otherwise than to the United States over a significant period of time prior to the date upon which the information is furnished.

(i) Such suggestions as the person furnishing the information may have as to specific avenues of investigation to be pursued or questions to be asked in seeking pertinent information.

§ 53.28 Adequacy of information.

If any information filed pursuant to § 53.26 in the opinion of the Commissioner does not conform substantially with the requirements of § 53.27, the Commissioner shall return the communication to the person who submitted it with detailed written advice as to the respects in which it does not conform.

§ 53.29 Initiation of antidumping proceeding; summary investigation.

Upon receipt of information pursuant to § 53.25 or § 53.26 in a form acceptable to the Commissioner, the Commissioner shall conduct a summary investigation. If he determines that the information is patently in error, or that merchandise of the class or kind is not being and is not likely to be imported in more than insignificant quantities, or for other reasons determines that further investigation is not warranted, he shall so advise the person who submitted the information and the case shall be closed.

§ 53.30 Antidumping Proceeding Notice.

If the case has not been closed under § 53.29, the Commissioner shall publish a notice in the FEDERAL REGISTER that information in an acceptable form has been received pursuant to § 53.25 or § 53.26. This notice, which may be referred to as the "Antidumping Proceeding Notice," will specify—

(a) Whether the information relates to all shipments of the merchandise in question from an exporting country, or only to shipments by certain persons or firms; in the latter case, the names of such persons and firms will be specified.

(b) The date on which information in an acceptable form was received and that date shall be the date on which the question of dumping was raised or presented for purposes of sections 201(b) and 202(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(b) and 161(a)).

(c) The fact that there is some evidence on record concerning injury to or likelihood of injury to or prevention of establishment of an industry in the United States.

(d) A summary of the information received. If a person outside the Customs Service raised or presented the question of dumping, his name shall be included in the notice unless a determination under § 53.23 requires that his name not be disclosed.

§ 53.31 Full-scale investigation.

(a) *Initiation of investigation.* Upon publication of an Antidumping Proceeding Notice the Commissioner shall proceed, by a full-scale investigation, or otherwise, to obtain such additional information, if any, as may be necessary to enable the Secretary to reach a determination as provided by § 53.32. In order to verify the information presented, or to obtain further details, investigations will, where appropriate, be conducted by Customs Representatives in foreign countries, unless the country concerned objects to the investigation. If an adequate investigation is not permitted, or if any necessary information is withheld, the Secretary will reach a determination on the basis of such facts as are available to him.

(b) *Termination of investigation.* If at any time during an investigation the Commissioner determines that further investigation is not warranted by the facts of the case, he may recommend to the Secretary that the case be closed by a determination of no sales at less than fair value.

§ 53.32 Determination as to fact or likelihood of sales at less than fair value.

(a) *Fair value determination.* Upon receipt from the Commissioner of Customs of the information referred to in § 53.31, the Secretary of the Treasury will proceed as promptly as possible to determine whether or not the merchandise in question is in fact being, or is likely to be, sold in the United States or elsewhere at less than its fair value.

(b) *Submission of views.* During the course of an antidumping proceeding interested persons may make such written submissions as they desire. Appropriate consideration will be given to any new or additional information submitted. The Secretary or his delegate also may at any time invite any person or persons to supply him orally with information or argument.

§ 53.33 Negative determination.

(a) *Notice of Tentative Negative Determination.* If it appears to the Secretary that on the basis of information before him a determination of sales at not less than fair value may be required, he will publish in the FEDERAL REGISTER a "Notice of Tentative Negative Determination," which will include a statement of the reasons upon which the tentative determination is based.

(b) *Opportunity to present views*—(1) *Written.* Interested persons may make such written submissions as they desire, within a period which will be specified in the notice, with respect to the contemplated action. Appropriate consideration will be given to any new or additional information or argument submitted.

(2) *Oral.* If any person believes that any information obtained by the Bureau of Customs in the course of the antidumping proceeding is inaccurate or that for any other reason the tentative determination is in error, he may request in writing that the Secretary of the Treasury afford him an opportunity to present his views in this regard. Upon receipt of such a request, the Secretary will notify the person who supplied any information, the accuracy of which is questioned and such other person or persons, if any, as he in his discretion may deem to be appropriate. If the Secretary is satisfied that the circumstances so warrant, an opportunity will be afforded by the Secretary or his delegate for all such persons to appear, through their counsel or in person, accompanied by counsel if they so desire, to make known their respective points of view and to supply such further information or argument as may be of assistance in leading to a conclusion as to the accuracy of the information in question. The Secretary or his delegate may at any time invite any person or persons to supply him orally with information or argument.

(c) *Final determination.* As soon as possible thereafter, the Secretary will make a final determination and publish his determination in the FEDERAL REGISTER.

(d) *Negative determination after issuance of a withholding of appraisement notice.* The procedure specified in paragraphs (a), (b), and (c) of this section will not apply if the decision to issue a negative determination is made by the Secretary after a withholding of appraisement notice has been issued and thereafter he has afforded interested parties an opportunity to be heard pursuant to the provisions of § 53.37. In lieu thereof a final negative determination will be published setting forth the statement of reasons.

§ 53.34 Withholding of appraisement.

(a) *Three-month period.* If the Commissioner determines during the course of his investigations that there are reasonable grounds to believe or suspect that any merchandise is being, or is likely to be, sold at less than its foreign market value (or, in the absence of such value, then its constructed value) under the Antidumping Act, and if there is evidence on record concerning injury or likelihood of injury to or prevention of establishment of an industry of the United States, he shall publish notice of these facts in the FEDERAL REGISTER in a "Withholding of Appraisement Notice," indicating—

(1) That the belief or suspicion re-

lates only to certain shippers or producers, if this is the case and that the investigation is limited to the transactions of such shippers or producers;

(2) The expiration date of the notice (which shall be no more than 3 months from the date of publication of the notice in the FEDERAL REGISTER, unless a longer period of withholding of appraisement has been requested by the importer and the exporter pursuant to paragraph (b) and has been approved by the Commissioner).

This withholding of appraisement notice will be issued concurrently with the Secretary's determination pursuant to § 53.35, unless appraisement is being withheld pursuant to paragraph (b) of this section.

(b) *Six-month period.* At any time prior to the issuance of the withholding of appraisement notice referred to in paragraph (a) of this section, importers and exporters concerned may request that the period of withholding of appraisement extend for a period longer than 3 months, but in no case longer than 6 months. Upon the receipt of such a request from importers and exporters concerned the Commissioner will decide whether appraisement should be withheld for a period longer than 3 months. If the Commissioner decides that a period of withholding of appraisement longer than 3 months is justified, he will publish a withholding of appraisement notice upon the same basis and containing information of the same type as is required by paragraph (a) of this section, except that the expiration date of the notice may be 6 months from the date of publication of the notice in the FEDERAL REGISTER.

(c) *Advice to District Directors of Customs.* The Commissioner shall advise all district directors of customs of his action. Upon receipt of such advice the district director of customs shall proceed to withhold appraisement in accordance with the pertinent provisions of § 53.48.

(d) *Notice issued before July 1, 1968.* The time limitations of this section do not apply to withholding of appraisement notices issued before July 1, 1968.

§ 53.35 Affirmative determination; general.

If it appears to the Secretary on the basis of the information before him that a determination of sales at less than fair value is required, unless the withholding of appraisement notice was issued pursuant to § 53.34(b), he will publish in the FEDERAL REGISTER his Determination of Sales at Less Than Fair Value. This determination will include

(a) An adequate description of the merchandise;

(b) The name of each country of exportation;

(c) The name of the supplier or suppliers, if practicable;

(d) The date of the receipt of the information in an acceptable form;

(e) Whether the appropriate basis of comparison is purchase price or exporter's sales price; and

(f) A statement of reasons upon which the determination is based.

§ 53.36 Affirmative determination; appraisement withheld pursuant to § 53.34(b).

If it appears to the Secretary on the basis of the information before him that a determination of sales at less than fair value is required, and if a withholding of appraisement notice has been issued pursuant to § 53.34(b), he will publish in the FEDERAL REGISTER his Determination of Sales at Less Than Fair Value within 3 months from the date of publication of such withholding of appraisement notice. This determination will contain information of the same type as required in § 53.35 (a) through (f).

§ 53.37 Affirmative determination—opportunity to present views.

As soon as possible after the publication of the withholding of appraisement notice if any person believes that for any reason the withholding action is in error, he may request that the Secretary of the Treasury afford him an opportunity to present his views in this regard. Upon receipt of such a request the Secretary will notify each person who supplied any information, relied upon in connection with the withholding action, and such other person or persons, if any, as he may deem to be appropriate. If the Secretary is satisfied that the circumstances so warrant, an opportunity will be afforded by the Secretary or his delegate for all interested persons to appear, through their counsel or in person, accompanied by counsel if they so desire, to make known their respective points of view and to supply such further information or argument as may be of assistance in a consideration of the matter. Unless for unusual reasons it is clearly impracticable, such meeting will be held within three weeks of the date of the publication of the notice of withholding, unless such notice was issued pursuant to § 53.34(b), when it shall be held within 5 weeks of such publication. Reasonable notice of the meeting will be given.

§ 53.38 Referral to U.S. Tariff Commission.

Whenever the Secretary makes a determination of sales at less than fair value he shall so advise the U.S. Tariff Commission.

§ 53.39 Revocation of determination of sales at less than fair value; determination of sales at not less than fair value.

If the Secretary is persuaded from information submitted or arguments received that his determination of sales at less than fair value was in error, and if the Tariff Commission has not yet issued a determination relating to injury, he will publish a notice of "Revocation of Determination of Sales at Less Than Fair Value; Determination of Sales at Not Less Than Fair Value," or, if appropriate, a notice of "Modification of Determination of Sales at Less Than Fair Value," which notice will state the reasons upon which it was based. He shall notify the Tariff Commission of his action.

§ 53.40 Dumping finding.

If the Tariff Commission determines that there is, or is likely to be, the injury contemplated by the statute, the Secretary of the Treasury will make the finding contemplated by section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), with respect to the involved merchandise.

§ 53.41 Modification or revocation of finding.

(a) *Application to modify or revoke.* An application for the modification or revocation of any finding made as provided for in § 53.40 may be submitted in writing to the Commissioner of Customs, together with detailed information concerning any change in circumstances or practice which has obtained for a substantial period of time, or other reasons, which the applicant believes will establish that the basis for the finding no longer exists with respect to all or any part of the merchandise covered thereby.

(b) *Modification or revocation by Secretary.* The Secretary of the Treasury may on his own initiative modify or revoke a finding of dumping.

(c) *Notice of modification or revocation of finding.* Notice of intent to modify or revoke a finding will be published by the Secretary in the FEDERAL REGISTER. Comments from interested parties will be given consideration if they are received within the period of time stated in the notice.

§ 53.42 Publication of determinations and findings.

Each determination made in accordance with §§ 53.33, 53.34, 53.35, and 53.36, whether such determination is in the affirmative or in the negative, and each finding made in accordance with § 53.40, will be published in the FEDERAL REGISTER, together with a statement of the reasons therefor.

§ 53.43 List of current findings.

The following findings of dumping are currently in effect:

FINDINGS OF DUMPING

Merchandise	Country	T.D.	Modified by
Portland cement, other than white, nonstaining portland cement.	Sweden	55369	
	Belgium	55428	
Portland gray cement	Portugal	55501	
Portland cement, other than white, nonstaining portland cement.	Dominican Republic	55883	
Chromic acid	Australia	56130	
Steel reinforcing bars	Canada	56150	
Carbon steel bars and structural shapes.	Canada	56264	
Azobisformamide	Japan	56414	
Steel jacks	Canada	66-191	
Cast iron soil pipe	Poland	67-252	

Subpart D—Action by District Director of Customs

§ 53.48 Action by the District Director of Customs.

(a) *Appraisement withheld; notice to importer.* Upon receipt of advice from the Commissioner of Customs pursuant to § 53.34, the district director of customs shall withhold appraisement as to such merchandise entered, or withdrawn from warehouse, for consumption, after the date of publication of the "Withholding of Appraisement Notice," unless the Commissioner's Withholding of Appraisement Notice specifies a different effective date. Each district director of customs shall notify the importer, consignee, or agent immediately of each lot of merchandise with respect to which appraisement is so withheld. Such notice shall indicate (1) the rate of duty of the merchandise under the applicable item of the Tariff Schedules of the United States if known, and (2) the estimated margin of the special dumping duty that could be assessed. Upon advice of a finding made in accordance with § 53.40, the district director of customs shall give immediate notice thereof to the importer when any shipment subject thereto is imported after the date of the finding and information is not on hand for completion of appraisement of such shipment.

(b) *Request to proceed with appraisement.* If, before a finding of dumping has been made, or before a case has been closed without a finding of dumping, the district director of customs is satisfied by information furnished by the importer or otherwise that the purchase price or exporter's sales price, in respect of any shipment, is not less than foreign market value (or, in the absence of such value, than the constructed value), he shall so advise the Commissioner and request authorization to proceed with his

appraisement of that shipment in the usual manner.

§ 53.49 Certificate of importer.

If a finding of dumping has been made, the district director of customs shall require the importer or his agent to file a certificate of the importer on the appropriate one of the following forms. A separate certificate shall be required for each shipment.

FORM 1

NONEXPORTER'S CERTIFICATE, ANTIDUMPING ACT, 1921

Port of .....
Date ....., 19...

Re: Entry No. ....., dated ....., 19...
Import carrier: .....
Arrived ....., 19...

I certify that I am not the exporter as defined in section 207, Antidumping Act, 1921, of the merchandise covered by the aforesaid entry. I further certify that the merchandise was purchased for importation by ..... on ....., 19..., and that the purchase price is .....

(Signed) .....

FORM 2

EXPORTER'S CERTIFICATE WHEN SALES PRICE IS KNOWN, ANTIDUMPING ACT, 1921

Port of .....
Date ....., 19...

Re: Entry No. ....., dated ....., 19...
Import carrier: .....
Arrived ....., 19...

I certify that I am the exporter as defined in section 207, Antidumping Act, 1921, of the merchandise covered by the aforesaid entry; that the merchandise is sold or agreed to be sold at the price stated in the attached statement; and that, if any of such merchandise is actually sold at any price different from the price stated therefor in the attached statement, I will immediately notify the district director of customs of all the circumstances.

The merchandise was acquired by me in the following manner: .....
.....

and has been sold or agreed to be sold to ..... at .....
(name and address) (price)

(Signed) .....

FORM 3

EXPORTER'S CERTIFICATE WHEN SALES PRICE IS NOT KNOWN ANTIDUMPING ACT, 1921

Port of .....
Date ....., 19...

Re: Entry No. ....., dated ....., 19...
Import carrier: .....
Arrived ....., 19...

I certify that I am the exporter as defined in section 207, Antidumping Act, 1921, of the merchandise covered by the aforesaid entry, and that I have no knowledge as to any price at which such merchandise will be sold in the United States. I hereby agree that I will keep a record of the sales and will furnish the district director of customs within 30 days after the sale of any of such merchandise a statement of each selling price. I further agree that, if any of the merchandise has not been sold before the expiration of 6 months from the date of entry, I will so report to the district director of customs upon such expiration date.

The merchandise was acquired by me in the following manner: .....
.....

(Signed) .....

FORM 4

EXPORTER'S CERTIFICATE WHEN MERCHANDISE IS NOT, AND WILL NOT BE, SOLD ANTIDUMPING ACT, 1921

Port of .....
Date ....., 19...

Re: Entry No. ....., dated ....., 19...
Import carrier: .....
Arrived ....., 19...

I certify that I am the exporter as defined in section 207, Antidumping Act, 1921, of the merchandise covered by the aforesaid entry, and that such merchandise has not been, and will not be, sold in the United States for the following reason: .....
.....

(Signed) .....

(Sec. 486, 46 Stat. 725, as amended; 19 U.S.C. 1486)

§ 53.50 Appraisement of merchandise covered by Form 4.

If an unqualified certificate on Form 4 is filed and the district director of customs is satisfied that no evidence can be obtained to contradict it, the shipment will be appraised without regard to the Antidumping Act.

§ 53.51 Appraisement when required certificate not filed.

If the importer fails to file an appropriate certificate within 30 days following notification by the district director of customs that a certificate is required under section 53.49, appraisement shall proceed upon the basis of the best information available.

§ 53.52 Reimbursement of dumping duties.

(a) *General.* In calculating purchase price or exporter's sales price as the case may be, there shall be deducted the amount of any special dumping duties which are, or will be paid by the manufacturer, producer, seller, or exporter, or which are, or will be, refunded to the importer by the manufacturer, producer, seller, or exporter, either directly or indirectly, but a warranty of nonapplicability of dumping duties entered into before the initiation of the investigation, will not be regarded as affecting purchase price or exporter's sales price if it was granted to an importer with respect to merchandise which was:

(1) Purchased, or agreed to be purchased, before publication of a Withhold-

ing of Appraisement Notice with respect to such merchandise; and

(2) Exported before a determination of sales at less than fair value is made.

(b) *Statement concerning reimbursement.* Before proceeding with appraisement of any merchandise with respect to which dumping duties are found to be due the district director of customs shall require the importer to file a written statement in the following form:

I hereby certify that I (have) (have not) entered into any agreement or understanding for the payment or for the refunding to me, by the manufacturer, producer, seller, or exporter of all or any part of the special dumping duties assessed upon the following importations of (commodity) from (country): (List entry numbers) which have been purchased on or after (date of publication of withholding in Federal Register or purchased before (same date) but exported on or after (date of determination of sales at less than fair value).

A certificate will be required for all merchandise that is unappraised on the date that the finding of dumping is issued. Thereafter, a separate certificate will be required for each additional shipment.

§ 53.53 Release of merchandise; bond.

When the district director of customs in accordance with § 53.34(c) has received a notice of withheld appraisement or when he has been advised of a finding provided for in § 53.40, and so long as such notice or finding is in effect, he shall withhold release of any merchandise of a class or kind covered by such notice or finding which is then in his custody or is thereafter imported, unless an appropriate bond is filed or is on file, as specified hereafter in § 53.54, or unless the merchandise covered by a specified entry will be appraised without regard to the Antidumping Act, 1921, as amended.

§ 53.54 Type of bond required.

(a) *General.* If the merchandise is of a class or kind covered by a notice of withheld appraisement provided for in § 53.48(a) or by a finding provided for in § 53.40, a single consumption entry bond covering the shipment, in addition to any other required bond, shall be furnished by the person making the entry or withdrawal, unless—

(1) A bond is required under paragraph (b) of this section; or

(2) In cases in which there is no such requirement the district director of customs is satisfied that the bond under which the entry was filed is sufficient. The face amount of any additional bond required under this paragraph shall be sufficient to assure payment of any special duty that may accrue by reason of the Antidumping Act, but in no case shall be for less than $100.

(b) *Bond on customs Form 7591.* If the merchandise is of a class or kind covered by a finding provided for in § 53.40 and the importer or his agent has filed a certificate on Form 3 (section 53.49), the bond required by section 208 of the Antidumping Act, 1921 (19 U.S.C. 167), shall be on customs Form 7591. In such case, a separate bond shall be required for each entry or withdrawal, and such bond shall be in addition to any other bond required by law or regulation. The record of sales required under the conditions of the bond of customs Form 7591 shall identify the entry covering the merchandise and show the name and address of each purchaser, each selling price, and the date of each sale. The face amount of such bond shall be equal to the estimated value of the merchandise covered by the finding.

§ 53.55 Conversion of currencies.

In determining the existence and amount of any difference between the purchase price or exporter's sales price and the foreign market value (or, in the absence of such value, the constructed value) for the purposes of §§ 53.2 through 53.5, or of section 201(b) or 202(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(b), 161(a)), any necessary conversion of a foreign currency into its equivalent in U.S. currency shall be made in accordance with the provisions of section 522, Tariff Act of 1930, as amended (31 U.S.C. 372) and § 16.4 of this chapter, (a) as of the date of purchase or agreement to purchase, if the purchase price is an element of the comparison, or (b) as of the date of exportation, if the exporter's sales price is an element of the comparison.

§ 53.56 Dumping duty.

(a) *Rule for assessment.* Special dumping duty shall be assessed on all importations of merchandise, whether dutiable or free, as to which the Secretary of the Treasury has made public a finding of dumping, entered or withdrawn from warehouse, for consumption, not more than 120 days before the question of dumping was raised by or presented to the Secretary or his delegate, provided the particular importation has not been appraised prior to the publication of such finding, and the district director of customs has determined that the purchase price or exporter's sales price is less than the foreign market value or constructed value, as the case may be.

(b) *Entered value not controlling.* The fact that the importer has added on entry the difference between the purchase price or the exporter's sales price and the foreign market value or constructed value and the district director of customs has approved the resulting

entered value shall not prevent the assessment of the special dumping duty.

§ 53.57 Notice to importer.

Before dumping duty is assessed, the district director of customs shall notify the importer, his consignee, or agent of the appraisement of the merchandise, as in the case of an advance in value. If the importer files an appeal for reappraisement, liquidation shall be suspended until the appeal for reappraisement is finally decided.

§ 53.58 Dumping duty; samples.

If the necessary conditions are present, the special dumping duty shall be assessed on samples imported for the purpose of taking orders and making sales in this country.

§ 53.59 Method of computing dumping duty.

If it appears that the merchandise has been purchased by a person not the exporter within the meaning of section 207, Antidumping Act, 1921 (19 U.S.C. 166), the special dumping duty shall equal the difference between the purchase price and the foreign market value on the date of purchase, or, if there is no foreign market value, between the purchase price and the constructed value, any foreign currency involved being converted into U.S. money as of the date of purchase or agreement to purchase. If it appears that the merchandise is imported by a person who is the exporter within the meaning of such section 207, the special dumping duty shall equal the difference between the exporter's sales price and the foreign market value on the date of exportation, or, if there is no foreign market value, between the exporter's sales price and the constructed value, any foreign currency involved being converted into U.S. money as of the date of exportation.

Subpart E—Antidumping Appeals and Protests

§ 53.64 Antidumping appeals and protests procedure.

Appeals for reappraisement, applications for reviews of reappraisements, and protests relating to the Antidumping Act, 1921, as amended, shall be made in the same manner as appeals, applications for review, and protests relating to ordinary customs duties.

These amendments shall become effective on July 1, 1968.

LESTER D. JOHNSON,
Commissioner of Customs.

Approved: May 29, 1968

JOSEPH M. BOWMAN

Assistant Secretary.

For ready comparison the following parallel reference table shows where former §§ 14.6–14.13, 16.21, 16.22, and 17.9 appear in Part 53.

APPENDIX TO AMENDMENT OF ANTIDUMPING REGULATIONS

PARALLEL REFERENCE TABLE

(This table shows the relation of sections in Part 53 to 19 CFR 14.6–14.13, 16.21, 16.22, and 17.9)

Part 53 Sections		*Part 14 Sections*
53.1	Scope	New.
	SUBPART A—FAIR VALUE	
53.2	Fair value; definition	14.7(a).
53.3	Fair value based on price in country of exportation; The usual test.	14.7(a)(1).
	(a) General.	
	(b) Restricted sales	Footnote 15 to Part 14, Example 1.
53.4	Fair value based on sales for exportation to countries other than the United States.	14.7(a)(2).
	(a) General.	
	(b) Twenty-five percent rule.	
	(c) Restricted sales	Footnote 15 to Part 14, Example 2.
53.5	Fair value based on constructed value	14.7(a)(3).
	(a) General	14.7(a)(3).
	(b) Merchandise from controlled economy country.	New.
53.6	Calculation of fair value	14.7(b).
53.7	Fair value; differences in quantities	14.7(b)(1).
	(a) General.	
	(b) Criteria for allowances.	
	(c) Price lists	Footnote 15 to Part 14, Example 4.
53.8	Fair value; circumstances of sale	14.7(b)(2).
	(a) General.	
	(b) Examples.	
	(c) Relation to market value.	

APPENDIX TO AMENDMENT OF ANTIDUMPING REGULATIONS—Continued

Part 53 Sections		Part 14 Sections
	SUBPART A—FAIR VALUE—Continued	
53.9	Fair value; similar merchandise	14.7(b)(3).
53.10	Fair value; offering price	14.7(b)(4).
51.11	Fair value; sales agency	14.7(b)(5).
53.12	Fair value; fictitious sales	14.7(b)(6).
53.13	Fair value; sales at varying prices	14.7(b)(7).
53.14	Fair value; quantities involved and differences in price	14.7(b)(8).
53.15	Fair value; revision of prices or other changed circumstances	14.7(b)(9).
	(a) Discontinuance of investigation.	
	(b) Notice.	
53.16	Fair value; shipments from intermediate country	New.
53.17—53.22	Reserved.	
	SUBPART B—AVAILABILITY OF INFORMATION	
53.23	Availability of information in antidumping proceedings	14.6a.
	(a) Information generally available	14.6a(a).
	(b) Requests for confidential treatment of information	14.6a(b).
	(c) Standards for determining whether information will be regarded as confidential	14.6a(c).
53.24	Reserved.	
	SUBPART C—PROCEDURE UNDER ANTIDUMPING ACT, 1921	
53.25	Suspected dumping; information from customs officer	14.6(a).
52.26	Suspected dumping; information from persons outside Customs Service	14.6(b).
53.27	Suspected dumping; nature of information to be made available.	14.6(b) and Paragraphs 2 and 3 Footnote 15 to Part 14.
53.28	Adequacy of information	14.6(c).
53.29	Initiation of antidumping proceeding; summary investigation.	14.6(d)(1)(i).
53.30	Antidumping proceeding notice	14.6(d)(1)(i).
53.31	Full scale investigation	14.6(d)(3)(i) and (ii).
	(a) Initiation of investigation.	
	(b) Termination of investigation.	
53.32	Determination as to fact or likelihood of sales at less than fair value.	14.8(a).
	(a) Fair value determination	14.8(a).
	(b) Submission of views	14.8(a).
53.33	Negative determination	14.8(a).
	(a) Notice of tentative negative determination.	14.8(a).
	(b) Opportunity to present views	14.8(a).
	(c) Final determination	14.8(a).
	(d) Negative determination after issuance of a withholding of appraisement notice.	New.
53.34	Withholding of appraisement	14.6(e).
	(a) Three-month period	New.
	(b) Six-month period	New.
	(c) Advice to District Directors of Customs.	
	(d) Notice issued before July 1, 1968	New.
53.35	Affirmative determination; general	New.
53.36	Affirmative determination; appraisement withheld pursuant to § 53.34(b).	New.
53.37	Affirmative determination; opportunity to present views.	14.8(a).
53.38	Referral to U.S. Tariff Commission	14.8(a).
53.39	Revocation of determination of sales at less than fair value; determination of sales at not less than fair value.	New.
53.40	Dumping finding	14.8(b).
53.41	Modification or revocation of finding	14.12.
	(a) Application to modify or revoke.	
	(b) Modification or revocation by Secreary.	
	(c) Notice of modification or revocation of finding.	

APPENDIX TO AMENDMENT OF ANTIDUMPING REGULATIONS—Continued

		Part 53 Sections	Part 14 Sections
	SUBPART C—PROCEDURE UNDER ANTIDUMPING ACT, 1921—Continued		
53.42	Publication of determinations and findings		14.13(a).
53.43	List of current findings		14.13(b).
53.44–53.47	Reserved		
	SUBPART D—ACTION BY DISTRICT DIRECTOR OF CUSTOMS.		
53.48	Action by the District Director of Customs		14.9(a).
	(a) Appraisement withheld; notice to importer.		14.9(a).
	(b) Request to proceed with appraisement		14.9(b).
53.49	Certificate of importer		14.9(c).
53.50	Appraisement of merchandise covered by Form 4.		14.9(d).
53.51	Appraisement when required certificate not filed.		14.9(e).
53.52	Reimbursement of dumping duties		14.9(f).
	(a) General		14.9(f).
	(b) Statement concerning reimbursement		New.
53.53	Release of merchandise; bond		14.10(a).
53.54	Type of bond required.		
	(a) General		14.10(b).
	(b) Bond on customs Form 7591		14.10(c).
53.55	Conversion of currencies		14.11.
		Part 16 Sections	
53.56	Dumping duty.		
	(a) Rule for assessment		16.21(a) and Footnote 16 to Part 16.
	(b) Entered value not controlling		Footnote 16.
53.57	Notice to importer		16.21(b).
53.58	Dumping duty; samples		16.22.
53.59	Method of computing dumping duty		16.22.
53.60–53.63	Reserved.		
	SUBPART E—ANTIDUMPING APPEALS AND PROTESTS		
		Part 17 Sections	
53.64	Antidumping appeals and protests procedure		17.9.

[F.R. Doc. 68-6596; Filed, May 31, 1968; 11:43 a.m.]

PRESENT DUMPING REGULATIONS OF TREASURY DEPARTMENT

TITLE 19—CODE OF FEDERAL REGULATIONS

PROCEDURE UNDER ANTIDUMPING ACT

§ 14.6 Suspected dumping.

(a) If any appraiser or other principal customs officer has knowledge of any grounds for a reason to believe or suspect that any merchandise is being, or is likely to be, imported into the United States at a purchase price or exporter's sales price less than the foreign market value (or, in the absence of such value, than the constructed value), as contemplated by section 201(b). Antidumping Act, 1921, as amended (19 U.S.C. 160(b)), or at less than its "fair value" as that term is defined in § 14.7, he shall communicate his belief or suspicion promptly to the Commissioner of Customs. Every such communication shall contain or be accompanied by a statement of substantially the same information as required in paragraph (b) of this section, if in the possession of the appraiser or other officer or readily available to him.

(b) Any person outside the Customs Service who has information that merchandise is being, or is likely to be, imported into the United States under such circumstances as to bring it within the purview of the Antidumping Act, 1921, as amended, may communicate such information in writing to the Commissioner of Customs. Every such communication shall contain or be accompanied by the following:

(1) A detailed description or sample of the merchandise; the name of the country from which it is being, or is likely to be, imported; the name of the exporter or exporters and producer or producers, if known; and the ports or probable ports of importation into the United States. If no sample is furnished, the Bureau of Customs may call upon the person who furnished the information to furnish samples of the imported and competitive domestic articles, or either.

(2) Such detailed data as are reasonably available with respect to values and prices indicating that such merchandise is being, or is likely to be, sold in the United States at less than its fair value, within the meaning of the Antidumping Act, 1921, as amended, including information as to any differences between the foreign market value or constructed value and the purchase price or exporter's sales price which may be accounted for by any difference in taxes, discounts, incidental costs such as those for packing or freight, or other items.

(3) Such information as is reasonably available to the person furnishing the information as to the total value and volume of domestic production of the merchandise in question.

(4) Such suggestions as the person furnishing the information may have as to specific avenues of investigation to be pursued or questions to be asked in seeking pertinent information.

(c) If any information filed pursuant to paragraph (b) of this section does not conform with the requirements of that paragraph, the Commissioner shall return the communication to the person who submitted it with detailed written advice as to the respects in which it does not conform.

(d)(1) Upon receipt pursuant to paragraph (a) or (b) of this section of information in proper form:

(i) The Commissioner shall conduct a summary investigation. If he determines that the information is patently in error or that the merchandise is not being and is not likely to be imported in more than insignificant quantities he shall so advise the person who submitted the information and the case shall be closed. Otherwise, the Commissioner shall publish a notice in the Federal Register that information in proper form has been received pursuant to paragraph (a) or (b) of this section. This notice, which may be referred to as the "Antidumping Proceeding Notice," will specify whether the information relates to all shipments of the merchandise in question from an exporting country, or only to shipments

by certain persons or firms; in the latter case, only the names of such persons and firms will be specified. The notice shall also specify the date on which information in proper form was received and that date shall be the date on which the question of dumping was raised or presented for purposes of sections 201(b) and 202(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(b) and 161(a)). The notice shall also contain a summary of the information received. If a person outside the Customs Service raised or presented the question of dumping, his name shall be included in the notice unless a determination under § 14.6a of the regulations of this part requires that his name not be disclosed.

(ii) The Commissioner shall thereupon proceed promptly to decide whether or not reasonable grounds exist to believe or suspect that the merchandise is being, or likely to be, sold at less than its foreign market value (or, in the absence of such value, than its constructed value). To assist him in making this decision the Commissioner, in his discretion, may conduct a brief preliminary investigation into such matters, in addition to the invoice or other papers or information presented to him, as he may deem necessary.

(2) If the Commissioner decides, after such preliminary investigation, if any, that reasonable grounds do exist to believe or suspect that the merchandise is being, or is likely to be, sold at less than its foreign market value (or, in the absence of such value, than its constructed value) he will thereafter proceed, by a full-scale investigation, or otherwise, to obtain such additional information, if any, as may be necessary to enable the Secretary to reach a determination as provided by § 14.8(a).

(3) If the Commissioner decides, after such preliminary investigation, if any that reasonable grounds do not exist to believe or suspect that the merchandise is being, or is likely to me, sold at less than its foreign market value (or, in the absence of such value, than its constructed value), he will thereafter

(i) Proceed, by a full-scale investigation, or otherwise to obtain such additional information, if any, as may be necessary to enable the Secretary to reach a determination as provided by § 14.8(a), or

(ii) Recommend to the Secretary that a full-scale investigation is not warranted by the facts of the case and that the case be closed by a finding of no sales at less than fair value.

(e) If the Commissioner determines pursuant to paragraph (d)(1)(ii) of this section, or in the course of an investigation under paragraph (d)(3)(i) of this section, that there are reasonable grounds to believe or suspect that any merchandise is being, or is likely to be, sold at less than its foreign market value (or, in the absence of such value, than its constructed value) under the Antidumping Act, he shall publish notice of that fact in the FEDERAL REGISTER, furnishing an adequate description of the merchandise, the name of each country of exportation, and the date of the receipt of the information in proper form, and shall advise all appraisers of his action. This notice may be referred to as the "Withholding of Appraisement Notice." If the belief or suspicion relates only to certain shippers or producers, the notice shall specify that that is the case and that the investigation is limited to the transactions of such shippers or producers. The notice shall also specify whether the appropriate basis of comparison for fair value purposes is purchase price or exporter's sales price if sufficient information is available to so state; otherwise a supplementary notice will be published in the FEDERAL REGISTER as soon as possible which will specify which of such prices is the appropriate basis of comparison for fair value purposes. Upon receipt of such advice, the appraisers shall proceed to withhold appraisement in accordance with the pertinent provisions of § 14.9.

(Secs. 201, 407, 42 Stat. 11, as amended, 18; 19 U.S.C. 160, 173) [28 F.R. 14728, Dec. 31, 1963, as amended by T.D. 56315, 29 F.R. 16320, Dec. 5, 1964]

§ 14.6a Disclosure of information in antidumping proceedings.

(a) *Information generally available.* In general, all information, but not necessarily all documents, obtained by the Treasury Department, including the Bureau of Customs, in connection with any antidumping proceeding will be available for inspection or copying by any interested person, such as the producer of the merchandise, any importer, exporter, or domestic producer of merchandise similar to that which is the subject of the proceeding. With respect to documents prepared by an officer or employee of the United States, factual material, as distinguished from recommendations and evaluations, contained in any such docu-

ment will be made available by summary or otherwise on the same basis as information contained in other documents. Attention is directed to § 24.12 of this chapter relating to fees charged for providing copies of documents.

(b) *Requests for confidential treatment of information.* Any person who submits information in connection with an antidumping proceeding may request that such information, or any specified part thereof, be held confidential. Information covered by such a request shall be set forth on separate pages from other information; and all such pages shall be clearly marked "Confidential Treatment Requested." The Commissioner of Customs or the Secretary of the Treasury or the delegate of either will determine, pursuant to paragraph (c) of this section, whether such information, or any part thereof, shall be treated as confidential. If it is so determined, the information covered by the determination will not be made available for inspection or copying by any person other than an officer or employee of the United States Government or a person who has been specifically authorized to receive it by the person requesting confidential treatment. If it is determined that information submitted with such a request, or any part thereof, should not be treated as confidential, or that summarized or approximated presentations thereof should be made available for disclosure, the person who has requested confidential treatment thereof shall be promptly so advised and, unless he thereafter agrees that the information, or any specified part or summary or approximated presentations thereof, may be disclosed to all interested parties, the information will not be made available for disclosure, but to the extent that it is self-serving it will be disregarded for the purpose of the determination as to sales below fair value and no reliance shall be placed thereon in this connection.

(c) *Standards for determining whether information will be regarded as confidential.* (1) 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. Further, if disclosure of information in specific terms or with identifying details would be inappropriate under this standard, the information will ordinarily be considered appropriate for disclosure in generalized, summary or approximated form, without identifying details, unless the Commissioner of Customs or the Secretary of the Treasury or the delegate of either determines that even in such generalized, summary or approximated form, such disclosure would still be of significant competitive advantage to a competitor or would still have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information. As indicated in paragraph (b) of this section, however, the decision that information is not entitled to protection from disclosure in its original or in another form will not lead to its disclosure unless the person supplying it consents to such disclosure.

(2) Information will ordinarily be regarded as appropriate for disclosure if it

(i) Relates to price information;

(ii) Relates to claimed freely available price allowances for quantity purchases; or

(iii) Relates to claimed differences in circumstances of sale.

(3) Information will ordinarily be regarded as confidential if its disclosure would

(i) Disclose business or trade secrets;

(ii) Disclose production costs;

(iii) Disclose distribution costs, except to the extent that such costs are accepted as justifying allowances for quantity or differences in circumstances of sale;

(iv) Disclose the names of particular customers or the price or prices at which particular sales were made.

(Sec. 407, 42 Stat. 18; 19 U.S.C. 173) [T.D. 56315, 29 F.R. 16321, Dec. 5, 1964]

§ 14.7 Fair value.

(a) *Definition.* For the purposes of section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), the fair value of imported merchandise shall be determined as follows:

(1) *Fair value based on price in country of exportation—the usual test.* Merchandise imported into the United States will ordinarily be considered to have been sold, or to be likely to be sold, at less than fair value if the purchase price or

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exporter's sales price (as defined in sections 203 and 204, respectively, of the Antidumping Act, 1921, as amended (19 U.S.C. 162, 163)), as the case may be, is, or is likely to be, less than the price (as defined in section 205, after adjustment as provided for in section 202 of the Antidumping Act, 1921, as amended (19 U.S.C. 164, 161)), at which such or similar merchandise (as defined in section 212(3) of the Antidumping Act, 1921, as amended (19 U.S.C. 170a(3)) is sold for consumption in the country of exportation on or about the date of purchase or agreement to purchase, of the merchandise imported into the United States if purchase price applies, or on or about the date of exportation thereof if exporter's sales price applies.

(2) *Fair value based on sales for exportation to countries other than the United States.* If, however, it is demonstrated that during a representative period the quantity of such or similar merchandise sold for consumption in the country of exportation is so small, in relation to the quantity sold for exportation to countries other than the United States, as to be an inadequate basis for comparison, then merchandise imported into the United States will ordinarily be deemed to have been sold, and to be likely to be sold, at less than fair value if the purchase price or the exporter's sales price (as defined in sections 203 and 204, respectively, of the Antidumping Act, 1921, as amended (19 U.S.C. 162, 163)), as the case may be, is, or is likely to be, less than the price (as defined in section 205, after adjustment as provided for in section 202 of the Antidumping Act, 1921, as amended (19 U.S.C. 164, 161)), at which such or similar merchandise (as defined in section 212(3) of the Antidumping Act, 1921, as amended (19 U.S.C. 170a(3)) is sold for exportation to countries other than the United States on or about the date of purchase or agreement to purchase of the merchandise imported into the United States if purchase price applies, or on or about the date of exportation thereof if exporter's sales price applies.

(3) *Fair value based on constructed value.* If the information available is deemed by the Secretary insufficient or inadequate for a determination under subparagraph (1) or (2) of this paragraph, he will determine fair value on the basis of the constructed value as defined in section 206 of the Antidumping Act, 1921, as amended (19 U.S.C. 165).

(b) *Calculation of fair value.* In calculating fair value under section 201(a), Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), the following criteria shall be applicable:

(1) *Quantities.* In comparing the purchase price or exporter's sales price, as the case may be, with such applicable criteria as sales or offers, on which a determination of fair value is to be based, reasonable allowances will be made for differences in quantities if it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. In determining the question of allowances for differences in quantity, consideration will be given, among other things, to the practice of the industry in the country of exportation with respect to affording in the home market (or third country markets, where sales to third countries are the basis for comparison) discounts for quantity sales which are freely available to those who purchase in the ordinary course of trade. Allowances for price discounts based on sales in large quantities ordinarily will not be made unless (i) the exporter during the six months prior to the date when the question of dumping was raised or presented had been granting quantity discounts of at least the same magnitude with respect to 20 percent or more of such or similar merchandise which he sold in the home market (or in third country markets when sales to third countries are the basis for comparison) and that such discounts had been freely available to all purchasers, or (ii) the exporter can demonstrate that the discounts are warranted on the basis of savings specifically attributable to the quantities involved.

(2) *Circumstances of sale.* (i) In comparing the purchase price or exporter's sales price, as the case may be, with the sales, or other criteria applicable, on which a determination of fair value is to be based, reasonable allowances will be made for bona fide differences in circumstances of sale if it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences.

(ii) Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a reasonably direct relationship to the sales which are under consideration. Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a pur-

chaser's advertising or other selling costs. Reasonable allowances will also generally be made for differences in commissions. Except in those instances where it is clearly established that the differences in circumstances of sale bear a reasonably direct relationship to the sales which are under consideration, allowances generally will not be made for differences in research and development costs, production costs, and advertising and other selling costs of a seller unless such costs are attributable to a later sale of merchandise by a purchaser; provided that reasonable allowances for selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual selling expense incurred in the one market or the total amount of the commission allowed in such other market, whichever is less.

(iii) In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the effect of such differences upon the market value of the merchandise but, where appropriate, may also consider the cost of such differences to the seller, as contributing to an estimate of market value.

(3) *Similar merchandise.* In comparing the purchase price or exporter's sales price as the case may be, with the selling price in the home market, or for exportation to countries other than the United States, in the case of similar merchandise described in subdivisions (C), (D), (E), or (F) of section 212(3), Antidumping Act, 1921, as amended (19 U.S.C. 170a(3)), due allowance shall be made for differences in the merchandise. In this regard 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.

(4) *Offering price.* In the determination of fair value, offers will be considered in the absence of sales, but an offer made in circumstances in which acceptance is not reasonably to be expected will not be deemed to be an offer.

(5) *Sales agency.* If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 207 of the Antidumping Act, 1921, as amended (19 U.S.C. 166), the price at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in the determination of fair value.

(6) *Fictitious sales.* In the determination of fair value, no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

(7) *Sales at varying prices.* Where the prices in the sales which are being examined for a determination of fair value vary (after allowances provided for in subparagraphs (1), (2), and (3) of this paragraph), determination of fair value will take into account the prices of a preponderance of the merchandise thus sold or weighted averages of the prices of the merchandise thus sold.

(8) *Quantities involved and differences in price.* Merchandise will not be deemed to have been sold at less than fair value unless the quantity involved in the sale or sales to the United States, or the difference between the purchase price or exporter's sales price, as the case may be, and the fair value, is more than insignificant.

(9) *Revision of prices or other changed circumstances.* Whenever the Secretary of the Treasury is satisfied that promptly after the commencement of an antidumping investigation either (i) price revisions have been made which eliminate the likelihood of sales below fair value and that there is no likelihood of resumption of the prices which prevailed before such revision, or (ii) sales to the United States of the merchandise have terminated and will not be resumed; or whenever the Secretary concludes that there are other changed circumstances on the basis of which it may no longer be appropriate to continue an antidumping investigation, the Secretary shall publish a notice to this effect in the FEDERAL REGISTER. The notice shall state the facts relied on by the Secretary in publishing the notice and that those facts are considered to be evidence that there are not and are not likely to be sales below fair value. The notice shall also state that unless persuasive evidence or argument to the contrary is presented within 30 days the Secretary will determine that there are not and are not likely to be sales below fair value.

(Sec. 407, 42 Stat. 18; 19 U.S.C. 173) [28 F.R. 14728, Dec. 31, 1963, as amended by T.D. 56315, 29 F.R. 16321, Dec. 5, 1964]

§ 14.8 Determination of fact or likelihood of sales at less than fair value; determination of injury; finding of dumping.

(a) Upon receipt from the Commissioner of Customs of the information referred to in § 14.6(d), the Secretary of the Treasury will proceed as promptly as possible to determine tentatively whether or not the merchandise in question is in fact being, or is likely to be, sold in the United States or elsewhere at less than its fair value. As soon as possible the Secretary will publish in the FEDERAL REGISTER a "Notice of Tentative Determination," which will include a statement of the reasons on which the tentative determination is based. Interested persons will be given an opportunity to make such written submissions as they desire, within a period which will be specified in the notice, with respect to the contemplated action. Appropriate consideration will be given to any new or additional information or argument submitted. If any person believes that any information obtained by the Bureau of Customs in the course of an antidumping proceeding is inaccurate or that for any other reason the tentative determination is in error, he may request in writing that the Secretary of the Treasury afford him an opportunity to present his views in this regard. Upon receipt of such a request the Secretary will notify the person who supplied any information, the accuracy of which is questioned and such other person or persons, if any, as he in his discretion may deem to be appropriate. If the Secretary is satisfied that the circumstances so warrant, an opportunity will be afforded by the Secretary or his delegate for all such persons to appear, through their counsel or in person, accompanied by counsel if they so desire, to make known their respective points of view and to supply such further information or argument as may be of assistance in leading to a conclusion as to the accuracy of the information in question. The Secretary or his delegate may at any time, upon appropriate notice, invite any such person or persons as he in his discretion may deem to be appropriate to supply him orally with information or argument. As soon as possible thereafter, the Secretary will make a final determination, except that the Secretary may defer making an affirmative determination of sales below fair value during the pendency of any other antidumping proceeding which relates to the same class or kind of merchandise imported from another foreign country. The Secretary will defer making an affirmative determination only if he is satisfied that deferral is appropriate under all of the circumstances. Circumstances which the Secretary will take into consideration will include the dates on which information relating to the various antidumping proceedings came to his attention, the volume of sales involved in each proceeding, elements of hardship, if any, and probable extent of delay which deferral would entail. No determination that sales are not below fair value will be deferred because of this provision. Whenever the Secretary makes a determination of sales at less than fair value he will so advise the United States Tariff Commission.

(b) If the Tariff Commission determines that there is, or is likely to be, the injury contemplated by the statute, the Secretary of the Treasury will make the finding contemplated by section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), with respect to the involved merchandise.

(Secs. 201, 407, 42 Stat. 11, as amended, 18; 19 U.S.C. 160, 173) [28 F.R. 14728, Dec. 31, 1963, as amended by T.D. 56315, 29 F.R. 16327, Dec. 5, 1964]

§ 14.9 Action by the appraiser.

(a) Upon receipt of advice from the Commissioner of Customs pursuant to § 14.6(e), if the Commissioner's "Withholding of Appraisement Notice" shall specify that the proper basis of comparison for fair value purposes is exporter's sales price or if that notice does not specify the appropriate basis of comparison

for fair value purposes, each appraiser shall withhold appraisement as to such merchandise entered, or withdrawn from warehouse, for consumption, on any date after the 120th day before the question of dumping was raised by or presented to the Secretary of the Treasury or his delegate. If the Commissioner's "Withholding of Appraisement Notice," including any supplementary notice, shall specify that the proper basis of comparison for fair value purposes is purchase price, the appraiser shall withhold appraisement as to such merchandise entered, or withdrawn from warehouse, for consumtion, after the date of publication of the "Withholding of Appraisement Notice." Each appraiser shall notify the collector and importer immediately of each lot of merchandise with respect to which appraisement is so withheld. Upon advice of a finding made in accordance with § 14.8(b), the appraiser shall give immediate notice thereof to the collector and the importer when any shipment subject thereto is imported after the date of the finding and information is not on hand for completion of appraisement of such shipment. Customs Form 6459 shall be used to notify the collector and importer whenever appraisement is withheld under this paragraph.

(b) If, before a finding of dumping has been made, or before a case has been closed without a finding of dumping, the appraiser is satisfied by information furnished by the importer or otherwise that the purchase price or exporter's sales price, in respect of any shipment, is not less than foreign market value (or, in the absence of such value, than the constructed value), he shall so advise the Commissioner and request authorization to proceed with his appraisement of that shipment in the usual manner.

(c) If a finding of dumping has been made, the appraiser shall require the importer or his agent to file a certificate of the importer on the appropriate one of the following forms. A separate certificate shall be required for each shipment.

Form 1.

NONEXPORTER'S CERTIFICATE

ANTIDUMPING ACT, 1921

Port of _____
Date _____, 19__

Re: Entry No. _____, dated _____, 19__.
Import carrier: _____. Arrived _____, 19__.

I certify that I am not the exporter as defined in section 207, Antidumping Act, 1921, of the merchandise covered by the aforesaid entry. I further certify that the merchandise was purchased for importation by _____ on _____, 19__, and that the purchase price is _____.

(Signed) _____

Form 2.

EXPORTER'S CERTIFICATE WHEN SALES PRICE IS KNOWN

ANTIDUMPING ACT, 1921

Port of _____
Date _____, 19__

Re: Entry No. _____, dated _____, 19__.
Import carrier: _____. Arrived _____, 19__.

I certify that I am the exporter as defined in section 207, Antidumping Act, 1921, of the merchandise covered by the aforesaid entry; that the merchandise is sold or agreed to be sold at the price stated in the attached statement; and that, if any of such merchandise is actually sold at any price different from the price stated therefor in the attached statement, I will immediately notify the appraiser of all the circumstances.

The merchandise was acquired by me in the following manner:

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and has been sold or agreed to be sold to_____
(Name and address)

at_____.
(price)

(Signed)_____

Form 3

EXPORTER'S CERTIFICATE WHEN SALES PRICE IS NOT KNOWN

ANTIDUMPING ACT, 1921

Port of_____
Date_____, 19___

Re: Entry No. _____, dated _____, 19___.
Import carrier:_____. Arrived _____, 19___.

I certify that I am the exporter as defined in section 207, Antidumping Act, 1921, of the merchandise covered by the aforesaid entry, and that I have no knowledge as to any price at which such merchandise will be sold in the United States. I hereby agree that I will keep a record of the sales and will furnish the appraiser within 30 days after the sale of any such merchandise a statement of each selling price. I further agree that, if any of the merchandise has not been sold before the expiration of 6 months from the date of entry, I will so report to the appraiser upon such expiration date.

The merchandise was acquired by me in the following manner:

(Signed)_____

Form 4

EXPORTER'S CERTIFICATE WHEN MERCHANDISE IS NOT, AND WILL NOT BE SOLD

ANTIDUMPING ACT, 1921

Port of_____
Date_____, 19___

Re: Entry No. _____, dated _____, 19___.
Import carrier:_____. Arrived _____, 19___.

I certify that I am the exporter as defined in section 207, Antidumping Act, 1921, of the merchandise covered by the aforesaid entry, and that such merchandise has not been, and will not be, sod in the United States for the following reason:

(Signed)_____

(d) If an unqualified certificate on Form 4 is filed and the appraiser is satisfied that no evidence can be obtained to contradict it, he shall notify the collector promptly that the shipment will be appraised without regard to the Antidumping Act and proceed to appraise the merchandise in the usual manner.

(e) If the importer fails to file an appropriate certificate within 30 days following notification by the appraiser that a certificate is required under paragraph (c) of this section, the appraiser shall proceed upon the basis of the best information available.

(f) In calculating purchase price or exporter's sales price, as the case may be, there shall be deducted the amount of any special dumping duties which are, or will be, paid by the manufacturer, producer, seller, or exporter, or which are, or will be, refunded to the importer by the manufacturer, producer, seller, or exporter, either directly or indirectly, but a warranty of nonapplicability of dumping duties granted to an importer with respect to merchandise which is (1) purchased, or agreed to be purchased, before publication of a "Withholding of Appraisment Notice" with respect to such merchandise and (2) exported before a determination of sales below fair value is made, will not be regarded as affecting purchase price or exporter's sales price.

(Secs. 201, 202, 203, 204, 208, 407, 42 Stat. 11, as amended, 12, 13, 14, 18; sec. 486, 46 Stat. 725, as amended; 19 U.S.C. 160, 161, 162, 163, 167, 173, 1486) [28 F.R. 14728, Dec. 31, 1963, as amended by T.D. 56315, 29 F.R. 16322, Dec. 5, 1964]

§ 14.10 Release of merchandise; bond.

(a) When the collector has received a notice of withheld appraisement provided for in § 14.9(a), or when he has been advised of a finding provided for in § 14.8(b), and so long as such notice or finding is in effect, he shall withhold release of any merchandise of a class or kind covered by such notice or finding which is then in his custody or is thereafter imported, unless an appropriate bond is filed or is on file, as specified hereafter in this section, or unless he is advised by the appraiser that the merchandise covered by a specified entry will be appraised without regard to the Antidumping Act.

(b) If the merchandise is of a class or kind covered by a notice of withheld appraisement provided for in § 14.9(a) or by a finding provided for in § 14.8(b), a single consumption entry bond covering the shipment, in addition to any other required bond, shall be furnished by the person making the entry or withdrawal, unless

(1) A bond is required under paragraph (c) of this section, or

(2) In cases in which there is no such requirement the collector is satisfied that the bond under which the entry was filed is sufficient. The penalty of any additional bond required under this paragraph shall be in such amount as will assure payment of any special duty that may accrue by reason of the Antidumping Act, but in no case less than $100.

(c) If the merchandise is of a class or kind covered by a finding provided for in § 14.8(b) and the importer or his agent has filed a certificate on Form 3 (§ 14.9(c)), the bond required by section 208 of the Antidumping Act, 1921, as amended (19 U.S.C. 167), shall be on customs Form 7591. In such case, a separate bond shall be required for each entry or withdrawal, and such bond shall be in addition to any other bond required by law or regulation. The record of sales required under the conditions of the bond on customs Form 7591 shall identify the entry covering the merchandise and show the name and address of each purchaser, each selling price, and the date of each sale. The penalty of such bond shall be in an amount equal to the estimated value of the merchandise covered by the finding.

(Secs. 208, 407, 42 Stat. 14, 18; 19 U.S.C. 167, 173)

§ 14.11 Conversion of currencies.

In determining the existence and amount of any difference between the purchase price or exporter's sales price and the foreign market value (or, in the absence of such value, the constructed value) for the purposes of § 14.7, or of 201(b) or 202(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(b), 161(a)), any necessary conversion of a foreign currency into its equivalent in United States currency shall be made in accordance with the provisions of section 522, Tariff Act of 1930, as amended (31 U.S.C. 372) and § 16.4 of this chapter, (a) as of the date of purchase or agreement to purchase, if the purchase price is an element of the comparison, or (b) as of the date of exportation, if the exporter's sales price is an element of the comparison.

(Secs. 201, 202, 407, 42 Stat. 11, as amended, 18; 19 U.S.C. 160, 161, 173)

§ 14.12 Modification or revocation of finding.

An application for the modification or revocation of any finding made as provided for in § 14.8(b) will receive due consideration if submitted in writing to the Commissioner of Customs together with detailed information concerning any change in circumstances or practice which has obtained for a substantial period of time, or other reasons, which the applicant believes will establish that the basis for the finding no longer exists with respect to all or any part of the merchandise covered thereby. Notice of intent to modify or revoke a finding will be published by the Secretary in the FEDERAL REGISTER. Comments received from interested parties within 30 days following date of publication will be given consideration.

(Secs. 201, 407, 42 Stat. 11, as amended, 18; 19 U.S.C. 160, 173)

§ 14.13 Publication of findings.

(a) Each determination made in accordance with § 14.8(a), whether such determination is in the affirmative or in the negative, and each finding made in accordance with § 14.8(b), will be published in the FEDERAL REGISTER, together

with a statement of the reasons therefor. Findings made in accordance with § 14.8(b) will be published also in a weekly issue of the Treasury Decisions.

(b) The following findings of dumping are currently in effect:

Merchandise	Country	T.D.	Modified by
Portland cement, other than white nonstaining portland cement	Sweden	55369	
	Belgium	55428	
Portland gray cement	Portugal	55501	
Portland cement, other than white, nonstaining portland cement	Dominican Republic	55883	
Chromic acid	Australia	56130	
Steel reinforcing bars	Canada	56150	
Carbon steel bars and structural shapes	do	56264	
Azobisformamide	Japan	56414	
Steel jacks	Canada	66-191	
Cast iron soil pipe	Poland	67-252	

§ 16.21 Dumping duty; notice to importer.

(a) Special dumping duty shall be assessed on all importations of merchandise, whether dutiable or free, as to which the Secretary of the Treasury has made public a finding of dumping, entered or withdrawn from warehouse, for consumption, not more than 120 days before the question of dumping was raised by or presented to the Secretary or his delegate, provided the particular importation has not been appraised prior to the publication of such finding, and the appraiser reports that the purchase price or exporter's sales price is less than the foreign market value or constructed value, as the case may be.

(b) Before dumping duty is assessed the collector shall notify the importer of the appraiser's report, as in the case of an advance in value. If the importer files an appeal for reappraisement, liquidation shall be suspended until the appeal for reappraisement is finally decided.

(c) If the necessary conditions are present, special dumping duty shall be assessed on samples imported for the purpose of taking orders and making sales in this country.

(Secs. 202, 209, 407, 42 Stat. 11, as amended, 15, 18; 19 U.S.C. 161, 168, 173)

§ 16.22 Method of computing dumping duty.

If it appears that the merchandise has been purchased by a person not the exporter within the meaning of section 207, Antidumping Act, 1921, as amended (19 U.S.C. 166), the special dumping duty shall equal the difference between the purchase price and the foreign market value on the date of purchase, or, if there is no foreign market value, between the purchase price and the constructed value, any foreign currency involved being converted into United States money as of the date of purchase or agreement to purchase. If it appears that the merchandise is imported by a person who is the exporter within the meaning of such section 207, the special dumping duty shall equal the difference between the exporter's sales price and the foreign market value on the date of exportation, or, if there is no foreign market value, between the exporter's sales price and the constructed value, any foreign currency involved being converted into United States money as of the date of exportation.

(Secs. 202, 207, 42 Stat. 11, as amended, 14, as amended; 19 U.S.C. 161, 166)

Antidumping Protests and Appeals; American Producers' Appeals and Protests

§ 17.9 Antidumping; protests and appeals; procedure.

(a) Appeals for reappraisement, applications for reviews of reappraisements, and protests relating to the Antidumping Act, 1921, shall be made in the same manner as appeals, applications for review, and protests relating to ordinary customs duties.

(b) Notice of appraiser's reports which require the assessment of dumping duties shall be sent by the collector to the importer, consignee, or agent.

(Sec. 210, 42 Stat. 15, as amended; 19 U.S.C. 169)

DUMPING REGULATIONS OF TARIFF COMMISSION

TITLE 19—CODE OF FEDERAL REGULATIONS

PART 208—INVESTIGATIONS OF DUMPING INJURY TO DOMESTIC INDUSTRY

Sec.
208.1 Applicability of part.
208.2 Purpose of investigation.
208.3 Institution of investigation.
208.4 Public hearings.
208.5 Written statements.
208.6 Notification of Commission's determination.

AUTHORITY: The provisions of this Part 208 issued under sec. 335, 72 Stat. 680; 19 U.S.C. 1335.

SOURCE: The provisions of this Part 208 appear at 27 F.R. 12126, Dec. 7, 1962, unless otherwise noted.

§ 208.1 Applicability of part.

This Part 208 applies specifically to investigations for the purposes of section 201(a) of the Antidumping Act. For other applicable rules see Part 201 of this chapter.

§ 208.2 Purpose of investigation.

The purpose of an investigation by the Commission under section 201(a) of the Antidumping Act is to determine whether an industry in the United States is being, or is likely to be, injured, or is prevented from being established, by reason of the importation into the United States of a class or kind of foreign merchandise which the Secretary of the Treasury has determined is being, or is likely to be, sold in the United States or elsewhere at less than its fair value.

§ 208.3 Institution of investigation.

After the receipt of advice from the Secretary of the Treasury that he has determined that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, the Commission will institute an investigation for the purposes indicated in § 208.2.

§ 208.4 Public hearings.

If, in the judgment of the Commission, there is good and sufficient reason therefor, the Commission, in the course of its investigation, will hold a public hearing and afford interested parties opportunity to appear and be heard at such hearing. If no notice of public hearing issues concurrently with a notice of investigation, any interested party who believes that a public hearing should be held may, within fifteen days after the date of publication in the FEDERAL REGISTER of the notice of investigation, submit a request in writing to the Secretary of the Commission that a public hearing be held, stating the reasons for such request.

§ 208.5 Written statements.

At any time after a notice of investigation under § 208.3 is published in the FEDERAL REGISTER, any interested party may submit to the Commission a written statement of information pertinent to the subject matter of such investigation. If a public hearing is held in the investigation such statement may be presented in lieu of appearance at such hearing. Statements shall conform with the requirements for documents set forth in § 201.8 of this chapter.

§ 208.6 Notification of Commission's determination.

On or before the expiration of three months after the date of the receipt by the Commission of the advice from the Secretary of the Treasury referred to in § 208.3 the Commission will notify the Secretary of the Treasury of its determination. A summary of the Commission's determination, together with a statement of reasons therefor, will be published in the FEDERAL REGISTER.

INTERNATIONAL ANTIDUMPING CODE

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The parties to this Agreement,

Considering that Ministers on 21 May 1963 agreed that a significant liberalization of world trade was desirable and that the comprehensive trade negotiations, the 1964 Trade Negotiations, should deal not only with tariffs but also with non-tariff barriers;

Recognizing that anti-dumping practices should not constitute an unjustifiable impediment to international trade and that anti-dumping duties may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry;

Considering that it is desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases; and

Desiring to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Hereby agree as follows:

PART I - ANTI-DUMPING CODE

Article 1

The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement. The following provisions govern the application of this Article, in so far as action is taken under anti-dumping legislation or regulations.

A. DETERMINATION OF DUMPING

Article 2

(a) For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

(b) Throughout this Code the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

(c) In the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely trans-shipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

(d) When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

(e) In cases where there is no export price or where it appears to the authorities[1] concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

(f) In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in Article 2(e) allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.

(g) This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I of the General Agreement.

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[1] When in this Code the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate, senior level.

B. DETERMINATION OF MATERIAL INJURY, THREAT OF MATERIAL INJURY AND MATERIAL RETARDATION

Article 3

Determination of Injury[1]

(a) A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. In reaching their decision the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry. The determination shall in all cases be based on positive findings and not or mere allegations or hypothetical possibilities. In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered.

(b) The valuation of injury - that is the evaluation of the effects of the dumped imports on the industry in question - shall be based on examination of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity; and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

(c) In order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined, for example: the volume and prices of undumped imports of the product in question, competition between the domestic producers themselves, contraction in demand due to substitution of other products or to changes in consumer tastes.

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[1] When in this Code the term "injury" is used, it shall, unless otherwise specified, be interpreted as covering cause of material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

(d) The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effect of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

(e) A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent.[1]

(f) With respect to cases where material injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.

Article 4

Definition of Industry

(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that

(i) when producers are importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market

[1] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.

from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

(b) Where two or more countries have reached such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the industry referred to in Article 4(a).

(c) The provisions of Article 3(d) shall be applicable to this Article.

C. INVESTIGATION AND ADMINISTRATION PROCEDURES

Article 5

Initiation and Subsequent Investigation

(a) Investigations shall normally be initiated upon a request on behalf of the industry[1] affected, supported by evidence both of dumping and of injury resulting therefrom for this industry. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have evidence both on dumping and on injury resulting therefrom.

(b) Upon initiation of an investigation and thereafter, the evidence of both dumping and injury should be considered simultaneously. In any event the evidence of both dumping and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied, except in the cases provided for in Article 10(d) in which the authorities accept the request of the exporter and the importer.

(c) An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible.

(d) An anti-dumping proceeding shall not hinder the procedures of customs clearance.

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[1] As defined in Article 4.

Article 6

Evidence

(a) The foreign suppliers and all other interested parties shall be given ample opportunity to present in writing all evidence that they consider useful in respect to the anti-dumping investigation in question. They shall also have the right, on justification, to present evidence orally.

(b) The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the exporting countries, to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph (c) below, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

(c) All information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an anti-dumping investigation shall be treated as strictly confidential by the authorities concerned who shall not reveal it, without specific permission of the party submitting such information.

(d) However, if the authorities concerned find that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

(e) In order to verify information provided or to obtain further details the authorities may carry out investigations in other countries as required, provided they obtain the agreement of the firms concerned and provided they notify the representatives of the government of the country in question and unless the latter object to the investigation.

(f) Once the competent authorities are satisfied that there is sufficient evidence to justify initiating an anti-dumping investigation pursuant to Article 5 representatives of the exporting country and the exporters and importers known to be concerned shall be notified and a public notice may be published.

(g) Throughout the anti-dumping investigation all parties shall have a full opportunity for the defence of their interests. To this end, the authorities concerned shall, on request, provide opportunities for all directly interested parties to meet those parties with adverse interests, so

that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

(h) The authorities concerned shall notify representatives of the exporting country and the directly interested parties of their decisions regarding imposition or non-imposition of anti-dumping duties, indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public the decisions.

(i) The provisions of this Article shall not preclude the authorities from reaching preliminary determinations, affirmative or negative, or from applying provisional measures expeditiously. In cases in which any interested party withholds the necessary information, a final finding, affirmative or negative, may be made on the basis of the facts available.

Article 7

Price Undertakings

(a) Anti-dumping proceedings may be terminated without imposition of anti-dumping duties or provisional measures upon receipt of a voluntary undertaking by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices if the authorities concerned consider this practicable, e.g. if the number of exporters or potential exporters of the product in question is not too great and/or if the trading practices are suitable.

(b) If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the product in question, and the authorities concerned accept the undertaking, the investigation of injury shall nevertheless be completed if the exporters so desire or the authorities concerned so decide. If a determination of no injury is made, the undertaking given by the exporters shall automatically lapse unless the exporters state that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case. However, the authorities are of course free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

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D. ANTI-DUMPING DUTIES AND PROVISIONAL MEASURES

Article 8

Imposition and Collection of Anti-Dumping Duties

(a) The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

(b) When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

(c) The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(d) Within a basic price system the following rules shall apply provided that their application is consistent with the other provisions of this Code:

> If several suppliers from one or more countries are involved, anti-dumping duties may be imposed on imports of the product in question found to have been dumped and to be causing injury from the country or countries concerned, the duty being equivalent to the amount by which the export price is less than the basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing. It is understood that for products which are sold below this already established basic price a new anti-dumping investigation shall be carried out in each particular case, when so demanded by the interested parties and the demand is supported by relevant evidence. In cases where no dumping is found, anti-dumping duties collected shall be reimbursed as quickly as possible. Furthermore, if it can be found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(c) When the industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in Article 4(a)(ii), anti-dumping duties shall only be definitively collected on the products in question consigned for final consumption to that area, except in cases where the exporter shall, prior to the imposition of anti-dumping duties, be given an opportunity to cease dumping in the area concerned. In such cases, if an adequate assurance to this effect is promptly given, anti-dumping duties shall not be imposed, provided, however, that if the assurance is not given or is not fulfilled, the duties may be imposed without limitation to an area.

Article 9

Duration of Anti-Dumping Duties

(a) An anti-dumping duty shall remain in force only as long as it is necessary in order to counteract dumping which is causing injury.

(b) The authorities concerned shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if interested suppliers or importers of the product so request and submit information substantiating the need for review.

Article 10

Provisional Measures

(a) Provisional measures may be taken only when a preliminary decision has been taken that there is dumping and when there is sufficient evidence of injury.

(b) Provisional measures may take the form of a provisional duty or, preferably, a security - by deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

(c) The authorities concerned shall inform representatives of the exporting country and the directly interested parties of their decisions regarding imposition of provisional measures indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public such decisions.

(d) The imposition of provisional measures shall be limited to as short a period as possible. More specifically, provisional measures shall not be imposed for a period longer than three months or, on decision of the authorities concerned upon request by the exporter and the importer, six months.

(e) The relevant provisions of Article 8 shall be followed in the application of provisional measures.

Article 11

Retroactivity

Anti-dumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under Articles 8(a) and 10(a), respectively, enters into force, except that in cases:

(i) Where a determination of material injury (but not or a threat of material injury, or of a material retardation of the establishment of an industry) is made or where the provisional measures consist of provisional duties and the dumped imports carried out during the period of their application would, in the absence of these provisional measures, have caused material injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the anti-dumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

(ii) Where appraisement is suspended for the product in question for reasons which arose before the initiation of the dumping case and which are unrelated to the question of dumping, retroactive assessment of anti-dumping duties may extend back to a period not more than 120 days before the submission of the complaint.

(iii) Where for the dumped product in question the authorities determine

(a) either that there is a history of dumping which caused material injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury, and

(b) that the material injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to assess an anti-dumping duty retroactively on those imports.

the duty may be assessed on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

E. ANTI-DUMPING ACTION ON BEHALF OF A THIRD COUNTRY

Article 12

(a) An application for anti-dumping action on behalf of a third countr shall be made by the authorities of the third country requesting action.

(b) Such an application shall be supported by price information to sho that the imports are being dumped and by detailed information to show that th alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistanc to the authorities of the importing country to obtain any further information which the latter may require.

(c) The authorities of the importing country in considering such an application shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

(d) The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the CONTRACTING PARTIES seeking their approval for such action shall rest with the importing country.

PART II - FINAL PROVISIONS

Article 13

This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to the General Agreement and by the European Economic Community. The Agreement shall enter into force on 1 July 1968 for each party which has accepted it by that date. For each party accepting the Agreement after that date, it shall enter into force upon acceptance.

Article 14

Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code.

Article 15

Each party to this Agreement shall inform the CONTRACTING PARTIES to the General Agreement of any changes in its anti-dumping laws and regulations and in the administration of such laws and regulations.

Article 16

Each party to this Agreement shall report to the CONTRACTING PARTIES annually on the administration of its anti-dumping laws and regulations, giving summaries of the cases in which anti-dumping duties have been assessed definitively.

Article 17

The parties to this Agreement shall request the CONTRACTING PARTIES to establish a Committee on Anti-Dumping Practices composed of representatives of the parties to this Agreement. The Committee shall normally meet once each year for the purpose of affording parties to this Agreement the opportunity of consulting on matters relating to the administration of anti-dumping systems in any participating country or customs territory as it might affect the operation of the Anti-Dumping Code or the furtherance of its objectives. Such consultations shall be without prejudice to Articles XXII and XXIII of the General Agreement.

This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES who shall promptly furnish a certified copy thereof and a notification of each acceptance thereof to each contracting party to the General Agreement and to the European Economic Community.

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Geneva this thirtieth day of June, one thousand nine hundred and sixty-seven, in a single copy, in the English and French languages, both texts being authentic.

ARTICLE VI OF GENERAL AGREEMENT ON TARIFFS AND TRADE

Anti-Dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

* * * * * * *

Ad Article VI

Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

Note 1.—As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

Note 2.—Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Paragraph 6(b)

Waivers under the provisions of this sub-paragraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

June 19, 1968

EXECUTIVE BRANCH

ANALYSIS OF INTERNATIONAL ANTIDUMPING CODE
IN RELATION TO ANTIDUMPING ACT, 1921

SUMMARY

There follows an analysis of the International Antidumping Code, signed in Geneva on June 30, 1967, as part of the Kennedy Round, in relation to the Antidumping Act, 1921, and regulations thereunder. It has been prepared by the General Counsel of the Office of the Special Representative for Trade Negotiations in collaboration with legal counsel of the Departments of the Treasury and State.

This analysis demonstrates the consistency between the International Antidumping Code and the Antidumping Act, 1921, by relating each provision of the Code to relevant provisions of the Act and regulations and administrative practice thereunder. In particular, it cites pertinent sections of the new dumping regulations issued by the Department of the Treasury effective July 1, 1968.

Throughout the analysis the following terms are used: "the Act" (Antidumping Act, 1921), "the Code" (International Antidumping Code), "dumping" (sales at less than fair value), and "authorities" (officers of the Department of the Treasury or United States Tariff Commission, depending upon the context), and "old regulations" and "new regulations" (of the Department of the Treasury). In addition, it is to be noted that "antidumping duties" and "dumping duties" are used synonymously, the former being the term in the Code and the latter in the Act.

The provisions of the Antidumping Act, 1921, are codified in 19 U.S.C. 160 - 171. The new dumping regulations of the Department of the Treasury are set out in 33 F.R. 8244 - 8251 (1968), and its old dumping regulations are codified in 19 CFR 14.6 - 14.13, 16.21, 16.22, and 17.9. The dumping regulations of the United States Tariff Commission are codified in 19 CFR Part 208. The text of the International Antidumping Code was attached as Appendix A to the notice of proposed rule making concerning the new dumping regulations of the Department of the Treasury (32 F.R. 14962 - 14964 (1967)).

ANALYSIS OF INTERNATIONAL ANTIDUMPING CODE IN RELATION TO ANTIDUMPING ACT, 1921

PART I - ANTIDUMPING CODE

Article 1.

Article 1 states that the imposition of a dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement on Tariffs and Trade (GATT). Article VI establishes basic conditions to be satisfied before dumping duties may be imposed. In addition, Article 1 provides that the subsequent provisions of the Code govern the application of Article VI, insofar as action is taken under antidumping legislation or regulations. Article 1 therefore serves to introduce the provisions of the Code and to make clear their relationship to Article VI.

A. DETERMINATION OF DUMPING

Article 2.

Paragraph (a) defines a "dumped" product as one introduced into the commerce of another country at less than its "normal value". A product is to be considered as being "dumped" if its export price (equivalent to "purchase price" under section 203 of the Act (19 U.S.C. 162)) is less than the comparable

price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. There is no substantive difference between the Code in this respect and the provisions relating to sales at less than fair value as defined in Treasury's regulations (see section 14.7 of the old regulations and sections 53.2-53.16 of the new regulations).

Paragraph (b) defines "like product" as one which is alike in all respects to the product under consideration, or in the absence of such an identical product, another product which has characteristics closely resembling those of the product under consideration. There is no material difference between this provision and the definition of "such or similar merchandise" in section 212(3) of the Act (19 U.S.C. 170a(3)).

Paragraph (c) covers the case where products are not imported directly from the country of origin but rather from an intermediate country -- which becomes the country of export. In such a case, the export price (that is, the price at which the products are sold from the intermediate country to the country of importation) "shall normally be compared" with the comparable price in such intermediate country. However, in

such a case the export price may nevertheless be compared with the price in the country of origin if there is, in effect, no basis for using a comparable price in the intermediate country. This provision is in keeping with standard Customs practice (see section 14.3(d) of the old regulations and section 53.16 of the new regulations).

Paragraph (d) provides that when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the export price shall be compared with a comparable price of the like product when exported to any third country. Such price may be the highest such export price but should be a representative price. This conforms to the parenthetical "third-country price" provision in section 205 of the Act (19 U.S.C. 164).

Alternatively, paragraph (d) provides that the export price shall be compared with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. The addition for profit "as a general rule" shall not exceed the profit

normally realized on sales of products of the same general category in the country of origin. This provision restates the "constructed value" provision in section 206 of the Act (19 U.S.C. 165). That provision, however, specifies that the addition for profit must be at least 8%. Since ordinarily profit margins exceed 8%, the phrase "as a general rule" preserves the consistency between the Code and the Act in those relatively rare instances when the 8% adjustment must be made despite a lower profit margin for the general class of merchandise concerned.

Paragraph (e) deals with cases where there is no export price or where it appears to the authorities that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party. In such cases, the export price may be "constructed" on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine. There is no inconsistency between this provision and sections 204 and 207 of the Act (19 U.S.C. 163 and 166) which deal with this situation.

Paragraph (f) relates to the adjustments to be made in order to effect a fair comparison between the export price (or constructed export price under paragraph (e)) and the home market price (or the price in the intermediate country of export under paragraph (c), the price of export to a third country under paragraph (d), or the constructed value under paragraph (d)). It provides that the two prices shall be compared at the same level of trade, "normally" at the ex factory level. Under the Act the practice is to make the price comparison at the same level of trade, and in virtually every case this is the ex factory level. Paragraph (f) further provides that the price comparison shall relate to sales made at as nearly as possible the same time. This conforms to the Act.

In addition, paragraph (f) provides that due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. This provision is consistent with the Act. Finally, paragraph (f) provides that in the cases involving constructed export price under paragraph (e) allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. Since this is a hortatory provision, it creates no inconsistency with the Act.

Paragraph (g) provides that where state trading countries are concerned Article 2 does not prejudice the Second Supplementary Provision to paragraph 1 of Article VI which is set out in Annex I to the GATT. This Second Supplementary Provision provides that in the case of imports from a state trading country special difficulties may exist in determining price comparability and that in such cases it may be found necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate. Consistent with this provision, the "fair value" of imports from state trading countries is ordinarily determined under the "constructed value" provision in section 206 of the Act (19 U.S.C. 165). Section 53.5(b) of the new regulations is declaratory of Treasury's present practice under that section.

B. DETERMINATION OF MATERIAL INJURY, THREAT OF MATERIAL INJURY AND MATERIAL RETARDATION

Article 3. Determination of Injury.

Paragraph (a) provides that a determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are "demonstrably the principal cause of material injury or of threat of material injury to a domestic

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industry or the principal cause of material retardation of the establishment of such an industry".

Section 201(a) of the Act provides that the Tariff Commission shall determine "whether an industry in the United States is being or is likely to be injured, or prevented from being established, by reason of the importation of such merchandise into the United States" (19 U.S.C. 160(a)).

The concept of "the principal cause" is consistent with the Act and present practice. The Tariff Commission has always considered the causal relationship between dumped imports and injury in terms of something real and substantial. In published decisions, Commissioners have indicated that terms such as "primarily" are a proper characterization under the Act of the degree of causality required to establish injury. The term "the principal cause" is susceptible of such interpretation and, indeed, does not require that dumped imports be that cause which is greater than all other causes combined of material injury. It therefore allows injury determinations consistent with the requirements of the Act.

The term "injury" as used in the Act has consistently been interpreted by the Tariff Commission to mean "material injury". This has been true since the Commission was given

the function of making injury determinations in 1954. Moreover, during consideration of the Customs Simplification Act of 1954, the Ways and Means Committee was explicitly informed by the General Counsel of the Tariff Commission that the notion of "material injury" had been applied in antidumping cases and would continue to be applied. (Hearings on H.R. 9476 Before the Committee on Ways and Means, 83rd Cong., 2d Sess., 37-38 (1954)).

The Code speaks in terms of "material retardation of the establishment of such an industry" and the Act reads "is prevented from being established". The notion of "material retardation" is a reasonable interpretation of the idea of prevention and would permit injury to be found even though it is not shown that dumped imports absolutely prevent the establishment of an industry.

Paragraph (a) also provides that, in reaching their decision, the authorities shall weigh, on one hand, the effect of the dumping, and, on the other hand, all other factors taken together which may be adversely affecting the industry. The determination shall in all cases be based on positive findings and not on mere allegations or hypothetical possibilities. In the case of retarding the establishment of a

new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed, or machinery has been ordered. These requirements supplement but do not change the first and basic sentence of paragraph (a) and constitute reasonable standards for the application of that sentence.

Paragraph (b) provides that the valuation of injury -- that is the evaluation of the effects of the dumped imports on the industry in question -- shall be based on examination of all factors having a bearing on the state of the industry in question. It then lists, by way of example, a number of such factors, and concludes that no one or several of these factors can necessarily give decisive guidance. This paragraph highlights what is implicit in the Act and what would be inherent in any consideration of the question of injury.

Paragraph (c) provides that in order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined and then gives several examples

of such factors. This provision is a logical elaboration of the concept of the principal cause, which necessarily requires comparison with other identifiable causes.

Paragraph (d) provides that the effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production. This provision isolates, insofar as data permit, that sector of domestic production which is most likely to be affected by the dumped imports. The paragraph recognizes, however, that this is not always possible and therefore provides, as an alternative, that the effect of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products which includes the like product, for which the necessary information can be provided. In either case, the paragraph identifies as specifically as possible those productive facilities most vulnerable to dumped imports and is thereby consistent with the Act.

Paragraphs (e) and (f) concern the manner in which cases involving a threat of material injury are to be considered. Paragraph (e) provides that a determination of threat of

material injury shall be based on facts and not merely on allegation, conjecture, or remote possibility. The change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent. These requirements are consistent with the practice of the Tariff Commission. Paragraph (f) provides that with respect to cases where material injury is threatened by dumped imports, the application of antidumping measures shall be studied and decided with special care. This paragraph is designed to prevent the promiscuous use of the notion of "threat".

Article 4. Definition of Industry.

Paragraph (a) lays down the basic rule that in determining injury the term "domestic industry" shall be interpreted as referring either to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Each of these two alternative definitions of industry relates to the domestic producers of the like products. This is an appropriate refinement of the concept of "an industry" in the Act, since an imported product usually has its greatest

competitive impact on the like domestic product. Moreover, as defined in section 2(d) of the Code, a like product need not be only the identical product. It may be another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. The latter definition allows scope for considering the domestic producers which are affected by dumped imports but which do not produce the identical domestic product.

For purposes of defining an industry, the two alternative definitions in paragraph (a) deal not only with the requisite characteristics of the domestic product but with the required number of domestic producers.

The first of the two alternative definitions of industry speaks in terms of all the domestic producers and is consistent with a strict reading of the term "an industry" in the Act. The second definition recognizes that such an all-inclusive test may not always be appropriate. It therefore defines industry in terms of those producers who account for a major proportion of total domestic production of the product. This alternative is consistent with the Act. It will permit determinations of injury where geographic segmentation is not proper

and where the domestic industry as a whole is materially injured by dumped imports but certain producers in that industry are not.

Paragraph (a) provides two exceptions to the general definitions of industry. These two exceptions are not mandatory but simply permit two kinds of segmentation in defining an industry. Insofar as the Act does not envisage segmentation, either on its face or in legislative history, these two exceptions may be set aside. However, insofar as segmentation may be considered appropriate under the Act, the two types permitted by paragraph (a) are likewise appropriate.

Subparagraph (a)(i) provides that when producers are importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers. This is designed to permit those producers in the industry which are not importers of the product to be considered the industry for purposes of an injury investigation.

Subparagraph (a)(ii) lays down two alternative exceptions -- in terms of geographic segmentation -- to the general definitions of industry. The fact that either of these exceptions is available only "in exceptional circumstances" is consistent with the infrequent use of geographic segmentation

in the past. The first type of geographic segmentation involves segmentation due to transport costs. The second type involves segmentation based upon "special regional marketing conditions". In either case, injury may be found only if there is injury to all or almost all of the total production of the product in the market as defined. Such a condition is a reasonable one to maintain the integrity of the concept of injury.

Paragraph (b) provides that where two or more countries have reached such a level of integration that they have the characteristics of a single unified market, the industry in the entire area of integration shall be taken to be the industry referred to in paragraph (a). This provision applies to customs unions such as the European Communities and is not relevant to the United States.

Paragraph (c) provides that the provisions of Article 3(d) shall be applicable to Article 4. As noted above, Article 3(d) identifies, insofar as data permit, those productive facilities most vulnerable to dumped imports for purposes of determining injury. The effect of paragraph (c) is to provide that the same concept shall be used for purposes of determining the domestic producers of the like product under paragraph (a) of Article 4.

C. INVESTIGATION AND ADMINISTRATION PROCEDURES

Article 5. Initiation and Subsequent Investigation.

Paragraph (a) provides that investigations "shall normally" be initiated upon a request on behalf of the industry affected, supported by evidence both of dumping and of injury. However, an investigation may be initiated by the authorities concerned, provided they have evidence both on dumping and injury.

The requirement in paragraph (a) that investigations shall normally be initiated upon the request of an industry is consistent with past experience under the Act. The great majority of antidumping investigations has been started because of complaints by domestic industries. Only a relatively small number has been initiated by the Government.

Under the present regulations implementing the Act, evidence bearing on the question of injury is required, if it is reasonably available to the complainant. See section 14.6(b)(3) of the old regulations, requiring information as to the total value and volume of domestic production of the merchandise in question. The purpose of this provision is to ensure that an expensive and time-consuming investigation will not be initiated where there is no possibility of injury or

where the complaint is frivolous. This is consistent with the rule of statutory construction that a law will not be interpreted to require the performance of a futile act. With that rule in mind, section 53.27(e) of the new regulations provides that a complaint be accompanied by:

> "Information indicating that an industry of the United States is being injured, or is likely to be injured, or prevented from being established."

The Treasury Department will not, however, undertake to evaluate information bearing on injury. Under the Act this is a function of the Tariff Commission.

Paragraph (b) first provides that, upon initiation of an investigation and thereafter, the evidence of both price discrimination and injury "should be considered simultaneously". This hortatory provision does not legally obligate the United States to take any action.

Paragraph (b) also provides that, in any event, the evidence of both price discrimination and injury shall be considered simultaneously in the decision whether or not to initiate an investigation. This requirement will be satisfied by an examination of the complaint to see if evidence of injury is submitted as required by the new regulations.

Finally, paragraph (b) provides that the evidence of both price discrimination and injury shall be considered simultaneously thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied, except in the cases provided for in Article 10(d) in which the authorities accept the request of the exporter and the importer.

The procedure in keeping with this provision is set forth in section 53.34(a)(2) of the new regulations. This section provides that the Secretary of the Treasury's affirmative determination that there are, or are likely to be, sales in the United States of the merchandise in question at less than fair value, will be issued concurrently with the order to withhold appraisement. This, in effect, will accelerate the procedure currently employed, whereby after withholding of appraisement, a "tentative" determination of sales at less than fair value is issued, which is in turn followed by a final determination. Under the new procedure, no affirmative "tentative" determinations of sales at less than fair value would be issued. It should be noted that the "tentative" determination procedure followed under the current regulations would be retained where negative determinations are indicated. This is set out in section 53.33 of the new regulations.

In practice, therefore, by a final determination of sales at less than fair value under section 201(a) of the Act (19 U.S.C. 160(a)) the case would be forwarded to the Tariff Commission for consideration on the question of injury at the time the provisional measure -- withholding of appraisement -- is taken under section 201(b) of the Act. Under the Act, the Tariff Commission has three months to make its decision. Should new facts or other circumstances come to the attention of the Treasury Department, the original determination of sales, or likelihood of sales, at less than fair value would be revoked, if warranted. Such a revocation, prior to the time when the Tariff Commission has reached its determination on the question of injury, would effectively close the case. There has, in fact, been one revocation of a final determination of sales at less than fair value based on a re-evaluation of pertinent information (Finished Tubeless Tire Valves from West Germany, 32 F.R. 14780 (1967)).

The proposed procedure conforms to the requirement in the Code for simultaneous consideration of the questions of price discrimination and injury once "provisional measures" are applied. As to its consistency with the Act, it is clear that the

withholding of appraisement would still occur when the Secretary of the Treasury had reason to believe or suspect that there are, or are likely to be, sales below fair value. The elimination of the "tentative" determination stage, insofar as affirmative determinations are concerned, poses no problem under the Act, since this procedure was established simply as an administrative device in 1965. Because evidence of likelihood of sales below fair value is sufficient to justify an affirmative determination by the Secretary of the Treasury under the Act, even though the existence of sales below fair value may not have been established at the time of withholding or appraisement, the accelerated procedure can be implemented consistent with the requirements of the Act.

The exception in paragraph (b) relates to the second sentence of Article 10(d) of the Code. This sentence provides that appraisement shall not be withheld for a period longer than three months, or, when the exporter and the importer so request and the authorities accept, for a period longer than six months. Under the new regulations, the withholding of appraisement and the issuance of the Treasury Department's affirmative determination of sales at less than fair value would not be simultaneous in such six-month cases. Instead,

the affirmative determination would be made three months after appraisement had been withheld. See sections 53.34, 53.35, and 53.36 of the new regulations.

Paragraph (c) provides that an application shall be rejected and an investigation shall be terminated promptly as soon as the authorities are satisfied that there is not sufficient evidence of either price discrimination or injury to justify proceeding with the case. This paragraph also provides in a hortatory manner that cases should be closed where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible. Both provisions are in keeping with present practice under the Act. See sections 14.6(d)(1)(i) and 14.7(b)(9) of the old regulations and sections 53.15 and 53.28 of the new regulations.

Paragraph (d) provides that an antidumping proceeding shall not hinder the procedures of customs clearance. Since antidumping proceedings are not so used under the Act, this provision is consistent with the Act and its administration.

Article 6. Evidence

Paragraph (a) provides that all interested parties shall be given ample opportunity to present evidence in writing or,

on justification, orally. This provision is consistent with present practice under the Act. See section 14.8 of the old regulations and section 53.32(b) of the new regulations.

Paragraph (b) provides that the complainant, the importers and exporters known to be concerned, and the governments of the exporting countries shall be provided opportunities to see all information that is relevant, non-confidential, and being used by the authorities, and to prepare presentations on the basis of such information. This provision restates current practice under the Act. See section 14.6a of the old regulations and subpart B of the new regulations.

Paragraph (c) provides that all information which is by nature confidential or which is provided on a confidential basis by parties to an investigation shall be treated as strictly confidential by authorities and they shall not reveal it without specific permission of the party submitting the information. The present practice under the Act is the same. See section 14.6a(b) of the old regulations and section 53.23(b) of the new regulations.

Paragraph (d) provides that, if the authorities find that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or

to authorize its disclosure in generalized or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct. This is a permissive and not mandatory provision. Under present practice, such information would be disregarded if self-serving. See section 14.6a(b) of the old regulations. The substance of paragraph (d) is now reflected in section 53.23(b) of the new regulations. It is reasonable and consistent with the Act to take into account information which is demonstrably correct.

Paragraph (e) provides that, in order to verify information obtained or to obtain further details, the authorities may carry out investigations in other countries as required. However, they must obtain the agreement of the firms concerned and they must notify the representatives of the government of the country in question and receive no objection to the investigation. Paragraph (e) is a permissive provision. It is implicit in section 14.6(d)(3)(i) of the old regulations and is consistent with present practice. It is now reflected in section 53.31(a) of the new regulations.

Paragraph (f) provides that once the authorities are satisfied that there is sufficient evidence to justify initiating

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an investigation, representatives of the exporting country and the exporters and importers known to be concerned shall be notified. In addition, a public notice may be published. Both the mandatory and permissive parts of paragraph (f) are consistent with present practice. See section 14.6(d)(1)(i) of the old regulations, relating to public notice, and section 53.30 of the new regulations.

Paragraph (g) provides that throughout the investigation all parties shall have a full opportunity for the defense of their interests. On request, all directly interested parties shall be provided opportunities to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered, taking into account the need to preserve confidentiality and the convenience of the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case. These procedures are in keeping with present practice. See section 14.8(a) of the old regulations and sections 53.33 (a)(2) and 53.37 of the new regulations.

Paragraph (h) provides that the authorities shall notify representatives of the exporting country and the directly

interested parties of their decisions regarding the imposition or non-imposition of antidumping duties, indicating the reasons for such decisions and the criteria applied. In addition, the authorities shall, unless there are special reasons against doing so, make public the decisions. These provisions accord with present practice. Section 201(c) of the Act (19 U.S.C. 160(c)), requires publication of findings of injurious dumping. With respect to notification of interested parties, see section 14.13(a) of the old regulations and section 53.42 of the new regulations.

Paragraph (i) provides that the provisions of Article 6 shall not preclude the authorities from reaching preliminary determinations, affirmative or negative, or from applying provisional measures expeditiously. This provision permits preliminary determinations, such as "tentative" determinations, which under the new regulations would be made in cases where negative determinations on the question of price discrimination were indicated. See section 53.33(a) of the new regulations. Paragraph (i) also provides that, in cases where any interested party withholds the necessary information, a final finding, affirmative or negative may be made on the basis of the facts available. This is a permissive provision, which is now reflected in section 53.31(a) of the new regulations.

Article 7. Price Undertakings.

Paragraph (a) provides that antidumping proceedings may be terminated without imposition of antidumping duties or provisional measures upon receipt of a voluntary undertaking by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices. This provision is permissive and is consistent with present practice, under which assurances to cease exporting to the United States at dumped prices may be accepted. See section 14.7(b)(9) of the old regulations and section 53.15 of the new regulations.

Paragraph (b) provides that, if the exporters make, and the authorities accept, such an undertaking, the investigation of injury shall nevertheless be completed if the exporters so desire or the authorities so decide. The purpose of this provision is to allow the foreign producer who is convinced that his exports, though sold at a dumping price, do not injure, to have a chance to get a decision to this effect, thus allowing him to resume sales at such a price with at least some indication that this can be done without subjecting him to dumping duties. Paragraph (b) is consistent with present practice and is now reflected in section 53.15(b) of the new regulations.

Paragraph (b) also provides that, if a determination of no injury is made, the undertaking given by the exporters shall automatically lapse unless the exporters state that it shall not lapse. Under present practice, only those undertakings are accepted which are unqualified and which continue without regard to the disposition of the case.

Finally, paragraph (b) provides that the fact that exporters do not offer to give such undertakings, or do not accept an invitation made by the authorities to do so, shall in no way be prejudicial to the consideration of the case. Paragraph (b) adds, however, that the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue. These two provisions simply state what would be reasonable under such circumstances and are consistent with present practice under the Act.

D. ANTIDUMPING DUTIES AND PROVISIONAL MEASURES

Article 8. Imposition and Collection of Anti-Dumping Duties.

Paragraph (a) provides that the decision whether or not to impose an antidumping duty and whether the amount of the antidumping duty shall be the full margin of dumping or less, are decisions to be made by the authorities. This clearly

permits the United States to impose dumping duties equal to the full dumping margin, as required by section 202 of the Act (19 U.S.C. 161).

Paragraph (a) also states that "it is desirable" that the imposition be permissive and that the duty be less than the margin, if such lesser duty should be adequate to remove injury. This is a hortatory provision which does not impose an obligation upon the United States and therefore creates no inconsistency with the Act.

Paragraph (b) provides that, when an antidumping duty is imposed in respect of any product, such duty shall be levied on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury. This is consistent with section 202 of the Act (19 U.S.C. 161), which requires dumping duties to be imposed only in the amount of the dumping margin and is therefore necessarily non-discriminatory.

Paragraph (b) also provides that the authorities shall name the supplier or suppliers of the product concerned, subject to two exceptions. First, if several suppliers from the same country are involved and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. Second, if several suppliers from more than one

country are involved, the authorities may name either all the suppliers involved or, if this is impractical, all the supplying countries involved. Present practice under the Act conforms to the general rule, as qualified by the two exceptions, and is now reflected in section 53.35(c) of the new regulations.

Paragraph (c) provides that the amount of the antidumping duty must not exceed the margin of dumping. This is consistent with section 202 of the Act (19 U.S.C. 161), which does not authorize any excessive duties. Paragraph (c) also provides that, if subsequent to the application of the antidumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible. This cannot normally occur under the Act, since full opportunity is given under customs law for the determination of the correct amount of the dumping duty prior to its collection.

Paragraph (d) concerns a country which uses a "basic price system" for purposes of antidumping proceedings. The paragraph is inapplicable to the United States, since the Act does not provide for such a system.

Paragraph (e) provides, as a general rule, that when the industry has been interpreted as referring to the producers in

a certain area -- that is, in a case of geographic segmentation -- antidumping duties shall only be definitively collected on the products in question which are consigned for final consumption to that area. This requirement cannot be satisfied under the Act. Moreover, it would raise problems under the sixth clause of section 9 of article I of the Constitution.

Accordingly, paragraph (e) provides that, in lieu of satisfying the general rule and prior to the imposition of antidumping duties, the exporter shall be given an opportunity to cease dumping in the area concerned. If the exporter promptly gives adequate assurance to this effect, antidumping duties shall not be imposed. In a case of geographic segmentation, non-imposition of dumping duties could be justified under the Act only if the exporter's assurance were made very promptly and it were clearly adequate to remove any possibility of future dumping on his part. If the assurance does not meet these necessarily demanding conditions or, if it does so, but is then not fulfilled, the antidumping duties may be imposed without limitation to an area. This procedure is consistent with the Act since a sufficiently firm assurance to cease dumping would satisfy the basic purpose of the Act.

Article 9. Duration of Anti-Dumping Duties.

Paragraph (a) provides that an antidumping duty shall remain in force only as long as it is necessary in order to counteract dumping which is causing injury. This is consistent with the Act, which is directed exclusively to dumping which causes injury.

Paragraph (b) provides that the authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if interested suppliers or importers of the product so request and submit information substantiating the need for review. Review upon request is provided for in section 14.12 of the old regulations and section 53.41(a) of the new regulations. Review upon the initiative of the authorities reflects present practice and is provided for in section 53.41(b) of the new regulations.

Article 10. Provisional Measures.

Paragraph (a) provides that provisional measures may be taken only when a preliminary decision has been taken that there is dumping and when there is sufficient evidence of injury. The first condition is a requirement of section 201(b) of the Act (19 U.S.C. 160(b)). As previously mentioned in the

discussion of Article 5, the second condition will be satisfied if the complaint includes evidence of injury as required by section 53.27(e) of the new regulations.

Paragraph (b) provides that provisional measures may take the form of a provisional duty or security. Since such provisional measures are not permitted under the Act, this provision is inapplicable to U.S. practice.

Paragraph (b) also provides that withholding of appraisement is an appropriate provisional measure provided that the normal duty and the estimated amount of the antidumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures. Under the new procedures, the district director of customs will notify the importer of the normal duty and the estimated amount of the dumping duty. See section 53.48(a) of the new regulations.

Paragraph (c) provides that the authorities shall inform representatives of the exporting country and the directly interested parties of their decisions regarding imposition of provisional measures, indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public such decisions.

Under the new procedures, representatives of the exporting country and the directly interested parties will be informed by letter of the withholding of appraisement, together with the reasons for such decision and the criteria applied. In addition, the reasons and criteria will be set out in the public notices at the time the notice of withholding of appraisement is published.

Paragraph (d) provides in a hortatory manner that the imposition of provisional measures shall be limited to as short a period as possible. More specifically, paragraph (d) provides that provisional measures shall not be imposed for a period longer than three months or, on decision of the authorities concerned upon request by the exporter and the importer, six months. This provision is discussed previously in the commentary on Article 5(b).

Paragraph (e) provides that the relevant provisions of Article 8 shall be followed in the application of provisional measures. Article 8 relates to the imposition and collection of dumping duties. Accordingly, paragraph (e) refers to types of provisional measures other than withholding of appraisement and is therefore inapplicable to U.S. practice.

Article 11. Retroactivity.

This article establishes the general rule that antidumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision to impose such duties or to take such measures enters into force. The prospective application of withholding of appraisement is permitted by section 201(b) of the Act (19 U.S.C. 160(b)). In turn, section 202(a) of the Act (U.S.C. 161(a)) requires dumping duties to be assessed only on entries which are unappraised. In most cases, under present practice, appraisement is withheld only with respect to prospective entries and therefore dumping duties are imposed only on prospective entries. This will continue to be true under the new procedures.

Article 11 also contains three exceptions to the general rule, which are set out in clauses (i), (ii), and (iii), respectively.

Clause (i) provides, insofar as it is applicable to U.S. practice, that where a determination of injury (but not threat of injury) is made, antidumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied. Such retroactivity is permitted by section 202(a) of that Act.

Clause (ii) provides that where appraisement is suspended for the product in question for reasons which arose before the initiation of the dumping case and which are unrelated to the question of dumping, retroactive assessment of antidumping duties may extend back to a period not more than 120 days before the submission of the complaint. Effect may be given to this provision under section 202(a) of the Act, which permits dumping duties to be assessed on all unappraised entries of products entered not more than 120 days before the date of the complaint.

Clause (iii) covers the case where for the dumped product in question the authorities determine two things. First, there is a history of dumping which caused material injury or the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury. Second, the injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period of time) to such an extent that, in order to preclude it recurring, it appears necessary to assess a dumping duty retroactively on those imports. In this case, the duty may be assessed on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Section 201(b) of the Act permits the withholding of appraisement with respect to products entered for consumption not more than 90 days prior to the date of the notice of withholding. Accordingly, in such a case, section 202(a) of the Act would provide for the imposition of antidumping duties on products entered within such period.

E. ANTIDUMPING ACTION ON BEHALF OF A THIRD COUNTRY

Article 12.

This Article deals with the case where country A is dumping goods in country B and is thereby causing injury not to an industry in country B but to an industry in country C which exports to country B. In such a case, country C may apply to country B to impose dumping duties against country A. However, country B cannot impose antidumping duties in such a case without the approval of the GATT CONTRACTING PARTIES.

Paragraphs (a) and (c) of this article provide that the United States -- if it is in the position of country C -- may try to persuade country B to take action. Whether or not country B decides to invoke its antidumping law would, of course, have nothing to do with the Act. At the same time, paragraph (d) provides that if the United States is country B,

the decision whether or not to proceed with a case rests with the United States. This permits the United States to reject an application from country C, on the ground that section 201(a) of the Act deals only with injury to an industry in the United States.

PART II - FINAL PROVISIONS

This part contains Articles 13 through 17, which relate to procedural matters concerning the signature, entry into force, and operation of the Code. It therefore does not bear on U.S. practice under the Act.

APPENDIX B

Report of the U.S. Tariff Commission to the Senate Committee on Finance on S. Con. Res. 38

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CONTENTS

APPENDIX

REPORT OF THE U.S. TARIFF COMMISSION TO THE SENATE FINANCE COMMITTEE ON S. CON. RES. 38, 90TH CONGRESS, A CONCURRENT RESOLUTION REGARDING THE INTERNATIONAL ANTIDUMPING CODE SIGNED AT GENEVA ON JUNE 30, 1967

REPORT OF THE MAJORITY 1/

S. Con. Res. 38 of the 90th Congress states that it is the sense of Congress that --

> (1) the provisions of the International Antidumping Code, signed at Geneva on June 30, 1967, are inconsistent with, and in conflict with, the provisions of the Antidumping Act, 1921;
>
> (2) the President should submit the International Antidumping Code to the Senate for its advice and consent in accordance with article II, section 2, of the Constitution of the United States; and
>
> (3) the provisions of the International Antidumping Code should become effective in the United States only at the time specified in legislation enacted by the Congress to implement the provisions of the Code.

1/ Vice Chairman Sutton and Commissioners Culliton and Clubb comprise the majority. Additional comments by Commissioner Clubb are set forth beginning on page 34. The Separate Views of Chairman Metzger and Commissioner Thunberg appear following page 48.

The International Antidumping Code, 1/ which was negotiated within the framework of the General Agreement on Tariffs and Trade (GATT), has as its objective the establishment of basic principles with respect to antidumping measures that shall be observed by all contracting parties signatory to the Code and requires such parties to change their laws, regulations and practices when necessary to conform to these principles.

Dumping, which is a particular unfair trade practice also known as price discrimination, is condemned in the United States, both in interstate and international trade. The Antidumping Act, 1921, as amended, is only one of several acts of the United States Congress which deal with price discrimination in international trade.

The report 2/ discusses the present United States laws relating to price discrimination, the international obligations of the United States under the General Agreement on Tariffs and Trade (GATT) relating to antidumping measures, a comparison of the Code with the relevant United

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1/ Hereinafter referred to as the Code.

2/ In considering this report, note should be made of the fact that the Code has had to be examined in its bare form. There are neither published official contemporaneous reports of the negotiators nor authoritative interpretations of the GATT contracting parties concerning the Code which would serve as aids in its interpretation. In contrast, the U.S. acts have been examined in light of their legislative history and judicial precedent. Moreover, the Code is expressed in part in terminology which does not appear to have special meaning in the field of unfair trade practices whereas the key words and terms used in U.S. statutes are words of art having definite meanings derived from legislative history and judicial precedent.

States laws, and implementation of the Code by the United States.

U.S. Laws on Price Discrimination

Price discrimination in its various forms in international trade would appear to be subject to one or more of the provisions of at least six Federal statutes.

Resumes of the statutes are set forth below. The Antidumping Act, 1921, is set forth first because it is the one most often invoked in connection with alleged dumping of imported articles and its provisions were apparently the only ones considered by the U.S. negotiators in relation to the Code. The remaining statutes are mentioned in the chronological order of their enactment in order that the reader may better sense the development of statutory controls on unfair methods of competition.

Antidumping Act, 1921, as amended

Special dumping duties are to be assessed under the Antidumping Act, 1921, as amended, when "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value" 1/ and "an industry in the United States

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1/ Hereafter referred to as "LTFV" sales.

is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States". Procedurely, the Act provides that the Secretary of the Treasury shall determine whether the first quoted condition exists. If the Secretary makes an affirmative determination, he informs the Tariff Commission which then acquires jurisdiction to determine whether one or more of the second quoted conditions exist. The Act directs the Commission to make its investigation and determination within the three-month period starting on the date of receipt of advice of the Secretary's determination. Affirmative determinations by both agencies, taken together, constitute a "finding" of dumping within the meaning of the Act (section 201(a)). The special dumping duty to be assessed is an amount equal to the difference between the purchase price and the foreign market value (or their approximate equivalents in some cases).

The basic concept of what constitutes injurious dumping under the Act has not changed since its enactment in 1921. Until 1954 the Secretary of the Treasury was responsible for administering the entire Act. However, in that year the responsibility for determining whether an industry was being injured, or likely to be injured, or prevented from being established, was transferred to the Tariff Commission. Moreover, the retroactive assessment of special duties was limited to entries, or withdravals from warehouse, for consumption

made on or after the date which is 120 days prior to the date of receipt of a complaint by the Treasury Department. No substantive changes have been made in the original concepts of "industry" and "injury" as those words appeared in the original Act.

Other U.S. statutes

Act of 1890.--Section 1 of the Sherman Anti-Trust Act (15 U.S.C. 1) declares every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, to be illegal. Violators are subject to fines and imprisonment.

Act of 1894.--Section 73 of the Wilson Tariff Act of 1894 (15 U.S.C. 8) provides, among other things, that every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement or contract is intended to operate in restraint of lawful trade or free competition in lawful trade or commerce. Criminal sanctions

apply for its enforcement. International price discrimination could be used to cause restraint of trade within the meaning of the Act.

Act of 1914.--Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) provides that unfair methods of competition in commerce among the several States or with foreign nations are declared unlawful. No injury test appears in the statute. The Act provides that the Federal Trade Commission may order violators to cease and desist and imposes penal sanctions on those who refuse to obey such orders. 1/

Act of 1916.--Section 801 of the Revenue Act of 1916 (15 U.S.C. 72) provides in effect that if there is predatory price discrimination in international trade, there shall be two sanctions. The injured party may recover treble damages for his injury and the persons who are responsible for such price discriminations shall be subject to a fine and/or imprisonment.

Act of 1930.--Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) provides that, "in addition to any other provision of law," unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure "an industry", efficiently

1/ The U.S. Supreme Court has held that the F.T.C. Act was designed to supplement and bolster the Sherman Act of 1890 -- to stop in their incipiency acts and practices which, when full blown, would violate that Act -- as well as to condemn as "unfair methods of competition" existing violations of the Sherman Act. F.T.C. v. Motion Picture Advertising Co., 344 U.S. 392; F.T.C. v. Brown Shoe Co., Inc., 384 U.S. 316.

and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States are declared unlawful. The statute requires absolute exclusion of such imports as the remedy in such cases. 1/

United States Obligations Under the GATT 2/

Article VI of the General Agreement on Tariffs and Trade recognizes that dumping is to be condemned and sets forth general principles relating to when dumping duties may be appropriately assessed. The principles in Article VI are generally in agreement with the underlying principles in the United States Antidumping Act but are not framed in identical language. The United States on October 30, 1947, bound itself to observe the principles set forth in Article VI to the extent that they are not inconsistent with existing legislation. 3/

On June 30, 1967, the United States became a party to the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade." The first twelve articles of this Agreement consist of the "Anti-dumping Code" now commonly referred to as the

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1/ A similar section 316 in the Tariff Act of 1922 provided for the assessment of an additional duty of from 10 to 50 percent or absolute exclusion in extreme cases.

2/ Copies of Article VI of the GATT, the Protocol of Provisional Application of the GATT, and the Agreement on Implementation of Article VI of the GATT appear on pages xv through xxix of the Appendix.

3/ Article VI is in Part II of the GATT. Paragraph 1(b) of the Protocol of Provisional Application of the GATT states that Part II of the Agreement will be applied by the United States "to the fullest extent not inconsistent with existing legislation" (i.e., legislation existing on October 30, 1947).

'International Antidumping Code". The preamble to the Agreement states several purposes for the Code which are --

1. To recognize that anti-dumping practices should not constitute an unjustifiable impediment to international trade.

2. To recognize that anti-dumping duties may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry.

3. To interpret the provisions of Article VI of the GATT and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation.

Each party accepting the Agreement agrees, pursuant to Article 14 thereof, to "take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code." The United States, the United Kingdom, and Canada have signed the Agreement definitively and without reservation. 1/ Thus, the undertaking of the Agreement by the United States appears to supersede the Protocol of Provisional Application insofar as it applies to

1/ The United States signed the Agreement on June 30, 1967. It comes into force on July 1, 1968, pursuant to article 13 of the Agreement. The Agreement has also been signed without reservation by Belgium, Denmark, Finland, France, Germany, Italy, Japan, Luxemburg, the Netherlands, Sweden, and Switzerland, but is still subject to parliamentary ratification or other formal action in those countries. The European Economic Community is a signatory, subject to approval by its Council of Ministers. The Commission does not have information with respect to the status of implementation action in the countries signatory to the Agreement.

Article VI of the GATT and the United States is obliged internationally to abide by the Code beginning July 1, 1968, and to take all necessary steps to ensure the conformity of all its laws, regulations, and administrative procedures with the provisions of the Code.

Comparison of the Code with U.S. Statutes

For convenience, each article of the Code which relates to a special principle to be followed in a country's antidumping policies will be identified and then compared with the principles of the Antidumping Act, 1921, as amended, and to a limited degree with the other U.S. statutes dealing with price discrimination.

Article 1 - Duties

Article 1 states that dumping duties are to be assessed only under the circumstances provided for in Article VI of the GATT and that the provisions of the Code govern the application of Article VI, insofar as action is taken under anti-dumping legislation or regulations.

Article 2 - Dumping

Article 2 defines dumping as the introduction of a product into the commerce of another country "at less than its normal value." A product is sold at less than its normal value "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Basically, this statement of what constitutes dumping coincides with what constitutes "sales at less than fair value" within the meaning of the Antidumping Act. However, because of the use of terminology in the Code

which does not have identical counterpart terminology in the Act, and because there is no background material revealing the intent of the negotiators of the Code, it is not possible to make a precise comparison of the two provisions. The U.S. negotiators of the Code are of the opinion that Article 2 represents practice under the Act, an opinion in which the Secretary of the Treasury is in agreement. The Commission does not have first-hand experience (as does the Treasury Department) in the practical application of the Act for purposes of determining "foreign market values", "purchase prices", "constructed values", and "exporter's sales prices" which are defined therein and, therefore, is not in a position to report on the relative importance of the differences in terminology between Article 2 of the Code and the cited prices and values defined in the Act.

It will be observed that U.S. unfair trade statutes, other than the Antidumping Act, contain little or no specific criteria for determining whether there is price discrimination in a given situation. A comprehensive study of these statutes, their legislative history, and rulings made thereunder would need to be made to determine whether carrying out the Code necessitates any conforming amendments with respect to how price discriminations shall be determined.

Article 3 - The Injury Test

Article 3 of the Code contains criteria for determining that "injury" which justifies the assessment of special dumping duties. It states:

> A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. In reaching their decision the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry. * * * In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example, that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered. [Underscoring added for emphasis.]

Section 201(a) of the Antidumping Act states that the Commission shall determine --

> whether an industry in the United States is being, or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

The Act does not require a determination that dumped imports are adversely affecting an industry to a degree greater than any one or combination of other factors adversely affecting an industry before there can be an affirmative determination of injury, as is required by the Code. The Commission in making its determinations with respect to injury under the Act has not weighed the injury caused by such imports against other injuries that an industry might be suffering. The injury test has always been whether the imports at less than fair

value were causing, or were likely to cause, material injury, 1/ i.e., any injury which is more than de minimis. 2/

The Code criterion for injury 3/ is susceptible of two meanings. It states that a determination of injury shall be made only when the "dumped" imports are demonstrably the principal cause of material injury. This standard can be construed to mean that if the impact of "dumped" goods, considered alone, does not cause material injury there can nevertheless be a determination of material injury if the aggregate effect of all injurious factors is material injury and "dumping" is the principal causal factor. It would seem, however, that the negotiators intended that dumping duties be sanctioned only in those cases where the "dumped" goods are individually the cause of material injury and that such injury is greater than the injury caused by all other causal factors. The first interpretation would have the effect of making antidumping procedures under the Code more restrictive than the latter interpretation. The Antidumping Act is less restrictive

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1/ Commissioner Clubb agrees with the substance of this statement, but notes that his views on this matter are expressed in more detail in the decision on cast-iron soil pipe from Poland (32 F.R. 12925, Sept. 9, 1967).

2/ Some Commissioners, in making negative determinations, have explained that any existing injury, if material, was caused by factors other than "dumped" imports; but such explanations were not weighed against material injury caused by dumped imports for the purpose of making a negative determination.

3/ In this report the word "injury", for the sake of brevity, is used in the sense of injury or likelihood of injury, to an industry, or the prevention of the establishment of an industry, as those terms or their counterparts are used in the Antidumping Act or the Antidumping Code, unless otherwise specified.

than the Code under the first interpretation and more restrictive than the Code under the second.

The Tariff Commission has never had presented to it a serious claim that imports at less than fair value have prevented the establishment of an industry. It will be noted that the Code test for the comparable situation is not whether an industry "is prevented from being established" by reason of imports at less than fair value, but is whether the establishment of an industry is "materially retarded" principally by reason of imports at less than normal value. The Code states that a determination of material retardation shall not be made unless there is convincing evidence of the forthcoming establishment of an industry, "for example, that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered". This example, whether construed as three mutually exclusive tests or a single test that is met by one of two circumstances illustrative of that test, would seem to establish a more stringent qualification for a determination of a material retardation of the establishment of an industry under the Code than the present qualifications for a determination under the Act that an industry is prevented from being established. Moreover, the requirement that the subject dumped imports be the "principal" causation of

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material retardation would further intensify the stringency of the Code requirements for such an affirmative determination. The factors affecting the ability of persons to establish a given industry may be quite numerous and exceedingly difficult to differentiate and "weigh" for the purpose of determining whether "dumped" goods are the "principal" causation of the persons' inability to establish the industry.

Article 3 of the Code states that, in evaluating the effects of the "dumped" imports on an industry, consideration shall be given to an examination --

> of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity; and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

The Antidumping Act is silent as to how the effect of LTFV imports on an industry shall be evaluated. It requires the Commission to determine whether LTFV imports are injuring an industry in the United States. Since the Act contains no word of limitation concerning

the degree of injury to be considered, the word has been generally construed to mean injury in any degree greater than de minimis, i.e., more than trifling injury. Any injury more than de minimis is material injury. Moreover, the Act does not authorize the forgiveness of a material injury caused by LTFV imports in those cases where consideration of "all [other] factors having a bearing on the state of the industry in question" shows that the industry is in a healthy condition despite the effect of the LTFV imports. The Code concept of considering all factors having a bearing on the state of an industry in determining whether "dumped" imports are causing injury is different from the Commission's usual interpretation of the Antidumping Act. Under the Act, most commissioners have assessed the effects of LTFV imports on a domestic industry by weighing the extent to which such imports have penetrated U.S. markets, taken away customers, depressed market prices, or disrupted markets. Other factors may enter into consideration, but these are the basic factors generally considered.

Article 3 of the Code provides that "A determination of threat of material injury shall be based on facts and not merely on

allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent." The Act requires the Commission to determine whether imports at LTFV are likely to cause injury to an industry. Most commissioners seem to have used the test of whether a reasonably prudent man would anticipate that injury will occur in the foreseeable future. Other commissioners have used the test of imminent injury.

It may be noted that the Acts of 1890, 1894, and 1914 condemning unfair methods in competition, such as price discrimination in international trade (dumping), have no criterion that there be injury or likelihood of injury before the guilty parties are penalized. Judicial precedent seems to support rigid enforcement of these statutes, even to the extent of preventing a single sale at an unfair price level. The Act of 1916 imposes criminal sanctions on dumping if there is an "intent" to injure an industry. Proof of injury or likelihood of injury is not required for criminal prosecution. However, injury must be proven under that Act if treble damages are to be awarded to an industry. The Act of 1930 (section 337 of the Tariff Act of 1930) merely requires a finding that the imports involved in an unfair method of competition (price discrimination) have "the effect or

tendency" to destroy or substantially injure an industry. A "tendency" to cause injury appears to be a less stringent requirement than is likelihood of injury.

Article 4 - Scope of an Industry

Article 4 of the Code defines industry as follows:

(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that

(i) when producers are importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

(b) Where two or more countries have reached such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the industry referred to in Article 4(a).

(c) [The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production

> in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effect of the dumped imports shall be assessed by the examination of the product of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.] 1/

The Code does not parallel U.S. precedent as to what constitutes the industry, or industries, to be considered under the Antidumping Act. For example, it only allows consideration of the effect of imports on one industry -- that which produces a product identical to the "dumped imports, or failing such production, that which produces another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." 2/ Under the Antidumping Act, the Commission has considered whether "an industry" is being injured. There is no qualification as to the kind of industry nor the number of industries that might be affected by the imports under consideration. 3/

Paragraph (a) of article 4 of the Code, in defining industry, treats specially with those circumstances in which the industry for purposes of the Code may consist of a regional group of producers 4/

1/ Article 4(c) states that the provisions of Article 3(d) shall be applicable to Article 4. Accordingly, the language of 3(d) has been substituted therefor.

2/ Note use of term "like product" in Article 4, as defined in Article 2(b) of the Code.

3/ In Investigation No. AA-1921-24 the Commission considered the effect of imports of narrow glass panes on the flat glass industry, the jalousie glass louvre industry, and a jalousie window industry. In Investigation No. AA-1921-15, it considered the effect of imports of nepheline syenite on the domestic feldspar industry.

4/ This industry concept is commonly referred to as a "regional industry", "geographical industry" or "segmented industry" concept.

rather than all or virtually all producers in the contracting country producing the subject article. The conditions under which a regional industry concept may be employed in an injury determination under the Code are so narrowly defined that four out of five affirmative determinations by the Tariff Commission might not have been made had the Code been in effect when the determinations were made. Moreover, the four findings of dumping are currently in effect and, if continued beyond June 30, 1968, would appear to be inconsistent with the Code.

In one case, the Commission determined that LTFV imports into a particular geographical market area were injuring an industry composed of the producers of such product in that geographical area where virtually all of their production was sold. 1/ This case might have had the same result insofar as the Code standards for "industry" are concerned. In another case 2/ the LTFV imports were found to injure an industry composed of producers "in or adjacent to" the competitive market area in which the imports were sold, and in three cases 3/ such imports were found to injure an industry composed of producers "adjacent" to the competitive market area. The Code would limit a regional industry to all producers "within such a market" who "sell all or almost all of their production of the product in question in that market".

1/ Investigation No. 5 (cast-iron soil pipe from the United Kingdom).
2/ Investigation No. 19 (portland cement from Belgium).
3/ Investigations Nos. 16, 22, and 25 (portland cement from Sweden, Portugal, and the Dominican Republic).

The Code treats with a regional industry as being almost wholly contained within a "competitive market area", a circumstance which in the Commission's experience rarely exists. If the cited cases are any indicia, four out of five cases do not appear to fit the Code standard of regional "industry". Moreover, the Code would require that all or almost all of the producers within the subject market area be injured before there could be an affirmative determination of injury under its provisions. The Commission has never limited its affirmative determinations of injury to those cases where "all or almost all of the producers" were injured. We are not in a position to state what the outcome of the Commission's past affirmative determinations might have been under such a limitation of the Code.

In recent years, cases have arisen where LTFV imports have been concentrated in competitive market areas which were served to a significant degree by virtually all domestic producers. The concentration of sales of such imports in certain competitive market areas were found to cause, or were found likely to cause, injury to an industry composed of all domestic producers of such product even though a sizable portion of the total producers may not have individually experienced material injury nor were likely to experience material injury within the foreseeable future.[1/] Such determinations were based on the concept that an injury to a part of the industry is necessarily an injury to the whole industry.

1/ Investigation No. 32 (chromic acid from Australia), and No. 50 (cast-iron soil pipe from Poland).

The Code does not treat specially with situations of the kind just described. If an industry consisting of all producers were to be adjudged injured only in those cases where the injury parallels that required with respect to regional industries, perhaps only a few of the affirmative determinations would have been made had the Code been the prevailing law at the time the determinations were made. On the other hand, if the Commission's contemporary method of determining whether there is injury falls within the terms of Article 4, it would seem that the contemporary method could be used to avoid the limitations on the use of a regional industry concept.

Article 4(b) of the Code specifies circumstances under which an industry must be considered as consisting of all producers in two or more countries. The provision appears to relate solely to common market unions such as the European Economic Community. Unless the United States forms such a union, Article 4(b) would seem to have no relevancy to the Act.

The earliest three Federal statutes cited in this report do not specify that an industry be injured before remedial action is taken. The Act of 1916 specifies that "Any person injured in his business or property" by reason of predatory dumping may sue for treble damages. Thus, that Act does not limit its remedies to situations where there is injury to a nationwide industry or an exceptional regional industry.

It would appear that each of these statutes are not as limited in affording remedies against dumping as is the Code when considered in light of the "industry" criterion.

Article 5 - Initiation of Investigations of Dumping

Article 5 of the Code states in effect that dumping investigations shall normally be initiated upon complaint by the industry producing the like product, 1/ but that in unusual circumstances the Secretary of the Treasury may initiate such an investigation. In either event, the investigation must not be initiated until there is evidence at hand of sales at LTFV and injury and a simultaneous consideration of such evidence to determine whether an investigation is warranted. After the initiation, if any, such evidence should be considered simultaneously to determine whether there are sales at LTFV and injury.

The Act would seem to compel the Secretary of the Treasury to initiate an investigation whenever he has reason to suspect sales at less than fair value by reason of any information submitted to him. The Act does not qualify the source of such information.

The Act vests jurisdiction in the Secretary of the Treasury to determine whether there are sales at LTFV. Jurisdiction to determine whether there is injury is vested in the Tariff Commission. The

1/ That is, a producer of a product identical to the LTFV product or, failing such production in the United States, a producer of another product which has characteristics closely resembling those of the LTFV product.

latter jurisdiction would seem to arise only when the Secretary of the Treasury has advised the Tariff Commission of an affirmative determination of sales at LTFV. Thus, a question arises as to whether there is authority under the Act to delay initiating an investigation of alleged dumping in order to comply with the mandatory simultaneity prerequisites of the Code for initiating an investigation. Moreover, a question also arises as to whether the Secretary of the Treasury and the Tariff Commission have authority under the Act to comply with the permissive direction of the Code that final decisions with respect to sales at LTFV and injury be made simultaneously.

Under the Act, the Commission has examined primarily those factors which show the effect that the "margin of dumping" 1/ has on a domestic industry. The Code concept of simultaneity in the dual determinations of "dumping" and "injury" suggests that the negotiators had in mind a mere assessment of the injury caused by the presence of LTFV goods in the marketplace without regard to whether the "margin of dumping" has had any material effect in causing injury. This intent seems to be borne out by Article 3(b) of

1/ "Margin of dumping" is an amount equal to the difference between the home market price of the foreign article and the lower price for which it is sold for export to the United States. It is sometimes characterized as an "unfair discount". The amount of the margin in a particular case is determined by the Treasury Department and is accepted without review by the Tariff Commission.

the Code which specifies certain factors to be weighed in determining whether there is injury.

The Code in demanding simultaneity of consideration creates an anomalous result. The separation of function between the Treasury Department and the Tariff Commission embodied in the Act permits a logical order for determining whether an unfair act exists and, if so, whether such act injures an industry. Until a margin of dumping has been determined, it is obvious that no appraisal can be made of its effect. When a determination of sales at LTFV is received from the Treasury Department, it has been the Commission's experience that a number of preliminary steps must be taken before consideration can be given to the injury determination. The Commission generally needs to know approximately when sales at LTFV began, the margins of difference, the dates of any changes that may have occurred in such margins, the conditions existing in the domestic markets where the LTFV goods are being sold, the extent of such imports, etc. Procedurally, these preliminary steps require from one to two months to complete; there-

after public hearings are usually held to give opportunity to all interested parties to submit facts and points of view. In other words, effective simultaneity in any real sense is not procedurally feasible or logical.

Article 5(c) of the Code provides that a dumping complaint must be rejected if there is not sufficient evidence of injury to proceed with the case. Inasmuch as the Act vests sole authority in the Commission to make injury determinations, and as such authority does not become viable until the Commission has received an official determination of LTFV sales by the Secretary of the Treasury, it does not seem that either the Treasury or the Commission has authority to review complaints to determine whether sufficient evidence of injury has been submitted therewith for purposes of rejecting the complaint.

Under most of the statutes, including the Antidumping Act, dealing with unfair methods of competition, the responsibility for initiating an investigation is placed upon the administering agency. The Code, on the other hand, seems to be designed to discourage the initiation of investigations by an agency and would supplant the statutory procedures with a complaint procedure.

Article 6 - Right to be Heard - Notice of Decision and Reasons Therefor

Article 6 of the Code deals with the rights of interested parties to be heard and to be informed to the extent reasonably practicable of all facts considered in a dumping case.

Article 7 - Forgiveness of Dumping

Article 7 of the Code permits a country to close a case without assessing a special dumping duty in those cases where the exporter agrees to cease exporting to the investigating country or agrees to stop exporting at LTFV. This provision is in harmony with a recently established practice of the U.S. Treasury Department under the Act. The Department, when it finds sales at LTFV, publishes a "tentative" determination of sales at LTFV. If the exporter promises to raise his prices to fair value or to cease exports to the United States, the Department makes a final determination of no sales at LTFV and, therefore, does not refer the matter to the Commission to determine the effect of such imports on domestic industries. It is estimated that under such a practice the average exporter can sell his goods at LTFV in the United States for approximately two years 1/ with impunity insofar as the effectiveness of the Act is concerned. Thus, sporadic dumping would not appear to be effectively stopped under this practice.

The latter part of Article 7 provides that an exporter of goods sold at LTFV is entitled to have a formal determination made as to whether his goods are causing injury in the importing country without having to revise his prices or to cease exporting such goods. This is harmonious with the Act. Not all "LTFV" prices are literally unfair within the domestic unfair trade law concepts and the Commission has applied this philosophy to the Act.

1/ Sales at less than fair value are usually not satisfactorily proven to the point of a "tentative" determination until after imports have entered the United States for a period of about two years.

. . .

None of the unfair trade statutes cited in this report specifically provide a mechanism for a violator of the statute concerned to avoid the remedial or penal actions directed to be taken thereunder by his agreement to conform to the law after he is caught. The Code in this respect does not appear to conform with any of the statutes.

Article 8 - Dumping Duties

Article 8 of the Code deals with the imposition of a special dumping duty. Paragraph (a) of the Article provides that the assessment of such a duty is not mandatory but permissive. It requires that such duties not be assessed in excess of the actual margin of difference and expresses a desire that the amount be less than the margin if such lesser duty would be adequate to remove injury. Under the Act, assessment of a duty equivalent to the margin is mandatory.

Paragraph (e) of article 8 of the Code provides that if a regional industry is involved, dumping duties shall be assessed only on imports going into the regional area. Moreover, even these duties shall not be assessed if the exporter gives assurance that he will "cease dumping in the area concerned". Under these provisions of the Code it would seem that the exporter for some years may elude special dumping

duties by jumping from one market area to another when the duties become imminent in the one area. These provisions of the Code appear to be in conflict with the Act. In addition, a question arises as to whether section 8(1) of Article I of the Constitution, which requires a uniform levy of duties, would permit the assessment of dumping duties on this basis. (See Ellis K. Orlowitz Company v. United States, 50 C.C.P.A. 36 (C.A.D. 816).)

Since the Code would only permit the assessment of special dumping duties as a deterrent to price discriminations in international trade, the question arises as to whether other remedies and penalties provided for in the unfair trade statutes of the United States must be changed if there is to be a conformity with the Code.

Article 9 - Revocation of Dumping Findings

Article 9 of the Code provides in effect that a finding of dumping shall be terminated when it ceases to serve its intended purpose. The Act contains no special provision for the termination of a finding thereunder. There are cases in which meritorious reasons exist for revoking dumping findings. The Secretary of the Treasury has promulgated a regulation (19 CFR 14.12) establishing a procedure under which a dumping finding will be modified or revoked if a change in circumstances or practice has obtained for a substantial period of time, or other reasons obtain which establish that the basis for the dumping finding no longer exists with respect to all or a part of the merchandise covered thereby.

The imposition of penal sanctions and the awarding of treble damages under the other unfair trade laws are one-time remedies not comparable to dumping duties. The matter of revocation does not arise (except for mistakes). The remedies are, however, always available against every single infraction should such a practice be resumed. Articles once refused entry under section 337 of the Tariff Act of 1930 continue to be so excluded until the President finds "that the conditions which led to such refusal of entry no longer exist."

Article 10 - Interim Safeguards (provisional measures) Against Suspected Dumping

Article 10 of the Code prohibits imposing any interim safeguards which would offset suspected dumping margins until the contracting country has made a preliminary decision that there are sales at LTFV and it has in hand adequate evidence of injury. Thereafter, interim safeguards may only be imposed with respect to prospective entries of dumped goods.

The Act requires no evidence of injury before imposing interim safeguards. It provides that when the Secretary of the Treasury "has reason to believe or suspect", from the invoice or other papers or from information presented to him or to any person to whom authority under that Act has been delegated, that there are sales at LTFV, he "shall authorize * * * the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than 120 days before the question of dumping has been raised."

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Once appraisement reports are ordered withheld, such merchandise is not released from customs custody except under bond with surety guaranteeing the payment of dumping duties should there be an affirmative finding of dumping.

Inasmuch as the Act vests with the Tariff Commission sole authority to make determinations of injury and as this authority does not include the making of tentative or interim determinations of injury, the conditions of the Code with respect to provisional or interim measures could not be fulfilled under the Act until a finding of dumping had been made. Thus, it would appear that the fulfillment of the conditions for provisional measures under the Code would preclude the taking of any provisional or interim measures by the United States under the Act.

If the Act were to be amended to authorize preliminary determinations of injury, there would be a further problem of complying with paragraph (d) of Article 10 of the Code which states that no interim safeguard may be imposed "for a period longer than three months or, on decision of the authorities concerned upon request by the exporter and the importer, six months." Under the Act, the Secretary of the Treasury is to impose safeguards at the moment he "has reason to believe or suspect" sales at LTFV. Thereafter, such imports are released only under bond guaranteeing the payment of all duties lawfully due on the goods. With respect to pending cases, the average period of withholding appraisement is approximately one year. This

average, which is not unusual, indicates that U.S. customs officers are not able to complete their pricing investigations under the Act in time to comply with the three- or six-month limitation under the Code on interim safeguards.

Article 11 - Retroactivity of Dumping Duties

Article 11 of the Code specifies the conditions under which dumping duties may be assessed retroactively. Considered alone, it would seem to authorize the retroactivity specified under the Act. However, as indicated below, retroactivity is dependent in large measure upon the extent to which interim safeguards are authorized.

The authority to assess dumping duties on a retroactive basis under the Act has been the subject of much criticism by some of our principal trading partners, most notably by the United Kingdom which provided the major impetus for the negotiation of the Code. As a matter of practice, retroactive assessments of dumping duties are rarely made in the United States under the existing Act. It is the practice of the Treasury Department not to authorize the withholding of appraisement of entries until that Department has made a tentative determination that there are sales at LTFV. This determination is usually made from one to two years after the receipt of a complaint. During the course of Treasury's investigation, customs officers habitually make prompt appraisements of virtually all entries of the suspect goods so that few, if any, entries of such imports are affected by a dumping finding except those made after the date of the withholding order.

Article 12 - Third Country Dumping

Article 12 of the Code permits countries at their discretion to afford protection against third country dumping (e.g., if one country sells its product at LTFV in the United States and causes injury to the industry of a third country which exports the like product to the United States, the Code would approve the assessment of a dumping duty by the United States on the dumped goods). The Antidumping Act does not authorize the assessment of dumping duties in such cases.

Implementation of Code by the United States

As previously stated, article 14 of the Agreement containing the Code provides that --

> "Each party to this Agreement shall take all necessary steps, of a general or particular character, to insure, not later than the date of entry into force of the Agreement [July 1, 1968] for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code."

Thus, insofar as the Agreement is concerned, the question raised for the United States is what, if any, steps must be taken with respect to its laws, regulations, and administrative procedures if they are to conform with the provisions of the Code.

It is well settled that the Constitution does not vest in the President plenary power to alter domestic law. The Code, no matter what are the obligations undertaken by the United States thereunder

internationally, cannot, standing alone without legislative implementation, alter the provisions of the Antidumping Act or of other United States statutes. As matters presently stand, we believe that the jurisdiction and authority of the Commission to act with respect to the dumping of imported articles is derived wholly from the Antidumping Act, and 19 U.S.C. 1337.

This, of course, is not to say that the provisions of the Code may not prompt useful reconsideration of the procedures promulgated under existing law to conform them with the Code to the extent necessary, but domestic statutory law is the sole authority for making changes in such procedures and any changes made therein must be wholly compatible with the substantive and procedural provisions enacted in such law.

The Commission does not contemplate making any changes in its Rules of Practice and Procedure, 1/ but it is noted that the Treasury Department does contemplate changes in its Customs Regulations by reason of the prospective effectiveness of the Code. On October 28, 1967, the Treasury Department issued notice of its proposed amendments of the Customs Regulations relating to procedures under the Antidumping Act (32 F.R. 14955).

1/ Parts 203 and 208 of the Commission's Rules relate specifically to investigations under sections 1337 and 160 (et seq.) of title 19 of the United States Code.

ADDITIONAL COMMENTS OF COMMISSIONER CLUBB

In my judgment a basic question raised by S. Con. Res. 38 is what effect the Tariff Commission must give to the International Antidumping Code (hereinafter the "Code"), [1] assuming that it goes into effect internationally as scheduled on July 1, 1968, without the benefit of implementing legislation in the United States. The minority state that in such circumstances the Commission will be

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1/ The Code is an executive agreement interpreting Article VI of GATT. Article VI, which relates to antidumping and countervailing duties has been in force since 1947, but signatory countries are only required to abide by it to the extent that it is not inconsistent with then existing legislation. The Code sets out more detailed rules regarding when antidumping measures are permitted. In addition, it requires that existing legislation be brought into conformity with it. In this connection, the preamble to the Code states,

> "* * *
>
> Desiring to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;"
>
> The signatories to this Code agree that:
>
> "1. The imposition of an anti-dumping duty is a measure, to be taken only under the circumstances provided for in Article VI of the General Agreement."

In the Final Provisions of the Code each signatory country agrees to

> "take all necessary steps . . . to ensure, not later than the date of the entry into force of the agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code." Code, Article 14.

required to apply the Code except where it is inconsistent with the Antidumping Act of 1921 (hereinafter the "Act"), 2/ in which case the Act would prevail. The Vice Chairman, Commissioner Culliton and I take the position that the Commission is powerless to apply the Code even after it goes into effect internationally until Congress implements it, or it is approved by Congress pursuant to the Treaty provisions of the Constitution. Since both the majority and minority have dealt only briefly with this point, and since it appears to me to be a fundamental issue, it might be worthwhile to explain my views on it in more detail.

At the outset it might be noted that there is nothing in the Code itself which indicates that it is intended to be applied as law in any of the signatory countries. Instead each government has committed itself to bring its laws into conformity with the Code, and the negotiators for the United States have indicated that in their best judgment United States law is already consistent, so no changes are required. I see nothing in this which indicates an intention that the Code itself be applied as domestic law. Nonetheless, responsible sources have indicated that they feel that the Code should be given what amounts to the force and effect of law,

2/ The Commission's responsibilities relating to dumping were imposed upon it by Congress in the Antidumping Act of 1921, as amended. That Act now provides that when the Commission is advised by the Treasury Department that an imported article is being sold at less than fair value (i.e., dumped)

> ". . . the (Tariff) Commission shall determine . . . whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation . . . (of dumped) merchandise."

or "near law." For example, a Treasury Department memorandum refers to the necessity of construing two "laws" (meaning the Act and the Code) to be consistent. A similar comment is made in the minority report here. Accordingly, it becomes necessary to determine what effect the Code should have on future Commission proceedings.

I. Status of the Code under United States Law

Unlike statutes and treaties 3/ approved by both the legislature and the executive, the status of executive agreements such as the Code, which are entered into by the executive alone, has not always been clear. 4/

It appears to be agreed, however, that an executive agreement has no effect as domestic law if it is inconsistent with a federal statute. 5/ Accordingly, it is necessary to determine what amounts

3/ Statutes and treaties are provided for in the Constitution which states,

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land;" U. S. Const. art. VI, cl. 2.

4/ See, McClure, International Executive Agreements (1941). McDougal and Lans, Treaties and Congressional-Executive or Presidential Agreements. Interchangeable Instruments of National Policy, 54 Yale L. J. 181 (1945).

5/ In this connection the Restatement states,

> "Effect on Domestic Law of Executive Agreement Pursuant to President's Constitutional Authority
>
> (1) An executive agreement, made by the United States without reference to a treaty or act of Congress, conforming to the constitutional limitations stated in

to an "inconsistency" for this purpose. One theory appears to be that after Congress has acted with respect to a matter it has occupied the field, and thereafter any executive agreement in the same area is inconsistent, even if it merely provides different means to achieve the same objectives, or if it fills holes which Congress left void. Another is that the Code is fundamentally in conflict with the Act if it in effect transfers the responsibility for interpreting the Act from the Commission to the executive.

A. The Occupied Field

In the only case involving this issue, United States v. Guy W. Capps, Inc., 204 F. 2d 655 (4th Cir. 1953), aff'd on other grounds 348 U. S. 296 (1955), the Court apparently followed this theory. There the Court noted that the Congress in the Agriculture Act of 1948 had provided a procedure for the prevention of agricultural

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5/ Continued

§ 121, and manifesting an intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States

(a) supersedes inconsistent provisions of the law of the several states, but

(b) does not supersede inconsistent provisions of earlier acts of Congress."

Restatement (Second) of the Law of Foreign Relations of the United States, § 144 (1965).

imports harmful to domestic price support programs. Ignoring this procedure for preventing excessive imports of eating potatoes, the President instead entered into an executive agreement with Canada to accomplish the same purposes by different means. The executive agreement provided in effect that Canada would not permit potatoes to be shipped to the United States unless the United States buyer had agreed not to resell them for table use. When a United States buyer violated this agreement, the government brought suit, claiming damages for breach of contract. On appeal from a judgment for the buyer, the Court of Appeals for the Fourth Circuit held that the resale provision of the contract was unenforceable because it was based on a void executive agreement. On this point the Court said

> "Since the purpose of the agreement as well as its effect was to bar imports which would interfere with the Agricultural Adjustment program, it was necessary that the provisions of this statute be complied with and an executive agreement excluding such imports which failed to comply with it was void.
>
> "We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with the regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The executive may not bypass Congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy." 204 F. 2d at 659-60.

Based on the theory of the Capps case it could be argued that once the Antidumping Act of 1921 was enacted, Congress had occupied the field of antidumping law in the United States, and the executive was thereafter without power to provide alternatives, even though they might be consistent alternatives. Under this theory the Commission would be unable to apply the Code as domestic law.

B. Basic Conflict between the Act and the Code

Even if one does not accept the theory of Capps, however, it seems to me that there would be a fundamental inconsistency between the Act and the Code if the Commission treated the Code as domestic law. This becomes apparent when the function of the Commission under the Act alone is compared with its function under the Act and the Code combined. Under the Act, the Commission has the sole administrative responsibility for interpretation of the Act; if both are applied together, this responsibility is shared with, and controlled by, the executive. The Act provides that

> ". . . the Commission shall determine . . . whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of . . . (dumped) merchandise into the United States." 19 U.S.C. § 160 (a) (1964). (Emphasis supplied.)

The determination to be made by the Commission involves not only the finding of facts, but also the interpretation of the Act. If the Commission treats the Code as law, the Commission would be

bound to accept the interpretation written into the Code, even though others might seem more reasonable. Similarly, an interpretation already adopted by the Commission as the most reasonable one might have to be discarded in favor of the interpretation of the executive embodied in the Code. Finally, any future Commission interpretation of the Act which was not favored by the executive, could be changed by a subsequent amendment to the Code. This would appear to be in direct conflict with the injury provisions of the Act which lodge the responsibility for interpreting the Act in the Commission.

The lack of authority in the executive branch to bind the agencies and courts to a particular interpretation of United States law apparently has long been recognized. Thus Hackworth reports the following diplomatic correspondence from 1910:

> "The Mexican Government requested an exchange of notes interpreting a provision of the extradition treaty between Mexico and the United States in the sense that authentication of extradition papers by the respective consuls would be sufficient. Secretary Knox replied:
>
> > The department regrets to say that it deems it inadvisable to exchange notes in the sense proposed in your note, since even if the department did exchange notes setting forth an understanding as suggested by you, such notes would not, so far as the internal affairs of this Government are concerned, have the status either of a treaty or of a law, but would be merely an executive interpretation of the treaty and of the Federal statutes. This would not be binding upon the courts of this country, which might at any time disregard the agreement incorporated in the notes, in which case it would not be possible for the department to control their decision. This

> is particularly true, since it is not entirely clear to the department that the contention which you make regarding the meaning of Article VIII of the treaty is the only one which may properly be placed upon it. . . . Therefore it would appear that such regulations as you suggest would, in order to be properly effective in this country, have to be made either by means of new legislation or by means of a formal treaty.
>
> The Mexican Ambassador (De la Barra) to the Secretary of State (Knox), no. 522B, Mar. 2, 1910, and Mr. Knox to Mr. de la Barra, no. 216, Apr. 13, 1910, MS. Department of State, file 12208/4; 1910 For. Rel. 731-733." 5 Hackworth, Digest of International Law 399 (1943).

The basic conflict between the Act and the Code which would arise if the Commission treated the Code as law, lies in the subtle, but necessarily implied, transfer of at least a portion of the interpretative authority from the Commission, where Congress placed it, to the executive. Since this conflict would arise in any case in which the Commission attempted to apply the Code, it seems clear that, if the Code does not receive legislative approval, the Commission must continue to apply the provisions of the Act alone.

II. Should the Code be Applied by the Commission even though It Is Not Domestic Law?

It is argued that, even if the Code does not have the constitutional underpinnings necessary to become law domestically, it nonetheless should be applied by the Tariff Commission to future antidumping cases. This argument proceeds on two separate theories.

A. The Authoritative Interpretation Theory

First, it is contended by some outside the Tariff Commission that the Commission is part of the executive branch, and since the

President is the head of that branch, any interpretation which he places on a statute is binding upon all segments of the executive branch. Accordingly, since the Code represents the President's interpretation of the Antidumping Act of 1921, it is argued that it is binding upon both the Treasury Department and the Tariff Commission, even though it might not be binding on the courts.

Feeling as I do that the Tariff Commission is not part of the executive branch for this purpose, I reject this argument.

B. The Rule of Construction Theory

Second, it is argued that, even if the Code is not binding on the courts or the Tariff Commission so as to change domestic law, well established rules of statutory construction require that the Commission construe the Antidumping Act in such a manner that it does not conflict with the Code. This argument has been made both by the Commission minority and by the Treasury Department, although on somewhat different grounds. The Treasury Department asserts that

> "It is concluded . . . that no provision of the International Anti-Dumping Code requires implementation in such a way as to be in conflict with United States law. In reaching this conclusion this memorandum follows the customary rule of construction that where alternative interpretations of two 'laws' (in this case a statute and an Executive Agreement) are possible, that interpretation should be followed which will avoid a conflict. It is our conclusion, after a thorough study of the Code and comparison of its provisions with the Anti-Dumping law, that the Code is consistent with the U. S. statute." Memorandum reportedly transmitted by the Treasury Department to Senator Hartke under cover of a letter dated September 20, 1967. (Emphasis supplied.)

I think the rule of construction referred to is not applicable here.

The goal of any rule of statutory construction is to effectuate the intent of Congress. 6/ Thus, when Congress passes a law which appears on its surface to conflict with an unrepealed existing law, the courts assume that Congress was aware of the earlier Act, and since it was not repealed, the courts assume that Congress intended them both to be applied at the same time. Accordingly, in order to effectuate the intent of Congress the courts strive to find an interpretation which will give effect to both.

Such a rule obviously has no application here, however, because one of the "laws" involved is not a law at all, but a unilateral act

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6/ One authority has stated this proposition as follows:

> "the application of the law according to the spirit of the legislative body remains the principal objective of judicial interpretation. Some have emphasized the words of the legislature themselves and have insisted on a literal interpretation as the safest means of determining legislative intent. Others have used the 'equity of the statute' and when necessary have disregarded the words in order to follow legislative intention. Still others have relied heavily on extrinsic evidence found in the legislative history of prior enactments, the procedure through which the immediate statute passed, its committee reports, and its interpretation by administrative officials, in order to determine the intent of the legislature. None of these methods or the numerous subsidiary canons of interpretation can be criticized if they in fact reflect the intent of the legislature but none can be supported when they result in a finding of legislative intent which did not in fact exist with the legislature.

2 Sutherland, Statutory Construction, 315, § 4501 (3d ed. 1943).

of the executive branch. Accordingly, there is no basis for a presumption that Congress intended both to apply. Moreover, since the executive agreement was made 46 years after the Act was passed, there is no ground for presuming that Congress had the Code in mind when it passed the Act, and intended them to be construed harmoniously.

Second, the rule of construction argument is supported by the Commission minority on slightly different grounds. The minority maintains that in future cases the Commission should

> "apply the principles of American law to the task of interpretation of the Act . . ., including those principles relating to interpreting the Act so as to avoid inconsistency between it and the international obligations of the United States. (Emphasis supplied.)

There appears to be a court practice, supported by the authorities cited by the minority, to construe acts of Congress so that they do not conflict with the "law of nations."[7] This rule of

[7] However, none of the authorities cited by the minority support the broader proposition that a statute should be interpreted to avoid inconsistency between it and all international obligations of the United States. Indeed, it does not appear that any of the cases cited involved an executive agreement, or even a treaty. On the contrary, in each case the court appears to have construed an act to conform with a customary rule of international law in existence when the Act was passed. Thus, the minority cites Murray v. The Schooner Charming Betsy, 6 U.S.(2 Cranch) 64 (1804), wherein the Court held that a law providing for the forfeiture of vessels owned by U.S. citizens engaged in U.S.-French trade, did not authorize the seizure of a vessel owned by an American expatriate who had since sworn allegiance to Denmark. In the course of the opinion Chief Justice Marshall said,

> "It has been very properly observed, in argument, that the building of vessels in the United States for sale to neutrals,

construction, like the one discussed above, is designed to effectuate the intent of Congress. It is based on the theory that when Congress enacts a statute it is aware of the requirements of international law, and does not intend to violate it. Accordingly, in construing the Antidumping Act of 1921 it might be proper to assume that Congress intended it to conform to the requirements of international law in existence at that time, but not to an executive agreement made 46 years later.

7/ Continued

> in the islands, is, during war, a profitable business, which congress cannot be intended to have prohibited, unless that intent be manifested by express words, or a very plain and necessary implication. It has also been observed, that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." 6 U. S. (2 Cranch) 64, 118.

The minority cites Lauritzen v. Larsen, 345 U. S. 571 (1953), where the Court held that the Jones Act did not cover an alien seaman on an alien ship in alien waters. The Court noted that the usual rule of international law is that the law of the flag state governs the internal affairs of a ship. In this connection the Court said,

> "Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law." 345 U. S. 571, 581.

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But even if the rule were otherwise applicable, it seems clear that the Code is not the type of "international law" which will require a harmonious construction. In this connection the Restatement defines international law as "those rules of law applicable to a state . . . that cannot be modified unilaterally by it." Restatement, § 1. This definition appears to embody the usual distinction made between customary and conventional international

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7/ Continued

Finally, the minority cites McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U. S. 10 (1963), a case in which the Court held that the National Labor Relations Act was not intended by Congress to cover alien seamen on foreign flag vessels. In holding that U. S. law did not apply, the Court concluded,

> "We therefore conclude, . . . that for us to sanction the exercise of local sovereignty under such condition 'in this delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.'" 372 U. S. 10, 21-22.

In each of these cases the conflict was between a possible interpretation of an Act of Congress and a long established rule of customary international law, and in each case the Court concluded that Congress should not be presumed to have intended to violate the rule in the absence of some clear expression of that intent. Accordingly, the Court chose a construction which brought the Act into conformity with the rule.

I find nothing in these cases which supports the proposition that the interpretation of an Act of Congress is to be limited by an executive agreement entered into later in time.

law. 10/ Since the Code is an international agreement (conventional international law), it can be unilaterally modified by any signatory nation by ceasing to be a party to it. Accordingly, it seems clear that the Code is not "international law" as that term is used in the Restatement, and comments therein to the effect that statutes are to be construed in a manner consistent with international law are not applicable.

Conclusion

In my judgment the following conclusions about the relationship between the Act and the Code appear to be warranted:

(1) The Code does not have the force and effect of law in the United States.

(2) There is no rule of statutory construction which requires the Commission to construe the Act to be in harmony with the Code.

10/ Thus, Hackworth states,

> "Conventional international law, so-called, is not to be confused with customary international law. While a convention--such as certain of the Hague conventions--may, and often does, embody well-established international law, it may at the same time include provisions which are not established international law but which the contracting parties agree should govern the relations between them. The convention as such is binding only on the contracting parties and ceases to be binding upon them when they cease to be parties to it. Those provisions of a convention that are declaratory of international law do not lose their binding effect by reason of the abrogation of or withdrawal from the convention by parties thereto, because they did not acquire their binding force from the terms of the convention but exist as part of the body of the common law of nations. Provisions of conventions that are not international law when incorporated therein may develop into international law by general acceptation by the nations." 1 Hackworth, Digest of International Law, 17 (1940).

A final question is whether the United States will be in violation of the Code, if the Commission continues to apply the Act, but this question must ultimately be answered by the Contracting Parties. If the results reached by the Commission in applying the Act after the Code goes into effect internationally are very different from those which the Contracting Parties expected under the Code, presumably the Contracting Parties will complain to the President that the United States is not abiding by the Code. At that time questions of how and whether to amend the Act or the Code may have to be faced.

Separate Views of Chairman Metzger and Commissioner Thunberg

S. Con. Res. 38 upon adoption would resolve, "That it is the sense of Congress that --

"(1) the provisions of the International Antidumping Code, signed at Geneva on June 30, 1967, are inconsistent with, and in conflict with, the provisions of the Anti-Dumping Act, 1921;

"(2) the President should submit the International Antidumping Code to the Senate for its advice and consent in accordance with article II, section 2, of the Constitution of the United States; and

"(3) the provisions of the International Antidumping Code should become effective in the United States only at the times specified in legislation enacted by the Congress to implement the provisions of the Code."

Paragraph (1) of S. Con. Res. 38 would resolve that it is the sense of the Congress that the provisions of the International Antidumping Code, signed at Geneva on June 30, 1967, "are inconsistent with, and in conflict with, the provisions of the Anti-Dumping Act, 1921".

The "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade" of June 30, 1967, was accepted on that date by signature on behalf of the United States of America, to enter into force for each party accepting it on July 1, 1968 and is referred to as the "International Antidumping Code".

Article 14 of the Code states that, "Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code." The Code itself, therefore, does not purport to change domestic laws in any country. If a country is of the view that there is a need to make changes in its domestic law in order for it to conform with Code requirements, any such changes would have to be achieved through domestic law changes in the usual manner -- in the United States through Congressional action amending the Anti-Dumping Act.

It is our understanding that the Executive Branch has been and is of the view that the provisions of the Code and the Act are not inconsistent with, and in conflict with, each other. During the course of negotiation of the Code prior to June 30, 1967, representatives of the Executive Branch met with the Commission to discuss the provisions of the Code then under international negotiation. The then-Chairman of the Commission expressed the view that the Code and the Act were not inconsistent. He did not purport to speak for the Commission as a whole. The Commission was not requested to, and did not, take an official position on that question, nor did any Commissioner volunteer his views at that time.

The functions of the Tariff Commission under the Anti-Dumping Act, 1921, assigned to it since 1954, are to determine, within three months after the Secretary of the Treasury determines that a class or kind of foreign merchandise is being, or is likely to be, sold at less than its fair value, "whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States."

The procedure pursuant to which the Commission performs these functions does not appear to be affected by any provision of the Code. The Commission can continue in the future as it has in the past to make its determinations within three months of receiving the Secretary of the Treasury's less than fair value determination, following the procedures established by the Commission's Rules of Practice and Procedure.

We have examined the provisions of the Code relating to injury, causation, and the definition of industry, in relation to the Act, for the purpose of commenting upon paragraph (1) of the resolution.

A. Injury.

Regarding injury, the Code (Article 3) refers to "material injury", or a threat thereof, to a domestic industry or "material retardation" of the establishment of such an industry; it states that evaluation of injury shall be based on an examination of "all factors having a bearing on the state of the industry in question"; it enumerates a number of such factors; and it avers that no "one or several of those factors can necessarily give decisive guidance".

In implementing the Act, the Commission since 1954 has determined whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of sales at less than fair value. As did the Secretary of the Treasury in the years before 1954, the Commission has determined since that time whether the injury being caused or threatened is "material", and in many cases has considered injury in these terms. In evaluating injury the Commission has made an overall judgment, taking into account all relevant matters.

B. Causation.

The Code states (Article 3 (a)) that a determination of injury shall be made only when less than fair value sales "are demonstrably the principal cause of material injury to a domestic industry, or the "principal cause" of material retardation of the establishment of such an industry. It further states that in reaching this decision, there shall be weighed "the effect of" the less than fair value sales, on the one hand, and "all other factors taken together which may be adversely affecting the industry", on the other hand; that the determination be based on "positive findings and not on mere allegations or hypothetical" possibilities; and that in cases of "retarding the establishment of a new industry" in the importing country, "convincing evidence of the forthcoming establishment of an industry must be shown".

The Act states that the Commission must determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, "by reason of" the importation of less than fair value merchandise. Neither the Congress, nor, so far as we are aware, the Treasury Department during its administration of the "injury" provisions prior to 1954, nor the Commission, has attempted to define or qualify the term "by reason of", which has the dictionary meaning of "cause". Formulations which have been used from time to time in other statutes, such as "caused in whole or in part", or "have contributed substantially", or "caused in major part", have not been employed. The Commission has made an overall judgment, after considering all the relevant facts and circumstances, whether there has been injury "by reason of" less than fair value imported merchandise.

C. An Industry in the United States.

The Code defines "domestic industry" (Article 4) as referring to "the domestic producers as a whole of the like products", or to those whose "collective output of the products constitute a major proportion of the total domestic production of those products". In "exceptional circumstances", however, the industry

> "may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the

> product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined."

The Act refers to "an industry in the United States". The Commission, in the absence of special circumstances where there has appeared to be a discrete geographical market area for the product, has considered the industry in national terms. In some cases, however, where there is such a discrete geographical market area, the Commission has determined that it constitutes "an industry in the United States" for the purpose of the Act. The Commission has considered all relevant factors affecting such a determination in arriving at its judgment.

* * *

The Commission is primarily a fact-finding agency, performing its duties by finding particular facts in particular investigations and applying the standards laid down by law to those facts as found. While it may find it necessary to interpret the law in the course of applying it to such particular facts, it has not done so by regulations or by general advisory opinions in advance of its findings of facts in particular investigations. Apart from those circumstances in which the obvious meaning of a proposed statute or international agreement

is so at odds with an existing instrument as to warrant a flat statement to that effect without more, it is our opinion that to attempt to interpret law and derive subsidiary standards of application thereof out of the context of the specific facts of particular investigations would tend to result in abstract interpretations and standards which have not emerged from the factual setting of a particular investigation and thus have not been tested against specific conditions for the carrying on of the trade and commerce of our country. Moreover, the Commission would not have had the advantage of briefs and arguments from interested parties in regard to the appropriate interpretation or standard to be applied to the facts of the particular investigation, and thus would be risking, through such an advance abstract interpretation, affecting the results of future investigations in circumstances which have strong adversary connotations. These considerations appear to us to be of particular importance where interpretations of a statute in relation to an international agreement might affect the performance of the international obligations of the United States. We are of the opinion that our position in these regards is consistent with the Commission's primary fact-finding function.

Accordingly, having examined those provisions of the Code and of the Act relating to the direct functions of the Commission under the Act, we limit ourselves to the statement that a) they are founded upon common basic concepts, b) they obviously differ

in language, and c) these differences in language do not appear obviously or patently to call for differing results in future cases regardless of their inevitably differing facts and circumstances. Indeed, we are unable, in the absence of the particular combination of facts and circumstances involved in each injury determination, to assert categorically that in such cases their application would lead to identical or to differing results.

If, following July 1, 1968, the Commission has occasion to perform its statutory duties under the Anti-Dumping Act (there are presently no cases thereunder pending before the Commission), and a question of consistency between a provision or provisions of the Code and of the Act is a relevant issue and there has been no intervening new American legislative action, the Commission should apply the principles of American law to the task of interpretation of the Act as it affects the facts of the investigation, including those principles relating to interpreting the Act so as to avoid inconsistency between it and the international obligations of the United States. If this proved not to be possible, the Commission should apply the provisions of the Act to the facts found, not those of the Code.[1/]

1/ See Restatement of the Law, Second, Foreign Relations Law of the United States (American Law Institute, 1965) Secs. 1,3(3), and Comment j. to Sec. 3. Section 3 (3) states that, "If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict

We have also examined the provisions of the Code and of the Act which relate to those aspects of the Anti-Dumping Act whose Administration has been entrusted primarily to the Secretary of the Treasury -- relating to determination of "dumping"(Article 2), investigation and administration procedures (Articles 5, 6, and 7) and anti-dumping duties (Articles 8, 9, 10 and 11). With the exception of the provisions of Article 5 relating to the timing of investigation of the questions of less than fair value sales and of injury, these articles concern matters with which the Commission has not had practical administrative experience, and as to which we would not presume to speak authoritatively. It is our understanding that the Treasury Department takes the position that none of those provisions requires implementation in such a way as to be in conflict with any provision of law administered by it.

(fn 1/ contd.)

with international law, a court in the United States will interpret it in a manner that is consistent with international law." Section 1 defines "international law" to mean those rules of law applicable to a state or international organization "that cannot be modified unilaterally by it." After July 1, 1968, the International Anti-Dumping Code will contain rules of law applicable to the United States in its relations with other states which "cannot be modified unilaterally by it." The fact that it is an executive agreement, made by the President under his own authority, makes it no less binding upon the United States in this regard as an international obligation (Sections 122, 131). See also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Murray v. Schooner Charming Betsy, 2 Cranch 64, 118 (1804); Lauritzen v. Larsen, 345 U.S. 571, 578 (1952).

We limit ourselves to the statement that the Code's provisions in these respects do not appear obviously or patently to call for different results or procedures than those required by the Act.

Regarding the timing of the initiation and subsequent investigation of "dumping and of injury resulting therefrom" (Article 5), the Code requires that an investigation shall be initiated, or continued after initiation, only if there is "evidence both on injury and on injury resulting therefrom", and that such evidence must be considered simultaneously beginning on the date when "provisional measures" (i.e., withholding of appraisement) are applied, unless requested otherwise by the exporter and importer.

Since the Act assigns to the Commission the task of determining whether injury has resulted or is likely to result by reason of the importation of merchandise at less than fair value, the question may be raised whether the Treasury Department, in conforming its anti-dumping regulations to the provisions of the Code as in its Proposed Procedures under the Act (32 Fed. Reg. 14955, Oct. 28, 1967), will in this respect be impinging upon the Commission's statutory function of determining whether injury has occurred or is likely. It appears to us that the answer depends upon the purpose of the simultaneity requirement, and the nature of the consideration of evidence of injury which will be undertaken by the Treasury Department.

The Proposed Treasury Regulations of October 26, 1967, require that "information indicating that an industry of the United States is being injured, or is likely to be injured, or prevented from being established", be furnished to the extent feasible (Sec. 53.27). It is our understanding that the Treasury Department would require that this evidence be furnished, and would examine it, not with a view to determining whether there has in fact been injury (a question which under statute is within the province of the Commission), but with the purpose of assuring itself that initiation of the investigation would not be futile, in the sense that it would be a waste of taxpayers' money for the Government to initiate a full anti-dumping investigation in the absence of any indication that it would possibly result in an assessment of anti-dumping duties.

If the Act is administered in this manner, as it is our understanding that the Treasury Department intends that it shall be, it is our view that the Commission's statutory function of determining the question of injury within three months of a determination by the Secretary of the Treasury that there have been sales at less than fair value, can continue to be performed by it as in the past.

* * *

The remaining articles of the Code (Articles 12, 13, 15, 16 and 17) relate to "formal" matters, to international consultative mechanisms, and to the possibility of anti-dumping action on behalf of a third country. The latter is wholly permissive in respect of any signatory; since the Act does not authorize such action by the

United States, it is not of practical significance at present.

* * *

Paragraphs (2) and (3) of S. Con. Res. 38 appear to involve questions of Constitutional law relating to the Presidential and the Congressional power affecting the foreign relations, and the regulation of the foreign commerce, of the United States, which are outside the special competence of this Commission. Accordingly, we offer no comment upon them.

APPENDIX

Sections 1, 2, and 4 of Sherman Antitrust Act of 1890, as amended (15 U.S.C. 1, 2, 4)

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1—7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1—7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1966, ch. 281, 80 Stat. 282.)

§ 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 2, 26 Stat. 209; July 7, 1966, ch. 281, 80 Stat. 282.)

§ 4. Jurisdiction of courts; duty of United States attorneys; procedure.

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1—7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (July 2, 1890, ch. 647, § 4, 26 Stat. 209; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

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Sections 73 and 74
of
Wilson Tariff Act of 1894, as amended
(15 U.S.C. 8, 9)

§ 8. Trusts in restraint of import trade illegal; penalty.

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months. (Aug. 27, 1894, ch. 349, § 73, 28 Stat. 570; Feb. 12, 1913, ch. 40, 37 Stat. 667.)

§ 9. Jurisdiction of courts; duty of United States attorneys; procedure.

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of section 8 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (Aug. 27, 1894, ch. 349, § 74, 28 Stat. 570; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

Sections 4 and 5
of
Federal Trade Commission Act of 1914, as amended
(15 U.S.C. 44, 45)

§ 44. Definitions.

The words defined in this section shall have the following meaning when found in sections 41—46 and 47—58 of this title, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" includes all documents, papers, correspondence, books of account, and financial and corporate records.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce", approved February 14, 1887[1] and all Acts amendatory thereof and supplementary thereto and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto.

"Antitrust Acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890; also sections 73—77, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894; also the Act entitled "An Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes'", approved February 12, 1913; and also the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914. (Sept. 26, 1914, ch. 311, § 4, 38 Stat. 719; Mar. 21, 1938, ch. 49, § 2, 52 Stat. 111.)

[1] So in original. Probably should read "February 4, 1887".

§ 45. Unfair methods of competition unlawful; prevention by Commission.

(a) Declaration of unlawfulness; power to prohibit unfair practices.

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or

agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227 (a) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) Proceeding by Commission; modifying and setting aside orders.

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41—46 and 47—58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Review of order; rehearing.

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the

Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

(d) Jurisdiction of court.

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Precedence of proceedings; exemption from liability.

Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return.

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order.

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

(h) Same; order modified or set aside by Supreme Court.

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Same; order modified or set aside by Court of Appeals.

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Same; rehearing upon order or remand.

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) Definition of mandate.

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order.

Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of

such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. (Sept. 26, 1914, ch. 311, § 9, 38 Stat. 719; Feb. 13, 1929, ch. 229, § 2, 45 Stat. 980; Mar. 21, 1936, ch. 49, § 3, 49 Stat. 111; June 22, 1938, ch. 601, § 1107 (f), 52 Stat. 1026; June 25, 1948, ch. 646, § 32 (a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Mar. 16, 1950, ch. 61, § 4 (c), 64 Stat. 21; July 14, 1952, ch. 743, § 2, 66 Stat. 632; Aug. 23, 1958, Pub. L. 85-726, title XIV, § 1411, 72 Stat. 800; Aug. 20, 1958, Pub. L. 85-791, § 8, 72 Stat. 943; Sept. 2, 1958, Pub. L. 85-889, § 9, 72 Stat. 1750; June 11, 1960, Pub. L. 86-507, § 1(13), 74 Stat. 200.)

Sections 800 and 801
of
Revenue Act of 1916
(15 U.S.C. 71, 72)

PREVENTION OF UNFAIR METHODS OF COMPETITION

§ 71. Definition.

When used in sections 71—77 of this title the term "person" includes partnerships, corporations, and associations. (Sept. 8, 1916, ch. 463, § 800, 39 Stat. 798.)

§ 72. Importation or sale of articles at less than market value or wholesale price.

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue thereafor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction of actions for damages thereunder. (Sept. 8, 1916, ch. 463, § 801, 39 Stat. 798.)

V 11

Section 337
of
Tariff Act of 1930, as amended
(19 U.S.C. 1337)

§ 1337. Unfair practices in import trade.

(a) Unfair methods of competition declared unlawful.

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) Investigations of violations by Commission.

To assist the President in making any decisions under this section the commission is authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) Hearings and review.

The commission shall make such investigation and give such notice and afford such hearing, and when deemed proper by the commission such rehearing, with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation. The testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles. Such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Customs Court, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs and Patent Appeals by the importer or consignee of such articles. If it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only. The judgment of said court shall be final.

(d) Transmission of findings to President.

The final findings of the commission shall be transmitted with the record to the President.

(e) Exclusion of articles from entry.

Whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall direct that the articles concerned in such unfair methods or acts, imported by any person violating the provisions of this chapter, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, refuse such entry. The decision of the President shall be conclusive.

(f) Entry under bond.

Whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed; except that such articles shall be entitled to entry under bond prescribed by the Secretary of the Treasury.

(g) Continuance of exclusion.

Any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to such refusal of entry no longer exist.

(h) Definition.

When used in this section and in sections 1336 and 1340 of this title, the term "United States" includes the several States and Territories, the District of Columbia, and all possessions of the United States except the Virgin Islands, American Samoa, and the island of Guam. (June 17, 1930, ch. 497, title III, § 337, 46 Stat. 703; Proc. No. 2696, July 4, 1946, 11 F. R. 7517, 60 Stat. 1352; Aug. 20, 1958, Pub. L. 85-686, § 2 (c) (1), 72 Stat. 679.)

§ 1337a. Same; importation of products produced under process covered by claims of unexpired patent.

The importation for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, shall have the same status for the purposes of section 1337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent. (July 2, 1940, ch. 518, 54 Stat. 724.)