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THE ANTIDUMPING ACT: ITS ADMINISTRATION AND PLACE IN AMERICAN TRADE POLICY

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I. INTRODUCTION

PROBABLY the most important development in the laws regulating the importation of foreign goods in recent years has been the increase in the delegation of functions by Congress to the executive. Despite the number of comprehensive tariff bills during the first three decades of the century, more flexible methods were necessary to deal with the multifarious problems created by increased imports. Merely raising or lowering the specific and ad valorem rates became too crude a device. The response to the necessity for more subtle adjustments was for Congress to set policies and leave the details to the administrators.

Congress has delegated several types of adjusting mechanisms to supplement the basic tariff laws.¹ At one extreme is the so-called scientific flexible tariff provision, designed to equalize the cost of production of foreign goods with that of American goods by the imposition of a duty. Despite its description as "scientific," it is really protectionism. At the other extreme is the authorization given the President by the Trade Agreements Act² to negotiate tariff modifications with other countries, any modification then being generalized to extend the reduced rate to imports from still other countries. In spite of the inclusion of an escape clause,³

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¹ There has always been some authority delegated to the executive by the Congress. See LARKIN, *THE PRESIDENT'S CONTROL OF THE TARIFF* 37-61 (1936) for prior history of such delegation. What is unique in the twentieth century is the degree of reliance on the executive. The cumulative effect of the actions taken by administrative officials has been termed the "invisible tariff." BIDWELL, *THE INVISIBLE TARIFF* (1939).

² 48 Stat. 943 (1934), as amended, 19 U.S.C. §§ 1351-64 (1958).

³ Act of June 16, 1951, § 6, 65 Stat. 73, as amended, 19 U.S.C. § 1363 (1958). The escape clause provides that any reduction in duty proclaimed under the Trade Agreements Act shall not be permitted to continue when any product subject to the reduced duty is imported into the United States in such increased quantities as to cause or threaten serious injury to domestic industry producing like or competitive products.

this statute is a significant step toward liberalization of trade. Somewhere between these polar positions are a number of statutory devices whose stated goal is to prevent "unfair" practices by foreign producers, exporters and governments which are harmful to the American domestic economy. Examples are the countervailing duty, imposed to neutralize export bounties; the exclusion of goods produced or sold by "unfair methods of competition or unfair acts" which has been applied to merchandise produced by unlicensed foreign producers of patented American processes; and the Antidumping Act.⁴ True, the impetus for these acts has come from protectionists and their impact has been to reduce imports in some commodities. But unlike the flexible tariff or the high rates of the Smoot-Hawley Tariff of 1930, these devices are aimed only at the preservation of what Congress deems to be "fair" competition.

Broadly, the Antidumping Act prevents the "dumping" of foreign goods in the United States by imposing a duty equal to the excess of the price in foreign markets over the price in the United States when such price discrimination injures an American industry. For example, if a Japanese manufacturer sells at 30 in Japan and at 25 to an American importer, the importer must pay a dumping duty of 5. But if he sells to the importer at 30 while the prevailing American market price is, say, 40, he has not "dumped" the goods. The reasons for this latter conclusion lie in notions of fairness and in economics of comparative advantage, *i.e.*, an advantageous international division of labor.

It has now been forty years since the present Antidumping Act was passed. During that period certain administrative interpretations and procedures have developed. This discussion will not attempt a general exposition of the act,⁵ but rather will examine key terms which are not defined by the act itself, the administrative decisions interpreting these terms, and the soundness of these decisions when tested against the purposes of the act. In analyzing

⁴ Flexible tariff, 46 Stat. 701 (1930), as amended, 19 U.S.C. § 1336 (1958); Trade Agreements Act, 48 Stat. 943 (1934), as amended, 19 U.S.C. §§ 1351-64 (1958); countervailing duty, 46 Stat. 687 (1930), 19 U.S.C. § 1303 (1958); unfair competition, 46 Stat. 703 (1930), as amended, 19 U.S.C. § 1337 (1958); Antidumping Act of 1921, amended by 68 Stat. 1138 (1954), as amended, 19 U.S.C. §§ 160-73 (1958). Hereinafter the Antidumping Act will be referred to in the text simply as "the act."

⁵ A good explication of the act may be found in Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44 (1958).

these decisions, not only the factors that influenced the original passage of the act must be considered, but also the events which have occurred since the passage of the act in 1921, such as our expanded foreign trade, the altered aims of our foreign policy, changes in congressional economic thinking as manifested by such laws as the Robinson-Patman Act, and the strength of our domestic industry in terms of its ability to compete against foreign competition. This article will also explore, in the light of these factors, areas in which the act may need revision.

II. PASSAGE OF THE ANTIDUMPING ACT

The Economic Background

In order to analyze legislation designed to prevent dumping, it is necessary first to look briefly at the causes and types of dumping. Economists are agreed that dumping should be defined as "price-discrimination between national markets." This definition was advanced by Professor Viner in 1923⁶ and has been used as a starting point since then. But it is clear that not every case of what Viner calls dumping is undesirable. For example, a German producer selling chemicals at a higher price in the United States than in Germany is "discriminating between national markets," in Viner's terms, but this so-called reverse dumping calls for no preventative measures by the United States. Taking this into account, Viner restricts the definition to include only that dumping which is potentially injurious: "sales for export at lower prices than those charged at the same time and under like circumstances to buyers for the domestic market."⁷

Within the definition of dumping, there is a customary categorization drawn in terms of the intent of the foreign producer. The categories, broadly, are sporadic, intermittent and continuous.⁸ Sporadic dumping is typically a single transaction phenomenon. The foreign producer may find himself left with an overstock at the end of the season. Rather than disturb the price structure in

⁶ VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 3 (1923) [hereinafter cited as VINER]. This is the standard text on the subject. For a discussion of Viner's definition as compared to a definition based on sales below cost of production, see VON HABERLER, THE THEORY OF INTERNATIONAL TRADE 296-300 (1936).

⁷ VINER, MEMORANDUM ON DUMPING 3 (League of Nations Pub. No. 1926.II.63).

⁸ VINER 23-33. The outlines of the discussion of the classification of dumping are drawn from Viner's text.

the primary market of his own country, he may choose to dispose of the goods quickly, at a dumping price, in another country.

Intermittent dumping is described as typically part of a broader scheme by a foreign producer to establish or maintain a market for his goods abroad. He may sell at a dumping price to gain entry to the market, or to compensate for a natural preference of consumers for goods made at home, or to protect against competition by domestic producers trying to gain a portion of a market that he already controls. The foreign producer underselling his competitors to establish a monopoly by driving them out of business also falls into this class. Intermittent dumping, as contrasted with sporadic dumping, is directed toward the attainment of a permanent share of a market.

On the other hand, continuous dumping finds its rationale in the producer's economic relationship to his own country. An example is the manufacturer who maintains full production because of the consequent reduction in marginal cost of each unit produced, even though he is able to sell his entire output only by exporting a portion of it at a dumping price which brings in little if any profit. Because the impact of such dumping on the foreign market is not viewed by the producer as a reason for later adjustment of his price, this type of dumping will continue over a prospectively permanent period.

The fundamental economic question for each of the three categories is whether the advantage to the consumer who is able to purchase cheap goods outweighs the injury to producers who must try to compete with such goods. When dumping is sporadic, it is relatively unimportant to either the consumer or the domestic producer, although the gain to the consumer probably outweighs the injury to the producers. Continuous dumping, also, is thought not to be detrimental to the importing country since the consumer will enjoy a relatively permanent reduced price, and it will then be economically advantageous for the capital and labor of the domestic industry to move to the production of other goods. The chief danger, economists agree, is in intermittent dumping. It demoralizes and may irreparably injure domestic industry without the corresponding advantage to the consumer of permanently lowered prices. Once the objective is gained, whether it is entry to the market or destruction of domestic producers, prices are raised and the consumer suffers in the long run.

The discussion thus far has been relatively abstract. At this point the relevant question is, how may one type of dumping be distinguished from another at the time the dumping occurs? Without a thorough investigation of a foreign firm's economic position *vis-à-vis* its country's economy, the foreign industry and the domestic industry of the importing country, it would be impossible to decide whether an isolated case of dumping was sporadic, intermittent or continuous. And such a decision would be complicated by the fact that one must project the motive of the foreign producer into the future. Moreover, making a determination on the date of a producer's first instance of dumping assumes that in all cases he will have the same, single motive; this assumption seems unrealistic. Thus, it would be impractical to try to frame a statute directed in terms against intermittent dumping only.

The obvious alternative would be to prohibit all dumping. Viner suggests this approach and supports it by saying that "dumping prices are presumptive evidence of abnormal and temporary cheapness"⁹ and therefore injurious to domestic industry without being permanently helpful to consumers. This proposal has the merit of ease of administration, since it simply matches the home consumption price of the foreign producer with his export price and leaves the question of motive to the economic analysts.

There is at least one instance, however, in which this proposal is inadequate. This is the situation in which the foreign producer sells for a price below his price for home consumption in order to meet the price of his competitors in the importing country. Unless he can reduce his price to a competitive level he cannot hope to compete with the producers in the importing country. Even if the assumption that the dumping will be intermittent is justified in this case, the corresponding assumption that such dumping is harmful is no longer true since the domestic producer is not being undersold. Thus Viner's approach should be amended, if it is to serve as the basis for effective legislation, to prohibit dumping except when its purpose is to do no more than meet domestic competition. We may call this approach the "competitive-price" theory.

⁹ VINER 147. Von Haberler agrees with this analysis and says that it makes no difference to the importing country whether goods come in cheaply because of dumping, export bounties or comparative advantage; dumping is undesirable because its artificiality means that cheapness caused by it will not last as long as that caused by comparative advantage. VON HABERLER, *op. cit. supra* note 6, at 314.

Viner mentions this situation, but does not draw any distinction between it and other cases of dumping, for he says that competition from the foreign producer "will tend to force down the prices [of the producer in the importing country] and to necessitate a still further reduction of his own prices."¹⁰ But this argument assumes that domestic producers can sell their goods only if they price them below goods of foreign producers, or it assumes that there is some policy which protects domestic businessmen against competition from other producers who are only meeting, not undercutting, the domestic market price. Neither of these assumptions seems warranted. When a domestic and a foreign producer compete at the same price, it is more likely that the sales of the former will be far larger, not that he will be forced to cut his price to overcome foreign competition. This can be seen in cases decided by the Tariff Commission under the escape clause of the Trade Agreements Act.¹¹ The Commission says repeatedly that, other things being equal, American buyers prefer to buy from American manufacturers because the source of supply is closer, more reliable and better known.¹² The other phase of the argument, that there is some policy seeking to insulate a domestic producer from competitive prices, seems equally unjustified. The domestic analogue to the Antidumping Act is the Robinson-Patman Act which prevents price discrimination, except where the defense can show that it made sales below its normal price in order to meet competition.¹³ The potential effect on the American economy of the domestic chain stores against whom the Robinson-Patman Act was directed¹⁴ is surely greater than that of the foreign producers who may dump goods in the United States, and yet that law allows price discrimination "for the purpose of meeting," although "not for the purpose of beating or preventing competition."¹⁵ It seems clear that there is no general policy that prevents

¹⁰ VINER 132.

¹¹ 65 Stat. 73 (1951), as amended, 19 U.S.C. § 1363 (1958).

¹² E.g., U.S. TARIFF COMMISSION, INVESTIGATION NO. 13 UNDER SECTION 7 OF THE TRADE AGREEMENTS ACT (1953) (wood screws of iron and steel).

¹³ 49 Stat. 1526 (1936), 15 U.S.C. §§ 13, 13a, b, 21a (1958). Section 1(b) of the Robinson Patman Act provides in part: "[Nothing] herein contained shall prevent a seller . . . showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ." 15 U.S.C. § 13(b) (1958).

¹⁴ Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1057 (1957) contains an excellent account of the history of the statute and the evils at which it was directed.

¹⁵ AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN

price competition; that such competition is to be protected even where price discrimination is the result. It is hard to see why a domestic producer is entitled to have his competitor's goods excluded from the market when the competitor is willing to compete at the market price, regardless of whether the competitor is domestic or foreign.

If this "competitive-price" theory is accepted, it raises a further question: can the foreign producer reduce his price to compete with other foreign producers, as well as to compete with American producers? Suppose an American producer sells at 30 and a Japanese producer at a non-dumping price of 25. Can a German who sells in Germany at 35 sell in the United States at 25, or only at 30? It would seem that the German producer should be able to compete with his American competitor, but that an American statute should not allow him to dump to meet other foreign competition, since the purpose of dumping legislation is to protect domestic producers from competition which is unfair as to *them*—no more protection than this, but also no less.

The Historical Context

The Antidumping Act of 1921 was not Congress' first attempt to deal with the problem of international price discrimination. In 1916 it was made a crime to dump goods into the United States "with the intent of destroying or injuring an industry in the United States, . . . or of restraining or monopolizing any part of trade or commerce in such articles in the United States."¹⁶ It is clear that in 1916 Congress was concerned with eradicating practices of foreign producers that correspond to the kind of illegal activities which prompted the Sherman Act, *i.e.*, predatory price cutting. In the debate over the bill Senator Penrose called attention to such predatory dumping by German cartels.¹⁷ The penalties, also following the pattern of the antitrust laws, included fines up to \$5,000, imprisonment up to one year and a provision for treble damages. This statute has been wholly ineffective: there has never

ACT 98 (1950). The inexorable, progressive reduction of prices feared by Viner if foreign producers are allowed to dump to meet competition would surely be a more real threat in the situation envisaged by the Robinson-Patman Act: chain stores competing with corner grocers. Yet Congress allowed the defense of meeting competition. It seems to follow that in cases of dumping, meeting competition should be an a fortiori defense.

¹⁶ 39 Stat. 798, 15 U.S.C. § 72 (1958).

¹⁷ 53 CONG. REC. 14147-48 (1916).

been a prosecution under it. The necessity of showing a predatory motive and the difficulty of reaching the foreign producer to impose a penalty make it unworkable. It was the failure of the 1916 statute that led to the enactment of the Antidumping Act of 1921.¹⁸

Although the 1921 statute attacks the problem differently, there can be little doubt that the congressional conception of the evils of dumping had not changed. The sanctions of the antitrust laws were dropped because of their unworkability, not because of a divorcement of dumping and unfair monopoly practices in the congressional mind. A Tariff Commission report on dumping made in 1919 at congressional request, and relied on in the formulation of the 1921 statute, reiterated concern over the predatory tactics of the German dye industry and found it injurious because domestic businesses are forced "to sell their entire output at a small margin of profit, or even at a loss."¹⁹ The concentration on stopping predatory dumping was echoed by the report of the House Ways and Means Committee²⁰ and by the debates.²¹ Like the Tariff Commission, and the public which was pressing for effective legislation, Congress reacted largely in response to the publicity given to German dumping.²² In addition, there were examples of dumping by American firms which were noted by the legislators. It was recognized that these corporations had dumped merchandise in such countries as England and Canada in a predatory fashion, and the intent was to prevent the same tactics by foreign cartels.

III. ADMINISTRATIVE INTERPRETATION OF THE ACT

The Finding of Sales for Less Than "Fair Value"

The Antidumping Act of 1921 directs the Secretary of the Treasury to make a finding of dumping when a foreign producer

¹⁸ VINER, MEMORANDUM *op. cit. supra* note 7, at 13. In this memorandum, written in 1926, Viner states that he has found no prosecutions in any country that has a penal anti-dumping statute. Congressman Fordney, Chairman of the House Ways and Means Committee, asked the Tariff Commission to study the 1916 statute and the Canadian statute. The report was quite critical of the American statute. U.S. TARIFF COMMISSION, DUMPING AND UNFAIR COMPETITION (1919).

¹⁹ U.S. TARIFF COMMISSION, *op. cit. supra* note 18, at 20.

²⁰ H.R. REP. NO. 1, 67th Cong., 1st Sess. 23-24 (1921).

²¹ 61 CONG. REC. 254, 262 (remarks of Congressman Fordney), 1021 (remarks of Senator McCumber) (1921).

²² Even Viner, who thinks dumping by German cartels was over-dramatized, admits that it was the target of American reaction against dumping. VINER 51-53.

injures a domestic industry by selling merchandise in the United States "at less than its fair value."²³ Thus, the economic policy of the act came to rest in but two words in section 201 (a): "fair value." Is any sale for less than foreign market value a sale for less than "fair value"? Or is the Secretary to exercise discretion? The statute itself is not clear. The rejection of the approach of the 1916 penal statute made it clear that predatory intent was not to be the determinative factor, and yet it was also clear that predatory dumping was still the evil that Congress sought to eliminate.

The Secretary of the Treasury in 1923 chose a mathematical approach: goods were deemed sold for less than fair value if the purchase price in this country was below the foreign producer's home market price.²⁴ Thus, "fair value" was not given a distinct meaning; it was defined solely in terms of the duty to be collected. This duty is also computed by comparing the purchase price with the home market price. This definition of fair value requires a finding of dumping whenever the home market price exceeds the purchase price. In effect, this decision adheres to Viner's solution, to prohibit all dumping rather than to attempt to distinguish permissible from undesirable dumping. Such a definition of fair value is open to attack on several counts. First, from a reading of the text of the act it is seen that the term "fair value" is used but once—in section 201 (a). It is not defined and is not equated with the computation of the dumping duty, although the latter could easily have been accomplished through explicit language or by retaining an earlier House version of the bill. Section 201 (b) directs the Secretary to make an investigation whenever he has reason to believe that the purchase price or exporter's sale price is lower than the foreign market value; but subsection (a) allows him to issue a finding of dumping (subject to a finding of injury) only if he finds sales for less than fair value. In a carefully drafted statute such as this,²⁵ the implication must be that "fair value"

²³ § 201 (a), amended by 68 Stat. 1138 (1954), as amended, 19 U.S.C. § 160 (a) (1958).

²⁴ Art. 712. Unfair Value.—Merchandise is sold at less than its fair value within the meaning of section 201 (a) of the act if the purchase price or exporter's sale price of such merchandise is less than its foreign market value (or cost of production). 1923 Cust. Reg. 370. This form was preserved until 1955.

²⁵ In 1923 Viner said the act was "in almost all respects a model of draftsmanship." VINER 262. Since then he has acknowledged that despite the complexity of the provisions, the statute is subject to abuse by administrative officials. *Hearings Before the Subcommittee on Foreign Economic Policy of the Joint Committee on the Economic Report Pursuant to Sec. 5 (a) of Public Law 304, 79th Cong., 1st Sess.* 607 (1955).

was to have a meaning independent of the mathematical method of computing the duty.

Second, the legislative history discussed in part two of this article shows that Congress did not demand a showing of intent in the Antidumping Act because of the failure of the 1916 penal statute which had been directed, in terms, only at intentional predatory dumping; but the history does not indicate that intent was to be totally irrelevant. And third, the evolution of the bill shows that Congress intended the Secretary of the Treasury to use discretion. The original House bill did not contain the "fair value" provision; it was put in by the Senate.²⁶ When explicitly asked the meaning of the term during the debate, Senator McCumber, spokesman for the bill, replied that

"there should be that clear distinction between the foreign market value for the purpose of levying your tariff and a fair value for determining whether or not an article is being dumped into this country for the purpose of destroying an industry."²⁷

The debate indicates that the Secretary was to use discretion in determining when goods are sold for less than fair value, and this necessarily involves an inquiry into the reasons why the purchase price is at its present level, *i.e.*, whether the "value" of the goods means they are being sold at a price less than "fair."²⁸ The regulation adopted by the Secretary of the Treasury in 1923 leaves no room for discretion—if the purchase price is below the foreign market value, the finding of dumping is made (provided a domestic industry is injured). The regulation restores the version of the bill that was explicitly rejected by Congress. In 1955 the regulations were revised, but the basic approach to the definition of "fair value" remains unchanged.²⁹

The Secretary's regulation makes no concession to a flexible approach. It would seem that a definition of fair value which corresponded to the competitive-price theory would be preferable. Such a regulation would avoid the problem presented by the 1916 statute, for no assessment of intent is necessary. On the other

²⁶ S. REP. NO. 16, 67th Cong., 1st Sess. (1921).

²⁷ 61 CONG. REC. 1103 (1921) (remarks of Senator McCumber).

²⁸ The Democrats wanted "fair value" defined by statute, but no amendment to this effect was proposed.

²⁹ 19 C.F.R. § 14.7 (1961).

hand, the Secretary would not have uncontrolled discretion as to how to proceed or what factors are relevant. Moreover, it accords with the legislative history and gives the Secretary a more significant function than the making of an arithmetic computation. Finally, it would be in harmony with the spirit of competition enforced in domestic trade by the antitrust and Robinson-Patman acts and with our foreign policy of promoting freely competitive world trade. There have been cases in which a price which was technically a dumping price under the regulation did not even reduce the price to the level of the competitive domestic market price. The Secretary nonetheless followed the regulation and found sales for less than fair value.³⁰ This bizarre result excludes goods which had not even achieved a competitive price. In view of the congressional emphasis on the promotion of "fairness" by the act, this degree of protection to domestic industry seems unwarranted.

The Determination of Injury to Domestic Industry

Prior to 1954 the Secretary of the Treasury made both of the determinations required for a finding of dumping: which sales are for less than fair value, and whether the result of such sales is that "an industry in the United States is being or is likely to be injured, or is prevented from being established."³¹ The latter function was transferred to the Tariff Commission in 1954 because of the Commission's experience in findings of injury under the escape clause.³² As in the case of "fair value," there is no definition of what constitutes an "injury" in the act itself. Neither can one obtain any guidance from the legislative history.

From 1955 through June of 1961 the Tariff Commission processed sixteen cases and found three cases of injury. From the tenor of the reports of these investigations it seems that the Commission is applying roughly the same criteria in these cases as in the escape-clause cases.³³ This seems appropriate, since the decision to en-

³⁰ 1959 TARIFF COMMISSION ANN. REP. 34-35.

³¹ For standards of injury required by other countries, see GATT, ANTI-DUMPING AND COUNTERVAILING DUTIES 16-17 (1958) [hereinafter cited as GATT, ANTI-DUMPING DUTIES].

³² The transfer to the Tariff Commission was made by the Customs Simplification Act of 1954, § 301, 68 Stat. 1138, 19 U.S.C. § 160 (a) (1958).

³³ 1955-60 TARIFF COMMISSION ANN. REPS. Some of the factors used in deciding escape-clause cases are the level of gross sales and profits, the number of people employed, the number of firms in the field, and the share of the market.

trust this task to the Commission rested on the expertise acquired from handling escape-clause proceedings.

Nevertheless, a potentially dangerous precedent was set in the first case in which the Commission found an injury. A producer of cast-iron soil pipe in California complained of injury due to competition from dumped British soil pipe. He claimed that the industry injured by the import competition was the California segment of the total American industry. California produced eight percent of domestic soil pipe. Imports equalled three percent of California production and four-tenths percent of total domestic production. Production and profits had been increasing in the nation as a whole, as well as in California. Surprisingly, the Tariff Commission agreed with the complainant and found the California producers to be a separate industry. Even though the complainant was a marginal producer who had not made consistent profits when there had been no import competition, the requisite degree of injury was found.³⁴ The decision seems questionable, both as a matter of statutory interpretation and as a matter of policy. The act does not purport to provide relief for a producer or group of producers who may be injured by import competition; it speaks of relief only for an "industry." The Commission has consistently held in escape-clause cases that "industry" refers to the national market for a product or to a large regional market area.³⁵ As a matter of policy it would seem preferable to allow one marginal producer to go out of business rather than to subject all of a country's exports of a product to the United States to an added burden, and to create suspicion of American sincerity about the liberal trade policy this country espouses. As a final chapter, the Customs Court rejected an importer's attempt to restrict the finding to imported pipe directly competitive with the California pipe.³⁶

³⁴ ENKE & SALERA, *INTERNATIONAL ECONOMICS* 402-03 (1947). For a more vivid characterization of the complainant's business morality and record of bankruptcies there is a statement by an importer who was severely damaged by the soil-pipe finding. *Hearings on H.R. 6006, 6007 and 5120 Before the House Committee on Ways and Means*, 85th Cong., 1st Sess. 95 (1957) [hereinafter cited as *House Hearings*].

³⁵ In 1955 Congress resolved a split in the Tariff Commission by allowing a firm making a profit on its entire operation to complain about import competition injuring one product line in escape-clause proceedings. No other narrowing of the definition of "industry" was suggested. Trade Agreements Extension Act, 69 Stat. 166 (1955), 19 U.S.C. § 1364 (e) (1958).

³⁶ *Ellis K. Orlovitz Co. v. United States*, 43 Cust. Ct. 548 (1959) (Reappraisal Decision No. 9544), *aff'd*, 200 F. Supp. 302 (Cust. Ct. 1961).

As a result of the soil-pipe case and other cases many interested parties have urged some definition of the terms "injury" and "industry" by statute or regulation.³⁷ The Treasury has opposed any such definition because it would force taking of "a rigid position on the side of the protectionists or the free traders" which is not justified by "legislative history or by conditions as they exist today."³⁸ There is some merit to this position, especially with respect to putting definitions in the act itself, for as the Treasury's spokesman says, "Definitions are limitations."³⁹ But even admitting that this is so, there seems to be no good reason why some minimal standards could not be enunciated by the Commission. Having decided more than 100 escape-clause cases under the Reciprocal Trade Agreements Act and more than fifteen cases under the Antidumping Act, the Commission has obviously worked out some guidelines. The regulations would not have to be narrow or picayune; they could be general, as is the escape-clause legislation which lists the factors to be considered by the Commission in escape-clause decisions. The promulgation of regulations would have several beneficial results in addition to deterring decisions similar to the one in the soil-pipe case. First, it would give Congress an opportunity to review the approach of the Commission and to alter it if necessary. Second, it would reduce harassment by such marginal producers as the complainant in the soil-pipe case who have nothing to lose by filing a complaint and may gain if appraisements are withheld, even if there is a subsequent finding of no injury. For example, in the rayon staple fiber case domestic firms producing ninety-five percent of the domestic fiber affirmatively volunteered the opinion that there was no basis for a finding of injury to domestic industry from imports of French fiber, and even went so far as to call the filing of a complaint by the minority producers "vindictive."⁴⁰ Previously published regulations might have prevented filing of the complaint altogether, or at least might have resulted in a speedy dismissal. The importance of preventing the filing of harassing complaints was pointed out by counsel for the Swedish hardboard and rayon importers;⁴¹ he testified that the

³⁷ An array of proposals is presented in *House Hearings* 115, 369 (favorable to the soil-pipe decision); *id.* at 199, 395 (unfavorable).

³⁸ *House Hearings* 18.

³⁹ *Ibid.* No representative of the Tariff Commission appears to have testified.

⁴⁰ 1960 TARIFF COMMISSION ANN. REP. 36-37.

⁴¹ *Hearings on H.R. 6006 Before the Senate Committee on Finance*, 85th Cong., 2d Sess. 118 (1958) (statement of Robert L. Brightman).

rayon importers had been injured fully as much by the withholding of appraisements as were the hardboard importers who had been subjected to an actual finding of dumping.⁴² Trade is interrupted upon the filing of a complaint because the importer cannot determine his total costs until he learns whether a dumping duty will be payable; without knowing his costs he is forced to stop importing since the later payment of a duty may mean that he has sold the imported goods at a loss. Even after an investigation results in a negative finding, the original channels of trade might not be reopened if the producer has had to alter his production and marketing methods to meet consumer demands of differing countries. The third beneficial result of Commission regulations would be to enable the importer to evaluate his position more accurately. An importer of British soil pipe has contended that he relied on the fact that only four-tenths percent of the total consumption in the United States was provided by British imports.⁴³ He was probably justified in anticipating a finding of no injury since there had been twenty-five dismissals of dumping complaints on the ground of negligible import volume between 1934 and 1957.⁴⁴

One other aspect of the requirement of injury deserves mention. It has been suggested that injury to a domestic industry may not always be necessary for the dumping to be harmful. Let us assume that country *A* sells tin to country *B* at a dumping price. *B* either has no tin industry or has an industry which is unable to show an injury, but the industry of country *C* which ordinarily supplies *B* will be severely injured. Since there is no injury to a domestic industry, *B* would not impose a dumping duty. In conventional economic terms, *B* is justified in refusing to impose a duty, since the gain to its consumers is not offset by any damage to its industry. But if we call the countries Russia (*A*), the United States (*B*) and Bolivia (*C*), the context changes. No longer are these countries merely economic units, each seeking to maximize its own economic well-being. The United States has a political

⁴² An appraisalment is the appraising officer's formal designation of the value and quantity of imported merchandise and the assignment of the merchandise to the proper dutiable classification. 46 Stat. 729 (1930), as amended, 19 U.S.C. § 1500 (1958). The proper classification, in cases where dumping is suspected, cannot be known until the investigation is completed and a decision is reached as to whether dumping has occurred.

⁴³ *House Hearings* 93-94.

⁴⁴ ENKE & SALERA, *op. cit. supra* note 34, at 401-02.

interest in the strength of the Bolivian tin industry which supports the Bolivian economy.⁴⁵ Viner poses this problem and suggests that the solution may be in "international action," although he concedes that only predatory dumping should be outlawed, and he acknowledges the difficulties of classification based on intent.⁴⁶ International action seems unlikely though, since countries such as Bolivia would hesitate to bind themselves in a bilateral agreement which, in return for a similar agreement by the United States, would protect an American industry by penalizing Bolivian consumers; and it would be unseemly for the United States to extort some other concession from Bolivia in exchange for an American pledge to protect the Bolivian tin industry.

Considering the strength of the United States and the purchasing power of its consumers, a unilateral approach may be appropriate. A possible solution would be to allow application to the Secretary of the Treasury by importers of goods from the third country whose industry is injured, as domestic industry can apply now. The Secretary would make the finding of sales for less than fair value and the Tariff Commission of injury to the industry of the third country. There would be difficulties, such as getting accurate information from the third country, but Treasury attachés abroad have collected similar data for such purposes as computing foreign firms' costs of production, and these technical problems could probably be overcome. It is certain that the third country would respond readily to requests for information showing injury, just as domestic producers do now. At this point an additional step is necessary, since the procedure is designed to aid our foreign policy: the President would be given the power, as under the escape clause and flexible tariff procedures, to affirm the finding or not, taking into consideration our relations with the exporting country and the injured third country.

IV. PROCEDURAL REQUIREMENTS

The act directs the Secretary to make an investigation when he has reason to believe that there is dumping. He may act on in-

⁴⁵ The importance of this aspect of the act and of providing for it by statute *before* a crisis arises was suggested to the author by Mr. William Barnhard of the Washington, D.C. Bar.

⁴⁶ VINER, MEMORANDUM, *op. cit. supra* note 7, at 19. This seems to be the only discussion of the matter, although its relevance was recognized by the framers of article VI of GATT. A discussion of the relation of the act to this provision of GATT is found below.

formation submitted by an appraiser or other officer, on information submitted by a third party (usually a domestic producer), or on his own motion. On starting the investigation, he is authorized to withhold appraisement on goods entered up to 120 days before the question of dumping was first presented to him, and he must publish notice that the question has been raised.⁴⁷ If the Secretary finds sales for less than fair value, he notifies the Tariff Commission which has three months to determine "after such investigation as it deems necessary" whether a domestic industry is being, or is likely to be, injured because of the dumping.⁴⁸ An affirmative finding of injury requires the Secretary to publish the determination of sales for less than fair value and of injury, which publication then authorizes the customs officials to assess a dumping duty, as described in section 202 (a).⁴⁹

The act does not establish the procedural steps to be followed in the determination of sales for less than fair value or of injury. It was settled early that the Secretary of the Treasury (who until 1955 made both determinations) could conduct investigations as he chose, granting a hearing if he felt it necessary and revealing to the importer only so much of the information on which he based his findings as he pleased.⁵⁰ This position was not seriously questioned until recently.

In 1958 an importer attacked a finding of dumping by contending that the Secretary's failure to comply with the requirements of the Administrative Procedure Act rendered the finding void.⁵¹

⁴⁷ Antidumping Act of 1921, § 201 (b), amended by 68 Stat. 1139 (1954), as amended, 19 U.S.C. § 160 (b) (1958). The requirement of notice was added in 1958. Act of August 14, 1958, § 201 (b) (2), 72 Stat. 583 (1958).

⁴⁸ Antidumping Act of 1921, § 201 (a), amended by 68 Stat. 1138 (1954), as amended, 19 U.S.C. § 160 (a) (1958). This language differs from that of the escape clause by which the Tariff Commission is directed to hold hearings as well as investigations. 65 Stat. 74 (1951), as amended, 19 U.S.C. § 1364 (1958).

⁴⁹ Antidumping Act of 1921, § 302 (a), amended by 68 Stat. 1139 (1954), as amended, 19 U.S.C. § 161 (a) (1958).

⁵⁰ *Kreutz v. Durning*, 69 F.2d 802 (2d Cir. 1934), affirming *Kreutz v. Elting*, 3 F. Supp. 364 (S.D.N.Y. 1933); *Kleberg v. United States*, 21 C.C.P.A. (Customs) 110, 71 F.2d 332 (1933). The opinion by the trial judge in the *Kleberg* case was a vigorous attack on the Secretary's refusal to allow the importers to see the information on which the finding was based; he declared the finding void for lack of evidence to support it. T.D. 45387, 61 TREAS. DEC. 58 (Cust. Ct. 1932). This approach was reversed by the appellate division of the Customs Court and the finding was reinstated. The Court of Customs and Patent Appeals agreed with the appellate division. The view taken by the trial judge has not been heard again judicially.

⁵¹ *Elof Hansson, Inc. v. United States*, 41 Cust. Ct. 519 (1958). Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1958).

In *Elof-Hansson v. United States* the Customs Court upheld the Secretary's action and held the APA inapplicable to investigations under the act,⁵² citing earlier cases which had granted complete discretion to the Secretary. The Third Division of the Customs Court reversed, holding that the APA is applicable to the Secretary's investigation; that the investigation and finding are rule-making; and that noncompliance with the APA vitiated the finding even though the importer was not prejudiced thereby.⁵³ The Court of Customs and Patent Appeals recently reversed and reinstated the decision of the trial court, but the ground of decision was explicitly made the importer's failure to show prejudice resulting from the Secretary's noncompliance.⁵⁴ The court expressly refused to decide whether the APA is applicable to the act; that question is still open. It is relevant to future investigations, since the failure to proceed according to the APA was not mere inadvertence by the Secretary; he acknowledges that he does not comply with its requirements.⁵⁵

In determining whether to accept the view of the trial court or the Third Division, the first question is whether the Secretary is an agency within the meaning of section 2 (a) of the APA which reads in part:

" 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States. . . . Nothing in this Act shall be construed to repeal delegations of authority as provided by law."⁵⁶

The breadth of this definition and the intent of Congress to standardize all administrative procedure would seem to warrant inclusion of the Secretary of the Treasury. Other Cabinet members have been held subject to the APA.⁵⁷ Although it has been

⁵² *Elof Hansson, Inc. v. United States*, *supra* note 51, at 528.

⁵³ *Elof Hansson, Inc. v. United States*, 43 Cust. Ct. 627, 178 F. Supp. 922 (1959).

⁵⁴ "[It is] unnecessary to pass upon either the issue of applicability of the A.P.A. to an antidumping investigation . . . or the issue of whether or not the finding of dumping was 'rule-making' as defined in the A.P.A. . . ." 48 C.C.P.A. (Customs) 91, 296 F.2d 779 (1960).

⁵⁵ The Treasury's position was made clear before the House Committee. The Treasury's representative was asked if it was his position that determinations by the Secretary and the Tariff Commission "are entirely up to those agencies" with "no right of appeal." He was also asked if the APA is completely bypassed. Both answers were affirmative. *House Hearings* 45.

⁵⁶ 60 Stat. 237 (1946), 5 U.S.C. § 1001 (a) (1958).

⁵⁷ *Cates v. Haderlein*, 189 F.2d 369 (7th Cir. 1951) (Postmaster General); *United*

held that the Tariff Commission, acting as adviser to the President under the flexible tariff and unfair competition statutes, is not an agency because it advises rather than ordains, this reasoning does not apply to the Secretary; his action is more than advice—it is authorization for the assessment and collection of a duty. It is subject only to a Tariff Commission finding, not the absolute discretion of the President.⁵⁸

In view of the long history of agitation for reform of the administrative process that culminated in the APA, and in view of the direction given the statute by the Supreme Court,⁵⁹ the presumption is that an agency is subject to its provisions. The cases relied on by the trial court to sustain the Secretary's absolute discretion lose their meaning after the adoption of the APA, since Congress expressly indicated that "Any inconsistent agency action or statute is in effect repealed."⁶⁰ The trial court's strongest point was that if the APA applies to the act, Congress would have had no reason to amend section 201 (b) to require notice of an investigation by the Secretary. The Third Division's reply is that the APA has set the policy of notice and the requirement in section 201 (b) is supplemental to that policy. Although not spelled out by the court, this reply may be explained by the language of the two statutes: the APA requires notice only if interested parties are not otherwise informed,⁶¹ while the section 201 (b) requirement is unqualified and therefore more stringent than the usual APA mandate. In spite of the tenuousness of this argument, the strong congressional policy in favor of uniform administrative procedure and the Supreme Court's pronouncement that "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed . . ."⁶² should be enough to support it.

If it is decided that the APA is applicable, it is necessary to

States v. Libby, McNeil & Libby, 107 F. Supp. 697 (D. Alaska 1952) (Secretary of the Interior).

⁵⁸ The House Judiciary Committee report makes it clear that the second sentence of § 2(a) provides nothing to the contrary, since it "does not mean that the . . . requirements provided by the [Administrative Procedure Act] may be avoided." House Committee on the Judiciary, *Report on Administrative Procedure Act Bill*, H.R. REP. No. 1980, 79th Cong., 2d Sess. 19 (1946).

⁵⁹ *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). The Court stresses that "one purpose was to introduce . . . uniformity of procedure and standardization of administrative practice among the diverse agencies. . . ." *Id.* at 41.

⁶⁰ S. Doc. No. 248, 79th Cong., 2d Sess. 281 (1946).

⁶¹ APA § 4(a), 60 Stat. 238 (1946), 5 U.S.C. § 1003(a) (1958).

⁶² *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

categorize the Secretary's procedure as rule-making or adjudication. The applicable part of the definition of a rule is in section 2 (c) of the APA. It is extremely broad:

"Rule means the whole or any part of any agency statement of general or particular applicability and future effect designated to implement, interpret, or prescribe law or policy" ⁶³

The words "or particular" seem to extend rule-making to almost every agency action, but the reasons for not reading those words literally "are overwhelming." ⁶⁴ The words were inserted to make certain that rules addressed to named persons would not, by virtue of that fact alone, be interpreted as adjudication. ⁶⁵ There seems to be general agreement that the traditional, pre-APA distinctions between rule-making and adjudication still apply. ⁶⁶ A good description of those distinctions is made by one commentator on administrative procedure who states that rule-making is characterized by its essentially legislative nature, applicability to future conduct by drawing predictions from present facts, and concern with considerations of policy. ⁶⁷ The requirement in section 2 (b) that a rule have "future effect" does not mean that an agency cannot deal "with past transactions in prescribing rules for the future." ⁶⁸ Although it might be argued that the finding of the Secretary is adjudication as to the importer whose merchandise is already subject to the finding (due to the prior withholding of appraisement), the finding is clearly phrased and intended to cover all merchandise of a specific type from a specific country, including but not confined to the goods on which appraisement has been withheld. ⁶⁹ In terms of general applicability, as distinguished from the

⁶³ 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001 (c) (1958).

⁶⁴ 1 DAVIS, ADMINISTRATIVE LAW § 5.02, at 295 (1958). Since adjudication is, by the definition in § 2(d), only that which is not rule-making, a literal reading of § 2(c) would dispense with the hearing required by § 5 in most cases, and this would defeat the very purpose of the APA.

⁶⁵ House Committee on the Judiciary, *Report on the Administrative Procedure Act Bill*, H.R. REP. NO. 1980, 79th Cong., 2d Sess. 49 (1946).

⁶⁶ *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676 (9th Cir. 1949); 1 DAVIS, *op. cit. supra* note 66, § 5.02, at 296; Ginnane, "Rule-Making," "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. PA. L. REV. 621 (1947).

⁶⁷ Ginnane, *supra* note 66, at 630. There is strong support for this analysis in the legislative history. See S. Doc. No. 248, 79th Cong., 2d Sess. 255 (1946).

⁶⁸ House Committee on the Judiciary, *Report on the Administrative Procedure Act Bill*, H.R. REP. NO. 1980, 79th Cong., 2d Sess. 49 n.1 (1946).

⁶⁹ The cases offer an importer making this argument no support. *Willapoint Oysters*,

settlement of present rights, the Secretary seems to qualify as a rule maker.⁷⁰

The main effects of the application of section 4 (rule-making) to the Secretary would be threefold: (1) A "concise general statement" of the "basis" of a rule must be published.⁷¹ This language is ambiguous, but the history makes it clear that this is to be "fully explanatory of the *complete factual* and legal basis" for the rule so that the persons affected will know "the basic justification" for the rules.⁷² This is important for the importer who must know the factual grounding of the Secretary's finding before he can effectively attack it in court or even present rebuttal evidence to support a motion for revocation of the finding. The customary form of the finding gives an importer no indication of what information the Secretary has relied on.⁷³ (2) Section 4 requires the Secretary to make provision for a revocation procedure. Although the Secretary does from time to time revoke a finding in whole or in part, a more formal requirement could make this procedure more effective. (3) The courts have been very hesitant to impose any standards on the Secretary. The APA, on the other hand, requires the courts to exercise some measure of judicial review in order to protect the interests of those affected by administrative action.⁷⁴

In addition to the three points above, there are two other aspects of procedure on which the APA might have some effect. First, the Secretary would be required to receive relevant data

Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949); *George A. Rheman Co. v. United States*, 133 F. Supp. 668 (E.D.S.C. 1955).

⁷⁰ There is a third possibility in addition to rule-making and adjudication: ministerial, non-discretionary action. Ginnane, *supra* note 66, at 634. Although the Secretary comes close to that category with the mathematical computation of fair value, drawing conclusions from relevant data is still a job requiring a degree of discretionary skill.

⁷¹ APA § 4 (b), 60 Stat. 239 (1946), 5 U.S.C. § 1003 (b) (1958).

⁷² S. Doc. No. 248, 79th Cong., 2d Sess. 20, 225 (1946) (emphasis added).

⁷³ None of the operative language of a published finding is omitted in this example. *To Collectors of Customs and Others Concerned:*

After due investigation . . . the United States Tariff Commission . . . notified the Secretary of the Treasury of its determination that the industry manufacturing cast-iron soil pipe in the United States is being, or is likely to be injured, by reason of the importation into the United States of cast-iron soil pipe from the United Kingdom.

. . . I find that cast-iron soil pipe . . . from the United Kingdom is being, or is likely to be, sold in the United States at less than fair value.

David Kendall

Acting Secretary of the Treasury

⁷⁴ APA § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

from interested parties. This is probably not too important, since there is already the practice of receiving information from importers,⁷⁵ and, although section 4 of the APA requires the Secretary to consider such data, there is no way to enforce such a mandate.⁷⁶ Second, the necessity of retroactivity in applying a finding to goods on which appraisements have been withheld in order to make the act effective seems to nullify the requirement of section 4 (c) that a finding be published 30 days before it becomes effective;⁷⁷ but section 4 (c) may mean that the importers would have 30 days in which to try to persuade the Secretary to reconsider before duties are assessed, and during this period, for the first time, they should surely have access to the evidence on which the Secretary relied.

All of the discussion of the procedure of the Secretary and of the applicability of the APA would apply with equal force to the Tariff Commission's determination of injury but for one phrase in section 201 (a) of the act: the Commission is directed to make only "such investigation as it deems necessary."⁷⁸ It thus appears that Congress intended to give the Commission more discretion than it gave the Secretary, since no similar freedom is given the Secretary by the language of the act, and the language pertaining to the Commission was enacted after the passage of the APA. This conclusion is in accord with the customary view of the courts, which has been to grant as much freedom as possible to the Commission, as well as to the Secretary. If the APA does apply to the Commission so that the factual basis of its finding must be disclosed, the Commission would be forced to reveal what it has always treated as confidential information about the profits and production of domestic firms.

V. RELATION OF THE ACT TO CURRENT TRADE POLICY

The twentieth century has seen the executive branch of the federal government develop an American liberal trade policy to

⁷⁵ GATT, ANTI-DUMPING DUTIES 128. This publication contains information submitted by the Secretary concerning the administration of the act. Statutes and administration in other countries are also included.

⁷⁶ *United States v. Morgan*, 313 U.S. 409 (1941), which gives the history of the entire *Morgan* litigation.

⁷⁷ APA § 4 (c), 60 Stat. 239, 5 U.S.C. § 1003 (c) (1958).

⁷⁸ Antidumping Act of 1921, § 201 (a), amended by 60 Stat. 1138 (1954), as amended, 19 U.S.C. § 160 (a) (1958).

an unparalleled extent. Three major manifestations of this trend are shown by participation in the following programs: (1) the Reciprocal Trade Agreements Act, (2) bilateral treaties with an unconditional most-favored-nation clause, and (3) the General Agreement on Tariffs and Trade. All three of these developed after the passage of the Antidumping Act. Two sets of questions must therefore be answered concerning the relation of these programs of executive action to the terms and administration of the act: first, whether there is a conflict between the act and the international obligations assumed subsequent to it; and second, whether these obligations mark such a radical change since 1921 that the aims and methods of the act are no longer consistent with our overall trade and foreign policies.

The Reciprocal Trade Agreements Act

The Reciprocal Trade Agreements Act⁷⁹ does not seem to present any conflict with the Antidumping Act. It gives the President the power to negotiate tariff reductions with other countries, which reductions are then applied generally. This act also provides its own machinery for preventing injury to American industry caused by the reduction of tariff rates, in the form of an escape clause.⁸⁰ The negotiated rate reductions are just that: against the background of other relevant customs laws of both countries, each country bargains for reductions on a quid pro quo basis. It is reasonable to assume that the escape-clause remedy was meant to be exclusive, *i.e.*, after the President has responded to the plight of a domestic industry by raising the rate—either to, above or below its level before the negotiated reduction—a finding of dumping should not be made with regard to merchandise competing with the domestic industry. Since the purchase price for purposes of the Antidumping Act does not include import duties, this is not a necessary interpretation; as a matter of strict logic it is possible that an industry may be so competitively weak that a finding of injury may be made twice. Thus, if a firm is selling in the United States at a dumping price at the time that an escape-clause proceeding raises the duty to the point deemed necessary to protect domestic industry, none of that duty is included in the

⁷⁹ 48 Stat. 943 (1934), as amended, 19 U.S.C. §§ 1351-64 (1958).

⁸⁰ 65 Stat. 73 (1951), as amended, 19 U.S.C. § 1363 (1958).

purchase price; therefore, there is, technically, still dumping. As a matter of reconciling the policies of the two statutes, however, it is doubtful whether such domestic industry deserves, or was intended by Congress to receive, so high a degree of protection.⁸¹ The converse, however, does not follow. Even though a finding of dumping has been made, it is possible that a reduced tariff rate may be found too low to give adequate protection to American industry. The amount of the dumping duty is limited to the statutory differences between purchase price and foreign value, while the President is given extreme flexibility by the Trade Agreements Act, including authority to raise the duty above that which prevailed before the reduction negotiated by the trade agreement.

The Unconditional Most-Favored-Nation Clause in Tariff Treaties

The United States has negotiated many tariff treaties. The provision which is relevant to the act is found in all the treaties, expressly or by implication. It is the unconditional most-favored-nation clause (m.f.n.).⁸² The question, for our purposes, is whether an unconditional m.f.n. clause necessarily outlaws dumping duties as to merchandise brought under the clause, due to the fact that countries not subject to the finding of dumping may sell their goods without paying the dumping duty.

There are two American cases in this general area. The first is *John T. Bill Co. v. United States*.⁸³ In that case a contingent duty

⁸¹ Although the specific exception of goods encompassed by a trade agreement from the flexible tariff might seem to indicate that other statutes, like the Antidumping Act, are to continue in force, the reasons given in the text seem persuasive here, too, *i.e.*, it would contradict the logic of the statutes, passed at different points in our tariff history, to allow any domestic industry that much protection.

⁸² Abbreviated in the literature and hereinafter: m.f.n. Since 1923 the United States policy has been to provide for unconditional m.f.n. treatment. Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958). But even as to treaties dating from before 1923 the terms of such an unconditional clause mean that treaties containing conditional clauses automatically are made unconditional. For the explanation of this fact, see Catudal, *The Most-Favored-Nation Clause and the Courts*, 35 AM. J. INTL. L. 41, 48 (1941).

The clause is typically phrased thus: "Articles . . . shall not be subjected, upon importation . . . [to] higher duties or charges of any kind . . . more burdensome than those to which the like articles . . . of any other foreign country are subject. . . . All the provisions of this agreement providing for most-favored-nation treatment shall be interpreted as meaning that such treatment shall be accorded immediately and unconditionally, without request or compensation." The quotation contains the operative language of articles II (1) and VI of the Trade Agreement with Great Britain, Nov. 17, 1938, 54 Stat. 1897, 1899, 1900, E.A.S. No. 164.

⁸³ 27 C.C.P.A. (Customs) 26, 104 F.2d 67 (1939).

was imposed on German bicycles.⁸⁴ This contingent duty section (since repealed) allows the United States to retaliate against other countries whose tariff rate on bicycles is higher than the American rate; the duty may be raised to equal that of the other country.⁸⁵ The importer argued that the contingent duty was a violation of the United States-German treaty which contained an unconditional m.f.n. clause. It had previously been held that a conditional m.f.n. clause was not a bar to the assessment of a contingent duty,⁸⁶ and the Customs Court found no distinction between the two types of m.f.n. clauses.⁸⁷ In reversing, the Court of Customs and Patent Appeals pointed out that the adoption of the unconditional m.f.n. form in American treaties was a conscious choice designed to substantiate our claim of leadership in promoting trade and to make the m.f.n. clause fully effective.⁸⁸ It went on to hold that the contingent duty provision is totally inconsistent with the pledge of economic non-discrimination made by the unconditional m.f.n. clause, especially since the exceptions to the clause specified by the treaty do not include contingent duties. The reason for this decision is clear. Contingent duties are not imposed to neutralize some artificial impediment to competition, nor do they bear a rational relation to the tariff structure of the importing country; they are based on a factor—the tariff rate of the exporting country—that is no more relevant to the tariff rate of the importing country than other tariff policies of the exporting country. In other words, the penalty-duty is not intended to compensate for inroads on competition, but to retaliate for unrelated irritants.

The reasoning of the *Bill* case does not apply to countervailing duties. In such cases, the government of the exporting country seeks to erode the free competition supposedly guaranteed by both contracting governments in the m.f.n. clause, by granting an export bounty, and to offset that bounty the importing country imposes a countervailing duty. In the second case on the m.f.n. standard, *Balfour, Guthrie & Co. v. United States*,⁸⁹ the *Bill* case was

⁸⁴ The court refers to the duty as "countervailing," but recognizes its error in terminology in *Balfour, Guthrie & Co. v. United States*, 31 C.C.P.A. (Customs) 63, 136 F.2d 1019 (1943).

⁸⁵ Act of June 12, 1934, ch. 474, 48 Stat. 944.

⁸⁶ *Minerva Automobiles, Inc. v. United States*, 25 C.C.P.A. (Customs) 324 (1938).

⁸⁷ *John T. Bill Co. v. United States*, T.D. 48680, 70 TREAS. DEC. 814 (1936).

⁸⁸ Although the point was not argued, the court held the treaty to be self-executing. Catudal, *supra* note 82, at 54.

⁸⁹ 31 C.C.P.A. (Customs) 63, 136 F.2d 1019 (1943).

distinguished on this ground and the countervailing duty was allowed to stand. The case of the dumping duty seems poised between contingent and countervailing duties: it is not unrelated to the present import, but it is not to redress evasion of the m.f.n. standard by the other government. No case has really discussed the subject, but it seems to be assumed that dumping duties are consistent with an unconditional m.f.n. clause.⁹⁰

An argument that dumping duties are in violation of the m.f.n. clause, at least in some instances, can be made: The *Balfour* case rests on an estoppel of a government that grants an export bounty to protest the duty assessed to neutralize that bounty. There is no governmental assistance to a producer who exports at a dumping price, and therefore the antidumping duty cannot be a means of retaliating against a government which has itself violated the m.f.n. standard. Like the producer who is made liable for a contingent duty, the producer subject to a dumping duty is merely competing in a way that he anticipates will be successful. The only difference, and thus the only reason that a dumping duty may be justified, is that the importing country has categorized his price as "unfair." It must be remembered, though, that the unconditional m.f.n. clause is an absolute guarantee that the importing country will, under no circumstances (except for countervailing duties, for the reasons above) exact higher duties from this country than from another. In other words, strict neutrality is imposed on the importing country as between importers. The compatibility of a dumping duty with the m.f.n. standard turns on whether the dumping is really "unfair." It seems reasonable to say that dumping caused by an honest effort to meet competition in the importing country is not so "unfair" that it should be allowed to be condemned when there is such a m.f.n. clause; as in the contingent duty situation, the penalty is not tailored to the offense—there is, in fact, no offense. This is a further argument for the competitive-price theory that defines fair value in such a way as to exclude from findings of dumping sales at prices pegged to meet competition.

Whether this argument would be accepted is doubtful. The Secretary has given no indication that fair value will be redefined.

⁹⁰ H.R. REP. NO. 1000, 73d Cong., 2d Sess. 17 (1934); Schwarzenberger, *The Most-Favored-Nation Standard in British State Practice*, 22 BRIT. YB. INT'L L. 114 (1945).

And the courts have not been concerned with arguments this complex.⁹¹

The General Agreement on Tariffs and Trade

A final inquiry into the act's compatibility with present American trade policy concerns the General Agreement on Tariffs and Trade (GATT).⁹² Since GATT has a provision authorizing the levying of dumping duties, the task here is to see if the American act and the GATT provision conflict. Article VI of GATT is very similar to the act.⁹³ It allows an importing country to levy a dumping duty on the difference between "normal value" (home consumption price, price to third countries, or cost of production) and the purchase price, provided there is "material injury" to a domestic industry. The only critical difference is that article VI requires a finding of "material injury," while the act demands only a finding of "injury." Since the definition of neither term is precise, this divergence in wording would not seem important. Some countries have an even less strict requirement of injury than the United States: Australia, for example, requires only a "detriment" to a domestic industry, and Canada only that 10 percent of the class of goods be produced domestically.⁹⁴ In view of this disparity in terminology, and the fact that only one country (Sweden) specifies "material injury,"⁹⁵ it would be pedantic to say that a minor semantic difference means that a country's statute violates article VI. The Department of State has taken this position and has stated that the difference in wording is permissible.⁹⁶

Consistency With National Trade Policy

Although it is important to be sure that the act does not, in terms, conflict with our international commitments, an equally important question is whether the administration of the act con-

⁹¹ In the *Bill* and *Balfour* cases, for example, there is practically no discussion of *why* contingent duties are, and countervailing duties are not, in violation of the unconditional m.f.n. standard.

⁹² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700.

⁹³ A helpful booklet on antidumping statutes in other countries and the GATT provision in article VI is published by GATT. GATT, ANTI-DUMPING DUTIES.

⁹⁴ *Id.* at 17.

⁹⁵ *Ibid.*

⁹⁶ *House Hearings* 85.

flicts with the basic trade policy manifested by those commitments. Of course, the act is not as glaring an example of protectionism as the flexible tariff or the retention of some of the high rates of duty of the Smoot-Hawley Tariff. But the question remains whether the degree to which trade is curtailed by the act is desirable for a great trading nation.

Between 1934 and 1956 there were 198 cases processed by the Secretary, under the Anti-dumping Act. Only eight, or four percent, resulted in findings of dumping.⁹⁷ But the disruption to the normal channels of trade cannot be computed. Few importers would be so rash as to continue buying while a dumping investigation was in progress, since their total costs cannot be known until they learn whether a dumping duty is payable. The curtailing of trade by the act must be measured by the number of investigations, not by the number of affirmative findings that dumping exists and is injuring a domestic industry. And the amount of unjustifiable interference with trade must be measured by the number of investigations which result in no finding. Naturally, there will be some negative investigations, but the fact that only one investigation in twenty-five has resulted in a finding of dumping suggests that there are basic defects in the administration of the act.

The reinterpretations of fair value and injury advocated above are directed toward the discouragement or quick dismissal of complaints that today are likely to proceed to a full investigation. The position implicit throughout this discussion is that there should be a presumption in favor of an uninterrupted flow of trade. Such a position would be fully consistent with our international trade obligations which have been developing for the past several decades. And even if our trade policy did not indicate the efficacy of such a presumption, surely the experience under the act has shown such a presumption to be justified, since over ninety percent of the complaints have been dismissed.

There are also other ways in which the administration of the act could be tightened to protect importers, while not preventing findings of dumping when such findings are justified. The regulations provide for a preliminary investigation to determine whether a complaint has "reasonable grounds" to support it.⁹⁸ This

⁹⁷ GATT, ANTI-DUMPING DUTIES 129.

⁹⁸ 19 C.F.R. § 14.6 (d) (1961), T.D. 55118, 95 TREAS. DEC. 229 (1960).

is necessary, says the Treasury, "since price data and conditions of sale in the foreign market are not usually available" to domestic producers.⁹⁹ In view of the percentage of complaints which pass the preliminary stage and result in no finding, the "reasonable grounds" standard apparently has not been too rigorously applied. In effect, the Treasury gives a domestic producer a free shot at his foreign competition—at the least he can cut down import competition during the period of the investigation since importers will stop buying while appraisements are withheld. The solution, although it may seem hard on the domestic producer, may be to require a complaint to include solid evidence that it is not merely shooting in the dark.

That domestic producers do in fact enter complaints of dumping based on no more than anger over foreign competition seems clear. In 1919 the Tariff Commission made a study of dumping. It received allegations of dumping from 146 domestic producers and trade associations and on investigation found only twenty-three to be actual cases of dumping.¹⁰⁰ The Commission concluded that domestic producers "evidence a tendency to complain indiscriminately . . . of every form of successful foreign competition."¹⁰¹ This tendency seems to be a natural one. During recent periods, for example, Australia rejected 101 of 110 complaints (92%) and South Africa rejected 211 of 240 complaints (88%).¹⁰²

As a method of favoring the resumption of trade after a finding has issued, it has been suggested that the finding apply only to the firms that are actually dumping, not to the entire industry of a country.¹⁰³ The Secretary has apparently recognized the validity of such an approach by publishing periodic withdrawals of the finding on Swedish hardboard as to specific Swedish producers,¹⁰⁴ and recently by restricting the finding in the Belgian cement case;¹⁰⁵ but the findings in other cases are still phrased to apply to an entire industry of a country. If the presumption in

⁹⁹ GATT, ANTI-DUMPING DUTIES 127.

¹⁰⁰ U.S. TARIFF COMMISSION, DUMPING AND UNFAIR COMPETITION 12-13 (1919).

¹⁰¹ *Id.* at 18.

¹⁰² GATT, ANTI-DUMPING DUTIES 14.

¹⁰³ Testimony by the respected student of trade policy, George Bronz, *House Hearings* 385-87.

¹⁰⁴ T.D. 54168, 91 TREAS. DEC. 305 (1956); T.D. 54199, 91 TREAS. DEC. 338 (1956); T.D. 55006, 94 TREAS. DEC. 602 (1959); T.D. 55019, 95 TREAS. DEC. 9 (1959); T.D. 55115, 95 TREAS. DEC. 225 (1960).

¹⁰⁵ 26 Fed. Reg. 5102 (1961).

favor of trade, rather than of dumping, prevailed, the burden would be on the Secretary (and thus on the domestic producers) to show that specific foreign producers should come within a finding, not on the importer to show that his vendor has done nothing wrong. The form of the finding¹⁰⁶ would be altered to provide for the naming of specific foreign firms. No evidence has been found to support the Secretary's assumption that dumping by one foreign firm is reason to suspect other firms of the same industry and country of dumping: the Swedish hardboard experience seems to indicate that the opposite is true.

Perhaps the most unfortunate aspect of the act is its lack of a mechanism to bring it within the framework of our larger trade and foreign policies. Unlike the escape clause, there is no presidential review. The advantage of submission to the President before publishing a finding would be twofold: the President could subordinate a finding of dumping to total policy, and he could neutralize the protectionist amendments which Congress has added to the act in deference to domestic pressures.¹⁰⁷

There are at least four types of cases in which a presidential review of a finding of dumping would be valuable. *First*, when the goods are exported by an ally whose good will we cultivate. The President might be advised by the State Department that prospective concessions in trade or other areas are more valuable to the country than the finding of dumping in this particular case. *Second*, where there is an overriding national policy. Assume that the Tariff Commission made a finding of injury to an industry located in a chronically depressed area, and the national policy concerning that area was to offer inducements to relocation of the work force. Shutting off import competition might result in a temporary revival of the injured industry, to the short-term advantage but long-term disadvantage of the area and of national planning.

Third, in the case of countries which depend heavily on American purchases for their economic viability. The example above of American concern for the Bolivian tin industry points up the fact

¹⁰⁶ Note 73 *supra*.

¹⁰⁷ It is this presidential review which, in the opinion of one commentator, has prevented the escape clause from all but nullifying the advantages of the Trade Agreements Act. Gardner, *Organizing World Trade—A Challenge for American Lawyers*, 12 RECORD OF N.Y.C.B.A. 202, 219 (1957).

that our foreign policy is closely tied to trade policy, especially in our relations with countries which rely heavily on the export of one or two commodities. It is here that an indirect injury due to dumping (*i.e.*, where the industry of a third country is injured by sales at a dumping price to the United States) may be prevented. In view of the considerations involved, it would be unwise to vest ultimate authority for this kind of finding in officials of the Treasury and Tariff Commission, none of whom are in a position to gauge the overall effects of the finding on our total policy. Article VI of GATT contains an exception for just such a case; it allows the contracting parties (acting jointly) to waive the requirement of material injury to a domestic industry if an industry of another contracting party is materially injured.¹⁰⁸ Presumably, in cases serious enough for the United States to impose a dumping duty even though no domestic industry is injured, the assent of the contracting parties would be forthcoming. If the exporting country were not a member of GATT, approval by the contracting parties would be unnecessary. For these purposes, it is relevant to note that Czechoslovakia is the only member of the Communist bloc belonging to GATT.

Fourth, in our trade relations with underdeveloped countries. As these countries begin to produce more manufactured goods, they will seek foreign markets, as has India with her cotton goods. The economist Gunnar Myrdal points out that for the economically advanced countries to prevent the importation of such goods would be unsound from the viewpoints of an international division of labor and instilling a spirit of enterprise into the developing economies.¹⁰⁹ He predicts that these countries will press for a redefinition of dumping which will insist on the distinction "between, say, an international industrial cartel lowering temporarily its prices in a particular country long enough to liquidate sprouting competitors and a poor country . . ." which tries to break into difficult markets.¹¹⁰ If the Secretary refuses to define fair value in a way to permit some differentiation along these lines, then giving the President power to prevent the frustration of American foreign policy by preventing the raising of trade barriers in cases

¹⁰⁸ GATT, ANTI-DUMPING DUTIES 164.

¹⁰⁹ MYRDAL, AN INTERNATIONAL ECONOMY 257 (1956).

¹¹⁰ *Id.* at 258.

where the developing country is trying honestly to compete seems advisable.¹¹¹

VI. CONCLUSION

In the introduction to this article the act is described as having been intended to establish a policy of neutrality as between domestic producers and their import competition. The administrative interpretations since passage in 1921 illustrate the difficulties involved in maintaining such a policy. It would seem that these interpretations have swung the balance in favor of domestic complainants. The courts have been reluctant to exercise significant control over the Treasury or Tariff Commission, even where decisions have seemed questionable. As a result, there has been a good deal of agitation for legislative amendments. But while there have been numerous congressional hearings during the past ten years, the resulting amendments have been peripheral to the governing concepts of the act. Thus it would seem that remedial legislation or regulations would be desirable.

The above discussion is concerned with suggestions for modifications in the administration of the act which would help to achieve the desired neutrality. The principal modification would be a reformulation of the concept of "fair value" to correspond with the competitive-price theory. This would allow competitive trade and discourage harassing complaints by domestic producers. Also important, to prevent the soil-pipe decision from becoming a precedent for future decisions, would be broad definitions of the "industry" injured by import competition and of the requisite degree of "injury" necessary to warrant protection for such an industry. The procedural protection of the APA and the presumption favorable to continued trade rather than of dumping would be further steps toward the neutrality envisaged by the framers of the act. And the extension of presidential review to findings would be some assurance that the interests of neither importers nor domestic manufacturers will be given undue consideration.

If this discussion has a central thesis, it is that the importer is entitled to an even chance to compete with the domestic producer.

¹¹¹ "A reduction of our trade barriers . . . can be of greater benefit to other countries than all the much-advertised grants, loans and technical aid." Statement of Professor Jacob Viner, quoted in MYRDAL, *op. cit. supra* note 109, at 290.

This position is supported by elemental notions of fairness, as well as by a desire to preserve normal channels of trade and the good will of other trading nations, especially at a time when many of these nations are forming trading blocs with potentially high external tariffs and import controls. There is no accurate means of gauging the amount of potential dumping discouraged by the existence of the act, but the widespread acceptance of its basic mechanism by most trading nations indicates that it is probably effective. By incorporation of the suggested modifications, the act could retain its effectiveness, while at the same time protecting the importer.