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CABINET AFFAIRS STAFFING MEMORANDUM

Date: 10/7/83 Number: CM 379 Due By: _____

Subject: Trade Law Revision-Cabinet Council on Commerce and Trade

	Action	FYI
ALL CABINET MEMBERS	☐	☐
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State	☑	☐
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Defense	☐	☑
Attorney General	☑	☐
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Transportation	☑	☐
Energy	☑	☐
Education	☐	☑
Counsellor	☑	☐
OMB	☐	☑
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GSA	☐	☐
EPA	☐	☐
OPM	☐	☐
UA	☐	☐
SBA	☐	☐

	Action	FYI
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Baker	☑	☐
Deaver	☐	☐
Clark	☐	☑
Darman *(For WH Staffing)*	☑	☐
[redacted] SUNN	☑	☐
Jenkins	☐	☑
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CCEA/Porter	☐	☐
CCFA/	☐	☐
CCHR/Carleson	☐	☐
CCLP/Uhlmann	☐	☐
CCMA/Bledsoe	☐	☐
CCNRE/	☐	☐

REMARKS:

The Cabinet Council on Commerce and Trade will meet to discuss Trade Law Revision on Wednesday, October 12 at 8:45 AM in the Roosevelt Room.

DCI EXEC REG

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs

☐ Katherine Anderson
☐ Tom Gibson

☐ Don Clarey
☑ Larry Herbolsheimer
Associate Director

 fairs

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

MEMORANDUM FOR: The Cabinet Council on Commerce and Trade

FROM: Alan F. Holmer
Chairman, Working Group on Trade Law Revision

SUBJECT: Recommendations of the Working Group

At its September 14 meeting, the Cabinet Council directed that a working group be formed to develop recommended Administration positions on (1) Congressman Gibbons' proposals to reform the antidumping (AD) and countervailing duty (CVD) laws (Tab A) and (2) proposals developed by the Department of Commerce (Tab B).

As discussed on the following pages, the Working Group reached a consensus recommendation with respect to each aspect of Congressman Gibbons' proposals. It also developed consensus recommendations on the proposals suggested by the Department of Commerce. In general, the Working Group supported proposals which would serve to promote the aims of more efficient, more equitable, more predictable, and less costly administration of the AD and CVD laws. The Working Group also reviewed and approved a package of 45 technical amendments to the AD/CVD laws suggested by Commerce (Tab C).

Gibbons Proposals

Each of Congressman Gibbons' proposals will be briefly described, followed by the recommended position on that proposal. (Except as noted, there was consensus in the Working Group on the recommended Administration position). Starting on page 9, the additional proposals presented by Commerce are discussed.

A. Trade Remedy Assistance Office: This proposal would establish an office within the U.S. International Trade Commission (ITC) to answer inquiries on available trade remedies; and direct ITC and Commerce to assist small business petitioners in preparing and filing petitions under the AD and CVD laws.

- o Oppose. Commerce and ITC are sensitive to small business concerns and already provide much assistance to them.
- o The provision probably would be ineffective and very costly.
- o However, the proposal has considerable support in the Congress. Strong opposition probably is not advisable.

B. Targeting Monitoring Program: This proposal would require the ITC to establish a program to monitor, analyze, and report on whether foreign governments have planned or implemented targeting programs.

- o Oppose. This would duplicate a program already established in Commerce.
- o It would add significant burdens for our economic reporting offices overseas.
- o However, the proposal is likely have strong Congressional support. Strong opposition probably is not advisable.

C. Inclusion of Targeting Schemes Within Scope of CVD Law: This proposal would define as subsidies specified targeting practices (such as protected home markets and loose antitrust standards) and would make them actionable under the CVD law.

- o Strong opposition. There is no domestic or international consensus on what is targeting.
- o CVD is the wrong law to address targeting because quantification of any benefits provided would be exceedingly arbitrary and therefore could be challenged in the GATT and U.S. courts.

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- o Many U.S. practices probably could be considered targeting by foreign governments.

- o Even if the Administration succeeds in convincing the Hill that CVD is not the right law, it must be prepared either to take the initiative or to react to Hill proposals for responding to targeting practices under other U.S. trade laws.

D. Include Upstream Subsidies in CVD Law: This proposal has two points. The first would provide that the CVD law would apply to any benefit bestowed on a product "upstream" from the product under investigation (i.e., a part or component) if the benefit is available only to specific industries or groups of industries (i.e., is not generally available within the economy) and if the benefit is passed through to and affects the price of the product under investigation.

The second part of the proposal is intended to overturn the standard used by the Commerce Department in the Mexican ammonia case. It would consider as an upstream subsidy the sale by a government of natural resources at regulated prices when foreign purchasers were not allowed to purchase the resource at the same low price. (Congressman Gillis Long, D.-La., has introduced the same proposal).

- o Support first part of proposal to the extent it codifies current Commerce practice; oppose the second.

- o The first part principally codifies existing Commerce practice.

- o The second part would radically alter the essence of the CVD law, which counters distortions of resource allocations within a country. (Thus, as long as the same price is charged to all domestic purchasers, there is no subsidy).

- o The U.S. would be vulnerable in areas such as regulated natural gas if our trading partners adopt the same standard. This could affect our textile and chemical industries' exports.

- o There is much dissatisfaction with the Commerce ammonia decision and thus strong political pressure for change. On the other hand, there is growing concern that the change, if any, not affect petrochemical exports from Saudi Arabia.

- o We need to explore whether there is some middle ground between Gibbons proposal and the Commerce decision that is acceptable to both the Administration and the Hill.

E. Limited Prohibition of Downstream Dumping: This proposal would expand the AD law to cover the sale at less than fair value (or below cost) of a part or component used to produce the merchandise under investigation. (An example would be basic steel products sold below cost to foreign fabricators who exported their semi-finished steel products to the U.S.).

- o Oppose. Where an international sale (one third country into another) was involved -- e.g., Korean basic steel used by Japanese fabricators -- such a provision would violate the GATT.
- o Even where the sale occurred within one country, an AD action against the exporter would not affect the party engaged in the unfair trade practice, the supplier of the input.
- o In addition, it would be directed at foreign domestic commerce rather than international trade, thus calling into question the propriety of coverage by a trade remedy law.

F. Revision of Standards for Calculating Dumping from State-Controlled Economies (SCE's): The proposal would create an artificial pricing test to replace the current standard of using third country market surrogates in AD investigations of SCE exporters. Dumping duties would be assessed to the extent SCE exports were cheaper than the lowest average price of competitive products from market economies (including the U.S.). This is the same proposal as introduced by Senator Heinz in S.1351.

- o Support concept but urge additional thinking as to the injury test and the appropriate pricing standard.
- o Virtually all (including Commerce administrators) concede that the current standard is arbitrary, costly, and very difficult to administer.
- o Gibbons/Heinz would promote more certainty and would be less costly and easier to administer.
- o Last year the Administration supported the basic concept of then-current version of the Heinz bill (S.958), though it noted problems with particular provisions. This revised version responds to several Administration concerns.

- o Despite the significant improvement over prior versions, there still are areas where change is needed. In particular, several agencies expressed major concern about the granting of an injury test only to SCE's which were GATT members. (They argued that it also should apply where required by bilateral commitments). There also was some concern about the level of the artificial pricing standard. Using the lowest market price would permit inefficient SCE exporters to dump with impunity down to the price of the most efficient market competition; it also would preclude efficient SCE exporters from pricing below less efficient market competition.

- o Administration efforts to reach consensus on technical details should continue at the staff level.

G. Improve Injury Standards:

1. Cumulation of Injury Determinations -- This proposal would require the ITC to consider the combined injury effect from two or more sources when the petitions were filed simultaneously.

   - o Oppose cumulation being mandatory; support continuation of ITC discretion. The appropriateness (or lack thereof) of cumulation can only be judged on a case-by-case basis. ITC discretion is crucial.

2. ITC Consideration of Causal Link: This proposal would direct the ITC to consider the level of dumping or subsidization in its determinations of whether a U.S. industry is being injured by reason of the unfairly traded imports.

   - o Support. Where the import would undersell domestic competition even if AD or CVD duties were imposed, one cannot seriously argue that there is injury by reason of the imports.

3. Permit Finding of Injury Before Actual Importation: This proposal would clarify that an injury finding could be based on sales (or offers for sale) for future delivery, rather than having to await actual importation.

   - o Support as to sales; suggest further study as to offers.

   - o The proposal is designed to ensure ability to act where (as in the recent CVD proceeding on Railcars from Canada) sale occurs years before actual importation. Loss of the bid (sale to a foreign competitor) is the point at which injury occurs in such cases.

   - o To avoid GATT inconsistency and a very protectionist measure, support for coverage of offers should be withheld unless language is narrowly drawn to include only bona fide, irrevocable offers.

4. Criteria for Threat of Injury: The proposal would elaborate standards for threat of injury. The focus would be on assessing the probability of imports causing actual injury, based on factors including the nature of the unfair trade practice and likelihood of increased exports to the U.S. (Commerce proposed an alternate change, based on forecasted price effects of increased imports).

   - o Support principle of codifying and clarifying current standards and overturning limiting judicial decisions, but oppose any extension in scope.

   - o There was wide agreement that expanding the scope of the threat concept would be highly protectionist.

   - o While agreeing in concept to the principle of codifying current standards, there was widespread agreement that drafting of appropriate standards would be a difficult task.

   - o Administration efforts to reach consensus on technical details should continue at the staff level.

5. Special Threat of Injury Standards for Targeting Cases: This provision would specify special criteria for determining threat of injury in cases involving targeting subsidies.

   - o Oppose, based on recommended opposition to treatment of targeting under CVD law.

H. Reform of Settlement Agreements: This proposal would eliminate Commerce's ability (1) to suspend CVD investigations on the basis of an export tax imposed by the foreign country (in the amount of, and to offset, the level of subsidization as determined by Commerce), (2) to suspend CVD investigations on the basis of quantitative restraints, and (3) to suspend AD investigations on the basis of agreements to eliminate injurious effect.

   - o Oppose. Commerce should maintain the ability to suspend on a broad variety of bases. Different situations call for different responses.

   - o There is significant political opposition to continuing to allow suspensions based on export taxes, principally because of the feeling that lack of price increases on certain suspended Brazilian cases proves that the U.S. Government cannot ensure that export taxes actually are implemented and not evaded.

- o The Administration should consider offering a fallback.

- o There is no significant political opposition to continued ability to use QR's as basis for suspension or to base AD suspensions on elimination of injurious effect. (Chairman Gibbons, however, strongly opposes use of QR's). Neither basis has been used to date.

I. Procedural Improvements to Reduce Costs and Delay:

1. Shorter AD Timetables: This proposal would reduce AD time limits to those now applied to CVD investigations.

   - o Strongly oppose. The deadlines already are too short.

   - o Compressing the same work into shorter deadlines will increase the potential for mistakes. This will lead to more judicial review and therefore more cost -- the very opposite of what Gibbons says he wants.

   - o We expect private sector support for our position.

2. Limit Extension Authority: This proposal would limit the ability to extend investigations and the length of extensions.

   - o Oppose. Complicated cases need to be extended; there is too much data to gather and analyze within normal deadlines.

   - o There is strong support for limiting extensions, caused principally by the large number of extensions granted by Commerce in 1982 and early 1983.

   - o Extensions now are seldom granted.

3. Eliminate Interlocutory Appeals: This provision would eliminate interlocutory judicial review, concentrating it in one proceeding at the end of the administrative process.

   - o Support. This would significantly reduce the cost of proceedings. It was first proposed by Commerce Under Secretary Olmer.

4. Eliminate Presumption of Administrative Regularity: This proposal would end the presumption that administrative determinations in AD and CVD proceedings are presumed correct in judicial review and the plaintiff must prove they were incorrect.

   - o Strongly oppose. The presumption of administrative regularity applies to all agency decisions. There is no reason to make AD and CVD determinations an exception.

   - o The concept of administrative regularity is fundamental to effective functioning of the administrative process.

5. Provide Standards for Releasing Proprietary Information Under Administrative Protective Orders (APO's): This proposal would provide standards that would shorten the time it now takes to process requests for release of proprietary business information under an APO.

   o Support. It would speed up the process of making critical information available to representatives of interested parties, thus making the process more fair. This was first proposed by Under Secretary Olmer.

6. Allow Sampling and Averaging: The proposal would allow Commerce to use sampling and averaging techniques in determining U.S. price calculations in AD proceedings. (Currently sampling and averaging are permissible only with respect to foreign market transactions).

   o Support. It would greatly improve administrability of the laws. It is another proposal first made by Under Secretary Olmer.

7. Require Verification in Administrative Reviews: The proposal would require Commerce to verify information submitted by foreign companies or governments in all administrative review proceedings wherever there is a significant issue of law or fact or where revocation is sought.

   o Oppose. The significant issue standard is very imprecise and certain to lead to argument and litigation.

   o Commerce practice is to verify where there are controversial issues, significant changes in methodology, or requests for revocation. Currently, over 4,000 companies are under AD or CVD orders. A stricter standard would create administrative nightmares.

8. Preclude Offset Arrangements from Being Basis for Revocation:

   o Oppose for reasons expressed in response to proposal H on page 6. (Not allowing offsets like export taxes in revocations is similar to not allowing them as basis for suspending an investigation).

   o Refusal to grant revocation based on an export tax almost certainly would violate our GATT obligations.

9. Standing for Labor-Industry Coalitions: This proposal would overturn a court decision and would allow coalitions of labor and industry to file AD and CVD petitions (i.e., to have standing as petitioners) where the coalition members were representative of the greater part of the affected U.S. industry.

   o Support. No valid purpose served by not allowing such groups standing.

J. Study of Adjustments in AD Proceedings: This provision would require Commerce to prepare a study of current practices of making adjustments to prices in AD cases and of recommended reforms to those practices.

- o Support. The idea was first proposed by Commerce. The area is complex and is not amenable to easy solutions. Careful study is preferable to piecemeal legislation.

Commerce Proposals Approved by Working Group (Those Not Also Addressed by Gibbons)

A. Simplify Administrative Reviews by Permitting Use of Sampling and Averaging Techniques in AD Reviews: Commerce proposed permitting use of averaging and sampling techniques in administrative reviews of AD orders. (This proposal is broader than the Gibbons proposal discussed in section I.6 above). Currently, this is permissible only during the pre-order investigative phase of the case. During reviews, a dumping calculation must be made for each entry and a corresponding foreign market value must be calculated. (There can be tens of thousands of transactions during a review period).

- o Suggest addition. The small decline in accuracy would be vastly outweighed by the reduced burden.

B. Simplify Administrative Reviews by Permitting Assessment of CVD Duties on a Country-Wide Basis as Appropriate: Commerce proposed that countervailing duties be assessed on a country-wide basis; at present rates often must be calculated for individual companies.

- o Suggest addition in modified form. Justice dissents.
- o Have a presumption that rates will be calculated on a country-wide basis but enable an exporter to establish entitlement to a company-specific rate where its rate was significantly different from the average.
- o Justice was concerned about the anti-competitive effect of using country-wide rates.

C. Enhance Coverage of CVD Law to Cover "Sham" Leases: Commerce proposed clarifying that the CVD law could be applied against transactions which, although denominated as "leases," were in substance sales.

- o Suggest addition to cover "sham" leases. (Several agencies noted that extreme care would be required to draft appropriate statutory language).
- o More study is necessary about whether the law should apply to pure leases. The Administration should not propose coverage at this time.

D. Simultaneous AD and CVD Investigations: Commerce proposed that where a petitioner filed AD and CVD petitions simultaneously, it could elect to have the AD time limits apply to the CVD proceeding. This would enable both cases to proceed simultaneously throughout the investigation, thus eliminating current complaints about the different deadlines.

- o Suggest addition. (Approved without discussion).

E. Pre-Revocation Classification as Inactive Case: Commerce suggested that where exports of a product covered by an order cease for a number of years, interested parties do not exercise their rights to comment on determinations or to request hearings for several years, or there are other indicia that the case has ceased to be of interest to the U.S. industry, such proceedings would be classified as inactive. Detailed administrative reviews would cease to be conducted and unless the domestic industry came forward with evidence that reinstatement of the order was appropriate, the case would be revoked after two years in inactive status.

- o Suggest addition. This would save resources on cases of little continued interest. It also avoids the charge that orders are maintained longer than necessary.

F. Automatic ITC Injury Review: Commerce suggested consideration of having the ITC conduct injury reviews automatically every five years. The purpose would be to revoke orders where there no longer was injury.

- o Do not suggest addition, but instead suggest an amendment to allow Commerce to petition the ITC to begin a "changed circumstances" injury review.

- o There was general rejection of the suggestion as unduly burdensome to the domestic industry.

- o The alternate suggestion would give Commerce standing to ask the ITC to review whether injury was still being caused. The ITC would retain its discretion on whether to conduct such a review and, if conducted, whether injury still was being caused.

G. Eliminate Minimum Values in Constructed Value AD Calculations: Commerce suggested considering elimination of statutory minimum values for general and administrative (G&A) expenses (10%) and profit (8%) in AD calculations based on constructed value. Instead, actual amounts should be used whenever available. (The minimums could be retained for use where actual amounts were not provided).

- o Suggest addition. The minimum values are inconsistent with the GATT and have been a major and long-standing source of international irritation.
- o Because we have this provision that is widely viewed internationally as GATT inconsistent, U.S. ability to take the high ground in complaining about the GATT inconsistent practices of others is undercut.
- o They are very unfair to exporters and importers. They artificially inflate (or create) dumping margins.
- o Political opposition is likely to be intense because this charge will reduce dumping margins in certain cases.
- o Administrations have tried (so far without success) to eliminate this provision in every major trade bill since 1958.

Commerce Proposals Not Approved by Working Group

A. Implement Third-Country Dumping Provision of GATT AD Code: Commerce proposed implementation of GATT Article 12 into U.S. law to enable U.S. producers to allege that imports were being dumped into a third-country market, thereby causing material injury to the U.S. industry. The third country would be asked to conduct an investigation of such allegations.

- o Do not suggest addition to Gibbons package. There was general concern about U.S. Government involvement and, because of standing requirement in U.S. law, U.S. inability to reciprocate and commence a similar action here on behalf of a third-country requester.

- o The provision is unnecessary. The Administration could always use section 301 as the vehicle for such an action.

B. Prospective Establishment of AD and CVD Duties: Commerce suggested consideration of radically altering the AD and CVD assessment process so that a rate established in an administrative review would be assessed against entries until, as the result of the next review, a new rate was set. Currently, estimated duties are deposited upon entry and there is a contingent liability for definitive duties that ultimately will be assessed. Eighteen to twenty-four months later, an administrative review covering that entry will be completed. The definitive duty will be calculated. If the deposit was less, the shortfall will be collected; if the deposit was more, the excess will be refunded.

- o Do not suggest addition. There was widespread feeling that the proposal needed to be studied in greater detail. Various agencies expressed concerns about due process and potentially excessive protective effects stemming from assessing at a rate higher than that actually experienced; others stressed vulnerability to continued dumping and subsidization (i.e., exporters and importers always being one step ahead of the prospective rate).

1/27/83

SUBCOMMITTEE ON TRADE

DESCRIPTION OF POSSIBLE TRADE REMEDY BILL

TAB A

Introduction

-- Bill would make several reforms in our basic unfair trade remedy laws -- the antidumping (AD) and countervailing duty (CVD) statutes -- in order to address new unfair practices, reduce costs and delay, improve administrative procedures, and make such laws more accessible.

-- Bill would be consistent with our obligations under GATT.

-- Material injury would be a general condition for action against all forms of unfair practice covered by the bill (except in subsidy cases against countries which have not signed the GATT Subsidies Code).

Suggested Elements of Bill

I. ESTABLISHMENT OF A TRADE REMEDY ASSISTANCE OFFICE

A. Establish an office in the ITC to assist the public with information on remedies and benefits available under all the trade laws. This would help to reduce uncertainty about the type of remedies to pursue and would answer complaints that the government does not undertake sufficient efforts to see that the laws are utilized.

B. Provide further that in the case of "small businesses" the agencies responsible for administering each law shall provide assistance to enable them to prepare and file petitions and applications under such laws. Greater assistance to small business would significantly reduce complaints that trade remedies are too costly for such groups to pursue. To prevent abuses, the agencies would have discretion to refuse assistance in frivolous cases. In addition, limits would be imposed on staffing and expenditures to prevent excessive costs.

II. ESTABLISHMENT OF TARGETING SUBSIDY MONITORING PROGRAM

A. Require the ITC to establish and implement a continuing program to monitor and analyze the industrial plans and policies of foreign countries to discover whether targeting subsidies are being planned or implemented. This would

Prepared by the staff of the
Subcommittee on Trade
Committee on Ways and Means

provide the U.S. Government with a more sophisticated program of international industrial analysis. Placing responsibility in the ITC serves two purposes: First, it is the only agency with comprehensive commodity expertise; second, its independence would ensure a lack of bias and would eliminate foreign policy considerations. Establishment of such a program would include mandated limits on monitoring activities to prevent abuse. ITC would also have discretion, after consultations with the private sector and other agencies, to select the most important product sectors and countries for analysis to prevent excessive additional staffing and costs. Other agencies would be required to provide the ITC relevant information upon request.

B. Require regular reports of information gathered both to the public and the administering authority.

III. INCLUSION OF GOVERNMENT EXPORT TARGETING SCHEMES WITHIN THE SCOPE OF COUNTERVAILING DUTY LAW

A. Add "government export targeting schemes" to the existing list of subsidies which are actionable under CVD law. An "export targeting scheme" would be defined as "any coordinated government action involving two or more certain specified practices (see Attachment A) the effect of which is to assist a specific enterprise or industry (or group thereof) to become more competitive in the export of any class or kind of merchandise." As with other subsidies, targeting would only be subject to countervailing duties if it were found to be injurious to specific industries by the ITC. This provision is necessary if CVD law is to address the broad range of government programs designed to promote specific industries that do not currently fall within our statute's subsidy definitions. Current law only addresses outright grants or loans by the government, and a targeting provision would supplement this by also addressing other policies which have a subsidizing effect. The new provision would not require examination of the motives behind government policies, but only whether the requisite effect on exports was occurring. The objective would be to address only those programs which have a subsidizing and injurious effect rather than to attack a country's domestic industrial policy per se. Moreover, the targeting policy would have to involve some definite action, rather than simply guidance or "vision" by a government entity.

B. The provision would be consistent with GATT and Subsidies Code requirements regarding CVD procedures. Furthermore, it is intended to be compatible with Article 11 of the Subsidies Code, which recognizes the legitimacy of domestic

subsidies for industrial policy reasons but disapproves of their use to cause injury.

C. The above proposal would require a 3-step determination by the Commerce Department. First, is there a coordinated government action? Second, does it involve two or more of certain specified targeting practices? Third, does it have the effect of assisting a discrete class of companies or industries to become more competitive in their export activities? In addition, there would have to be the normal ITC proceeding to determine material injury.

D. The proposal would require that in valuing a targeting subsidy the Department use a method of calculation which reflects as accurately as possible the full economic benefits bestowed on all beneficiaries. This provision would permit Commerce to make a realistic assessment of the subsidy level. Using the present methodology of assessing the subsidy solely on the basis of the cash value would not yield meaningful results in targeting cases, since many targeting practices may not involve a simple cash transfer. This would also permit assessment of duties on subsidies which were granted prior to the period of importation but are still having an effect on the imports in question.

IV. INCLUSION OF UPSTREAM SUBSIDIES IN COUNTERVAILING DUTY LAW

A. Clarify that countervailing duties can apply to any subsidy which is otherwise actionable under the CVD law and which is bestowed either by the same country or a third country on a product "upstream" from the product under investigation (e.g., a subsidy on iron ore when the investigation involves steel) if (1) the subsidy results in a lower price on the upstream product than the generally available price for that input in the country producing the article under investigation; and (2) this resulting price difference is passed through and affects the price of the final product. The generally available price would be adjusted for any price suppression caused by subsidies or dumping. Examination of upstream subsidies would be limited to those which are only one stage upstream unless there is evidence that subsidies on earlier inputs have a substantial price effect. This clarification would carry out original Congressional intent by ensuring that all subsidies at whatever stage of production would be countervailable if they are passed through to the final product and cause injury.

B. Also clarify that the concept of "upstream" subsidies would apply to the sale of natural resources (such as natural gas or petroleum) or byproducts thereof by a government-controlled entity to downstream producers

within the domestic market at regulated prices which are below normal export prices. In such cases, the level of subsidy would be the difference between the lower domestic price and the export price. There would have to be a determination that the government somehow prohibits exports to U.S. producers at the regulated domestic price. The resource input would also have to be a significant portion of the product's cost. This provision would address the problem created by government-controlled sales of natural resources which discriminate in favor of domestic industries and thereby confer a benefit.

V. LIMITED PROHIBITION OF DOWNSTREAM DUMPING

A. Provide that the definition of dumping includes "downstream dumping" (the importation of products which include materials that were sold below their home market prices or cost of production). However, downstream dumping would not include situations where the party under investigation merely purchased the materials at prevailing market prices (technical dumping) or from domestic producers at discount prices rather than from foreign sources. In addition, Commerce would not be required to investigate downstream dumping complaints which are too remote or speculative. Finally, the normal injury standards would apply with respect to imports of the final product.

VI. REVISION OF EXISTING STANDARDS FOR ASSESSING NONMARKET COUNTRIES UNDER TRADE REMEDY LAW

A. Amend the nonmarket economy dumping provision to create a new "nonmarket pricing" test. Under this test, imports from any nonmarket economy country which are sold below the lowest free market price in the U.S. of like articles (domestic or imported), and which cause material injury, are subject to a duty equal to the difference in the two prices. This new standard would represent a significant improvement over the arbitrary and inequitable method for handling dumping by nonmarket entities.

B. However, this test would only apply where available information is insufficient to allow the case to be handled as a normal antidumping or countervailing duty case. If such information is available, the case is handled as a routine dumping or CVD case. Moreover, there would have to be a finding that the lowest free market price reflected sufficient competition in the U.S. market to be a truly competitive price. In cases where there is not sufficient competition, fair value will be based on prices or costs in the most comparable free market country where sufficient competition exists as under current law.

VII. IMPROVEMENT OF INJURY STANDARDS AND THREAT OF INJURY STANDARDS FOR BOTH ANTIDUMPING AND COUNTERVAILING DUTY CASES

A. Require the ITC to apply the principle of "cumulation"--adding together imports from two or more countries which are under simultaneous investigation for the purposes of assessing injury--if marketing of the goods in the U.S. is reasonably simultaneous, and there is a reasonable indication that the goods being cumulated have contributed to cumulative injury. This would ratify current practice while also providing more acceptable standards than some Commissioners presently apply.

B. Provide for the consideration of the level of subsidy or margin of dumping as causal factors, rather than simply basing causation on the volume of imports found to be dumped or subsidized. Obviously, the volume of such imports would still be an important causal factor, but would not preclude consideration of subsidy levels and dumping margins. This change would result in a more realistic injury assessment.

C. Clarifies that an investigation and injury finding may be based on sales or offers for sale for importation rather than merely importation. This is designed to address situations where large sales of foreign products have actually occurred or are pending but importation has not actually occurred due to delivery time or other factors. In such cases, the injurious effect of the subsidy or dumping may occur prior to actual importation and the investigation should not await such importation.

D. Establish statutory criteria for determining "threat of material injury." Threat shall mean the probability of imports causing actual injury as demonstrated by any of the following factors: the nature of the unfair practice; the likelihood that exports will be directed to the U.S. as a result of increased capacity in the exporting country; increased U.S. market penetration; and substantial inventories in the U.S. market. The threat of injury must be real and imminent, and a finding of "threat" could not be based on mere supposition or conjecture, but the absence of indicia of present injury should not be conclusive. This change is essential because of widespread uncertainty as to proper threat standards. It merely clarifies rather than expands the original meaning of threat as reflected in earlier legislative history. However, there have been court challenges to threat findings which have confused the issue, and as a result it has become a subject of great uncertainty for the ITC. If the law is to deter unfair acts, particularly in the targeting area, a clear but rational threat test is essential.

E. Set forth special threat factors for consideration in "targeting subsidy" cases, including the effect of such practices on export competitiveness and the extent to which such practices will adversely affect capital availability, outlays for R&D, and future investment. These are merely additional factors to consider--the actual standards would be the same as in C above.

VIII. REFORM OF SETTLEMENT AGREEMENTS IN BOTH ANTIDUMPING AND COUNTERVAILING DUTY CASES

A. Preclude the use of "offsets" such as export taxes as a means of settling CVD cases. Instead the government or exporters must agree to eliminate the subsidy or cease exports to the U.S. This would prohibit a practice which is capable of great abuse and which does not effectively address foreign subsidies. Also, eliminate 6-month grace period in which subsidies or dumping may continue pursuant to a settlement agreement to eliminate such practices. In dumping cases, the only suspension authority would be based on an agreement by the exporter to cease dumping or cease exports to the U.S.

B. Eliminate entirely the authority of Commerce to suspend investigations based upon quantitative restrictions or other settlement agreements which do not completely eliminate the unfair practice. Also prohibit Commerce from terminating cases based on withdrawal of petitions due to a bilateral restraint agreement entered into by Commerce and the foreign government or exporter. This would prohibit the use of the CVD or AD laws for quota arrangements and restraint agreements that limit imports but do not eliminate the subsidy or dumping.

IX. PROCEDURAL IMPROVEMENTS TO REDUCE COSTS AND DELAY IN BOTH ANTIDUMPING AND COUNTERVAILING DUTY CASES

A. Provide for simultaneous timetables for AD and CVD cases (based on the shorter deadlines applicable to CVD cases under current law). This change would reduce the unreasonably long period for AD determinations. It would also reduce additional costs to petitioners where filings involve both laws, since separate injury hearings would not be necessary. Finally, it would reduce administrative expenses for Commerce and the ITC.

B. Limit further the authority of Commerce to extend timetables by declaring a case "extraordinarily complicated". This limitation is necessary to prevent the almost routine practice of declaring cases complicated without due regard to the Congressional intent that the case be extraordinary. As a result, parties experience unreasonable delays and

higher costs. The proposed limit would allow only 30 days extension (compared to 50-65 days under present law) and would require a detailed finding, together with a report to Congress, that the case is extraordinarily complicated.

C. Prohibit all interlocutory judicial review (i.e., review by the court during the course of a Commerce or ITC investigation). All challenges to agency action would be rolled together and reviewable by the court after the final agency action has been taken. The purpose of this change is to eliminate costly and time-consuming legal action where the issue can be resolved just as equitably at the end of the administrative proceedings.

D. Eliminate any presumption for or against administrative regularity in judicial review of agency findings. This would clarify that the court is to impose a substantial evidence requirement in its review of agency action without any presumption in favor of or against the correctness of the agency's action.

E. Provide for a standardized method for releasing confidential information which will greatly simplify agency procedures and reduce time-consuming and costly filings by parties. The new system would call for "standing requests" to be filed by all parties at the outset with routine decisions on release by Commerce as confidential information is submitted. Also, permit persons other than counsel (i.e., economic consultants), to receive confidential information pursuant to protective order.

F. Permit Commerce to utilize sampling and averaging techniques in determining U.S. price in dumping cases. This is an important improvement which would allow greater administrative efficiency. However, require that all sampling and averaging be based on representative transactions selected by Commerce rather than either party.

G. Require Commerce to verify information in its annual review process wherever there is a significant issue of law or fact or wherever revocation is being sought.

H. Preclude "offset" arrangements, such as offset taxes, from constituting "changed circumstances" justifying revocation of CVD orders. This is necessary to close a potential loophole if settlements based on "offsets" are precluded.

I. Amend standing rules to permit any combination of firms, labor unions or trade associations which already have standing to file cases if such combined group has a majority of its membership involved in production of the like product. This would permit labor-industry coalitions,

for example, to bring cases if a majority of their members represent the industry producing the like product.

X. STUDY OF ADJUSTMENTS IN ANTIDUMPING CASES

A. Require Secretary of Commerce to prepare a study of current practices in antidumping cases of making adjustments to purchase price, exporters' sale price, and foreign market value.

B. Require submission of such study to Congress within one year along with recommendations for reform.

ATTACHMENT A

ILLUSTRATIVE LIST OF TARGETING PROGRAMS

1. The exercise of government control over banks and other financial institutions to require diversion of private capital on preferential terms into specific firms or sectors.

2. Extensive government involvement in promoting or encouraging anticompetitive behavior among specific beneficiaries, including:

   a. Assistance in planning and establishing joint ventures an anticompetitive export effect;

   b. Relaxation of antitrust rules normally applied to industries in order to assure development of anticompetitive export cartels;

   c. Assistance in planning or coordinating joint research and development among selected beneficiaries to promote export competitiveness; and

   d. Regulations concerning the division of markets or allocation of products among selected beneficiaries.

3. Special protection of the home market in order to permit the development of competitive exports in a specific sector or product.

4. Special restrictions on technology transfer or government procurement in order to limit competition in a specific sector or industry and thereby promote export competitiveness.

5. The use of investment restrictions, including domestic content and export performance requirements, in order to limit competition in a specific sector or industry and thereby promote export competitiveness.

* * * * * * * * * *

TAB B

SUMMARY OF POSSIBLE REVISIONS TO THE ANTIDUMPING AND COUNTERVAILING DUTY LAWS

I. Enhance Coverage of Threat of Injury (Tab B)

A. Establish statutory criteria for determining whether there is "threat of material injury." The ITC would find a real and imminent threat whenever it determined that imports are at prices which, if the import volume increased, would depress or suppress domestic prices and that the volume of imports is likely to increase to a level that would cause actual injury.

B. This change merely clarifies the original meaning of the "threat" standard. It is essential to overcome decisions by the Court of International Trade which have interpreted the provision so narrowly as to make it useless.

C. An effective standard for threat of material injury is crucial to domestic producers because it enables them to file antidumping (AD) and countervailing duty (CVD) cases without having to wait until they actually have suffered material injury. The revised standard will be of particular use in cases involving procurement of large capital items, where importation (and thus actual material injury) occurs months, sometimes years, after the contract award.

II. Implement the Third-Country Dumping Provision of the GATT AD Code (Tab C)

A. Implement Article 12 of the GATT AD Code into U.S. law. This would enable a U.S. industry to allege that imports into a third country market were being dumped, thereby causing material injury to the U.S. industry. (For example, the U.S. semi-conductor industry could allege injury as the result of dumping by Japanese producers in the EC market.) Where Commerce is satisfied that the allegations in the petition are well founded, it will file that petition, on behalf of the U.S. industry, with the government of the third country (the EC in the example). The U.S. Government will request initiation of a third country dumping investigation.

B. This implementation of Article 12 into U.S. law will provide another possible avenue of relief for U.S. industries suffering material injury in third country markets.

III. Simplify and Rationalize Administrative Reviews (Tab D)

A. Permit Commerce to use sampling and averaging in administrative reviews of outstanding dumping orders. Currently, Commerce must determine the actual price and cost for each entry and a corresponding home market sale. (There can be hundreds of thousands of sales during a review period). This change would align the practice in the post-order reviews with that already permitted during fair value investigations. It would significantly reduce the burden involved in conducting administrative reviews of AD orders.

B. Permit Commerce to use sampling and averaging in administrative reviews of CVD orders and further provide that all CVD orders can be country-wide in scope. Unlike dumping, subsidization reflects government policy, and the extent to which individual enterprises benefit from countervailable subsidies very often does not differ significantly. Moreover, the trade distorting effect of subsidies usually can be accurately measured without the additional administrative burden of calculating the actual benefit for each exporter. Use of country-wide rates, in conjunction with greater authority to use sampling and averaging techniques, would significantly reduce the current burden of CVD reviews.

IV. Procedural Improvements in the AD and CVD Laws

A. Concentrate Judicial Review: Eliminate all interlocutory judicial review in AD and CVD proceedings. Challenges to all aspects of the administrative proceedings before Commerce and the International Trade Commission (ITC) would be maintained, but those actions would be reviewable by the court only after final agency action. This change will eliminate costly and time-consuming piecemeal litigation while preserving all substantive rights to challenge any facet of agency action. (Tab E)

B. Streamline Protective Order Process: Improve procedures for releasing proprietary business information under administrative protective orders (APO's). Parties submitting proprietary information will be required to submit concurrently either a statement agreeing to release under an APO or the reasons for opposing such release. In addition, since much of the information is submitted in response to agency requests and so can be identified in advance, applications for release under an APO can be submitted before the data are received. These two modifications, needed because of judicial language, should significantly shorten the Department's processing time for such requests. (Tab F)

C. Enhance Coverage of CVD Law: Clarify that the CVD law covers sales for future delivery (i.e., that the actionable event is the contract award rather than the first actual importation) and transactions which, although denominated as "leases," are in substance sales. Both changes would ratify agency practice in the Canadian subway car case. They involve areas where coverage is necessary to fulfill the purpose of the law but where the language of the current law is ambiguous. (Tab G)

D. Allow Labor-Industry Coalitions as Petitioners: Change the requirements for who has standing to file an AD or CVD petition on behalf of an industry to include combinations of firms, unions, and trade associations (a majority of whose members are involved in producing the petitioned product). This would permit labor-industry coalitions to file petitions. (Tab H)

E. Simultaneous AD and CVD Investigations: Provide that where a petitioner simultaneously files AD and CVD petitions, the time limits for the AD investigation also would apply to the CVD investigation where the petitioner so elected. This would enable both cases to proceed simultaneously throughout the investigation, thus eliminating current complaints about the different deadlines. (Tab I)

V. Study of Adjustments in Antidumping Cases

A. Propose that the Secretary of Commerce conduct a study of ways to improve the current provisions on adjustments in AD calculations and report recommendations for change to Congress within one year.

B. There is widespread recognition that the current provisions on adjustments in AD calculations to both the U.S. export price and the home market price to which it is compared are numerous, detailed and complicated. Sometimes indirect selling expenses can be deducted and sometimes they cannot; there is no logic to the situation. The economic ideal would be to deduct all selling expenses, both direct and indirect, from both U.S. export and home market sales. However, this would be very unpopular with many domestic interests. (Since selling expenses usually are greater in the home market than on export sales, deducting all expenses would usually cause dumping margins to be lower than under the present rules). The other easy alternative, comparing prices in both markets with all selling expenses included, would satisfy those whose goal is to promote high margins, but would be inconsistent with GATT obligations and would create artificial dumping margins. A great deal of effort will be required to explore how to rationalize the process in a manner that was politically acceptable. Thus, we propose a one-year study. (Tab J)

VI. Issues Requiring Further Consideration

A. Prospective Review of AD and CVD Orders: Serious consideration needs to be given to whether the administrative review process should be radically altered. Currently, imports of merchandise entering the U.S. after an affirmative preliminary determination of dumping or subsidization must deposit estimated antidumping or countervailing duties. Assuming final affirmative determinations of dumping or subsidization and injury, each of these entries will be subject to an administrative review at some point (usually 18-24 months) in the future. At that point (and not before), the actual dumping or CVD duty to be assessed will be ascertained. If more than the deposit, the remainder will be collected; if less, the excess will be refunded. Thus, there is contingent liability and complete commercial uncertainty for long periods of time. This would end if assessment of duties were made prospectively. This would entail a declaration that until further notice, duties in the amount of a stated percentage would be collected. There would be no contingent liability, no commercial uncertainty. On the other hand, the actual level of dumping or subsidization on any particular entry would not be precisely measured.

We note that all our trading partners with AD or CVD laws impose duties prospectively. (Tab K)

B. Revocation of AD and CVD Orders: Current policy on revocation of AD and CVD orders has created scores of orders that no one still cares about but which require annual administrative reviews because the strict revocation standards can't be met. However, any perception that we were loosening revocation standards would create strong opposition from many domestic interests. Thus, changing the law in this regard might be considered too controversial to put forward. (Tab L)

C. Automatic ITC Injury Review: Unlike Commerce, ITC is not required to conduct regular reviews of its determinations. Such reviews (perhaps every 5 years) would result in some terminations and so would focus government resources on the cases which matter--injurious unfair practices. (Tab M)

D. Upstream Subsidization: With respect to upstream (or indirect) subsidization (subsidization of a component reflected in the price of the finished product), the political clamor for changed rules is growing, but concern as to GATT legality and administrability must be resolved before any change is proposed. (Tab N)

E. Eliminate Minimum Values in AD: Where dumping calculations are based on constructed value, should the actual amounts for general and administrative expenses (G&A) and for profit of the foreign firms investigated be used unless unreasonable? Current law, requiring a minimum 10% value for G&A and an 8% minimum for profit, is inconsistent with the GATT and has been a major source of international irritation. (Tab O)

Enhance Coverage of Threat of Injury

Text prepared by the International Trade Commission is attached.

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

August 26, 1983

Mr. Alan Holmer
Deputy Assistant Secretary
Import Administration
Room 3009B
U.S. Department of Commerce
14th & Constitution Avenue, NW.
Washington, D.C. 20230

Attention: Robert Seely, Esq.

Dear Mr. Holmer:

You have asked for our assistance in drafting a proposed change in the standard for threat of injury in Title VII investigations, which would permit an affirmative threat finding in certain cases where such a finding would be unlikely now. Enclosed is such a draft.

We are pleased to provide this technical drafting advice on the understanding that the Commission does not take a position on the question of whether such a change in the law is desirable.

Yours very truly,

Michael H. Stein
General Counsel

Enclosure

THREAT OF INJURY

Present law. — Under the antidumping and countervailing duty provisions of the Tariff Act, the U.S. International Trade Commission is required to determine whether an industry in the United States is materially injured, or is threatened with material injury, or whether the establishment of an industry in the United States is materially retarded by reason of imports of the dumped or subsidized merchandise subject to investigation. Section 771(7) of the Tariff Act specifies factors for the Commission to examine in its determinations of material injury. That section also specifies that with respect to the threat of material injury, the Commission should take into account the nature of the subsidy and the likely effects of that kind of subsidy when presented with information by the Department of Commerce that the subsidy is an export subsidy inconsistent with the obligations of the international agreement on subsidies and countervailing measures. There is no other statutory guidance concerning determinations of a threat of material injury. The Commission issued regulations which described the factors which the agency had relied upon historically in making determinations of threat or likelihood of injury. (19 C.F.R. 207.26(d).)—

> (d) For purposes of this section — In determining whether there is a threat of material injury, the Commission shall consider among other factors—
>
> (1) The rate of increase of subsidized or dumped exports to the U.S. Market;
>
> (2) Capacity in the exporting country to generate exports; and
>
> (3) The availability of other export markets.

The bill.—Under Section 771(7)(E)(iii), the Commission would be required to make findings as to whether imports or contracts for imports of the product under investigation are sold or offered for prices which, if the imports increased, would have a depressing or suppressing effect on domestic prices and whether the volume of imports of the product is likely to increase to a materially injurious level.

Reason for the provision.—Prior to the investigations conducted pursuant to standards legislated in the Trade Agreements Act of 1979, only one Commission antidumping or countervailing duty determination had been reversed by a reviewing court. That case was Methyl Alcohol from Canada (Inv. No. AA1921-202, USITC Publication 986, June 1979). The U.S. Court of International Trade held that the record of the Commission's investigation only showed a possibility that injury might occur at some remote future time. The Court held that this possibility was inadequate to support a determination that there was a likelihood of injury. Alberta Gas Chemicals, Inc. v. United States, 515 F. Supp. 780 (1981). The standard for a likelihood of injury determination recited by the Court was that adopted by the Congress in the legislative history of the Trade Agreements Act, "[T]here must be information showing that the threat is real and injury is imminent, not a mere supposition or conjecture." S. Rep. No. 249, 96th Cong., 1st Sess. 88, 89 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979).

Since the passage of the Trade Agreements Act, the Commission has considered some 400 antidumping and countervailing duty cases. During this period only three final determinations have been based only on a threat of material injury. Relief based upon a threat of material injury is crucial to domestic producers because it enables them to file antidumping and

countervailing duty cases without waiting until they have suffered material injury. The proposed bill would require the Commission (and the Court) to focus on forecasting the effects of import competition rather than the inherent speculation involved in forecasting.

Proposed amendment.—

771(7)(E) Special Rules.

(iii) In cases in which the Commission determines that there is no material injury to an industry in the United States, the Commission shall make a determination as to whether there is a threat of material injury. A real and imminent threat of material injury exists when the Commission finds that imports or contracts for imports of the product under investigation are sold or offered for prices which, if imports increased, would have a depressing or suppressing effect on domestic prices, and the volume of imports of the product under investigation is likely to increase to a materially injurious level.

TAB C

Implement AD Code Provisions on Third-Country Dumping

Article 12 of the GATT Antidumping Code provides that a government can petition another country to conduct an antidumping investigation on behalf of an industry in the applying country. In other words, the U.S. could petition the EC to investigate whether imports of semi-conductors into the EC from Japan were being dumped, thereby causing injury to the U.S. semi-conductor industry. This provision is not implemented in U.S. law.

We propose implementing the provision. Inclusion would respond to the complaint that there is no current mechanism to address cross-national dumping of components that are used in finished products exported to the U.S. which while not dumped themselves benefit from the reduced cost of the dumped input. The only argument against implementing the proposal is that it would raise false expectations since the Code does not require the petitioned country to undertake the requested investigation, and possibly increase trade frictions as the U.S. attempts to pressure other countries to pursue dumping cases.

Statutory Amendments
[New Material underlined; deleted material in brackets]

Sec. . AUTHORITY TO PETITION AGAINST DUMPING IN A THIRD COUNTRY

Title VII of the Tariff Act of 1930, as amended (19 U.S.C. §1671 et seq) is amended by adding at the end thereof the following subtitle:

SUBTITLE E: THIRD COUNTRY DUMPING

Sec. 791. Authority to Request Relief

The administering authority may request the investigating authority of another country that is a signatory to the Anti-dumping Code (the Agreement on Implementation of Article VI of the Tariffs and Trade) to conduct an antidumping investigation on its behalf to establish whether or not a class or kind of merchandise is being imported and sold at dumped prices in such other country from a third country outside the United States and whether or not the alleged dumping is causing injury to the domestic industry concerned in the United States.

Sec. 792. Form of the Request

The request for relief under sec. 791 shall be made in the form of a petition, supported by information available to the administering authority, which demonstrates to the satisfaction of the administering authority that a formal investigation is warranted into the question whether the elements necessary for the imposition of a duty under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade exist.

Sec. 793. Assistance to Investigating Authority

The administering authority shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require in conducting the investigation.

Procedures to Improve the Process of Administrative Review of Outstanding Orders

A. Present law

The present law contains no provision that specifies whether or not a net subsidy is to be calculated separately for each company receiving countervailable benefits and whether or not the imported merchandise manufactured or produced by each such company is to receive a company-specific rate of deposit or bond, or assessment amount. Moreover, there is at present no provision that would permit averaging and generally recognized sampling techniques to be used in the calculation of net subsidies.

With regard to antidumping calculations under section 773(f), the administering authority is permitted to use averaging or generally accepted sampling techniques in calculating foreign market value whenever a significant volume of sales is involved or a significant number of adjustments to prices is required. The administering authority is also permitted under this section to take account of adjustments which are insignificant in relation to the price or value of the merchandise.

B. The bill

The proposed amendment to section 771(6) specifically would permit the administering authority generally to calculate the net subsidy for deposit, bond, or assessment purposes on a country-wide, basis. The administering

authority is expected to develop appropriate standards for determining when not to use the broad country-wide basis for calculating the net subsidy.

In order to permit averaging and sampling techniques to be applied, as appropriate, in countervailing duty investigations, and in countervailing duty proceedings under section 751, section 771(6) is further amended to provide specifically that the administering authority may use these techniques in calculating a net subsidy. It is intended that this provision permit the administering authority to calculate the net subsidy based on its analysis of information concerning receipt of benefits by less than all manufacturers and/or exporters. The administering authority is expected to develop standards for an appropriate method of sampling.

For antidumping calculations, section 773(f) is amended to give the administering authority discretion to use averaging or generally recognized sampling techniques without regard to the volume of sales or the number of adjustments to price required. The elimination of this limitation in the present law confirms the administering authority's discretion to calculate foreign market value based on weighted average sales prices rather than individual sales prices. The administering authority shall develop standards for an appropriate method of sampling.

Section 751(a)(2) of the Act is amended to eliminate the language which suggests that foreign market value must be determined separately for each entry of imported merchandise.

This change extends the averaging and sampling techniques just described to both antidumping investigations and the administrative review of antidumping order.

C. Reasons for the provision

A principal problem in countervailing duty proceedings is the uncertainty over whether the administering authority should determine the level of subsidies received by each exporter. Unlike dumping, subsidization reflects government policy, and the extent to which individual enterprises can and do benefit from countervailable subsidies very often does not differ significantly. Moreover, the trade distorting effect of countervailable programs may be measured with reasonable accuracy in many cases without the additional administrative burden of calculating the net subsidy specifically for each foreign manufacturer or exporter. Section 771(6) is amended by this bill to make clear that the preferred method for calculating the net subsidy and assessing countervailing duties is on a country-wide basis in each case, and that the administering authority may use averaging and sampling techniques as appropriate.

The current administrative review process is unnecessarily cumbersome and complex. In antidumping proceedings the principal problem is that the actual price and cost for each export home market sale often must be used. For each outstanding order, there can be scores of different

producers and exporters and thousands of such sales during a review period, so the time and effort to gather the necessary data, to verify it, and to make the necessary dumping calculations are enormous. In the investigative phase of the proceeding (i.e., before issuance of an order), by contrast, the statute now clearly permits Commerce to sample exporters (by regulation Commerce need not investigate more than 60 percent of export volume) and to use weighted average prices for each investigated company. Section 773(f) is amended to broaden the averaging and sampling authority to permit its use more extensively in investigations and in administrative review proceedings under section 751 of the Act.

The amendments will simplify the administrative review process for both antidumping and countervailing duty proceedings. The improvement in the speed and efficiency of administration will more than compensate for the relatively insignificant loss of mathmatical precision in the calculations.

D. Proposed Amendments

1. Section 773(f) is amended to read as follows [deleted material is bracketed; new material is underlined]:

(f) AUTHORITY TO USE SAMPLING TECHNIQUES AND TO DISREGARD INSIGNIFICANT ADJUSTMENTS.-For the purpose of determining foreign market value under this section, the administering authority may-

(1) use averaging or generally recognized sampling techniques [whenever a significant volume of sales is involved or a significant number of adjustments to prices is required], and

(2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

2. Section 751(a)(2) is amended to read as follows [deleted material bracketed; new material is underlined]:

(2) DETERMINATION OF ANTIDUMPING DUTIES.-For the purposes of paragraph (1)(B), the administering authority shall determine-

(A) the [foreign market value and] United States price of each entry of merchandise subject to the antidumping duty order and included within that determination and,

(B) the foreign market value of the imported merchandise, and

[(B)] (C) the amount, if any, by which the foreign market value [of each such entry] of the merchandise exceeds the United States price of [the] each such entry.

The administering authority, without revealing confidential information, shall publish notice of the

results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

3. Section 771(6) is amended to read as follows [deleted material is bracketed; new material is underlined]:

(6) Net Subsidy.-

(A) For the purpose of determining the net subsidy, the administering authority may subtract from the gross subsidy the amount of-

[(A)] (i) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy, [B] (ii) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and [C] (iii) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

(B) For the purpose of estimating or determining the amount of the net subsidy under this subtitle, the administering authority may calculate the net

subsidy on a country-wide basis, or on any other basis it deems appropriate under the circumstances, and may use averaging or generally recognized sampling techniques.

TAB E

TRADE LAW REVISION PROPOSALS FOR THE CABINET COUNCIL ON COMMERCE AND TRADE

Limit Judicial Review During Administrative Proceedings to Final Agency Actions

A. Present Law

Under present provisions of law most interim actions taken under the antidumping and countervailing duty laws are subject to interlocutory judicial review. The statute (19 U.S.C. 1516a) specifically provides for the review of Commerce preliminary negative determinations and determinations that an investigation is extraordinarily complicated and thus should be extended. The courts effectively have expanded the statutory provisions by agreeing to review "negative aspects" of an otherwise affirmative preliminary determination and accepting jurisdiction (under the residual jurisdiction provision of 28 U.S.C. 1581(i)) of a wholly affirmative preliminary determination.

While the number of such interlocutory challenges to date has not been great, they arise typically in the most complex and important investigations, creating a serious drain on the Commerce Department's legal and investigative resources at the most critical times and thus hampering their ability to complete such investigations in a timely and satisfactory manner. Further, it typically is difficult or impossible to complete such litigation before final

administrative action overtakes the process and effectively renders the litigation moot or nearly so. The approach taken by the courts has created a strong likelihood that interlocutory challenges will increase in the future, putting further unacceptable drains upon administrative resources and greatly raising the cost of these proceedings to private parties without significantly benefitting them.

B. The bill

The amendments made to the judicial review provisions of titles 19 and 28, United States Code, will concentrate judicial review at the end of the administrative proceeding and eliminate interlocutory review. Specifically, the provisions for review of preliminary negative determinations and determinations that an investigation is extraordinarily complicated have been eliminated. It is intended that all interlocutory actions which are in fact, or by necessary implication, incorporated in the final agency action will be reviewable in accordance with the provisions for the review of final determinations, and not before then. Otherwise, interlocutory actions will not be reviewable. Further, the bill will make it clear that final affirmative determinations with the exceptions noted below, will not be challengeable until an antidumping or countervailing duty order is published. Additional amendments to 19 U.S.C. 1516a are made to correct or clarify more technical problems which have arisen under these provisions. They include: 1) providing

that a final affirmative determination by Commerce, although normally not reviewable until an antidumping or countervailing duty order is published, is challengeable within 30 days after a final negative injury determination by the International Trade Commission which specifically relies upon the size of the dumping margins or net subsidy calculated by Commerce in reaching its negative determination; 2) eliminating the specific provision for review of a determination by Commerce not to review an agreement or a determination based upon changed circumstances (which will still be challengeable as part a challenge to a final determination under section 751 of the Tariff Act of 1930 (19 U.S.C. 1675)); 3) providing that specific exclusions by Commerce of any company or product, even if made in the context of an otherwise affirmative determination, can be challenged within 30 days after publication of the determination without waiting for publication of an order (with all other aspects of a final determination denominated as affirmative reviewable solely in accordance with the provisions governing review of affirmative final determinations); 4) providing that a challenge to a suspension agreement entered into by Commerce under section 704 or 734 of the Tariff Act of 1930 (19 U.S.C. 1671c or 1673c) can include a challenge to any final determination issued by Commerce in a suspended investigation which is continued pursuant to a request by one of the parties if that final determinations results in a change in the size of the

dumping margin or net subsidy calculated, or in the reasoning underlying such calculations, at the time the suspension agreement was concluded; and 5) providing a specific cause of action to review determinations by Commerce as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order (which determinations are not necessarily made at the time of a final section 751 review). Finally, the bill will make a number of technical, conforming amendments to Title 28, United States Code.

C. Reasons for the amendments

These amendments will consolidate and simplify the judicial review provisions covering antidumping and countervailing duty determinations, streamlining the process to reduce costs to private parties without removing any significant rights or protection they now have. In particular the elimination of interlocutory review should not be a disadvantage to domestic industries since that type of review is unlikely to be concluded before the administrative process is concluded and thus equally unlikely to provide meaningful benefits to them. Any aspect of an interim action which specifically or by necessary implication is incorporated in the final action will be challengeable as part of a challenge to the final determination. Simultaneously, the elimination of interlocutory review will remove the real threat that the

Commerce Department will not be free to devote the necessary resources to the administrative process and should help to ensure timely and accurate determinations. These amendments are not intended to affect the current law on judicial review of agency action concerning the release of confidential business information. In order to achieve the time and cost savings for which these amendments are designed it is essential that the courts not utilize the residual jurisdiction provision of 28 U.S.C. 1581(i) or any other provision of law to entertain challenges to interim actions by the Commerce Department and the International Trade Commission, and it is intended that all challenges to administrative actions under the antidumping and countervailing duty laws, except as noted above, be governed strictly and solely by the amended section 516A.

The additional technical amendments to section 516A are designed to cure technical deficiencies in that section which have led to confusion or delay in the process of judicial review and to help ensure that all reviewable determinations are subject to proper and timely review within the framework of this section. Section 516A now contains references to "The Secretary" and "section 303." These references have been deleted because section 303 currently provides that the administering authority and the Commission shall follow the procedures in Subtitle IV of the Act (relating to the imposition of countervailing duties).

[New material underlined; deleted material in brackets]

D. Suggested Amendment

Section 516A of the Tariff Act of 1930, as amended (19 U.S.C. 1516a) is amended to read as follows:

§1516a. Judicial review in countervailing duty and antidumping duty proceedings

(a) Review of determination. --

(1) Review of certain determinations. --

[(A) Thirty-day review. --] Within 30 days after the date of publication in the Federal Register of notice of --

(A) [(i)] a determination by [the Secretary or] the administering authority, under section [1303(a)], 1673a(c) or 1671a(c) of this title, not to initiate an investigation,

(B) [(ii)] a determination by [the administering authority or] the Commission, under section 1675(b) of this title, not to review [an agreement or] a determination based upon changed circumstances, or

(C) [(iii)] a negative determination by the Commission, under section 1671b(a) or 1673b(a) of this title, as to whether there is reason-

able indication of material injury, threat of material injury, or material retardation, an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

[(B) Ten-day review. -- Within 10 days after the date of publication in the Federal Register of notice of --

(i) a determination by the administering authority, under section 1671b(c) or 1673b(c) of this title, that a case is extraordinarily complicated, or

(ii) a negative determintion by the administering authority under section 1671b(b) or 1673b(b) of this title, an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules

of that court, contesting any factual findings or legal conclusions upon which the determination is based.]

(2) Review of determinations on record. --

(A) In general. -- Within thirty days after

(i) the date of publication in the Federal Register of --

(a) [i] notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or

(b) [ii] an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), or -

(ii) the date of mailing of a determination described in clause (vi) of subparagraph B,

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

"(B) REVIEWABLE DETERMINATIONS. -- The determinations which may be contested under subparagraph (A) are as follows:

"(i) Final affirmative determinations [by the Secretary and by the Commission under section 303, or] by the administering authority and by the Commission under section 705 or 735 of this Act.

"(ii) A final negative determination [by the Secretary,] the administering authority[,] or the Commission under section [303,] 705[,] or 735 of this Act, including any part of a final affirmative determination which specifically excludes any company or product.

"(iii) A final determination, other than a determination reviewable under paragraph (1), by [the Secretary,] the administering authority[,] or the Commission under section 751 of this Act.

"(iv) A determination by the administering authority, under section 704 or 734 of this Act, to suspend an antidumping duty or a countervailing duty investigation, including any final determination resulting from a continued investigation which changes the size of the dumping margin or net subsidy calculated at the time the suspension agreement was concluded, or the reasoning underlying such calculations.

"(v) An injurious effect determination by the Commission under section 704(h) or 734(h) of this Act.

"(vi) A determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.

(3) Exception. Notwithstanding the limitation imposed by subparagraph (2)(A)(ii) of this subsection, a final affirmative determination by the administering authority under section 705 or 735 of this Act may be contested by commencing an action, in accordance with the provisions of subparagraph (2)(A), within thirty days after the date of publication in the Federal Register of a final negative determination by the Commission under section 705 or 735 of this Act which is expressly predicated upon the size of either the dumping margin or net subsidy determined to exist.

Additional conforming amendments.

Amend 28 U.S.C. 2636(c) to read:

"(c) A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930[, other than a determination under section 703(b), 703(c), 733(b), or 733(c) of such Act,] is barred unless commenced in accordance with the rules of the Court of

International Trade. [within thirty days after the date of the publication of such determination in the Federal Register] within the time specified in section 516A.

Delete 28 U.S.C. 2636(d) and redesignate subsections (e) through (i) as (d) through (h), respectively.

Amend 28 U.S.C. 2647 to read:

§2647. Precedence of cases

"The following civil actions in the Court of International Trade shall be given precedence, in the following order, over other civil actions pending before the court, and shall be assigned for hearing at the earliest practicable date and expedited in every way:

"(1) First, a civil action involving the exclusion of perishable merchandise or the redelivery of such merchandise.

["(2) Second, a civil action for the review of a determination under section 516A(a)(1)(B)(i) or(ii) of the Tariff Act of 1930.]

"[(3) Third,] (2) Second, a civil action commenced under section 515 of the Tariff Act of 1930 involving the exclusion or redelivery of merchandise.

"[(4) Fourth] (3) Third, a civil action commenced under section 516 or 516A of the Tariff Act of 1930. [other than a civil action described in paragraph (2) of this section.]"

Improve Procedures for Release of Information Under Administrative Protective Orders

A. Present Law

With respect to the confidential information developed in an antidumping or countervailing duty proceeding, section 777(b) provides that information submitted to the administering

authority (the Department of Commerce) or the ITC which is properly designated as confidential by the person submitting it shall not be disclosed to any person without the consent of the person submitting it unless pursuant to a protective order. The Department and the Commission may require that information for which confidential treatment is requested be accompanied by a non-confidential summary.

Under section 777(c), upon receipt of an application which describes with particularity the information requested and sets forth the reasons for the request, the Department and the ITC could make certain confidential information, submitted by any party to the investigation, available under protective order.

B. The bill

One of the proposed changes would make it necessary for parties submitting information for which confidential

treatment is requested to submit at the same time a non-confidential summary of the information or a statement explaining why the confidential information cannot be summarized for the public reading file.

Another change would require the party submitting the confidential information to submit at the same time either a statement permitting its release in accordance with the statutory procedures for protective orders or a statement of the reasons why it should not be so released.

Finally, the proposed amendment specifically would permit interested parties to request the release under administrative protective order prior to the submission of the information to the Commission or the Department, provided that the application satisfies the other statutory requirements.

C. Reasons for the amendments

The change that would require ("shall require") instead of permit ("may require") the Department and the Commission to obtain non-confidential summaries of confidential information (or a written explanation of when the information cannot be summarized) will clarify the importance of such summaries. These summaries in practice have made it possible for parties not directly involved in the administrative proceedings to inform themselves about the proceeding. In addition, they have tended in some cases to reduce the scope

of or eliminate the need for release of information under administrative protective orders. The uniform rule regarding submission of summaries will eliminate fruitless debate over whether and when such summaries should be provided and thereby will conserve administrative resources for the other aspects of the proceedings. This provision does not define what constitutes an adequate non-confidential summary. How detailed summaries should be and what they should contain in any particular case or situation are questions for the administering authority and the Commission to answer in a manner consistent with the purpose of this section.

The statutory requirement that interested parties submit with the confidential information a statement either opposing or agreeing to release of the information under protective order and the statutory authority to permit the anticipatory filing of applications for protective order together will significantly shorten the agency's processing time for such applications. The current practice requires an applicant to wait until the information has been received by the Department before he or she submits an application for release under protective order. Thereafter, under current practice, the Department solicits comments on the application from the party that submitted the confidential information. Since much of the information submitted during the course of these proceedings is submitted in response to agency requests, and therefore can be identified in advance of

submission, there is no valid reason to delay processing the application for release of such information until after the information has been received.

D. Suggested Amendments

1. Section 777(b)(1) second sentence, is amended to read as follows [existing law proposed to be omitted is enclosed in brackets; new material is underlined]:

The administering authority and the Commission [may] shall require that information for which confidential treatment is requested be accompanied by:

(A) a non-confidential summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or a statement that the information is not susceptible to summary accompanied by a statement of the reasons in support of the contention [.], and

(B) a statement permitting the administering authority or the Commission to release under administrative protective order, in accordance with subsection (c), the information submitted in confidence, or a statement that the information should not be released under administrative protective order.

2. Section 777(c)(1)(a) is amended by adding in the first line, after the word "application," the phrase, "before or after receipt of the information requested."

V. "Broadening the Coverage of the Countervailing Duty Law"

A. Present law

Section 701(a)(1) currently covers only "merchandise imported into the United States." No express provision is made to cover either sales for future delivery or merchandise imported under leases that are actually sales in substance. Similarly, the Commission's injury analysis, as described in sections 701(a)(2), 703(a), 705(b), and 771(f), refers to material injury caused by "imports".

B. The bill

Section 701(a)(1) is amended to include both "merchandise imported or sold for importation into the United States."

In addition, a new subsection is added to the definitional provisions of section 771 which defines the term "imports" as imported merchandise, merchandise entered under a lease which the administering authority determines is equivalent to a sale, or merchandise sold for future importation.

C. Reasons for the provision

First, as now written, section 701(a)(1) does not expressly apply to sales of merchandise for which actual importation will occur in the future, although the Department of Commerce has initiated a countervailing duty investigation

in at lease one case involving a sale, but no actual importations at the time of initiation. Railcars from Canada, 47 Fed. Reg. 31415 (July 20, 1982). The bill will codify this administrative practice in order to remove any question regarding the adminstering authority's ability to respond in a timely fashion in such situations.

Second, in addition to defining the term "imports" to be consistent with the new wording of section 701(a)(1), the bill also includes within that definition merchandise entered under a lease which the administering authority determines is equivalent in substance to a sale. This definition is intended to ensure that the Commission will consider the impact of possible sales for future importation and leases that are equivalent to sales in determining whether a domestic industry is being materially injured "by reason of imports". Because the existence of either type of transaction may not be readily apparent to either the administering authority or the Commission, the primary burden of coming forward with information in this regard is on the petitioner. If, prior to the initiation of an investigation, a petitioner alleges that particular sales or leases should be investigated, and an investigation is initiated, it is intended (1) that the administering authority will identify in its notice of initiation which transactions, if any, will be investigated, and (2) that the Commission will also consider such transactions in making its preliminary determination. If allegations are made after the investigation

has commenced, but a reasonable time before the adminstering authority's final determination must be made, or if the administering authority otherwise becomes aware of such transactions during that period, the administering authority will state its conclusions in this regard in its final determination, and such findings shall be considered by the Commission in making its final determination. It is intended that this definition will apply to both antidumping and countervailing duty proceedings.

No changes to section 701(a)(1) regarding the inclusion of leases substantially like sales is necessary because it is understood that merchandise entered into the United States under a lease is, in most circumstances, considered by Customs to be an importation. Thus, the phrase "imported or sold for importation into the United States" would implicitly include leases.

D. Proposed Amendments 1. Subsection 701(a)(1) is amended as follows [new material is underlined]:

(a) GENERAL RULE.-If-

(1) the administering authority determines that-

(A) a country under the Agreement, or

(B) a person who is a citizen or national of such a country,

or a corporation, association, or other organization organized in such a country, is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported or sold for importation into the United States, and

* * * *

2. Section 771 is amended as follows by adding the following at the end thereof [new language underlined]:

(18) IMPORTS--The term "imports" means merchandise entered into the United States, or merchandise sold for importation into the United States at a future date, including merchandise under a lease which is determined to be equivalent to a sale.

Tab H

Allow Labor-Industry Coalitions as Petitioners

The current provision on who has standing to file an AD or CVD petition on behalf of a domestic industry has been interpreted by the Court of International Trade to exclude ad hoc labor-industry coalitions. No valid purpose is served by excluding such groups as long as they truly are representative of the affected industry. Thus, we propose amending the provision to include combinations of firms, unions and trade associations in which a majority of the members are involved in producing the product competing with the allegedly unfairly traded import.

Tab I

Simultaneous AD and CVD Investigations

Under current law, there are radically different statutory deadlines for AD and CVD investigations. As a result, when a petitioner simultaneously files AD and CVD petitions, the cases cannot proceed simultaneously. The determinations in the CVD investigation must be made long before those in the AD case. This has caused problems for some petitioners, particularly in having to go through the time and expense of two separate injury determinations before the ITC. To eliminate this problem, we propose amending the law to provide that where AD and CVD petitions are filed simultaneously, both will proceed on the AD timetable where the petitioner so elects.

Simplify Adjustments to U.S. and Foreign Prices in Antidumping Proceedings

A. Present law

The rules on adjustments in antidumping calculations, particularly those relating to differences in circumstances of sale, are numerous, detailed, and complicated. Among the distinctions required to be made in determining whether a particular claimed expense is one for which an adjustment is appropriate are -- is the selling expense indirect or is it direct; is it a selling expense or a general and administrative expense; is the expense based on its cost or its price; if not directly attributable to a particular item, how should it be allocated? In addition, there are numerous special rules allowing certain expenses for which adjustment normally is not allowed to offset certain other expenses and establishing ceilings (caps) on the level of other adjustments.

B. The bill

The bill contains a proposal to require the Department of Commerce to conduct a study and report its conclusions and recommendations to the appropriate committees of The House and Senate no later than January 1, 1985.

Tab K

Option Collect AD and CVD duties on a prospective basis and eliminate cash deposits of estimated duties

Background

After the Department of Commerce issues an antidumping or countervailing duty order, all subsequent imports of the affected merchandise are subject to cash deposits of estimated duties upon entry into the United States. In each annual administrative review mandated by section 751 of the Tariff Act, the Department retrospectively calculates the actual amount of subsidization or sales at less than foreign market value occurring during such a reviewed period. The Department then must set the final duty rates on entries (individually in antidumping proceedings) during that period, with payments or collections to adjust for over- or under-collection of cash deposits.

Amendments adopted in 1979 were intended to prevent repetition of the Treasury Department's chronic delays in assessing antidumping duties. Yet the new scheme itself creates a 12- to 24-month delay after entry of specific merchandise, since the Department tries to review a one-year period within the following year. This delay, caused solely by retrospective assessment, means that U.S. importers -- usually U.S. firms unrelated to the foreign exporters -- remain at substantial risk as to their ultimate liability for a long time after contracting for and receiving merchandise.

Pros

-- Eliminates substantial uncertainty now faced by U.S. importers as to their ultimate duty liability. (This would not necessarily increase or decrease imports. It would simply allow U.S. importers to decide more rationally whether to import, and from whom.)

-- Significantly simplifies administration of the AD and CVD laws and so prevents delay and saves money.

Cons

-- Where prospective rates were low, subsidy levels or dumping margins could be increased for a time without corrective action by the Department. To mitigate this possibility, liquidation could be suspended where evidence is presented of a radical increase in subsidy levels or dumping margins. Duties could then be imposed retroactively, if radically increased subsidy levels or dumping margins were found in the next administrative review.

-- Likely to be opposed by the trade bar, which prospers on the complications inherent in restrospective duties and regular reviews.

Option Write legislative history sanctioning revocation of AD and CVD orders where exports to U.S. have ceased or parties are no longer interested.

Background

The Department's statutory authority to revoke outstanding AD or CVD orders or to terminate suspension agreements is virtually unqualified. Yet the legislative history indicates that it should be used only where subsidization or dumping no longer exists. As a result, the Department's revocation policy has been restrictive. Scarce resources are consequently wasted on administrative reviews of cases in which even the parties have become disinterested or where the product concerned is no longer exported to the U.S.

Pros

-- Saves administrative resources by facilitating revocation of cases of little interest to anyone.

-- Eliminates international opposition to allegedly unreasonable continuation of cases.

Cons

-- U.S. industry and trade bar will oppose any perceived relaxation of presently stringent revocation policy.

C. Reasons for the proposal

The complexity of the problem of simplifying adjustments to U.S. and foreign prices in antidumping proceedings makes further study necessary. It would also give the Department a chance to measure the effect of alternative proposals on the competing interests in the business community.

D. Proposed legislation

The Secretary of Commerce shall conduct a study to determine how the statutory, regulatory, and administrative rules and procedures for adjusting U.S. and foreign market prices in antidumping proceedings can be simplified in a manner consistent with the purpose of the antidumping law and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

The Secretary shall transmit the study, including conclusions and recommendations, to the Subcommittee on Trade of the House Committee on Ways and Means and the Subcommittee on International Trade of the Senate Committee on Finance, no later than January 1, 1985.

Tab L

Option Facilitate termination of CVD orders where exports to U.S. have ceased or parties are no longer interested.

Background

The Department's statutory authority to revoke outstanding AD or CVD orders or to terminate suspension agreements is virtually unqualified. Yet the legislative history indicates that it should be used only where subsidization or dumping no longer exists. As a result, the Department's revocation policy has been restrictive. Scarce resources are consequently wasted on administrative reviews of cases in which even the parties have become disinterested or where the product concerned is no longer exported to the U.S.

To remedy this problem, Commerce could be authorized to classify certain cases as inactive; and for those cases to waive assessments, deposits and reviews and to revoke automatically after some period of time, absent requests for domestic interested parties for reinstatement.

Pros

-- Saves administrative resources by facilitating revocation of cases of little interest to anyone.

-- Eliminates international opposition to allegedly unreasonable continuation of cases.

Cons

-- U.S. industry and trade bar will oppose any perceived relaxation of presently stringent revocation policy.

Tab M

Option Provide for automatic injury review by the ITC at regular intervals (for instance, 5 years).

Background

Unlike Commerce, the ITC is not now required to review its determinations regularly. Particularly where trade patterns shift rapidly, injury may no longer exist even if dumping and subsidization continues. Providing for regular ITC injury reviews (perhaps every 5 years) would ensure that, in accordance with the overall statutory scheme, relief is provided against injurious unfair trade practices.

Pros

-- Terminates some cases through negative ITC injury determinations, and so focuses scarce government resources on cases of greatest import (where there are injurious unfair trade practices)

-- Ensures greater conformity with GATT obligation to counteract only injurious dumping or subsidization

Con

-- Makes AD and CVD laws more expensive for petitioners and respondents as well as for the United States Government.

Tab N

Option Clarify that the CVD law does cover upstream subsidies

Background

Upstream (or indirect) subsidization occurs when the subsidization of a component provides a competitive benefit to a finished product that is exported to the U.S. Upstream susidization has been alleged in recent cases (e.g., subsidized coal as a subsidy to steel, price-controlled natural gas as a subsidy to ammonia). However, Commerce's negative findings on those particular allegations have resulted in the view that the law should be amended to cover upstream subsidization.

This option would clarify that the law does apply where the following conditions are met: (1) the government program benefits only a specific industry or group of industries including the component manufacturer, (2) the input is only used by a specific industry or group of industries including the manufacturer of the finished product under investigation, and (3) subsidization of the input provides a competitive benefit to the product under investigation, essentially by comparison to the international price of the input.

Pros

-- Reassures domestic industry that CVD law does cover appropriate upstream subsidies.

-- Continues to regard as subsidies only benefits provided to a specific industry or group of industries, and so does not trigger foreign retaliation against U.S. exports (such as textiles and petrochemical products) made with generally available price-controlled natural gas.

Con

-- Won't satisfy non-exporting domestic industries, which wish to have even generally available benefits (i.e., not provided to a specific industry or group of industries) considered subsidies.

Tab O

Option Eliminate minimum values for general expenses and for profit in the calculation of constructed value when used as the basis of foreign market value.

Background

Whenever dumping comparison cannot be based on price in the foreign home market or on prices for export to countries other than the U.S., the law provides that the Department shall use constructed value (CV). This is the sum of the cost of materials and fabrication, general expenses, and profit. The actual cost (or market value) of material is always used. Likewise, fabrication is based on actual cost. Currently, however, the law requires an addition for general expenses of the higher of actual expenses or 10% of materials and fabrication; profit must be based upon the higher of the actual profit or 8% of materials, fabrication, and general expenses.

We propose to eliminate these artificial floors and rely upon a firm's actual home market general expenses and profit figures whatever their level, provided the producer does not operate at a loss within a progression of levels of home market production and sales.

Pros

-- Eliminates international objections to U.S. practice of establishing arbitrary minimum values inconsistent with the GATT.

-- Provides leverage to U.S. delegations negotiating with other countries to secure their conformity with other provisions of the GATT.

-- Injects economic reality into administration of the statute by eliminating arbitrary standards that create artificial dumping margins.

Cons

-- Will be highly unpopular with U.S. industry, since the general expenses and profit floors generally create or exaggerate dumping margins.

-- Requires more thorough analysis of expense and profit ratios than is currently necessary in administering CV provision, since examination could not be discontinued when ratios fall below the statutory breakpoints.

-- Is unlikely to be enacted by the Congress in the present political environment.

Tab C

PROPOSED TECHNICAL AMENDMENTS TO THE ANTIDUMPING AND COUNTERVAILING DUTY LAWS

In addition to proposals that are controversial or would entail major substantive changes in the antidumping (AD) and countervailing duty (CVD) laws, there are many technical changes that would clarify ambiguities, correct mistakes, and improve administrability.

1. Permit Waiver of Verification in CVD Investigations: Amend section 703 to permit waiver of verification in CVD investigations. (Currently waiver is possible only in AD investigations). Often in countervailing duty cases, the same information occasionally applies to two or more different investigations. Petitioner and other interested parties, if allowed, might waive verification of material verified in previous investigations, or material submitted by a government which is publicly available, thus saving the Department time and money. Domestic manufacturers would not be adversely affected by this provision, because it could only be instituted at their request.

2. Critical Circumstances in CVD Only Where Export Subsidies Are More Than De Minimis: Amend section 703(e) to make clear that an affirmative determination of critical circumstances is warranted only where the export subsidies are more than de minimis. Under the GATT Code critical circumstances can be based only on export subsidies. As now drafted, a court could hold that Commerce had to make an affirmative determination whenever the overall subsidy level (i.e., including domestic subsidies) was more than de minimis.

3. Clarify Period of Retroactivity in Critical Circumstances: Amend sections 703(e) and 733(e) to clarify that where a critical circumstances determination is affirmative, the retroactive suspension of liquidation applies to entries made on or after the date which is 90 days before the date on which that determination is published in the Federal Register. As presently drafted, the law could be interpreted to refer to the date the Deputy Assistant Secretary makes the decision. Publication date is more appropriate than signature date because that is when the public has knowledge of the action.

4. Authorize Termination of Self-Initiated Investigations: Amend sections 704(a) and 734(a) to make explicit Commerce's right to terminate self-initiated investigations. This would end the need to resort to the fiction, as was done in the termination of investigations on certain steel products from Belgium, Brazil, France, Romania, South Africa and Spain (see 47 F.R. 5754), that in self-initiated investigations the administering authority is the petitioner for purposes of section 704(a) and 734(a) and may therefore withdraw its petitions and terminate the investigations.

5. Establish Deadline for Submitting Proposed Suspension Agreements: Amend sections 704(d) and 734(d) to provide that foreign governments or exporters desiring a suspension of investigation must submit a draft suspension agreement to the Department no later than 45 days prior to the statutory due date for the final determination. The statute already provides for a 30-day comment period. This change would ensure that the Department had adequate time to analyze proposals. This would prevent the all-too-frequent occurrence of drafts not being submitted until one or two days before the start of the comment period.

6. Establish Formal Suspension Agreement Comment Procedures: Amend sections 704(e) and 734(e) to provide more formal rights to comment on proposed suspension agreements.

7. Clarify Rights of Interested Parties as to Suspension Agreements in Self-Initiated Cases: Amend sections 704(e) and 734(e) to provide more formal rights to comment on proposed suspension agreements in cases self-initiated by the Department.

8. Permit Renegotiation of Suspension Agreements Where the Breach of Its Terms Is Technical or Is Minor and Unintentional: Amend sections 704(i) and 734(i) to specifically authorize renegotiation of suspension agreements where the breach is technical (e.g., a new exporter must be added to restore coverage of at least 85% of exports) or is minor and unintentional. It is difficult to foresee and memorialize in agreements all of the provisions necessary to cover every eventuality and to assure that the terms are stated clearly enough to avoid every future misunderstanding between or among the parties. In the course of an administrative review, Import Administration may learn that the foreign government or company is in some way acting (or failing to act) contrary to our interpretation of the agreement or that the agreement itself has ambiguities which render it difficult to interpret or administer. The foreign party or government may disagree with our interpretation of the agreement or our characterization of the conduct in question. Such omissions or lack of clarity in the agreement warrant revision or amendment of the written agreement in order to clarify it, rather than termination of it as having been violated.

9. Clarify that When a Suspension is Violated and an Investigation Resumed, Data from Current Period Should Be Used: Amend sections 704(i)(1)(B) and 734(i)(1)(B) to clarify that when a suspension agreement is violated and an investigation resumed, the investigation will be based on the most current data in the possession of the Department. The provision as now drafted could be interpreted to require use of the original investigation data base. Since violation and resumed investigation can occur many years after the suspension, this makes no sense. Further, the statute should be amended to permit the Department to take up to 90 days to complete an investigation which was not continued pursuant to sections 704(g) or 734(g) and the ITC to make a determination (where appropriate) not later than 120 days after the resumption of the investigation.

10. Clarify that Customs Conducts Fraud Investigations: Amend sections 704(i)(2) and 734(i)(2) to clarify that when Commerce determines that a suspension agreement has been intentionally violated, it will refer the matter to the U.S. Customs Service, which will have the authority to conduct a section 592 fraud investigation.

11. Clarify that an Affirmative Final Determination of Critical Circumstances Is Possible Even Where the Preliminary Determination Was Negative: Amend sections 705(a)(2) and 735(a)(2) to eliminate current confusion and to make explicit that even where the preliminary determination of critical circumstances was negative, the final critical circumstance determination can be affirmative. Where it is, suspension is retroactive to the date 90 days before the date on which the notice containing the affirmative critical circumstance determination is published in the Federal Register.

12. Conform Time Periods for Completion of Administrative Reviews: Amend sections 706, 736, and 751 to eliminate the time periods in sections 706 and 736. Change the period in section 751 to make the first annual review due 24 months after the date of the AD/CVD order, with subsequent reviews due at 12 month intervals. As presently drafted, the time periods are inconsistent.

13. Permit Liquidation of Small-Value Entries Without Assessment of AD or CVD Duties: Amend sections 706 and 736 to include a statement such as: "Entries of merchandise subject to potential countervailing/antidumping duties where the value of that merchandise is $250.00 or less shall be liquidated without regard to such duties." Customs allows liquidation of small-value entries as informal entries without extensive paperwork. (The Import Specialist who knows about AD and CVD rates never sees informal entries). This is a cost-effective approach to duty collection. It would be very burdensome for Customs not to allow such informal entries for merchandise subject to AD/CVD. They would have to restructure the entire informal entry procedure, which they would be very reluctant to do. This proposed change also prevents the withholding of appraisement, for example, on million dollar shipments because $250 or less of one of the items in the shipment is subject to AD/CVD duties. (There are not many commercial small-value entries, so there is unlikely to be a significant loss of revenue).

14. Change the title of section 734(b) to "Agreements To Eliminate Completely Sales at Less Than Foreign Market Value...." This brings the title into conformity with the terms of section 734(b)(2).

15. Change Scope of Early Determinations to Cover Merchandise Entered and Sold to the First Unrelated Purchaser During Period: Amend section 736(c)(1) to cover only entries which were entered and sold to unrelated purchasers during the period between an affirmative preliminary determination by Commerce and an affirmative injury determination by the ITC. Exporter's Sales Price cannot be calculated unless there is a sale to an unrelated purchaser. There can be situations where merchandise is entered during this period but is not sold to an unrelated purchaser until long thereafter. Without this proposed change, section 736(c) cannot cover such situations.

16. Expand Scope of Sections 738 and 740 to Include CVD as well as AD: Amend sections 738 ("Conditional Payment of Antidumping Duty") and 740 ("Antidumping Duty Treated as Regular Duty for Drawback Purposes") to cover CVD proceedings as well as AD proceedings. Coverage is limited to AD only because of historical accident.

17. Delete Section 739: Section 739 ("Duties of Customs Officers") is an anachronism. Since Customs now acts solely in response to Commerce instructions in assessing AD and CVD duties, the provision is unnecessary.

18. Clarify that Review of CVD Suspension Agreement is of the Level of Actual Subsidization and in AD Suspension Agreement is Comparison with Foreign Market Value: Amend sections 751(a)(1)(C) to clarify that in administrative reviews of CVD suspension agreements the review concerns the level of subsidization from subsidies determined to exist by Commerce. As drafted, the law can be interpreted to refer to the level of all potential subsidies. The change can be accomplished by changing "any net subsidy" to "the net subsidy" in that subsection. Amend section 751(a)(1)(C) by changing the phrase "fair value" to "foreign market value" and delete the phrase "involved in the agreement".

19. Clarify that Wholesalers of Imported Merchandise Do Not Have Standing as Petitioners: Amend sections 771(9)(C)-(E) to make it clear that only parties involved in producing like merchandise in the U.S. have standing as petitioners. This could be done by adding "manufactured in the United States" in each of these subparagraphs, or by inserting "manufactured in the United States" after the words "a product" in section 771(10). Wholesalers of imported merchandise have sought standing, claiming the current provision is ambiguous.

20. Conform Definitions of Related Parties: Amend sections 771(13)(B),(C),(D) and 773(e)(3) to conform currently disparate definitions for related parties. Import Administration staff suggests that in all cases the level be set at 15%. Currently the range is from "any interest" to 20%. There is no logical reason for the differing levels.

21. Change References to "Wholesale Quantities" to Be "Commercial Quantities": Amend sections 771(14)(B), 771(17), 773(a)(1)(A), and 773(a)(4)(A) to replace references to "usual wholesale quantities" with "usual commercial quantities." The reference to wholesale can be erroneously interpreted to refer to a level or class of sale rather than to the size.

22. Permit Examination of Sellers' Pricing Structure in Purchase Price Transactions: Amend section 772(b) to replace "...purchased...from the manufacturer or producer..." to "...purchased...from the manufacturer, producer, or seller...." This change codifies Commerce practice in AD proceedings, under which the prices from sellers or trading companies to unrelated U.S. purchasers are used as the basis of purchase price in certain instances. One example is where the seller or trading company buys a fungible product from a manufacturer who is unaware of ultimate destination. The seller then charges different prices to purchasers in different markets. Another example is evidence suggesting the seller and manufacturer collusively set a false price in the transaction between them. However, the Committee reports should also clarify the language in the TAA Senate Finance Committee Report at 94 and the Ways and Means Committee Report at 75 under the definition of U.S. Price. The phrase " ... under terms of sale fixed" should be deleted; the phrase "on or before the date of importation" should be changed to "on or before the date of the manufacturer's sale" and the word "will" in the phrase "... will be used as purchase price" should be changed to "may". This change recognizes current practice and more clearly expresses the legislative intent.

23. Conform Sections 772(d)(1)(B) and (C): These provisions concern upward adjustments to purchase price in AD proceedings (i.e., additions to restore comparability to the home market price against which it is being compared). Subsection (B) concerns import duties imposed on inputs by that country which were rebated on items subsequently exported (but are included in the price of goods sold in that country's home market). Subsection (C) deals with taxes imposed by that country which are rebated upon exports. Subsection (C) contains the explicit qualification that this addition is to be made "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation...." There is no such explicit qualification in (B). There should be. Since the adjustment is meant to restore comparability, it should apply only to the extent the import duties are added to or included in the price of goods when sold in the foreign home market.

24. Where United States Price Is Based on Exporter's Sales Price (ESP), Change Date of Home Market (HM) Comparison to Date of Sale to the First Unrelated Purchaser: Amend section 773(a)(1) to change the date of HM comparison in ESP cases from "at the time of exportation" to "at the time of sale to the first unrelated party." During the course of an investigation, the case analyst must decide for which period to request HM information. This often comes down to a guessing game as to how far back to go to obtain HM information to cover comparisons based on the earliest date of exportation for any sales transactions made during the period under investigation. Also, a manufacturer may have had some merchandise in stock for many years, requiring Commerce to obtain HM information that is many years old and that has no bearing on the current marketing situation. By basing comparisons on date of sale, the case analyst can limit the request for information to the period under investigation. The only problem with this change is that, since the product which had been warehoused in the U.S. may have evolved before its sale to an unrelated party, there may be no readily comparable model being sold contemporaneously in the foreign market. In these cases, comparisons would have to be based on the most similar models then being sold (properly adjusted for differences in physical characteristics). Adoption of this change also will require amendment of Commerce's regulation on currency conversion. (In drafting, care must be taken to ensure that this change will not create dumping margins solely because of inflation).

25. Clarify Provisions on Third Country Resellers: Amend section 773(a) to codify current Commerce practice that where (1) a reseller purchases from a manufacturer who is unaware of where the reseller intends to export the merchandise, (2) the merchandise enters the commerce of a third country (i.e., is not merely transshipped) but is not substantially transformed (e.g., is warehoused), and (3) is subsequently exported to the U.S. -- HM price can be based on price in the third country rather than in the country of origin. This change is based on article 2.3 of the GATT AD Code. It is meant to reflect the realities of which market really is the "home market" under these circumstances.

26. Clarify Criteria for Determining Viability of Home Market: Amend section 773(a)(1)(B) to replace "...so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison..." with "...so small in relation to the quantity sold in the home market and for exportation to all countries including the United States as to form an inadequate basis for comparison...." Without relationship to U.S. sales, Commerce can be faced with (and has been) instances where both home market and non-U.S. export markets are tiny, yet the viability test on its face is satisfied. This makes no sense.

27. Clarify that the Viability Test Applies to Comparisons Based on Sales for Export to Third Countries: Amend section 773(a)(1)(B) to explicitly extend the viability test (discussed in the previous paragraph) to situations where a third country market is not sufficiently large to serve as an adequate basis for comparison. The same reasons for disregarding a home market with insufficient sales apply with equal force to non-U.S. export markets.

28. Change the Viability Test from Quantity to Sales: Amend section 773(a)(1)(B) (the portion quoted in paragraph 28 above) to replace "quantity sold" by "sales." There are situations where viability is better determined by comparison of the value or number of sales in the two referent markets, rather than by aggregate quantity. This change would enable use of any of the three bases as appropriate.

29. Alter Method of Adjusting for Circumstances of Sale: Amend section 773(a)(4)(B) to allow appropriate selling expenses to be deducted from both United States Price and Foreign Market Value, rather than deducting the difference from (or adding it to) Foreign Market Value, as the statute now requires. This change would simplify calculations. (This change is unrelated to possible substantive changes in the nature of allowable circumstance of sale adjustments. Such changes will be the subject of a Commerce study).

30. Clarify Use of Weighted Average Cost of All of a Producer's Facilities Capable of Producing the Product Under Investigation Where Constructed Value Is Used as the Basis of Foreign Market Value: Amend section 773(e)(1)(A) to codify current Commerce practice of using the weighted average cost of all of a producer's facilities producing the product under investigation for purposes of calculating the constructed value in AD proceedings. In several major dumping cases, most notably carbon steel from Europe in 1980, several producers claimed that certain of their plants were used to produce steel for the U.S. market and others were used exclusively to produce steel for the home market. The plants were of substantially different ages and used different production methods, although the end products were identical. This led to substantially different production costs for the various plants and resulted in production cost manipulations and requests for substantial adjustments by the respondents. It was therefore determined that the costs of all plants producing the item would be averaged and those costs would be used. This concept could be implemented by adding the words "...however, where more than one facility is used in the country of exportation to produce the merchandise or essentially identical merchandise, the weighted average cost shall be used" at the end of section 773(e)(1)(A).

31. Amend Constructed Value Provision to Replace "Imported" with "Subject to the Investigation": Amend section 773(e)(1) to replace the word "imported" in line 2 with the words "subject to the investigation." This change would complement using the concept of weighted average cost of all facilities in an antidumping case. It would preclude arguments that we could only consider the costs of plants producing merchandise destined for the U.S.

32. Modify Constructed Value Provision to Refer to General Expenses and Profit of a Specific Producer: Amend section 773(e)(1)(B) so as to provide that general expenses and profit shall be based on the actual experience of the producer for whom a constructed value is being calculated. Section 773(e)(1)(B) currently provides that general expenses and profit shall be based upon sales "made by producers in the country of exportation." Interpreted literally, this language requires that Commerce calculate general expenses and profit upon the basis of a national average. In practice, neither Commerce nor Treasury has used a national average. In the Trade Act of 1974, Congress amended the definition of "such or similar" so that Treasury could no longer calculate dumping margins for Company X upon the basis of sales by Company Y. The purpose of this change was to allow the practices of each producer to stand on their own. Since constructed value is a surrogate for actual sales, this rationale also should apply to constructed value and the calculation of general expenses and profit. This amendment would conform the statute to current practice.

33. Clarify That New Issues Can Be Raised in an Administrative Review of a CVD Order: Amend section 775 to replace "investigation" with "proceeding." This would give explicit authority to consider new subsidy allegations in administrative reviews of CVD Orders.

34. Use Term "Best Information Available" Consistently: Amend text of section 776(b) to replace "best information otherwise available" with "best information available," the term consistently used elsewhere in the statute, and place this provision under a separate section.

35. Clarify That Ex Parte Memos Apply to Administrative Reviews: Amend section 777(a)(3), replacing "investigation" with "proceeding" to clarify that the ex parte memo requirement applies to administrative reviews of orders as well as to investigations.

36. Change "Confidential" to "Proprietary Business Information": Amend section 777 to replace "confidential," wherever it appears, with "proprietary business information." This will clarify that the reference always is to sensitive company commercial and financial data rather than national security information at the "confidential" level.

37. Permit Release of Proprietary Business Information to Customs: Amend section 777(b)(1) to enable Commerce to release proprietary business information to Customs when it is conducting Customs fraud investigations relating to AD or CVD proceedings. The law now permits access only by Commerce or ITC staff involved in the proceeding. This change is needed so that Commerce can enforce compliance with its requests for accurate information through the threat of civil or criminal fraud actions.

38. Apply Interest Provisions to All AD and CVD Findings or Orders: Amend section 778(a) to codify Commerce practice and make the interest provisions of the statute applicable to all orders and findings. Section 778(a) presently provides for interest on overpayments or underpayments of estimated duties deposited on merchandise entered or withdrawn for consumption on or after an ITC final affirmative determination under sections 705(b) (for CVD) or 735(b) (for AD). As a result, ITA has no explicit authority to pay or charge interest for surpluses or shortages in deposits collected on entries under "old law" CVD orders, old law AD findings, or no injury CVD orders under new section 303 because none of those actions involved ITC decisions under sections 705 or 735.

39. Conform Interest Provisions to IRS Practice: Amend section 778(b) to provide that when interest is assessable or refundable, it will be calculated on the basis of the IRS rates in effect during the period covered. If the rate changes during the period, the variation will be taken into account in the calculation. This conforms to IRS practice. As currently drafted, the rate of interest in effect when the amount of AD or CVD is finally determined controls all covered entries (some of which entered up to two years prior to that determination.

40. Clarify Use of "Investigation" and "Proceeding": The terms "investigation" and "proceeding" have distinct technical meanings in AD and CVD cases. The former refers to the time from the filing of a petition until the issuance of an order or a negative determination ending the case. The latter applies to a longer period; where an order is issued, it covers the entirety of the case from petition filing to ultimate revocation of the order. Despite these distinct meanings, the terms are used loosely in the statute. All references to either term should be checked and, where appropriate, changed.

41. Screen the statute for phrase "such or similar merchandise", "like merchandise", "class or kind", "the merchandise", "identical or substantially identical merchandise", "such", and "similar". Several different terms are used in the law to define merchandise subject to investigation and calculations. At times the antecedents for phrases such as "the merchandise" are unclear. The only distinction that needs to be maintained is that between the class or kind of merchandise as the universe of goods subject to a proceeding, and such or similar merchandise as the basis for determining foreign market value. Other phrases should be eliminated, and when "the merchandise" is used the antecedent should be clear. We note that the phrase "like product" is used in both the GATT AD and CVD codes. If the phrase is deleted from the Tariff Act there should be a conforming definition.

42. Add language to 701(a)(1) to avoid countervailing subsidies between countries that are not members of the same customs union. The language would restrict countervailable subsidies to those within such country. The purpose is to avoid countervailing aid provided by one country to another's industry. This sort of aid exists generally only as foreign assistance, such as that provided by AID or, through multilateral channels, the IMF or World Bank. The change would make clear that the law does not apply to foreign aid.

43. Amend Sections 704 and 734 to Require that Suspension of Liquidation Continue for 30 Days Following the Publication of an Agreement Suspending An Investigation. This provision protects the interests of domestic parties by extending the suspension of liquidation up to and through the period during which judicial review may be sought. If a preliminary determination and suspension agreement were published concurrently, it would be necessary to issue a suspension of liquidation.

44. Modify Section 772(e)(2) to Allow the Determination of Expenses Incurred in Selling the Merchandise in the U.S. Whether the Expenses are Incurred In or Outside the U.S. As the statute presently reads, the only selling expenses deducted from U.S. price are those incurred in the U.S. This allows a foreign manufacturer to absorb indirect selling expenses for its U.S. subsidiary which results in a higher U.S. price.

45. Modify Sections 706 and 736 to Eliminate Gap in Coverage: Amend sections 707 and 737 to say "....for consumption before publication of a countervailing duty order (antidumping duty order) under section 706 (section 736)." This will eliminate the gap period in sections 707 and 737 between the affirmative final determination of the Commission and our publication of an antidumping duty order or countervailing duty order.

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