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# Proposals for Change in the Administration of the Antidumping Act

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# Proposals for Change in the Administration of the Antidumping Act

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The Antidumping Act of 1921 as amended, ("the Act")[1] recently has been criticized on grounds of economic theory and trade policy. Commentators on the Act have suggested extensive statutory changes to create a more rational response to the concerns that underlie the existence of an "antidumping" law.[2]

While statutory reform of United States antidumping law is needed, improvement in the administration of the Act in its present form is of more pressing importance. Administrative decisions under the existing Act are, in fact if not in theory, adjudications directed toward identified foreign manufacturers[3] and specific imported products and can result in the imposition of liability for substantial amounts of additional duties upon United States importers. Given the particularity with which determinations under the Antidumping Act apply, such determinations should be made with the same concern for due process and accuracy of result evident in other administrative proceedings directed toward particular persons.

This article suggests changes that might be made in the administration of the existing Act to improve the efficiency of investigations and the fairness of determinations under the Act in its present form. Most of these suggestions are addressed to the Treasury Department's fair value investigation, with only a few comments on the International Trade Commission injury investigation phase. The ITC has developed a framework for injury investigations that appears generally to be both workable and acceptable to interested parties. Treasury's fair value investigation, on the other hand, has tended to be more controversial. This stems in part from the complicated factual issues that necessarily must be dealt with in determining fair value and from the fact that Treasury deals with those issues in a system of divided jurisdiction, with the United States Customs Service and the Office of the

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General Counsel of the Treasury Department making separate, but sometimes overlapping, determinations.[4]

## SCHEDULING THE INVESTIGATION

Section 201(b) of the Antidumping Act requires that Treasury make an initial fair value determination within six months after the publication of a notice of investigation.[5] If, during this period, Treasury determines that reason exists to believe or suspect that the merchandise under investigation is being sold at less than fair value, it must publish a Withholding of Appraisement Notice along with its affirmative initial determination of sales at less than fair value. A final determination as to whether less than fair value (hereinafter LTFV) sales exist must be made within three months thereafter.[6]

Under the Antidumping Regulations,[7] an affirmative determination made at the end of the six-month investigation will be final, unless the exporter and importer concerned request a six-month withholding of appraisement.[8] If Treasury grants the request, the initial determination is only tentative, and Treasury has three more months in which to reach the final determination.

Given the statutory deadlines for Treasury's investigation, it is imperative that the time available be used efficiently. During the investigation, Customs and Treasury set various deadlines applicable to the foreign manufacturer and the complainants with respect to matters such as the foreign manufacturer's response to the antidumping questionnaire and the filing of briefs in conjunction with the Treasury hearing. However, no effective schedule seems to be applied to the work that must be performed by Customs and Treasury. While Treasury does establish an internal schedule for each antidumping investigation, this schedule is not disclosed to the complainant and the foreign manufacturer, and it does not seem to be enforced internally.

As a result of delays within Customs and Treasury, a "hurry up and wait" atmosphere often prevails in fair value investigations. For example, valuable time may be wasted in awaiting Customs' issuance of the initial questionnaire. The foreign manufacturer is required to make an intensive effort to meet the deadline established by Customs for responding to the questionnaire. In part because of the large number of antidumping cases, the casehandler may not be able to turn to the questionnaire response when it is received, and a few weeks may pass before the detailed Customs analysis is begun. When the response finally is analyzed by Customs and Treasury, it is possible that the manufacturer may be faced with last minute requests for additional information. If the manufacturer is unable to provide the information within the short time allotted by Treasury,

there is the possibility that Treasury will invoke its "best available evidence" rule and proceed to use other sources of information or assumptions in making its fair value determination.

While the time allowed by the Act for the fair value investigation is relatively short when one considers the complexity of the issues involved, there is sufficient time for full and fair investigation if the time is managed wisely. The following steps would help avoid the last-minute crisis atmosphere that sometimes occurs in Treasury antidumping investigations.

First, the Treasury internal schedule should be refined to provide an orderly sequence of events with adequate time allowed for each stage of the investigation. An example of such a schedule is set forth in table 1. The internal schedule should be viewed as establishing guidelines, not deadlines, and it should be adjusted as experience dictates.

Second, at the outset of each antidumping investigation, Treasury should provide to the foreign manufacturer, the United States importer, and the complainant, copies of the guideline schedule, with appropriate target dates filled in. These target dates should be flexibly applied, taking into account developments in the particular case. While the target dates would be subject to some change, as necessary, having the sequence of events laid out in advance would assist the parties in planning, and the target dates would provide criteria for identifying the cause of any significant delays in the development of the investigation.

Third, Treasury should be less restrictive in exercising its authority under section 201(b)(2) to extend an investigation. That section provides that if the Secretary concludes that the initial determination cannot reasonably be made within six months, he may extend the deadline for the determination by up to three months.[9]

There have been several cases in which Treasury has made revised LTFV determinations after its final determination had been made and the case referred to the ITC.[10] These late changes in the LTFV margins indicate that the initial withholding decision in those cases may have been premature, before Treasury had gathered and fully analyzed the necessary facts, and therefore an extension under section 201(b)(2) would have been appropriate. An extension under this section would seem to be called for, particularly where delays are caused by the inability of Customs or Treasury to meet their target dates under the guideline schedule.

## THE INVESTIGATION PROCESS

### *Consolidation of Functions*

The formal Treasury determinations in antidumping proceedings are made by the General Counsel, pursuant to delegation from the

*Table 1.*
*Suggested Time-Frame for*
*Treasury Antidumping Investigation*

| Event | Elapsed Time |
|---|---|
| **Preliminary Investigation** | |
| Complaint accepted | day one |
| Customs investigation | |
| Treasury decision | 30 days |
| **Full investigation** | |
| Publication of notice/referral to ITC | day one |
| Customs investigation | |
| Delivery of questionnaire | |
| Questionnaire response | |
| Verification | 2½ months |
| Verification report | |
| Customs analysis | |
| Treasury review | |
| Disclosure | 4 months |
| Election of 3-month or | |
| 6-month withholding | 4¼ months |
| Treasury determination (3-month withholding) | |
| Pre-hearing briefs | |
| Statutory hearing | 5 months |
| Post-hearing briefs | |
| Withholding decision | 6 months |
| Final affirmative | |
| Tentative negative | |
| Referral to ITC | 6 months |
| Final negative | 9 months |
| Treasury determination (6-month withholding) | |
| Treasury conference | |
| Withholding decision | 6 months |
| Tentative affirmative | |
| Tentative negative | |
| Disclosure re: tentative decision | |
| Pre-hearing briefs | |
| Hearing | 7½ months |
| Post-hearing briefs | |
| Final affirmative or negative | |
| Referral to ITC | 9 months |

*Note:* This time-frame would provide guidelines which must be flexibly applied to respond to the needs of each particular case. If Treasury determines at any time within the 6-month period prior to the withholding decision that a decision cannot reasonably be made within six months, it can extend the deadline for the withholding decision by up to three months. 19 U.S.C. § 160(b)(2) (1976). This would allow greater time for the remaining phases of the investigation.

Secretary of the Treasury.[11] Presently, three separate government offices are involved in gathering the facts and preparing a recommended decision for the General Counsel. The manufacturer's response to the antidumping questionnaire is verified (audited) at the manufacturer's plant by a Customs field agent who is stationed overseas. Following the verification, the Customs agent prepares a report and transmits the report and the manufacturer's questionnaire response to Customs headquarters in Washington. There the verification report and questionnaire response are analyzed by the Customs case handler. The case handler then prepares a report of the Customs findings and a recommended determination. After approval by the case handler's supervisors, the Customs recommendation is submitted to the Office of Tariff Affairs in the Treasury Department. The Office of Tariff Affairs reanalyzes the case and submits its recommendation to the General Counsel of the Treasury, who makes the formal determination.

This fragmentation of the investigative process can result in unnecessary duplication of effort and conflicting analysis. For example, the Customs case handler may question whether information was adequately verified, even though the Customs field agent who conducted the verification felt that the information had been fully documented. The Treasury analyst might consider that additional information is needed on a particular point, even though the Customs case handler considered the point to be adequately supported. Or the Office of Tariff Affairs might take an entirely different position than Customs as to whether an adjustment should be allowed, and might require that the fair value calculations be reworked.

The efficiency of Treasury antidumping investigations would be greatly improved if fact gathering, verification, and analysis were combined in a single office. Such a consolidation of these functions would eliminate the duplication of effort, second-guessing, and last minute changes of direction that sometimes occur under the present arrangements.

In the absence of such consolidation, there at least should be closer coordination between the Customs case handler and the Office of Tariff Affairs analyst during the Customs fact gathering investigation.[12] For example, the Office of Tariff Affairs should review the questionnaire response and the verification report when they are received by Customs, rather than awaiting the formal Customs report and recommendation. In this way, the Office of Tariff Affairs would be able to raise any questions, and indicate its views, at an early stage of the investigation. If either Customs or the Office of Tariff Affairs concluded, from their joint review of the response and verification report, that further information were needed, this information then could be requested by Customs in a timely manner.

*The Disclosure Conference*

In March, 1978, Treasury revised the Antidumping Regulations to formalize the practice of providing disclosure conferences at which Customs discloses the preliminary results of the investigation to representatives of the foreign manufacturer and of the complainant.[13] The revised regulation, however, made a significant change from prior practice, by providing that the disclosure conference will be held only before the *final* determination. As a result, where six-month withholding of appraisement is applicable there is no opportunity prior to the withholding decision, made at the time of a *tentative* determination of sales at less than fair value, for the foreign manufacturer or the complainant to be informed of the proposed Treasury action.

The withholding of appraisement can have an immediate adverse effect on the foreign manufacturer and the United States importer, since it makes further entries of the merchandise subject to possible assessment of dumping duties in the event of a dumping finding. As a result, upon withholding of appraisement, importers may be required to post an additional bond on imports to cover this potential liability.[14] These added costs and risks may cause importers to avoid further purchases of the merchandise, thus terminating or greatly restricting the manufacturer's sales to the United States.

Since the withholding of appraisement can have such a direct impact on the manufacturer and importer, due process requires that they be provided a meaningful opportunity to learn the basis for, and to comment on, a proposed withholding of appraisement before the withholding decision is made. The present disclosure conference regulation, which denies this opportunity where six-month withholding is applicable, should be changed to provide for prewithholding disclosure and comments. This change would not seem to impose an undue burden on Customs or Treasury, inasmuch as there already is not only disclosure, but also a full hearing and briefing, prior to the withholding decision where six-month withholding of appraisement has not been requested.

In explaining its new disclosure regulation, Treasury described the purpose and significance of disclosure conferences as follows:

> These conferences are a means for providing information to interested persons concerning the bases for the Treasury Department's determinations.
>
> . . . .
>
> Under present procedures, after Customs has initially reviewed the available data for determining foreign market value or constructed value and purchase price or exporter's sales

price, as applicable, and has made any tentative adjustments considered appropriate, interested persons may request a disclosure conference to discuss the tentative calculations and adjustments. The calculations and adjustments discussed at the conference, however, are subject to further analysis and review by the Treasury Department before a tentative or final determination is published in the proceeding.

Because of the complex issues of fact and law involved in antidumping proceedings, the Treasury Department has concluded that meaningful disclosure on the bases for a tentative determination is possible only after the analysis and review process is completed. Ample time is provided thereafter for the presentation of information and views.[15]

As this notice indicates, the disclosure conference is intended to provide information concerning the preliminary determinations of the Treasury Department (*i.e.*, the Office of Tariff Affairs), which may involve changes from the Customs analysis. It is, therefore, somewhat incongruous that the disclosure conference continues to be the responsibility of Customs. Since the purpose of the disclosure conference is to explain the conclusions reached by the Office of Tariff Affairs, the conference should be conducted by that Office, not Customs.

### PRICE ADJUSTMENT CALCULATIONS

The Act and regulations provide that, in making a fair value determination, the price charged by the manufacturer for merchandise exported to the United States will be compared on an ex-factory basis with the ex-factory prices of the same merchandise sold by the manufacturer in its home market, or, if there are insufficient home market sales, in third country markets. If no home market or third country sales exist, or such sales are determined to be below the cost of production, fair value is calculated on the basis of constructed value, as defined in the statute.[16] In basing fair value on home market or third country sales, adjustments are to be made to take into account price differences resulting from differences in circumstances of sale between the foreign market (i.e., home market or third country) and United States sales; adjustments also are to be made for physical differences between the merchandise sold in the foreign market and that exported to the United States.[17]

The Treasury rules dealing with differences in merchandise and differences in circumstances of sale arbitrarily and unfairly limit the nature and amount of adjustments that will be recognized. These

rules were adopted for the administrative convenience of Customs and Treasury in the belief that arbitrary rules ease verification and analysis of claimed adjustments. This approach not only is contrary to statutory requirements; it is also inefficient and unnecessary, since cost accounting principles provide a neutral and reliable basis for quantifying claimed adjustments.

*Differences in Circumstances of Sale*

Adjustments for differences in circumstances of sale presently are provided for in section 153.10 of the regulations.[18] Examples of differences for which allowances will be made include differences in credit terms, guarantees, technical assistance, servicing, and certain advertising and selling costs. However, recognition of adjustments for these differences is subject to a qualification under section 153.10(a), which states: "Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration."

The exact meaning of this "direct relationship" test is unclear, and it has been applied inconsistently by Treasury.[19] In some cases, Treasury has required that the cost of differences be demonstrated on a bookkeeping basis. That is, the adjustment has been denied where the manufacturer apparently could not demonstrate that a particular expenditure was incurred in connection with the sale under consideration.[20] This bookkeeping approach unfairly results in denial of adjustments for actual cost differences that can be identified through cost accounting techniques. For example, suppose that a manufacturer provides extensive technical assistance, such as tests and consultations which assist the customers in using the product, to its customers in the home market, and that no charge is made for such services. Assume further that the manufacturer provides no technical assistance to United States purchasers of the product. The manufacturer can identify, through cost accounting procedures, the per-unit cost of providing technical assistance in the home market. Rational pricing policy would require that the manufacturer include this cost in his home market price, where it is reflected in the value to the customer, while not including such costs in the price of sales for export to the United States. Thus, in adjusting the home market sales price to remove the price element due to the technical assistance, one normally would make an adjustment in the amount of the average per-unit cost in the home market of providing such assistance.

However, the Treasury Department usually has taken the position that an adjustment for technical assistance will be allowed only where it can be demonstrated that particular technical assistance

costs were incurred with respect to the particular transactions being analyzed.[21] Recognition of an adjustment for technical assistance in such a case becomes purely a matter of happenstance. While the manufacturer does not vary his price from sale to sale based on whether or not technical assistance was provided in connection with a particular sale, the Treasury adjustment does work in this manner, leading to arbitrary and unpredictable results.

In calculating the selling price of exports to the United States for comparison with fair value, a deduction is made for any commissions paid on the sales, and in an exporter's sales price situation for any selling expenses incurred in the United States in conjunction with the sales. To place the foreign market sales (home market or third country, as appropriate) on a comparable basis, it is necessary also to deduct the full amount of commission or selling expenses incurred on those sales in calculating foreign market value. Section 153.10(b) of the regulations recognizes an adjustment for home market or third country selling expenses, but places a cap on the amount of the price adjustment permitted. In general, this provision permits an adjustment to foreign market value only in the actual amount of the home market or third country selling expense, or the amount of the United States selling expense or commission, whichever is less. Thus, while the regulation recognizes that selling expenses may differ between United States and home market or third country sales, it establishes a one-sided rule that denies an adjustment for differences in selling expenses where the foreign market selling expenses are greater than the selling expenses or commissions in the United States market.

Treasury should abolish the direct relationship test and the selling expense cap and should recognize adjustments for differences in circumstances of sale to the extent that the amount of those differences can be demonstrated and quantified by cost accounting analysis.[22] This change would not only promote fairness in the Treasury determination of fair value, but it would also eliminate time-consuming disputes as to the meaning and application of the direct relationship test. Cost accounting principles are used in antidumping investigations in determining cost of production, in calculating the selling expense adjustment on United States sales, and in determining constructed value. Such principles also should apply to the calculation of cost differences due to differences in circumstances of sale.

### *Differences in Merchandise*

The Act permits foreign market value to be based on the price of merchandise in the home market that differs from the merchandise sold in the United States market, where identical merchandise is not sold in the two markets.[23] In such a situation, the Act requires that

due allowance be made for differences in price or value resulting from the physical differences in the merchandise.[24] Section 153.11 of the Regulations provides that, in making due allowance for differences in merchandise, "the Secretary will be guided primarily by the differences in cost of manufacture . . . but, when appropriate, he may also consider the effect of such differences upon the market value of the merchandise."[25]

The statutory focus of the adjustment is upon the effect of the difference on price, not cost. However, it may be difficult objectively to ascertain the effect of merchandise differences upon price, where both versions of the merchandise are not sold in the same market. Therefore, differences in cost of manufacture may aid in determining the effect of the differences in merchandise upon price or value. While the Regulations could be interpreted in a manner consistent with the statutory requirement, Customs and Treasury have adopted a rigid policy in applying this provision of the Regulations in a manner contrary to the Act. Under a rule announced in recent decisions, Treasury limits the amount of adjustment for differences in merchandise to the cost of labor, material, and direct factory overhead attributable to such differences. No allowance is made for other elements that normally enter into the calculation of price, or market value, such as selling expenses, warranty expenses, general overheads and normal profit.[26]

If the price or value of the product as a whole includes overhead and profit, in addition to labor and material costs, then the calculated value of any portion of that product, representing the difference between the home market product and the export product, also should include all of those elements.[27] The impact of the arbitrary Treasury rule can be demonstrated in the following example: Sup-

*Table 2.*
*Costs and Profits of Two Models of a Product*

| | Home Market Model | Export Model |
|---|---|---|
| Direct cost (material and fabrication) | 75 | 60 |
| Indirect cost (general overhead and selling expense)—33% of direct cost) | 25 | 20 |
| Total cost | 100 | 80 |
| Profit (25% of total cost) | 25 | 20 |
| Selling price | 125 | 100 |

pose a manufacturer produces two models of its product—a deluxe model, sold only in the home market, and an economy export model, sold only to the United States. Assume, further, that the manufacturer uses a neutral rule to price its products, and the costs and profit on the two models are as shown in table 2.

Inasmuch as the prices for the export model and the more expensive home market model have been set on a neutral basis, the difference between the home market price and the export price is not the result of price discrimination, but is due solely to differences between the home market and export merchandise. Under a rational price adjustment method, which took into account all elements of price on a *pro rata* basis, the home market price, after removing the amount of the price attributable to the differences between the machines, should be the same as the price of the export model, as follows:

| | | |
|---|---|---|
| Difference in direct cost | 15 | |
| Indirect cost (33% × 15) | 5 | |
| Profit (25% × 20) | 5 | |
| Adjusted home market price | 125 − 25 | = 100 |

However, under the policy applied by Treasury, an adjustment would be made only in the amount of the direct cost attributable to the difference in merchandise. In the example, this would result in a 10 percent dumping margin.

| | | |
|---|---|---|
| Home Market model | 125 | |
| Adjustment (direct cost difference) | 15 | |
| Adjusted home market price | 110 | |
| Export model price | 100 | |
| Dumping margin | | 10÷ 100 = 10% |

The Treasury rule, which gives rise to such artificial margins, should be changed. Treasury apparently adopted this rule because of a lack of confidence that it could adequately analyze and verify claimed adjustments which include elements other than direct cost. However, an analysis of overhead and indirect costs is included in calculating cost of production, and an analysis of such costs and profit is necessary in calculating constructed value. There is no reason why these concepts should be excluded in making due allowance for differences in merchandise.

In summary, the fairness and efficiency of the fair value investigation would be greatly improved if Treasury would abandon the special arbitrary rules it has developed for calculating adjustments and instead would use commercially acceptable accounting and pricing

principles in determining the price effect of differences in circumstances of sale and differences in merchandise.

Section 201(a) provides that, upon notification by the Secretary of the Treasury that a class or kind of foreign merchandise is being or is likely to be sold in the United States at less than fair value, the International Trade Commission must 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 Act does not set forth criteria for determining what constitutes injury, and the decisions of the Commission in past antidumping cases have not provided significant precedents to further clarify the meaning of the injury test.[28] Typically, such decisions have recited statistical information developed by the Commission staff in the course of the investigation and then stated a determination as to whether or not the Commission found injury. While the opinions have emphasized those portions of the statistical information that tended to support the Commission's finding of injury or no injury, they normally have not contained much reasoned explanation of the Commission's determination.

Recently this situation has changed somewhat. Some of the opinions show a greater effort to respond to the arguments presented by the parties at the hearing and to state principles of general applicability that might be relied upon in future cases.[29] However, Commission decisions still do not contain the degree of legal and factual analysis that one routinely finds in judicial opinions. As a result, Commission determinations continue to appear to be based largely on subjective considerations of what constitutes injury. It remains difficult, therefore, to predict how the Commission might decide a particular case, and there is little explanation to reconcile apparently inconsistent decisions. Commission opinions should provide a more complete explanation of the reasons for the decisions reached, addressing the issues presented by the parties at the hearing and in their briefs, with a view to distilling principles and interpretations that could have precedential value in future cases.

As an alternative to developing case law precedent, the Commission might consider defining injury criteria by regulation. So far, the Commission has not attempted to do so, but it has held open the possibility that definition of statutory terms and interpretive standards might be developed by rule making at some future date.[30]

Whether through rule making or by a conscious effort to write opinions having precedential value, the Commission should develop more objective standards for determining whether or not injury or likelihood of injury exists.

For purposes of judicial review, antidumping determinations generally are treated the same as normal Customs duty determinations, and review of such determinations is lodged with the Customs Court. An American manufacturer may challenge the failure to assess antidumping duties pursuant to procedures set forth in section 516 of the Tariff Act of 1930, as amended,[31] which also applies to challenges of normal Customs classification or rate of duty determinations. Pursuant to section 210 of the Act, an importer's challenge to dumping determinations is raised by filing a protest to the assessment of special dumping duties.[32] Such a protest is given the same treatment under the law as a challenge to valuation in normal Customs duty cases. If the protest is denied, the importer must pay the duties as assessed in order to invoke the jurisdiction of the Customs Court.[33] Upon review, the importer bears a double burden of proving that the Customs assessment was wrong and then of proving the correct foreign market value and United States purchase price or exporter's sales price, including the detailed calculations of adjustments for any differences in merchandise and differences in circumstances of sale.[34] The Customs Court may also consider challenges to the dumping finding,[35] but the ability of the Customs Court to provide an adequate remedy in the event it finds an error in the Treasury fair value determination or the Commission injury determination is subject to considerable doubt.[36]

In short, the present Customs Court procedures are entirely unsuited to dealing with the complex issues that can arise in antidumping cases. The challenge to a special dumping duty may include constitutional due process issues and questions as to the validity of the Treasury regulations, the proper application by Treasury of the Act and Regulations to the particular facts, and the procedural and legal correctness of the Commission's injury determination, in addition to questions concerning the correctness of foreign market value and purchase price or exporter's sales price calculations on particular importations.

To provide more meaningful and efficient judicial review, section 210 of the Act should be amended to specifically provide Administrative Procedure Act (hereinafter APA) review in antidumping cases.[37] Jurisdiction for such review might be lodged either in the Customs Court or in Federal district courts. Under a revised Section 201, any person who filed an appearance at the Treasury fair value hearing or the ITC injury hearing would be entitled to appeal the Treasury or ITC decision by filing an appeal with the appropriate court within sixty days after the determination that is the subject of the appeal, except that an appeal of an affirmative finding of sales at less than fair value would be appealable only in an appeal of the finding of dumping.[38] The appeal would be tried pursuant to the applicable

provisions of Chapter 7 of Title 5 of the United States Code, and the Court would have authority to issue an injunction or to remand the matter to Treasury or the ITC, as appropriate, with instructions to proceed in a manner not inconsistent with the decision of the Court.

Further, under this proposal, appeals from assessments of special dumping duties would be separate from appeals related to the finding of dumping. As under the present law, the determination of the appropriate Customs officer as to foreign market value or constructed value, purchase price, or exporter's sales price, and the action of the Customs officer in assessing a special dumping duty, would be subject to the right of protest. Thereafter, judicial review would be subject to APA standards and procedures as in the case of the suggested appeal procedures for antidumping investigation determinations. Recognizing that complicated factual issues can arise in calculating foreign market value, the Court would have the authority to remand the matter to the administrative agency; many of these issues would be resolved more efficiently by remand than by trial *de novo* in the Customs Court.

Because of the magnitude of duties that may be at issue in Antidumping Act cases, the "admission ticket" provision requiring payment of duties to invoke Customs Court jurisdiction should be dropped. Instead, APA procedures for permitting or staying administrative action pending appeal would be applicable.

## CONCLUSION

There is room within the scope of the existing Antidumping Act for substantial improvements in the conduct of antidumping investigations. It is hoped that the discussion in this article provides useful ideas for making administration of the Antidumping Act fairer and more efficient, as well as shedding light on current administrative practices under the Act.

## NOTES

1. Ch. 14, tit. II, 42 Stat. 11 (1921), *as amended,* 19 U.S.C. §§ 160–73 (1976).
2. *See* Fisher, *Dumping: Confronting the Paradox of Internal Weakness and External Challenge, ante;* Barceló, *The Antidumping Law: Repeal It or Revise It, ante;* Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis,* 5 L. & POL'Y INT'L BUS. 85 (1973); Barceló, *Antidumping Laws as Barriers to Trade—the United States and the International Antidumping Code,* 57 CORNELL L. REV. 491

(1972); Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 43 (1958).

3. The coverage of a dumping finding is stated in terms of a specified class or kind of merchandise from a specified country. While the finding does not name the manufacturers to whom it applies, it may exclude particular manufacturers by name. A manufacturer will be excluded, for example, when Treasury determines in its investigation that the manufacturer's sales were not made at less than fair value. *See* 19 C.F.R. § 153.38 (1977).
4. 19 C.F.R. § 153.31 (1977) delegates to the Commissioner of Customs the responsibility to conduct an investigation upon publication by the Secretary of the Treasury of an "Antidumping Proceeding Notice." Treasury Department Order No. 250–2, signed by the General Counsel of the Treasury, establishes the Office of Tariff Affairs within the Office of the General Counsel and delegates to the Deputy Assistant Secretary (Tariff Affairs) authority, *inter alia*, "to review all antidumping and countervailing duty cases investigated by the U.S. Customs Service and to recommend their disposition to the General Counsel." 42 Fed. Reg. 54,042 (1977).
5. 19 U.S.C. § 160(b) (1976).
6. These time limitations were enacted as part of the amendments to the Antidumping Act contained in section 321 of the Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1978.
7. 19 C.F.R. §§ 153.0–153.64 (1977).
8. 19 C.F.R. §§ 153.35(b), 153.36, 153.37 (1977).
9. Treasury has exercised the extension authority in the cases involving Motorcycles from Japan, 43 Fed. Reg. 2,968 (1978); Cold Rolled and Galvanized Carbon Steel Sheets from Belgium, France, the Federal Republic of Germany, Italy, the Netherlands, and the United Kingdom, 43 Fed. Reg. 24,933 (1978); Carbon Steel Bars, Carbon Steel Strip, Carbon Steel Plates and Certain Structural Carbon Steel Shapes from the United Kingdom, 43 Fed. Reg. 32,343 (1978); and Carbon Steel Wire Rod from France, 43 Fed. Reg. 19,947 (1978).
10. Animal Glue and Inedible Gelatin from Yugoslavia, Sweden, the Netherlands, and West Germany, 42 Fed. Reg. 56,829 (1977); Saccharin from Japan, 42 Fed. Reg. 63,511 (1977); Ice Hockey Sticks from Finland, 43 Fed. Reg. 9,912 (1978). *See also* Viscose Rayon Staple Fiber from Belgium, 43 Fed. Reg. 32,915 (1978).
11. Treasury Department Order No. 250–1, June 16, 1977 (not published in the Federal Register).
12. As part of this process, the Customs report and recommendation might be replaced with a joint Customs-Office of Tariff Affairs staff report on the results of the investigation.
13. 43 Fed. Reg. 11,982 (1978), *amending* 19 C.F.R. § 153.31 (1978).
14. 19 C.F.R. § 153.50, 153.51 (1977).

15. 43 Fed. Reg. 11,982 (1978).
16. The Act does not define "fair value," but the concepts for calculating fair value are indicated in 19 U.S.C. §§ 161(b), (c), 164, 165 (1976). The Regulations set forth rules for calculating fair value based, in large part, on the statutory concepts. *See* C.F.R. §§ 153.1–153.18 (1977).
17. 19 U.S.C. §§ 161(b), (c), 170a(3)(A) (1976); 19 C.F.R. §§ 153.10, 153.11 (1977).
18. 19 C.F.R. § 153.10 (1977).
19. *Compare* the treatment of advertising costs in Motorcycles from Japan, 43 Fed. Reg. 35,140 (1978), with the treatment of technical assistance costs in Viscose Rayon Staple Fiber from Austria, 43 Fed. Reg. 3,234 (1978) and advertising costs in Viscose Rayon Staple Fiber from France, 43 Fed. Reg. 53,530 (1978).
20. *See, e.g.*, Hollow or Cored Ceramic Brick and Tile from Canada, 41 Fed. Reg. 26,037 (1976); Nylon Yarn from France, 43 Fed. Reg. 31,257 (1978); Saccharin from Japan, 42 Fed. Reg. 46,091 (1977); Melamine in Crystal Form from Japan, 41 Fed. Reg. 41,727 (1976); and Railway Track Maintenance Equipment from Austria, 42 Fed. Reg. 41,339 (1977).
21. *See, e.g.*, Viscose Rayon Staple Fiber from Finland, 43 Fed. Reg. 53,531 (1978); Rayon Staple Fiber from Austria, 43 Fed. Reg. 3,234 (1978).
22. *Cf.* W. WARES, THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY 108 (1977). "[P]resent policy, which limits adjustments for differences in circumstances of sale to those bearing a 'direct' relationship to the sales involved, is unjustified."
23. 19 U.S.C. § 164 (1976) provides that the foreign market value of merchandise exported to the United States shall be calculated on the basis of the home market or third country price of "such or similar merchandise." "Such or similar merchandise" is defined in 19 U.S.C. § 170a(3) (1976).
24. 19 U.S.C. §§ 161(b), (c), 170a(3)(A) (1976).
25. 19 C.F.R. § 153.11 (1977). Prior to amendment of the Regulations in June 1976, 41 Fed. Reg. 26,203 (1976), the order of priorities was reversed, with the Secretary being guided primarily by the effect of the differences upon the market value of the merchandise, but also able to take into account differences in cost of manufacture.
26. *See* Question c-10 of the current Customs Antidumping Questionnaire for Manufacturers and Sellers which states, in pertinent part:
*Generally, any adjustment for differences in the cost of manufacture will be made only for differences in costs of material and labor and direct factory overhead costs, not for differences in general overhead, other fixed costs, or profit.*
27. 19 U.S.C. § 165 (1976).
28. *See* Krauland *The Standard of Injury in the Resolution of Antidumping Disputes, post.* For an analysis of opinions of the Tariff Commission, the predecessor to the International Trade Commission, *see*

Note, *Innovation and Confusion in Recent Determinations of the Tariff Commission under the Antidumping Act*, 4 N.Y.U. J. INT'L L. & POL. 212 (1971).

29. *See, e.g.*, the Commission's opinions in Steel Wire Strand for Prestressed Concrete from India, AA1921-182, USITC Publ. 906 (1978); and Ice Hockey Sticks from Finland, AA1921-177, USITC Publ. 871 (1978).
30. 42 Fed. Reg. 56,502 (1977).
31. 19 U.S.C. § 1516 (1975), *as amended* by section 331(b) of the Trade Act of 1974.
32. 19 U.S.C. § 169 (1976).
33. 28 U.S.C. § 1582(c)(2) (1976).
34. *See, e.g.*, F. W. Meyers & Co. v. United States, 376 F. Supp. 860 (Cust. Ct. 1974); James C. Goff Co. v. United States, 290 F. Supp. 769 (Cust. Ct. 1968), *aff'd* 441 F.2d 671 (C.C.P.A. 1971).
35. *See* J. C. Penney Co. v. United States Treasury Dept., 439 F.2d 63 (2d Cir. 1971).
36. *Cf.* SCM Corp. v. United States International Trade Comm'n, 549 F.2d 812 (D.C. Cir. 1977), *aff'g* 404 F. Supp. 124 (D.D.C. 1975). *See also* the related decision of the Customs Court in SCM Corp. v. United States, 450 F. Supp. 1178 (Cust. Ct. 1978).
37. The Administrative Procedure Act judicial review provisions are set forth at 5 U.S.C. §§ 701-06 (1976).
38. Thus, an affirmative determination of sales at less than fair value would be appealable only if there also were an affirmative injury determination by the International Trade Commission resulting in a dumping finding. If the International Trade Commission found no injury, the affirmative Treasury determination would become moot.