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A. Paul Victor

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## UNITED STATES ANTIDUMPING RULES\*

A. PAUL VICTOR\*\*

### INTRODUCTION

Antidumping laws in the United States have come of age. After almost sixty years of slumber, these laws are being invoked with increasing frequency by many domestic industries in their fight to cope with growing competition from abroad. Indeed, today it is common to read in the nation's press about "dumping" cases covering all types of merchandise—from fungible goods, such as chemicals and steel, to widely used consumer products, including automobiles and television sets.

The purpose of this article is to examine, generally, the underlying statutes and regulations governing the problem of "dumping." In essence, this examination requires inquiry into the two provisions of the United States Code that control this subject—the almost unheard of Revenue Act of 1916 (1916 [Antidumping] Act)<sup>1</sup> and the more well known Antidumping Act of 1921 (1921 Act).<sup>2</sup> For reasons which will become obvious, the bulk of this article will focus on the 1921 Act.

At the outset, a definition of "dumping" is essential. It should be noted that concerns over "dumping" go back to at least the Middle Ages, with fears raised over all types of potential "dumping" practices, such as sporadic, one-shot, and predatory "dumping" prac-

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\* A. Paul Victor, 1978. All rights reserved. This article is adapted from a speech given by Mr. Victor at several World Trade Institute programs on legal problems involving international trade. The author is grateful for the assistance of Alan L. Langus in preparing the article for publication.

\*\* B.B.A., University of Michigan (1960); J.D., with distinction, University of Michigan Law School (1963); Partner, Weil, Gotshal & Manges, New York, New York.

1. 15 U.S.C. § 72 (1970).

2. 19 U.S.C. §§ 160-171 (1970), as amended by The Trade Act of 1974, Pub. L. No. 93-618, Title III, § 321(a), 88 Stat. 2043.

tices.<sup>3</sup> "Dumping" simply refers to the practice of "price-discrimination between . . . national markets,"<sup>4</sup> and, more particularly, "the practice of selling goods in an export market at prices below those prevailing in the home market."<sup>5</sup> But even if such sales exist, they are not condemnable standing alone. They must produce the requisite *injury* in the export market before a sanction will be imposed.<sup>6</sup>

### THE REVENUE ACT OF 1916

Antidumping legislation in the United States commenced with the Revenue Act of 1916.<sup>7</sup> At the time it was enacted, there was widespread fear that when World War I ended, the United States' infant war industries would be wiped out by foreign cartels using stockpiled merchandise which the Europeans had been unable to sell because of the diversion of shipping to noncommercial channels.<sup>8</sup> There was a concern that fledgling American industries would be snuffed out by their stronger foreign counterparts when peace was once again established.<sup>9</sup>

The key provisions of this Act, more commonly referred to as the Antidumping Act of 1916, make it a *crime*

for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States . . . .<sup>10</sup>

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3. FEDERAL TRADE COMMISSION, ANTIDUMPING LEGISLATION IN THE UNITED STATES AND OTHER FOREIGN COUNTRIES, S. DOC. NO. 112, 73d Cong., 2d Sess. 1, 2 (1934).

4. J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 4 (1966).

5. Barceló, *Antidumping Laws as Barriers to Trade — The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 494 (1972).

6. See 15 U.S.C. § 72 (1970); 19 U.S.C. § 160(a) (Supp. V 1975).

7. 15 U.S.C. § 72 (1970).

8. Marks, *United States Antidumping Laws—A Government Overview*, 43 ANTITRUST L.J. 580, 581 (1974).

9. A specific inducement for the enactment of the 1916 Act was the purposeful assault by the "German dye monopoly" on the burgeoning American dye industry. See W. CULBERTSON, *COMMERCIAL POLICY IN WAR TIME AND AFTER* 39-40 (1919).

10. 15 U.S.C. § 72 (1970). This antidumping clause was the subject of intense partisan

Liability, however, is expressly conditioned on the acts being "done with the *intent* of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."<sup>11</sup> In other words, only intentional, predatory dumping is condemned under this Act, not technical dumping done unintentionally without the specific intent of achieving one of the prohibited goals mentioned in the Act. The Act condemns conduct by individual companies as well as combinations or conspiracies to "dump."<sup>12</sup> In addition to the availability of criminal sanctions, the Act also permits suits by private parties for treble damages and attorney's fees if they can establish an injury caused by a violation of the Act.<sup>13</sup>

The 1916 Act has been an extremely obscure law. In its sixty-two year history, the government has *never* brought a case under it. Indeed, until just recently, there was only one reported decision of a private action, and that case involved a discovery question.<sup>14</sup> It was not until 1975, in cases involving Japanese television manufacturers who were sued for alleged 1916 Act violations, that a court first analyzed the Act and upheld its constitutionality against a challenge that it was void for vagueness.<sup>15</sup> Today, despite its past obscurity, more and more companies are becoming aware of its existence and instituting lawsuits seeking treble damages against foreign competitors for alleged predatory "dumping."<sup>16</sup> Nevertheless,

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congressional debate between the forces of freer trade and those of protectionism. See 53 CONG. REC. 13,080 (1916) (remarks of Senator Penrose). The debate helps explain why the Wilson Administration chose a criminal statute to deal with "dumping" instead of recommending the imposition of dumping duties. See 53 CONG. REC. 10,619 (1916) (remarks of Mr. Switzer).

11. 15 U.S.C. § 72 (1970) (emphasis added).

12. *Id.*

13. *Id.*

14. See *H. Wagner & Adler Co. v. Mali*, 74 F.2d 666, 669-70 (2d Cir. 1935).

15. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 251, 256 (E.D. Pa. 1975). The author represents some of the defendants in that action.

16. See, e.g., *Smokey's of Tulsa, Inc. v. American Honda Motor Co.*, No. 77-309-C (E.D. Okla. July 7, 1978) (dismissed for lack of jurisdiction over defendant Honda Motor Co., still pending as to American Honda Motor Co.) (involving imports of motorcycles and parts thereof from Japan); *Superior Coal Co. v. Ruhrkohle A.G.*, No. 78-51 (E.D. Pa., filed Jan. 6, 1978) (involving imports of coke products from Germany allegedly with the intent of destroying or injuring the anthracite coal and independent commercial coke industries in the United States); *G.O. Carlson, Inc. v. Avesta Jernverks, AB*, No. 76-1257 (E.D. Pa. March 29, 1977) (dismissed with prejudice) (involving imports of stainless steel plate from Sweden).

the Revenue Act of 1916 remains a curious statute, which has yet to be tested.

### THE ANTIDUMPING ACT OF 1921

Perhaps the lack of activity under the 1916 Act was predictable from the fact that only five years later, in 1921, Congress passed an entirely new statute to deal with "dumping."<sup>17</sup> This Act took a completely different approach from that of its predecessor—it provided for *administrative* rather than *judicial* proceedings by the government *alone* to determine the existence of any "dumping" sales.<sup>18</sup> If they existed, the Act then provided for imposition of an additional duty in the amount of the "dumping" margin on all future shipments.<sup>19</sup> In contrast to the 1916 Act, the 1921 Act did not require a showing of an *intent* to "dump" and injure a domestic industry.<sup>20</sup>

Proceedings under the 1921 Act in its most recent form include first, a Treasury Department determination as to whether any Less Than Fair Value (LTFV) sales have taken place,<sup>21</sup> and second, if such sales have occurred, a determination by the International Trade Commission (ITC) as to whether the requisite injury or likelihood thereof exists as a consequence of such sales.<sup>22</sup> If both questions are answered affirmatively, a Dumping Finding will be issued, and all imports since the date of Withholding of Appraisement are at risk for the imposition of possible dumping duties.<sup>23</sup>

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17. See 19 U.S.C. §§ 160-171 (1970 & Supp. V 1975).

18. *Id.* § 160 (Supp. V 1975).

19. *Id.* § 161 (1970). A dumping margin is the amount by which the adjusted foreign market value exceeds either purchase price or exporter's sales price, whichever is applicable under the Act. Where a "dumping" margin is determined to exist a duty in the amount of the margin is imposed on the merchandise in addition to regular duties.

20. Compare *id.* § 160 (Supp. V 1975) with 15 U.S.C. § 72 (1970).

21. 19 U.S.C. § 160 (Supp. V 1975).

22. *Id.* Under the original 1921 Antidumping Act both the determination of LTFV sales and injury were made by the Secretary of the Treasury. The authority to determine injury was transferred from the Secretary of the Treasury to the Tariff Commission (now the ITC) by a 1954 amendment. See 68 Stat. 1138.

23. 19 U.S.C. § 160 (Supp. V 1975). The statute permits the assessment of special dumping duties on merchandise "entered or withdrawn from warehouse for consumption" up to one hundred and twenty days "before the question of dumping was raised." *Id.* § 161(a) (1970). However, by regulation and practice, such assessments are generally imposed only on unappraised entries after the effective date of a Withholding of Appraisement Notice. 19 C.F.R. § 153.53(a) (1977). For an explanation of "Withholding of Appraisement Notice" see page 228 *infra*.

*How an Antidumping Proceeding Is Instituted*

A proceeding under the 1921 Act commences when any person, either within or without the Customs Service, submits information to the Commissioner of Customs regarding alleged violations.<sup>24</sup> The complaint must include the name of the petitioner; the percentage of total domestic production, sales, and employment represented by the petitioner; a detailed description of the imported merchandise; a sample of the merchandise, upon request; the tariff classification; the name of the country of export; the ports of entry; the names of known foreign manufacturers, producers, or exporters; and relevant price information.<sup>25</sup> Additionally, some information demonstrating injury is required.<sup>26</sup> In short, a complainant must do his homework, both at home and abroad, or an antidumping proceeding may not be instituted by the government.<sup>27</sup>

After a satisfactory complaint is received, the Commissioner of Customs conducts a preliminary investigation which must be completed within thirty days.<sup>28</sup> If the Commissioner decides that the information in the complaint is erroneous, or that the merchandise is not being imported or not likely to be imported in more than insignificant quantities, or for any other reason, he may advise the person who submitted the information that further investigation is not warranted and close the case.<sup>29</sup> If the Commissioner decides that a full scale proceeding should be initiated, however, he makes a recommendation to the Secretary of the Treasury who, if he agrees, will publish an Antidumping Proceeding Notice in the *Federal Register* officially launching the proceeding.<sup>30</sup>

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24. 19 C.F.R. § 153.25 (1977) deals with information submitted by persons within the Service, while information supplied by outside individuals is covered by 19 C.F.R. § 153.26 (1977).

25. 19 C.F.R. § 153.27 (1977). The price information must include the home market price of such or similar merchandise, or if that is not available, the price from the country of exportation to a third country, as well as the export price to the United States, or the first price to unrelated purchasers in the United States if the importer is related to the exporter. *Id.*

26. *Id.* This information should include data regarding domestic production, sales, and prices; the profitability, capacity utilization, and capital investment of the firm and industry; the volume and value of all imports; the market share of the alleged LTFV imports and the effect of the alleged LTFV sales; unemployment statistics; and the names and addresses of producers in the United States. *Id.*

27. *See id.* § 153.28.

28. 19 U.S.C. § 160(c)(1) (Supp. V 1975); 19 C.F.R. § 153.29 (1977).

29. 19 U.S.C. § 160(c)(1) (Supp. V 1975); 19 C.F.R. § 153.29 (1977).

30. 19 U.S.C. § 160(c)(2) (Supp. V 1975). All notices and determinations in antidumping

The Notice describes the merchandise involved, summarizes the information received, and states that the injury criterion also seems to be satisfied.<sup>31</sup> If there is any substantial doubt as to whether the requisite injury is being caused by the alleged LTFV sales, the Secretary can immediately transfer the case to the ITC, which has thirty days to decide if there is "no reasonable indication" of injury.<sup>32</sup> If the ITC so decides, the case is over.<sup>33</sup> The purpose of this "summary" proceeding is to avoid a more lengthy, expensive, and potentially trade disruptive antidumping proceeding if there ultimately will be no Dumping Finding because the injury requirement will not be met despite the presence of LTFV sales.<sup>34</sup>

From an analysis of the thirteen cases in which the "summary" proceeding has been used thus far, it appears that the ITC will be reluctant to abort a "dumping" proceeding on the basis of "no reasonable indication" of injury since it will ordinarily be able to obtain only a limited quantum of evidence and data on which to base its judgment in the thirty day statutory period it has to complete its investigation.<sup>35</sup> In only four cases have antidumping proceedings been terminated at this stage.<sup>36</sup>

### *The LTFV Phase*

During the LTFV stage of a "dumping" case, the Customs Service and Treasury Department seek to determine if technical dumping sales have actually been made. Shortly after an Antidumping Proceeding Notice is published, the Customs Service commences a full-scale investigation by sending questionnaires to all known foreign manufacturers and related importers of the class or kind of mer-

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proceedings are published in the *Federal Register* under the Customs Service or Treasury Department headings for the LTFV phase, and under the International Trade Commission heading for the Injury phase. 19 C.F.R. § 153.30 (1977).

31. 19 C.F.R. § 153.30 (1977).

32. *Id.* § 153.29(b).

33. 19 U.S.C. § 160(c)(2) (Supp. V 1975).

34. COMMITTEE ON FINANCE, TRADE REFORM ACT OF 1974, S. REP. NO. 93-1298, 93d Cong., 2d Sess. 1, 170-71, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7308.

35. See, e.g., Methyl Alcohol From Canada, 43 Fed. Reg. 30,366, 30,367-68 (1978); Impression Fabric of Manmade Fiber from Japan, 42 Fed. Reg. 19,934, 19,934 (1977) (corrected in 42 Fed. Reg. 22,206); Butadiene Acrylonitrile Rubber From Japan, 40 Fed. Reg. 18,618, 18,619 (1975).

36. Photographic Color Paper From Japan and West Germany, 43 Fed. Reg. 16,554, 16,554 (1978); Uncoated Free Sheet Offset Paper From Canada, 43 Fed. Reg. 12,389, 12,389 (1978); Methyl Alcohol From Brazil, 42 Fed. Reg. 55,950, 55,950 (1977); Multimetal Lithographic Plates From Mexico, 41 Fed. Reg. 21,702, 21,704 (1976).

chandise in question from the country involved.<sup>37</sup> The investigations are always nationwide; however, if one or two exporters represent the bulk of the exports, the Service may only focus on their sales. The purpose of the questionnaires is to obtain information on which to base a determination whether LTFV sales exist.<sup>38</sup> Recipients of questionnaires are given thirty days in which to respond, although it is usually possible to obtain some additional time. The questionnaires seek information, necessary for determining whether there have been LTFV sales, for a designated time period—usually the prior six months or one year—known as the “period of investigation.”<sup>39</sup> The questionnaires also inquire into the relationship, if any, between the foreign manufacturer and the United States importer.

Information about the relationship between exporters and importers is essential for determining which *method* of price comparison is to be used in ascertaining whether LTFV sales exist: whether “fair value” (FV)<sup>40</sup> is to be compared with *exporter's sales price* (ESP) or *purchase price* (PP).<sup>41</sup> Since it is the purpose of the statute to ensure that injurious discriminatory pricing cannot be achieved through subterfuge or by arrangements between related companies,<sup>42</sup> the law seeks to determine the existence of technical “dumping” by reference to *arm's length transactions*. Thus, where an exporter sells to an unrelated importer, the “purchase price” is

37. 19 C.F.R. § 153.31 (1977).

38. *See id.* § 153.31(a).

39. *See id.* § 153.31(b). The data sought includes information concerning comparable merchandise sold in the home market, to third countries, and to the United States; unit selling prices; the costs incident to bringing the merchandise from the country of export to the United States; all expenses related to the sale of the merchandise in the United States and the country of export; commissions; rebates; discounts; and taxes.

40. “Fair value” is mentioned only once in the statute. *See* 19 U.S.C. § 160(a) (Supp. V 1975). In order to determine its meaning it is imperative to consult the Antidumping Regulations where the various methods of determining FV are set forth in their preferred order. *See* 19 C.F.R. §§ 153.2-6 (1977). As a matter of practice, FV has been defined in much the same way as adjusted “foreign market value” (FMV) under 19 U.S.C. §§ 161, 164 (Supp. V 1975). The Customs Service has treated FV and FMV as synonymous although there is nothing in the regulations specifically making the provisions dealing with FV applicable to the FMV phase of a “dumping” proceeding.

41. Basically, exporter's sales price is the price at which imported merchandise “is sold or agreed to be sold in the United States, before or after the time of importation” after certain adjustments to that price are made. 19 U.S.C. § 163 (Supp. V 1975). Purchase price of imported merchandise is “the price at which such merchandise has been purchased, or agreed to be purchased, prior to the time of exportation,” again, after specifically stated adjustments. 19 U.S.C. § 162 (Supp. V 1975).

42. Whether an importer and exporter are related within the meaning of the 1921 Act is governed by 19 U.S.C. § 166 (1970).



used to determine the domestic price.<sup>43</sup> But where the domestic importer is related to the exporter, the "exporter's sales price" is used. The use of ESP is an attempt to make foreign price comparisons based upon the first resale price in the United States to an unrelated purchaser.<sup>44</sup>

In short, the relationship between importer and exporter controls whether ESP or PP is used. Furthermore, this factor can have an important practical impact on the outcome of price comparisons because, unless there are sales to the same type of customer in the home market as in the United States, it is generally less favorable to compare PP with fair value of home market merchandise since the adjustments allowed to determine the *net ex-factory home market price* are fewer, or more restrictive, when PP is used.<sup>45</sup> For example, although an adjustment for warehouse expenses in the home market can be made in determining "fair value" when it is being compared with ESP, the Service will not allow such an adjustment when PP is used as the basis for the import price because PP does not take into account any of what the Service deems to be "overhead" expenses incurred by the domestic company, including warehouse expenses. Thus, the adjusted home market price would be higher when PP is used since warehouse expenses could not be deducted in reaching a net ex-factory price, creating a greater possibility that "dumping" margins will be found.<sup>46</sup>

The most common misconception about what constitutes "dumping" is the belief that it is possible simply to compare the price of, for example, a sewing machine made and sold in Italy with one made in Italy and exported to the United States. *But such a comparison would be inaccurate.* The products may be different; production costs may differ; and sales might be made to unrelated companies in Italy, but the exports made to a related subsidiary in the United States. In addition, the sales may be made to retailers in Italy but only to distributors in the United States. The manufacturer also may be required to absorb additional selling and distributing costs in Italy because of different methods of distribution, customs, and business mores abroad. All of these factors militate

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43. See 19 C.F.R. § 153.13(b)(1977).

44. See *id.*

45. In practice, the Service seeks to compare prices for merchandise sold in both markets at the net ex-factory level since, theoretically, that comparison is most equitable and meaningful.

46. See Round Head Steel Drum Plugs From Japan, 42 Fed. Reg. 14,947, 14,948 (1977).

against a simple initial price comparison and require a detailed technical analysis of the actual costs of doing business in each market.

Recognizing this, both the Act and the regulations envision that the prices being compared should be *adjusted* so that differences in prices resulting from differences in quantities sold, differences in circumstances of sale, and differences in the merchandise being compared can be taken into account.<sup>47</sup> As previously noted, the Service seeks to compare *net ex-factory prices* in "dumping" cases to see if any technical "dumping" margins exist.<sup>48</sup> It deducts from the relevant starting prices in both markets those costs and expenses deemed pertinent to determine net ex-factory prices, and then makes adjustments for cost of production differences before making a final price comparison to see if there has been "dumping."<sup>49</sup> The Service likewise seeks to compare prices at the same level of trade.<sup>50</sup>

The determination as to which deductions are required, allowed, or disallowed from the starting prices gives rise to the greatest disputes between the government and companies involved in anti-dumping proceedings. Those determinations can make the difference between technical "dumping" and sales at or above "fair value." For this reason, it is essential that in answering the government's questionnaires care be taken to ensure that the government is provided with all the information a responding company deems relevant to its *own* method of doing business.<sup>51</sup> The specific questions should be taken merely as the starting point for a full explanation of the company's home market and export transactions, since the objective is to show no LTFV sales in an effort to be *excluded* from any LTFV determination or Dumping Finding which

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47. See 19 U.S.C. § 161 (1970); 19 C.F.R. § 153.9-.11 (1977).

48. See 19 U.S.C. § 161 (1970); 19 C.F.R. § 153.9-.11 (1977).

49. See 19 U.S.C. § 161 (1970); 19 C.F.R. § 153.9-.11 (1977).

50. See 19 C.F.R. § 153.15 (1977).

51. It is in a company's best interest to provide the information. If information is not forthcoming the Service may proceed to use "all reasonable ways and means" to determine or estimate FV or FMV. See 19 U.S.C. § 168 (1970). The regulations also provide that the Service may use the "best information available" if data is not furnished in a "timely fashion" from the respondent company. See 19 C.F.R. § 153.54 (1977). The Service recently employed a "best information available" approach in the case of Television Receiving Sets, Monochrome and Color, From Japan, TD. 71-76 (March 8, 1971), reported in 36 Fed. Reg. 4597 (1971), using the "Japanese Commodity Tax formula" to estimate FMV rather than actual data from the books and records of the companies involved. The Service's action in this case is currently under protest. (The author represents some of the exporters and related company importers in that proceeding.)

may issue on exports from the subject country. The information submitted in responding to questionnaires will be *verified* from the books and records of the responding companies by Customs agents both in the United States and abroad.<sup>52</sup> LTFV sales are deemed to exist if it is determined that the export price, that is ESP or PP, is less than the FV of "such or similar" merchandise in the home market.<sup>53</sup>

As noted above, "fair value" will be calculated much like adjusted "foreign market value."<sup>54</sup> If the sales in the country of export are not sufficiently large to form an adequate basis of comparison, then sales of such or similar merchandise to third countries are used to determine FV or FMV.<sup>55</sup> If there are no home market or third country sales, then the government must *construct* a value for the merchandise. A value is constructed by totaling the sum of the cost of materials, an amount for general expenses and profit, and the cost of all containers and coverings.<sup>56</sup>

In order to reach comparable net ex-factory prices for the domestic and export markets, certain adjustments have to be made. These adjustments are basically of two types—one for the costs involved in bringing the merchandise to the United States, and the other for the costs involved in selling and distributing the merchandise. In the first category, adjustments are made for items such as the cost of packaging and containers, freight, insurance, import duties, and export taxes. These costs are deducted from either ESP or PP if included in the price.<sup>57</sup> In the second category, adjustments are made in both markets for all discounts, rebates, and allowances, as well as for differences in "circumstances of sale" such as credit terms, warranties, servicing, directly related selling, and advertising expenses.<sup>58</sup> Allowable adjustments will vary depending upon whether purchase price or exporter's sales price is being compared with the home market price.<sup>59</sup> When net ex-factory price calcula-

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52. See 19 C.F.R. § 153.31(a) (1977).

53. "Such or similar" merchandise is defined in 19 U.S.C. § 170a(3) (Supp. V 1975).

54. Foreign market value (FMV) is defined as "the price at the time of exportation of such merchandise to the United States at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported . . . for home consumption . . ." 19 U.S.C. § 164 (Supp. V 1975). The adjustments to FMV are provided for in 19 U.S.C. § 161 (Supp. V 1975).

55. *Id.* § 164(b); 19 C.F.R. § 153.3' (1977).

56. "Constructed value" is defined in 19 U.S.C. § 165(a) (1970).

57. 19 U.S.C. §§ 162, 163 (Supp. V 1975).

58. See 19 C.F.R. §§ 153.9-.11 (1977).

59. See text accompanying notes 45-46 *supra* where this variance is noted and illustrated

tions are completed, other adjustments are then factored in to reflect any differences in the merchandise being compared, usually by adjusting the home market price upwards or downwards based upon differences in cost of production (if higher for export, home market price is adjusted upward, and vice versa).

Once these calculations are completed, the adjusted home market price in foreign currency must be converted to a dollar price if the relevant export sale was made in dollars.<sup>60</sup> Ordinarily, the Service will use the exchange rates in effect during the several quarters pertinent to the period of the investigation, with the date of exportation as the determining date if exporter's sales price is used, and the date of the sale or agreement to sell if purchase price is used.<sup>61</sup> In certain instances, however, such as when the daily fluctuations are greater than five per cent, the certified daily exchange rate may be used instead of the quarterly rate.<sup>62</sup> At the LTFV stage, however, if prices vary because of currency fluctuations Treasury will not conclude that LTFV sales exist if the *only* reason for the difference between PP or ESP and "fair value" is the effect of fluctuating exchange rates.<sup>63</sup> In other words, if the facts justify it, LTFV sales will not be found as a result of *brief* exchange rate fluctuations.

The foregoing sets forth the main aspects of the "fair value" stage of a "dumping" proceeding. A few provisions in the recent amendments to the Act, however, at least bear mentioning in considering how "fair value" is determined. For example, a new provision was added in 1975 relating to multinational corporations.<sup>64</sup> If the company in question has facilities located in home country X which produce goods essentially for export to the United States, and facilities in country Y which manufacture in substantial quantity for sale in country Y and for export to the rest of the world, and if the FV is higher in country Y than in country X, it will be deemed inadequate to compare the sales from the facilities in the home country with the sales to the United States since the company sells few of its products from these facilities in country X. The new law provides, essentially, that in such a situation the comparison should be made to sales in

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by an example discussing the different treatment of warehouse expenses depending upon which export price is used.

60. See 19 C.F.R. § 153.57 (1977).

61. See *id.* § 153.52(a).

62. *Id.* § 159.34; see *id.* § 159.35 (determination of certified daily rate).

63. *Id.* § 153.52(b).

64. See 19 U.S.C. § 164(d) (Supp. V 1975).

country Y or from country Y to the rest of the world rather than constructing a value for sales in country X.<sup>65</sup>

Another new provision applies when the Secretary believes that sales in the home market have been made in substantial quantities at less than the cost of production over an extended period of time, and at prices which do not permit the recovery of all costs within a reasonable period of time in the normal course of trade.<sup>66</sup> In such a case those sales in the home market are to be *disregarded*, and the Secretary must either focus on only those home market sales above the cost of production or construct a value for domestic transactions in order to form the appropriate basis of comparison between "foreign" and United States prices.<sup>67</sup>

The Secretary must make a determination whether or not there are LTFV sales, or the likelihood thereof, within six months, or nine months if the case is designated as complicated, after publication of the Antidumping Proceeding Notice.<sup>68</sup> He can then do one of three things. First, if the conclusion is affirmative, the Secretary will issue a Withholding of Appraisal Notice, which suspends appraisal on *all* imports of the subject merchandise thereafter and requires that such imports enter under a bond covering estimated "dumping" duties.<sup>69</sup> All imports after the Withholding of Appraisal, as well as previously unappraised entries, are at risk for possible "dumping" duties if a Dumping Finding ultimately is made. Between the time of a Withholding of Appraisal and a final determination whether LTFV sales exist, there is a further opportunity to demonstrate no such sales, and a "hearing" open to all interested persons is held.<sup>70</sup> As previously noted, the only way a

65. *Id.*

66. *Id.* § 164(b); 19 C.F.R. § 153.5 (1977).

67. 19 U.S.C. § 164(b) (Supp. V 1975); 19 C.F.R. § 153.5 (1977). For a recent case involving application of this provision, see *Welded Stainless Steel Pipe and Tubing From Japan*, 43 Fed. Reg. 17,439 (1978). The Treasury Department has relied upon the sales below cost of production provision in implementing its so-called "trigger" or "reference" price system for steel imports. Under this mechanism, Treasury, through the Customs Service, establishes a reference price for particular imported steel articles based upon the production costs of the world's most efficient producers, currently the Japanese. The system is intended as an early warning device to the Service of possible "dumping." When an article enters the United States at a price which is below the trigger price for that article, Customs seeks an explanation. If a satisfactory explanation is not forthcoming, the Service then institutes a full "dumping" investigation without waiting for a formal complaint. Presently, the system only affects certain steel imports. Its legality has not yet been determined.

68. 19 U.S.C. § 160(b) (Supp. V 1975).

69. *Id.* § 167 (1970); 19 C.F.R. § 153.50 (1977).

70. 19 U.S.C. § 160(d) (Supp. V 1975); 19 C.F.R. § 153.40 (1977).

company can avoid a LTFV determination is to produce evidence to prove that the company made no LTFV sales during the period of investigation. Ordinarily, evidence is required regarding all of its exports during that period; in exceptional cases, however, as little as seventy-five per cent of its sales may suffice.<sup>71</sup> If an LTFV finding is made, it applies nationwide, and all companies exporting the relevant products from the country in question are caught in its grasp,<sup>72</sup> unless they have shown that they properly should be excluded from the finding.

Second, if the Secretary concludes that no LTFV sales are apparent, a Tentative Negative Determination will be issued, with the opportunity for interested persons to make known their views in the three months allowed before a *final* determination must be made.<sup>73</sup> Finally, if the Secretary concludes that: (1) dumping margins are minimal in relation to the volume of exports, price revisions have been made, and assurances of no future LTFV sales have been received; (2) sales to the United States have stopped and will not be resumed; or (3) other circumstances exist which make it inappropriate to continue the investigation, he can publish a Notice of Tentative Discontinuance of the antidumping case.<sup>74</sup>

### *The Injury Phase*

If the Secretary makes a final determination that LTFV sales existed during the period of investigation, the case is immediately sent to the ITC, which then has three months to decide "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 [the LTFV] merchandise into the United States."<sup>75</sup> One of the first questions the ITC must decide is the appropriate definition of an "industry." As a general rule, an industry includes all domestic producers of the product in question, although in some cases the ITC has looked only to a "competitive market area," especially where the product is heavy and of low value or where an industry is concentrated in a particular region of the country.<sup>76</sup>

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71. 19 C.F.R. § 153.38 (1977).

72. *See id.*

73. *Id.* § 153.34.

74. *Id.* § 153.33.

75. 19 U.S.C. § 160(a) (Supp. V 1975).

76. *See Ellis K. Orlowitz Co. v. United States*, 50 C.C.P.A. 36, 39-41 (1963).

The factors considered by the ITC as indicia of injury include price depression or disruption, market penetration of imports, domestic company profitability, and customer loss. Other criteria examined include idle domestic capacity, domestic unemployment, the margin of dumping, and the capacity of the exporter to maintain sales at less than fair value.<sup>77</sup> The ITC gathers information regarding these indicia from responses to questionnaires it sends out,<sup>78</sup> from hearings where testimony is elicited and data presented,<sup>79</sup> and from its own previously collected studies and data.

In order to find the requisite injury, as measured by these factors, the injury must be more than *de minimis*, but sometimes even a small market penetration can be sufficient.<sup>80</sup> In this connection, it should be noted that when assessing injury, the ITC has aggregated the effect of LTFV imports not only in terms of all the exporters in a country, but also in terms of all countries involved in the proceeding.<sup>81</sup> The same indicia of injury are used to determine the existence of a *likelihood* of injury except, of course, the ITC must look to the future and decide if the potential injury seems probable.<sup>82</sup> There are only a few cases where the Commission has found likelihood of injury.<sup>83</sup> No cases have been discovered where the Commission found injury because an industry was prevented from being established.<sup>84</sup> Of course, a Dumping Finding may be issued only if the ITC finds that the injury was "by reason of the importation of" the

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77. See, e.g., Carbon Steel Plate From Japan, 43 Fed. Reg. 17,410, 17,410-11 (1978); Pressure Sensitive Plastic Tape From Italy, 42 Fed. Reg. 44,853, 44,854 (1977); Melamine in Crystal Form From Japan, 41 Fed. Reg. 56,865, 56,866-67 (1976) (affirmative determination of Vice-Chairman Parker and Commissioners Moore and Bedell). In *Melamine* three Commissioners also voted *against* an affirmative injury determination. Nevertheless, an injury determination resulted since, by statute, "the Commission shall be deemed to have made an affirmative determination if the Commissioners of the Commission voting are evenly divided . . . ." 19 U.S.C. § 160(a) (Supp. V 1975).

78. 19 C.F.R. § 201.9 (1977).

79. *Id.* §§ 201.11, 208.4.

80. See Whole Dried Eggs From Holland, 35 Fed. Reg. 12,500, 12,501 (1970).

81. See *City Lumber Co. v. United States*, 457 F.2d 991, 996 (C.C.P.A. 1972); Portland Gray Cement From Portugal, 26 Fed. Reg. 10,010, 10,011-12 (1961).

82. See Impression Fabric of Manmade Fiber From Japan, 43 Fed. Reg. 14,143, 14,144-46 (1978); Metal-Walled Above-Ground Swimming Pools From Japan, 42 Fed. Reg. 35,231, 35,233 (1977).

83. See cases cited note 81 *supra*.

84. See 19 U.S.C. § 160(a) (Supp. V 1975). In *Regenerative Blower/Pumps From West Germany*, 39 Fed. Reg. 18,814 (1974), the "prevention of establishment" issue was considered for the first time by the Commission. In a 3-1 decision, the Commission made a negative determination. *Id.* at 18,814 n.1. It did so again, unanimously, in *Sorbates From Japan*, 43 Fed. Reg. 42,313, 42,314 (1978).

LTFV merchandise.<sup>85</sup> It is essential to establish *causation*, although “dumping” need not be the sole or even predominant cause of injury under the 1921 Act. As for *motive*, intent has no bearing on 1921 Act injury determinations.<sup>86</sup>

Attempts by the Department of Justice to convince the ITC to refrain from applying the 1921 Act where imports are simply meeting the prevailing domestic price, or are providing a significant source of competition, have met with little success. Despite these efforts by the Justice Department, meeting competition is not accepted as a defense in proceedings under the 1921 Act.<sup>87</sup> Finally, it should be noted that if a company has not been excluded by Treasury from the LTFV determination, the ITC will not exclude it from any “injury” finding.

### *The Dumping Finding*

If the ITC finds the requisite injury, the Secretary immediately publishes a Dumping Finding<sup>88</sup> which subjects all merchandise not yet appraised and all future imports to imposition of possible “dumping” duties. Once a company is subject to such a finding, the only way it can avoid it is by obtaining a modification or revocation which can be accomplished only after the submission of information showing no less than adjusted “foreign market value” sales for at least two years, and the execution of a letter of assurances that there will be no future “dumping” sales.<sup>89</sup>

A substantial amount of new data relating to “comparable” merchandise for periods subsequent to the Withholding of Appraisal must be submitted for at least two years.<sup>90</sup> “Master lists” are prepared by the Customs Service in Washington, D.C. for each “comparable” item sold at home showing “foreign market value” or “constructed value.” The “master lists” also contain information concerning applicable “purchase price” or “exporter’s sales price.”

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85. 19 U.S.C. § 160(a) (Supp. V 1975).

86. *But see* City Lumber Co. v. United States, 457 F.2d 991, 996 (C.C.P.A. 1972) (intent is a legitimate matter for the Tariff Commission [now ITC] to take into consideration).

87. *See, e.g.*, Elemental Sulfur From Mexico, 37 Fed. Reg. 9417, 9418 (1972); Large Power Transformers From France, Italy, Japan, Switzerland and the United Kingdom, 37 Fed. Reg. 8136, 8136 (1972); Sheet Glass From France, Italy and West Germany, 36 Fed. Reg. 21,432, 21,434 (1971).

88. 19 U.S.C. § 160(b) (Supp. V 1975); 19 C.F.R. § 153.43 (1977).

89. 19 C.F.R. § 153.44 (1977).

90. *See id.* § 153.44.



These lists are then transmitted to District Directors of Customs who use the relevant information when appraising merchandise for possible "dumping" duties. As might be expected, this process creates great uncertainty for exporters and importers regarding final prices, in addition to substantial work and expense on an ongoing basis. In addition, it should be remembered, the additional duty for "dumping" is borne by the *importer*, not the foreign seller.

#### CONCLUSION

As indicated herein, the 1921 Antidumping Act and regulations provide a technically complicated set of rules for exporters and importers to abide by if they are to protect themselves from the potentially trade disruptive consequences of an adverse ruling in a "dumping" proceeding. Moreover, a meaningful "dumping" analysis cannot be performed by the simple expedient of comparing initial prices in the home and export markets. For these reasons, as well as the substantial burdens and uncertainties which arise from the mere *fact* of a "dumping" case, companies involved in international trade should be sure that their home market and United States prices are established with an eye squarely on the 1921 Act *before* the question of "dumping" is raised.