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RENEGOTIATION AMENDMENTS ACT OF 1968

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

REPORT

[To accompany H.R. 17324]

The Committee on Finance, to which was referred the bill (H.R. 17324) to extend and amend the Renegotiation Act of 1951, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

I. SUMMARY

House bill.—The Renegotiation Act of 1951, as amended, which authorizes the Government to recapture excessive profits on certain Government contracts and subcontracts, in the absence of legislation, expires as of June 30, 1968. H.R. 17324 extends the act for 3 years, or until June 30, 1971.

The bill also amends the exemption for standard commercial articles and services in a number of respects to provide assurance that items qualifying for the exemption are, in fact, of a commercial nature. The changes made by the bill regarding this exemption are as follows:

(1) A reporting requirement is provided under which persons who self-apply the exemption for standard commercial articles are to furnish information to the Renegotiation Board, if the effect of the self-application is to reduce the person's total renegotiable sales below the $1 million statutory minimum.

(2) The exemption is not to apply if the article or service is sold to the Government at a higher price than a civilian commercial purchaser would be charged.

(3) The percentage of sales of an item which must be made commercially in order for the exemption to apply is increased from 35 to 55 percent.

(4) The alternate period (the current year and the preceding year) with respect to which the percentage test may be applied in the case of a standard commercial article is removed.

(5) The exemption for like articles which is unnecessary in view of the exemption for a class of articles is removed.

Committee amendments.—The committee's amendments make two principal changes in the House bill. First, the percentage of sales of an item which must be made commercially in order for the standard commercial articles and services exemption to apply is increased to 55 percent, rather than 50 percent as under the House bill. Second, the definition of commercial sales for purposes of the percentage test under existing law, namely, nonrenegotiable sales, is retained instead of being redefined as in the House bill to exclude nonrenegotiable government sales from the commercial sales category.

II. GENERAL STATEMENT

A. The Renegotiation Process

The Renegotiation Act of 1951, in general, provides that the Renegotiation Board is to review the total profit derived by a contractor during a year from all of his renegotiable contracts and subcontracts in order to determine whether or not this profit is excessive. The Board is empowered to eliminate those profits found to be excessive in accordance with certain statutory factors. Thus, renegotiation occurs not with respect to individual contracts but with respect to all renegotiable contracts and subcontracts of a contractor during a year. These contracts vary in form from cost-plus-fixed-fee to firm fixed-price contracts. Some may be prime contracts, while others are subcontracts, and they may be concerned with many different services and products. With respect to any given year they may also reflect only partial payments made on the contracts.

For purposes of renegotiation, profits generally are defined and determined in much the same way as for tax purposes. This similarity is also reflected in that provision is made in renegotiation for a 5-year loss carryforward, as well as the offsetting of losses and profits on different contracts within the year.

The act provides, in general terms, that the Renegotiation Board in determining whether profits are excessive is to give favorable recognition to the efficiency of the contractor with particular regard to attainment of quantity and quality products, reduction of costs and economy. The Board must also consider the reasonableness of costs and profits ,the net worth (with particular regard to the amount and source of public and private capital employed), the extent of the risk assumed, the nature and extent of the contribution to the defense effort, and the character of the business. Thus, in effect, the Board in its judgment must consider all of these factors, and the producer, where these factors are present to the greatest extent (e.g., is most efficient or makes the greatest contribution to the defense effort), is permitted to retain more profit than the producer who satisfies these factors to a lesser extent.

Various types of contracts are excluded from the act; some on a mandatory and others on a permissive basis. The mandatory exemptions include contracts with a State, local, or foreign government, those dealing with certain agricultural commodities, those dealing with mineral and related products, those with certain regulated common carriers, and receipts and accruals for standard commercial articles or services.

B. Three-Year Extension of the Act

In the absence of legislation, the Renegotiation Act expires as of June 30, 1968. The committee agrees with the House that in view of existing international conditions, the continuation of the Renegotiation Act is in the national interest. The renegotiation process allows an after-the-fact review of the profits on renegotiable contracts and subcontracts relating to the national defense and space efforts. This provides a further check on the reasonableness of the profits and prices that the Government has to pay in order to maintain its defense commitments.

Modern military and space procurement is characterized by changing technical requirements and increasing complexity. The nature of this procurement means there often is a lack of established market costs or prices to guide procurement officers, and accordingly the use of negotiated contracts is necessary for the large majority of the dollar amount of these procurements. This includes contracts negotiated with sole-source suppliers as well as contracts negotiated with some degree of price competition. Negotiated Department of Defense military contracts increased from 82 percent of the value of procurement in 1965 to 87 percent in 1967, reversing a downward trend from a high of 88 percent in 1961. In addition, negotiated NASA contracts increased from 91 percent of the value of procurement in 1961 to 97 percent in 1967.

A second factor which indicates the need to extend the Renegotiation Act is the substantial increase in defense and space related procurement during 1965–67, primarily related to the Southeast Asia military buildup. Total military procurement rose from $28 billion in 1965 to $44.6 billion in 1967, or 59 percent. The level of total military procurement is expected to continue at a high level for at least the next few years. Moreover, in view of the normal timelag between the time a contract is awarded and the time renegotiation filings are made with respect to the contract, the amounts received by contractors from procurement awards during the Vietnam military buildup will continue to be reported in Renegotiation Board filings during the next 3 years.

It also will take futher time to properly evaluate the impact of the several changes made in recent years in Government procurement techniques on the relationships between cost, profits, and prices in negotiated contracts and their effectiveness in reducing excessive profits on these contracts. Recent trends in procurement have indicated an increased shift in cost responsibility to the contractor via fixed-price and incentive contracts. Fixed-price contracts have increased from 58 percent of the value of military contracts in 1961 to 79 percent in 1967. A new system of establishing cost-profit-price relationships was initiated by the Defense Department in 1964 (weighted guidelines method of calculating allowable profits based upon the amount of contractor risk involved and the various cost inputs). In addition, procurement negotiating has been improved through strengthening the Truth in Negotiations Act, through revised procurement regulations tightening the cost reporting requirements on the contractor and obtaining postaward audit access to contractor and subcontractor performance records, including price adjustment clauses for defective cost or price data. Although these changes in procurement procedures are significant steps, several investigations by the General Accounting Office and congressional committees of defense and space related contract awards and administation of these contracts in recent years have found that further improvements are necessary in order to increase the efficiency of Government contract negotiating and administration.

The committee agrees with the House that in view of the extent of our defense effort and the factors described above, the Renegotiation Act should be extended for a 3-year period, from June 30, 1968, to June 30, 1971. The 3-year extension is in place of the permanent extension recommended by the administration. The nature of the renegotiation process, and its inherent reliance on human judgment is such that a periodic review of the process by Congress is desirable. This review should encompass both the operation of the renegotiation process as such, and the impact on renegotiation of the changing nature of procurement procedures. The 3-year extension will provide Congress another opportunity to review the renegotiation process and also to reexamine the effects of recent changes in procurement practices after they have been in use for a while.

C. Exemption for Standard Commercial Articles and Services

The standard commercial articles exemption provided under present law exempts amounts received or accrued in a fiscal year under any contract or subcontract for any one of the following categories:

1. A standard commercial article.
2. An article which is "identical in every material respect" with a standard commercial article.
3. A standard commercial service.
4. A service which is "reasonably comparable" with a standard commercial service.
5. Any article in a standard commercial class of articles.

For the exemption to be applicable to an article or service in any one of the above five categories, the item must meet what may be referred to as the 35-percent test, as well as other tests. The 35-percent test, in order to be sure that the price is tested by the market, requires, in the case of a standard commercial article, that at least 35 percent of the contractor's sales of the item be nonrenegotiable during the fiscal year under review or, alternatively, at least 35 percent of the aggregate sales for such year and the preceding fiscal year. In other words, at least 35 percent of the contractor's sales of the item must be commercial sales or sales to Government departments and agencies not covered by the act. In the case of the other four categories, the test requires that at least 35 percent of the sales for the year under review be nonrenegotiable.

Certain other tests must also be met with respect to each category. Thus, for an article to qualify as a standard commercial article, it must be one which is either customarily maintained in stock by the contractor or is offered for sale in accordance with a price schedule regularly maintained by the contractor. If an article is to be exempt as being identical in every material respect with a standard commercial article, it must be of the same kind and manufactured of the same or substitute materials as a standard commercial article, and it must be sold at a price which is reasonably comparable with the price of such standard commercial article.

For a service to be exempt as a standard commercial service, it need meet only the 35-percent test and be a "service" as defined by the statute. And, for a service to be exempt as reasonably comparable with a standard commercial service, it must be of the same or a similar kind, performed with the same or similar materials, and have the same or a similar result as a standard commercial service.

For an article to be exempt as an article in a standard commercial class of articles, the class in which it is grouped must be a standard commercial class. This means, under the statute, the class must consist of two or more articles with respect to which three conditions are met: (1) at least one of such articles either is customarily maintained in stock by the contractor or is offered for sale in accordance with a price schedule regularly maintained by the contractor, (2) all of such articles are of the same kind and manufactured of the same or substitute materials, and (3) all of such articles are sold at reasonably comparable prices.

A contractor may waive the exemption for sales of any one or all of the five categories discussed above for any fiscal year under certain prescribed conditions. In waiving the exemption with respect to any particular article or service, the contractor will not necessarily waive the exemption for any other article or service. The exemption for sales of a standard commercial article is "self-executing" in that it may be applied by the contractor without the filing of any application therefor. However, exemptions for sales of articles or services in any of the other four categories can be obtained only if the contractor files an application with the Board.

The primary reason for having the renegotiation process is that excessive profits may result from defense and space-related procurements, because the price of these procurements must be based on cost estimates made without adequate cost or production experience. On the other hand, there is available with respect to commercial items both market-tested prices and production experience. Under these conditions the committee agrees with the House that it is unnecessary to subject sales of commercial items to renegotiation.

There are a number of modifications which the House believed it was desirable to make in the provisions of the exemption for standard commercial articles and services in order to provide greater assurance that items qualifying for the exemption are in fact of a commercial nature. The more important of these changes involve: (1) a reporting requirement in cases where the standard commercial article exemption is self-applied and the effect of the exemption is to reduce a contractor's (or subcontractor's) renegotiable sales below the $1 million statutory minimum (the "floor"); (2) a requirement that the price charged the Government for an article or service be similar to the price charged in a comparable private commercial sale; (3) an increase of the 35-percent test to make the exemption inapplicable unless at least 50 percent of the sales of an article or service are made for private commercial use; and (4) a redefinition of "commercial sales" for purposes of the percentage test to exclude sales which may not be competitive.

The committee generally agrees with the House that these changes are desirable. The committee, however, made two principal modifications in the exemption for standard commercial articles and services as agreed to by the House: (1) it raised the required percentage of sales of an item which must be made commercially in order for the exemption to apply to 55 percent; and (2) it retained the definition of commercial sales for purposes of the percentage test which exists under present law; namely, nonrenegotiable sales.

(a) *Reporting self-applications of exemption*

As noted above, contractors (and subcontractors) at present may self-apply the exemption for a standard commercial article. If the result of a self-application of the exemption is to reduce a contractor's total renegotiable sales below the $1 million floor, the contractor is not required to file any report with the Renegotiation Board regarding either the self-application of the exemption or the contractor's renegotiable sales generally.

The committee agrees with the House that it is appropriate to require contractors where the self-application of the standard commercial article exemption takes them below the $1 million floor to file a report with the Renegotiation Board regarding the basis for the application of the exemption (and also an indication of total renegotiable sales of the contractor for the year). This requirement will provide a basis for determining the extent to which the exemption is self-applied (which is not ascertainable at present) and also will provide assurance that contractors are accurately and correctly applying the exemption. Accordingly, the bill provides that any person who would be required to file a financial statement with the Renegotiation Board (under sec. 105(e)(1)), if that person had not claimed the exemption for a standard commercial article, is to furnish to the Renegotiation Board information regarding the application of the exemption and the total renegotiable sales of the person. The Renegotiation Board will prescribe by regulations the information to be furnished under this provision.

(b) *Similar prices on renegotiable sales*

Recently, instances have come to light where sales to the Government of items of an apparently commercial nature were made at prices substantially in excess of the prices charged commercial purchasers. This type of price differentiation was not contemplated when the present exemption for standard commercial articles and services was adopted, and the committee agrees with the House that it is not appropriate to allow articles or services to qualify for the exemption where this type of price differentiation exists. Accordingly, the bill provides an additional requirement regarding price differentiation which must be met in order for an article or service to qualify for the exemption.

Under the bill an article will not qualify as a standard commercial article (and an article may not be included in a standard commercial class of articles) unless, in addition to the other requirements, the price charged in a sale under a contract or subcontract which otherwise would be subject to renegotiation (generally, a direct or indirect sale to a Government department specified in the act—hereafter called a Government sale) does not exceed the lowest price at which the article is sold in similar quantity by the contractor or subcontractor for civilian industrial or commercial use. The House bill provided that the price in the Government sale may exceed the private commercial price only where the excess price is attributable to the cost of special requirements relating to the Government sale, such as accelerated delivery or other unusual circumstances. The committee amended this provision by substituting "significantly different circumstances" for "unusual circumstances." The committee believes this more accurately describes the price differences which may arise that are to be taken into account. If the excess price is unreasonable in view of the accelerated delivery or other significantly different circumstances, it is not to be considered attributable to those circumstances. In the application of this requirement, adjustments are to be made to the price in the Government sale in order to take account of factors which occur only with respect to Government sales. For example, an adjustment is to be made to take account of the fact that sales to the Government are not subject to excise taxes. Thus, the price to the Government of an item must be lower than the private commercial price to the extent of the excise tax involved in the commercial sale.

In implementing the requirement that the commercial sales which are compared with the sale to the Government must be sales in similar quantity, the committee intends that the satisfaction of this requirement is not to be precluded by the absence of a commercial sale of similar quantity. In such a case the price which would be charged on a commercial sale in a quantity similar to that of the Government sale is to be determined with reference to the commercial sales actually made. This determination is to be made in cases where the quantity involved in a Government sale is larger than the quantity involved in commercial sales, as well as where it is smaller than the quantity involved in commercial sales. For example, the price in a sale to the Government, which is larger than the commercial sales, must reflect a volume discount that is consistent with the pattern of volume discounts established by the commercial sales (even though no schedule of special discounts may previously have been established for sales of the size made to the Government).

In comparing the prices charged in commercial sales and sales to the Government, the comparison is to be made between sales which are reasonably related in time. In situations where a general price change for articles sold by a contractor or subcontractor occurs before the sales to the Government but after the commercial sales (or vice versa), the price change is to be taken into account in determining whether the price charged the Government does not exceed the price charged in the commercial sales. For example, assume that between the time a contractor makes a commercial sale of an article and the time the article is sold in similar quantity to the Government, the contractor increases the prices of his products generally. In such a case, the price charged the Government is not to be considered in excess of the commercial price if the excess is attributable to the general price increase for the products sold by the contractor and if the price in the sale to the Government would not have exceeded the price in the commercial sale had the general price increase not intervened.

With respect to a class of articles, the similar price requirement is to be applied on an article-by-article basis. In other words, as a general rule the price in a sale to the Government of each article in the class is to be compared with the commercial price of the article. Due to the nature of a class of articles, however, an article presently may be included in the class even though it is sold only to the Government. The bill does not change this characteristic of a class of articles. In applying the similar price requirement where an article, which is to be included in a class, is sold only to the Government, the price of the article in the sale to the Government is to be compared with the price at which it would be sold commercially as indicated by the pattern of prices established in the commercial sales of other articles in the class. Under present law, all of the articles in a standard commercial class of articles must be sold at "reasonably comparable prices." This requirement is interpreted in the Board's regulations to mean generally that such differences as exist between the prices of the articles in a class are attributable to measurable characteristics and, without resort to cost analyses, are explainable in terms of market-tested differentials shown in the contractor's established commercial price pattern for articles of the same kind. In other words, under existing law there must be a specified relationship between the prices of articles included in a class of articles. This bill makes no change in this requirement or in the meaning or application of it by the Board.

In view of the relationship which must exist between the articles in a class of articles, the actual commercial sale prices of the articles will provide a pattern from which the price at which an article that is sold in similar quantity only to the Government can be determined.

In the case of a standard commercial service, or a service which is reasonably comparable with a standard commercial service, the bill provides a similar price requirement consistent with that provided for articles and classes of articles. Under the bill, a service will not qualify as a standard commercial service, or as a reasonably comparable service, unless, in addition to other requirements, the similar price requirement is satisfied. Under this requirement, the price in a Government sale for the service may not exceed the lowest price at which the service is performed under similar circumstances by the contractor or subcontractor for civilian industrial or commercial purposes. It is the intention of the committee that the application of the exemption is not to be precluded where services are performed for the Government under circumstances which are not similar to those under which the services are performed for civilian commercial purposes, if adjustments to the price of the Government sale, necessary to appropriately reflect the differences in circumstances, are determinable. In addition, the committee intends that in comparing the price charged the Government with the private commercial prices, appropriate adjustments are to be made to take account of significantly different circumstances associated with the Government sale.

(c) *Required percentage and definition of commercial sales*

As noted above, for an article to qualify as a standard commercial article under present law, at least 35 percent of the sales of the article in the year in question must be nonrenegotiable sales. This percentage test is also applicable with respect to the other types of items which may qualify for the exemption (a standard commercial service, a service which is reasonably comparable with a standard commercial service, and a standard commercial class of articles). The percentage test is designed to insure that the commercial sales of the item are of sufficient magnitude so that a market-tested price exists for the item.

The House bill made two changes in this requirement. First, it raised the required percentage of commercial sales to 50 percent. Second, it redefined commercial sales to exclude nonrenegotiable government sales from the commercial sales category.

The committee agrees with the House that the 35-percent requirement does not provide adequate assurance that the basic premise underlying the exemption is satisfied, namely, that the required magnitude of commercial sales is adequate to assure that the price of the item is in fact a market-tested price and that the item is a commercial item. The committee does not believe, however, that nonrenegotiable government sales should be excluded from the commercial sales category. In many cases these sales may be made under conditions similar to those under which commercial sales are made. Moreover, the exclusion of these sales from the commercial sales category will create substantial administrative problems for the Renegotiation Board and also for contractors and subcontractors, especially lower-tier subcontractors. Accordingly the committee's amendment retains the definition of commercial sales which is contained in existing law, namely nonrenegotiable sales. In addition, the committee's amendment raises the required percentage of commercial sales to 55 percent, which it is believed will more than offset the possible effect of not excluding nonrenegotiable government sales from the commercial sales category.

The combined effect of the committee's amendments is to deny qualification for exemption to an item if less than 55 percent of the sales of the item in the year of concern are nonrenegotiable. Changes of this type are applicable in the case of a standard commercial article, a standard commercial class of articles, a standard commercial service, and a service which is reasonably comparable with a standard commercial service.

(*d*) *Alternate 2-year base for percentage test*

Under present law, an article may qualify as a standard commercial article if the percentage test (formerly 35 percent; now to be 55 percent) is satisfied either with respect to the sales of the article in the current year or with respect to sales in the current and the preceding year. This alternate base to which the percentage test may be applied in the case of a standard commercial article is not provided with respect to any of the other categories of items which may qualify for the exemption.

The effect of this alternate base is to allow an article to be considered a standard commercial article even though a contractor's (or subcontractor's renegotiable sales of the item in the current year are of such a magnitude in relation to his total sales of the article that there is substantial question whether a market-tested price in fact exists in the current year. The committee agrees with the House that this alternate base is not consistent with the purpose of the exemption, which is to exempt from renegotiation articles for which the contractor or subcontractor has a significant commercial market. Accordingly, the bill removes the alternate 2-year period to which the percentage test may be applied in the case of a standard commercial article. Therefore, as is presently the case with the other categories of items which may qualify for the exemption, the percentage test in the standard commercial article category may be applied only with respect to sales in the current year.

(e) Exemption for like articles

Present law provides an exemption for an article which is identical in every material respect with a standard commercial article. This exemption is unnecessary because any article which qualifies under it also qualifies under the exemption for a standard commercial class of articles. Accordingly, the bill removes this exemption for an article which is identical in every material respect with a standard commercial article.

(f) Effective dates

The 3-year extension of the Renegotiation Act contained in the bill is to take effect as of June 30, 1968. The amendments made by the bill regarding the standard commercial articles and services exemption are to be applicable with respect to amounts received or accrued in fiscal years of contractors and subcontractors ending after the date of enactment of the bill.

III. CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

RENEGOTIATION ACT OF 1951

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SEC. 102. CONTRACTS SUBJECT TO RENEGOTIATION.

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(c) TERMINATION.—

(1) IN GENERAL.—The provisions of this title shall apply only with respect to receipts and accruals, under contracts with the Departments and related subcontracts, which are determined under regulations prescribed by the Board to be reasonably attributable to performance prior to the close of the termination date. Notwithstanding the method of accounting employed by the contractor or subcontractor in keeping his records, receipts or accruals determined to be so attributable, even if received or accrued after the termination date, shall be considered as having been received or accrued not later than the termination date. For the purpose of this title, the term "termination date" means June 30, **[**1968**]** *1971*.

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SEC. 105. RENEGOTIATION PROCEEDINGS.

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(e) INFORMATION AVAILABLE TO BOARD.—

(1) FURNISHING OF FINANCIAL STATEMENTS, ETC.—Every person who holds contracts or subcontracts, to which the provisions of this title are applicable, shall, in such form and detail as the Board may by regulations prescribe, file with the Board, on or before the first day of the fifth calendar month following the close of his fiscal year, a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry out this title. The preceding sentence shall not apply to any person with respect to a fiscal year if the aggregate of the amounts received or accrued under such contracts and subcontracts during such fiscal year by him, and all persons under control of or controlling or under common control with him, is not more than the applicable amount prescribed in subsection (f) (1) or (2) of this section; but any person to whom this sentence applies may, if he so elects, file with the Board for such fiscal year a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry out this title. *Any person who, but for the provisions of section 106(e)(1)(A), would not be relieved for a fiscal year from the filing requirements of the first sentence of this paragraph by reason of the preceding sentence shall furnish for such fiscal year such information with respect to the application of such provisions (and with respect to the aggregate specified in the preceding sentence) as the Board may by regulations prescribe as necessary to carry out this title.* The Board may require any person who holds contracts or subcontracts to which the provisions of this title are applicable (whether or not such person has filed a financial statement under this paragraph) to furnish any information, records, or data which are determined by the Board to be necessary to carry out this title and which the Board specifically requests such person to furnish. Such information, records, or data may not be required with respect to any fiscal year after the date on which all liabilities of such person for excessive profits received or accrued during such fiscal year are discharged. Any person who willfully fails or refuses to furnish any statement, information, records, or data required of him under this subsection, or who knowingly furnishes any statement, information, records, or data pursuant to this subsection containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisoned for not more than one year, or both.

(2) AUDIT OF BOOKS AND RECORDS.—For the purpose of this title the Board shall have the right to audit the books and records of any contractor or subcontractor subject to this title. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of the Board and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purpose of making examinations and audits under this title.

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SEC. 106. EXEMPTIONS.

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(e) MANDATORY EXEMPTION FOR STANDARD COMMERCIAL ARTICLES AND SERVICES.—

(1) ARTICLES AND SERVICES.—The provisions of this title shall not apply to amounts received or accrued in a fiscal year under any contract or subcontract for an article or service which (with respect to such fiscal year) is—

(A) a standard commercial article; *or*

[(B) an article which is identical in every material respect with a standard commercial article; or]

[(C)](*B*) a service which is a standard commercial service or is reasonably comparable with a standard commercial service.

(2) CLASSES OF ARTICLES.—The provisions of this title shall not apply to amounts received or accrued in a fiscal year under any contract or subcontract for an article which (with respect to such fiscal year) is an article in a standard commercial class of articles.

(3) APPLICATIONS.—Paragraph (1) (B) [or (C)] and paragraph (2) shall apply to amounts received or accrued in a fiscal year under any contract or subcontract for an article or service only if—

(A) the contractor or subcontractor at his election files, at such time and in such form and detail as the Board shall by regulations prescribe, an application containing such information and data as may be required by the Board under its regulations for the purpose of enabling it to make a determination under the applicable paragraph, and

(B) the Board determines that such article or service is, or fails to determine that such article or service is not, an article or service to which such paragraph applies, within the following periods after the date of filing such application:

(i) in the case of paragraph (1) (B) [or (C)], three months;

(ii) in the case of paragraph (2), six months; or

(iii) in either case, any longer period stipulated by mutual agreement.

(4) DEFINITIONS.—For the purposes of this subsection—

(A) the term "article" includes any material, part, component, assembly, machinery, equipment, or other personal property;

(B) the term "standard commercial article" means, with respect to any fiscal year, an article—

(i) which either is customarily maintained in stock by the contractor or subcontractor or is offered for sale in accordance with a price schedule regularly maintained by the contractor or subcontractor, [and]

(ii) the price of which under any contract or subcontract subject to this title is not in excess of the lowest price at which such article is sold in similar quantity by the contractor or subcontractor for civilian industrial or commercial use, except for any excess attributable to the

cost of accelerated delivery or other significantly different circumstances, and

[(ii)] *(iii)* from the sales of which by the contractor or subcontractor at least [35 percent] *55 percent* of the receipts or accruals in such fiscal year [, or of the aggregate receipts or accruals in such fiscal year and the preceding fiscal year,] are not (without regard to this subsection and subsection (c) of this section) subject to this title;

[(C) an article is, with respect to any fiscal year, "identical in every material respect with a standard commercial article" only if—

[(i) such article is of the same kind and manufactured of the same or substitute materials (without necessarily being of identical specifications) as a standard commercial article from sales of which the contractor or subcontractor has receipts or accruals in such fiscal year,

[(ii) such article is sold at a price which is reasonably comparable with the price of such standard commercial article, and

[(iii) at least 35 percent of the aggregate receipts or accruals in such fiscal year by the contractor or subcontractor from sales of such article and sales of such standard commercial article are not (without regard to this subsection and subsection (c) of this section) subject to this title;]

[(D)] *(C)* the term "service" means any processing or other operation performed by chemical, electrical, physical, or mechanical methods directly on materials owned by another person;

[(E)] *(D)* the term "standard commercial service" means, with respect to any fiscal year, a service—

(i) the price of which under any contract or subcontract subject to this title is not in excess of the lowest price at which such service is performed under similar circumstances by the contractor or subcontractor for civilian industrial or commercial purposes, and

(ii) from the performance of which by the contractor or subcontractor at least [35 percent] *55 percent* of the receipts or accruals in such fiscal year are not (without regard to this subsection) subject to this title;

[(F)] *(E)* a service is, with respect to any fiscal year, "reasonably comparable with a standard commercial service" only if—

(i) such service is of the same or a similar kind, performed with the same or similar materials, and has the same or a similar result, without necessarily involving identical operations, as a standard commercial service from the performance of which the contractor or subcontractor has receipts or accruals in such fiscal year, [and]

(ii) the price of such service under any contract or subcontract subject to this title is not in excess of the lowest price at which such service is performed under

similar circumstances by the contractor or subcontractor for civilian industrial or commercial purposes, and

[(ii)] *(iii) at least* [35 percent] *55 percent* of the aggregate receipts or accruals in such fiscal year by the contractor or subcontractor from the performance of such service and such standard commercial service are not (without regard to this subsection) subject to this title; and

[G] *(F)* the term "standard commercial class of articles" means, with respect to any fiscal year, two or more articles with respect to which the following conditions are met:

(i) at least one of such articles either is customarily maintained in stock by the contractor or subcontractor or is offered for sale in accordance with a price schedule regularly maintained by the contractor or subcontractor,

(ii) all of such articles are of the same kind and manufactured of the same or substitute materials (without necessarily being of identical specifications),

(iii) the price of each of such articles under any contract or subcontract subject to this title is not in excess of the lowest price at which such article is sold in similar quantity by the contractor or subcontractor for civilian industrial or commercial use, except for any excess attributable to the cost of accelerated delivery or other significantly different circumstances.

[(iii)] *(iv)* all of such articles are sold at reasonably comparable prices, and

[(iv)] *(v)* at least [35 percent] *55 percent* of the aggregate receipts or accruals in [the] *such* fiscal year by the contractor or subcontractor from sales of all [of] such articles are not (without regard to this subsection and subsection (c) of this section) subject to this title.

(5) WAIVER OF EXEMPTION.—Any contractor or subcontractor may waive the exemption provided in paragraphs (1) and (2) with respect to his receipts or accruals in any fiscal year from sales of any article or service by including a statement to such effect in the financial statement filed by him for such fiscal year pursuant to section 105(e)(1), without necessarily waiving such exemption with respect to receipts or accruals in such fiscal year from sales of any other article or service. A waiver, if made, shall be unconditional, and no waiver may be made without the permission of the Board for any receipts or accruals with respect to which the ~~contractor or subcontractor~~ has previously filed an application under paragraph (3).

(6) NONAPPLICABILITY DURING NATIONAL EMERGENCIES.—Paragraphs (1) and (2) shall not apply to amounts received or accrued during a national emergency proclaimed by the President, or declared by the Congress, after the date of the enactment of the Renegotiation Amendments Act of 1956.

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Calendar No. 1462

90TH CONGRESS 2d Session } SENATE { REPT. 1385 Part 2

RENEGOTIATION AMENDMENTS ACT OF 1951

JULY 26, 1968.—Ordered to be printed

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

REPORT

[To accompany H.R. 17324]

The Committee on Finance, to which was referred the bill (H.R. 17324) to extend and amend the Renegotiation Act of 1951, having considered the same, reports favorably thereon with further amendments and recommends that the bill as further amended do pass.

Introduction

Pursuant to the instructions contained in the motion to recommit the bill, H.R. 17324, a bill to extend and amend the Renegotiation Act of 1951, to the Committee on Finance, agreed to July 26, 1968, the Committee on Finance reports the bill with the recommendation that the bill as further amended pursuant to such instructions do pass.

The instructions contained in the motion to recommit directed the Committee on Finance to add to the bill further amendments approved by the committee in executive session on Tuesday, July 16, 1968, to—

(1) Suspend the International Antidumping Code (amendment No. 889), and

(2) Implement the International Coffee Agreement of 1968 (amendment No. 890).

This supplemental report of the Committee on Finance explains these further amendments.

SUSPENSION OF INTERNATIONAL ANTIDUMPING CODE

This amendment deals with the unfair trade practice of "dumping."

Dumping.—"Dumping", in a foreign trade sense, occurs when a foreign producer sells his merchandise in this country at a price less than that which he charges purchasers in his home market or a third country market, and a U.S. industry suffers injury because of that price discrimination.

The Antidumping Act of 1921 is one of a body of U.S. laws designed to combat unfair trade practices. Unlike other laws, which generally impose fines or jail sentences for violations, the Antidumping Act operates directly against the offending goods by assessing on them a "special dumping duty."

Under the law, the Treasury Department is charged with the task of determining whether imported goods are being sold "at less than fair value"; that is, at a lower price in the United States than the same goods are sold for in foreign markets. If the Treasury determines there are no such sales, the case is closed. On the other hand, if it makes a determination that foreign goods are being sold (or are likely to be sold) in the United States at a discriminatory price, it must then refer the case to the Tariff Commission.

The Tariff Commission is responsible for determining whether a domestic industry is being injured by reason of the sales at less than fair value. If it makes a negative determination the case is closed. But, if it finds that an industry "is being or is likely to be injured, or is prevented from being established" because of these sales, it makes an injury determination.

On the basis of these two affirmative determinations, the Secretary of the Treasury, through the Bureau of Customs, must assess a special dumping duty on the merchandise which continues to be dumped. This duty is an amount equal to the difference between the home market price and the dumped price.

Background.—Until recently, trade negotiations typically had been confined to areas where Congress had delegated authority to the President in advance to modify (1) the level of U.S. tariffs, and (2) other barriers of a nontariff nature. In June of last year, however, U.S. negotiators entered into two trade agreements with respect to which no advance authority had been delegated. One of these concerned the American selling price method of valuing certain products for tariff purposes. The other related to the Antidumping Act of 1921.

It is clear from the record that Congress did not delegate any authority under the Trade Expansion Act of 1962 to modify the U.S. Antidumping Act of 1921. The report of the Committee on Finance accompanying that act leaves no doubt about this. It states:

> Other laws not intended to be affected include the Antidumping Act and section 303 of the Tariff Act of 1930 which relates to countervailing duties (S. Rept. 2059, 87th Cong., second sess., p. 19).

Testimony during hearings on the Trade Expansion Act before the Committee on Ways and Means of the House also indicates an administration understanding that the Antidumping Act was outside the scope of authority requested by that legislation.

Notwithstanding this legislative history, when it became known in 1965 that negotiation of an International Antidumping Code was being contemplated, the Committee on Finance and the Senate responded by approving Senate Concurrent Resolution 100 of the

89th Congress expressing the sense of the Congress that no agreement requiring the modification of any tariff or other import restriction should be entered into except pursuant to authority delegated in advance by the Congress. In the report accompanying Senate Concurrent Resolution 100 the Committee on Finance stated:

> The Committee on Finance has been disturbed over reports that the current Kennedy round of tariff negotiations may be broadened to include U.S. offers of concessions with respect to matters for which there is no existing delegated authority, In the committee's view, this would violate the principles which have made our reciprocal trade program so successful for more than three decades.
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> * * * * *
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> Another area may involve the treatment of "dumped" goods by the country in which the dumping occurs. This problem concerns unfair trade practices in a domestic economy, and it is difficult for us to understand why Congress should be bypassed at the crucial policymaking stages and permitted to participate only after policy has been frozen in an international trade agreement.

Notwithstanding this long history of congressional concern that in the absence of authority specifically delegated by statute the unfair trade laws of this country should not be compromised through an international agreement, the International Antidumping Code was agreed to at Geneva during the Kennedy round of tariff negotiations by the United States in 17 foreign nations.

Shortly after it was concluded, Senate Concurrent Resolution 38 was introduced in the Senate to express the sense that the code is inconsistent with the act, that it should be submitted to the Senate for its advice and consent, and that it should not become effective in this country until Congress enacts legislation to implement it. The Tariff Commission was requested to comment on the resolution. It did so in a report received by the committee on March 8, 1968. By a 3 to 2 majority the Tariff Commission found several significant differences between the code and the law.

The majority report (Commissioners Sutton, Culliton, and Clubb) took the position that the code could not alter domestic law. It stated:

> It is well settled that the Constitution does not vest in the President plenary power to alter domestic law. The code, no matter what are the obligations undertaken by the United States thereunder internationally, cannot, standing alone without legislative implementation, alter the provisions of the Antidumping Act or of other U.S. statutes. As matters presently stand, we believe that the jurisdiction and authority of the Commission to act with respect to dumping of imported articles is derived wholly from the Antidumping Act and 19 U.S.C. 1337.

They concluded that the Tariff Commission does not contemplate making any changes in its rules of practice and procedures, but noted that the Treasury Department is changing its customs regulations to bring them into conformity with the code.

The minority report (Commissioners Metzger and Thunberg) observed that "the executive branch has been and is of the view that the provisions of the code and the act are not inconsistent with, and in conflict with, each other." With respect to Treasury's functions under the code—the determination of sales at less than fair value and of injury (determinations of injury is a statutory function of the Tariff Commission, not the Treasury)—these Commissioners expressed their "understanding that the Treasury Department takes the position that none of these provisions requires implementation in such a way as to be in conflict with any provision of law administered by it."

Commissioners Metzger and Thunberg chose not to proffer any opinion on the issues raised by Senate Concurrent Resolution 38, but instead chose to await the particular facts and circumstances involved in each injury determination before considering whether the provisions of the code would lead to identical or differing results.

In their minority views, these two Commissioners stated the view that in the consideration of future antidumping cases, any question of consistency between the code and the act should be resolved by applying:

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

The Committee on Finance agrees with the views expressed in the majority report of the Tariff Commission. The domestic law is paramount and a mere executive obligation cannot stand equal to it, and should not be interpreted as if it were coequal. Rather, if the obligation conflicts with the domestic law, it cannot be applied until the domestic law is amended to eliminate the conflict.

In the opinion of the committee there are many areas of significant conflict between the International Antidumping Code and our domestic unfair trade laws. These sharp differences, as illustrated in the following paragraphs, weaken the effectiveness of the domestic law as a defense against predatory price fixing by foreign merchants. They inevitably will lead to fewer instances of dumping duties being assessed than would be the case if the provisions of the code were not applied. Such a result is equivalent to changing the domestic law by executive agreement in violation of the constitutional provisions vesting in the Congress the sole power to assess taxes and duties.

Major Differences Between International Antidumping Code and the Antidumping Act of 1921

The major areas in which the code differs from the act concern (1) the definition of an "industry" affected by dumped imports; (2) the degree of "injury" required to invoke the statute; (3) the consideration of injury by the Treasury Department; (4) the revocation of a determination of sales at less than their fair value; and (5) the acceptance of price undertakings or the cessation of shipments at dumped prices. In addition, there are a host of less significant differences.

Definition of an industry.—The act contains no definition of an industry. It is a matter left to the judgment of the Tariff Commission in connection with its injury investigation. The code provisions relating to this definition are considerably more restrictive than the act in two important respects:

(a) *Like products.*—

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

The Tariff Commission advised the committee that the "like product" concept of an industry, required by the code, narrows their discretion as to what industry can be harmed by dumped imports—it permits imports to be compared to only one domestic industry, that which produces the "like product." On the other hand, under the act, the Commission has unrestricted discretion to weight the effect of dumped imports on one or more different industries if it feels they may be affected by the dumped goods. For example, in the past it has considered whether imports of narrow glass panes injured three separate domestic industries—the flat glass industry, the jalousie glass louvre industry, and the jalousie window industry. In another investigation, it considered the effects of imports of nephaline syenite on the domestic feldspar industry. Under the code, if apples were being dumped and were processed into applesauce, there could be no relief for injury to applesauce producers, because applesauce is not a "like product." The act, on the other hand, would permit a determination of injury to the applesauce industry. None of these comparisons would be permitted by the code.

Confining the Tariff Commission investigative function as it does, dumping duties which have been assessed, could not be imposed under the code. In the committee's opinion changing the results of a case by international agreement is tantamount to changing the law itself. If it has that effect, the agreement is inconsistent with the law and should not be allowed to operate until the law is modified to authorize it.

(b) *Competitive market area.*—

THE ACT	THE CODE
"The Commission shall determine whether an industry in the United States is being, or is likely to be injured, by the dumped imports."	"In exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry. If, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined" (art. 4(a)(ii)).

The conditions specified by the code for segmenting an industry are so restrictive that, in the judgment of the Tariff Commission, four out of five of its recent affirmative determinations of injury might not have been made if it had been required to apply the code's provisions. One of these cases related to an industry composed of producers in and adjacent to the competitive market area in which the imports were dumped. The other three cases concerned producers adjacent to the competitive market area. In still other cases, the Commission has found that injury to a part of an industry is necessarily an injury to the whole industry.

By limiting the concept of a competitive market (as the code does) to producers within such a market who sell all or almost all of their production of the product in question in that market (a circumstance which reportedly rarely exists), the Tariff Commission would be denied the flexibility it has under the act to determine from the facts and circumstances whether dumped imports concentrated in an area around a seaport can injure any domestic industry. This inflexibility will prevent dumping duties from being assessed in situations where they have been assessed.

As the committee has already observed, changing the results of a case by international agreement is tantamount to changing the law itself and enabling legislation must precede the implementation of the agreement.

Injury determination.—In the past, the Tariff Commission has determined that injury which is more than de minimis is sufficient to justify relief under the Antidumping Act.

The code, however, purports to require a far greater degree of injury to a domestic industry before a dumping duty may be assessed. It directs the Tariff Commission (an arm of the Congress) to weigh, on the one hand, the effects of the dumping, and on the other hand, all other factors taken together which may be adversely affecting the industry.

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

During the Finance Committee hearings on this matter, lawyers for the administration took the position that the term "demonstrably the principal cause of material injury" of the code was designed to result in the same interpretation—a determination of injury when dumped imports caused injury to a domestic industry in any degree greater than de minimis—that the Tariff Commission had given in the past. Yet, when pressed for a definite answer to the question of whether the Tariff Commission could make the same determination for the same case under the code as it had under the act, the lawyer replied in the negative.

The chairman observed that the weighing factor in the code (a technique which does not appear in the act):

> * * * suggests that picture of a pure woman standing there blindfolded with a scale in her hands and on one side of the scale there is what can be said for dumping and on the other side what can be said for all other causes. If the scale is heavier on this side than it is on the other, then this is the side on which justice must go * * *.

The administration lawyer responded that this weighing factor was a procedural provision which in his opinion did not change the substantive meaning of the notion of principal cause. He suggested it it was a leftover from an earlier draft in the negotiation process. He further advised the committee that there were no documents comprising a history of the negotiations or of interpretation which the parties might have agreed to during the negotiation process.

It is difficult to conclude that this weighting factor is merely procedural, or that it was left over. The code is cast in terms far too precise to permit such an interpretation and the restrictive nature of the weighing factor conforms to the pattern throughout the code of narrowing the range of discretion of the Tariff Commission. This pattern was conceded by the administration spokesmen. The more effectively its discretion is limited by the code the fewer will be its affirmative findings of injury.

Simultaneous investigations of injury; revocation of determinations of sales at less than fair value.—

THE ACT	THE CODE
No provision.	"Upon initiation of an investigation and thereafter, the evidence of both dumping and injury should be considered simultaneously. In any event, the evidence of both dumping and injury simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, * * * an application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case" (art. 5(b)(c)).

The Antidumping Act does not authorize the revocation of a determination of sales at less than fair value. In practice the Treasury Department automatically refers the case to the Tariff Commission after it has made such a determination and thereafter its responsibility in the matter ceases.

The Customs Simplification Act of 1954 in terms certain amended the Antidumping Act to remove the injury determination from the Treasury's jurisdiction and place it in the Tariff Commission. There are only two ways the simultaneous investigation of dumping and injury required by the code can occur, and in the opinion of the committee, both are contrary to the act.

First, the Tariff Commission might be expected to commence an investigation of injury at the same time Treasury initiates an investigation of sales at less than fair value. However, this would conflict with the provision of the act which confers jurisdiction of the Tariff Commission only after the Treasury Department has made a determination of sales at less than fair value. Alternatively, the Treasury Department might be expected to undertake a determination of the injury question during its investigation of the price matter. However, this would be contrary to the objective of the Customs Simplification Act which removed the injury factor from Treasury's jurisdiction.

As a matter of procedure, regulations just issued by the Treasury Department to implement the code follow this latter route. These regulations require evidence of injury to be submitted at the time a dumping complaint is filed. Despite the fact that no criteria are set forth governing what constitutes evidence of injury, the regulations also make provision for the Secretary to return a complaint if in his judgment it does not conform to his requirements.

During the hearing the committee was advised that Treasury would not make any evaluation of injury. The evidence of injury required by their regulations was described as necessary to prevent frivolous complaints and thereby save taxpayers' money. If Treasury does evaluate the evidence of injury—and it seems that it must in making a decision to proceed with the case—then the Tariff Commission will will be denied jurisdiction to investigate injury except in those cases Treasury passes through its own injury screen. And, if Treasury applies the code's concept of injury as its revised regulations suggest it is doing, few, if any, cases will reach the Tariff Commission.

The Treasury regulations further seek to achieve the code requirement of simultaneous consideration of dumping and injury by providing for the continuation of Treasury's investigation of dumping after an affirmative determination of dumping has been sent to the Tariff Commission, and by providing for revocation of such dumping determination if error has been committed. Not only do these regulations invest Treasury's formal dumping determination with a "tentative" status not authorized by domestic law, but also they could well result in greater cost to the taxpayers by requiring the Commission to undertake fruitless investigations of injury. For example, if it appears that the Tariff Commission is about to make an affirmative determination of injury, the foreign merchant might rush to Treasury with assurances of price revisions and thereby cause the Treasury to revoke its determination of sales at less than fair value and close the case after much of the costs of the injury investigation have been incurred by the Commission.

The legislative history of the injury provisions in the present law convinces the committee that the regulations of the Treasury and the requirements of the code do not comport either with the intent of Congress or with the language of the law.

Price undertakings.—

THE ACT	THE CODE
No provision.	"Antidumping proceedings may be terminated without imposition of antidumping duties or provisional measures, upon receipt of a voluntary undertaking by the exporters to revise their prices * * * or to cease to export to the area in question at dumped prices * * *" (art. 7).

The Antidumping Act, by its terms, does not specify that a dumping case can be closed because the foreign exporter has agreed either to alter his prices (in order to avoid a finding of sales at less than fair value) or to cease shipments of the offending goods to this country. However, the Treasury Department, by its regulations since 1965 (and by practice even earlier) has disposed of cases on these grounds. The code commits the United States to these Treasury Department practices.

The Tariff Commission advised the committee that under present Treasury practices "the average importer can sell goods at less than fair value in the United States for approximately 2 years with impunity insofar as the effectiveness of the act is concerned." Moreover, acceptance of such assurances only with respect to a specified market area would allow dumping to be repeated in other parts of the country.

Finally, the Tariff Commission reports that "none of the unfair trade statutes cited in this report specifically provide a mechanism for the violator of the statute concerned to avoid the remedial or penal actions directed to be taken thereunder by his agreement to conform to the law after he is caught. The code in this respect does not appear to conform with any of the statutes."

"Forgiveness of dumping," where a foreign producer agrees to raise his price (to prevent a finding of sales at less than fair value), or gives assurances of no further sales at dumped prices, is not a proper function for the Treasury Department in administering the Antidumping Act. If there are sales at less than fair value, Treasury should make a finding to that effect and refer the case to the Tariff Commission for an injury investigation. If there is no injury, then the finding of sales at less than fair value is meaningless and assurances of price adjustments (or to cease the shipments at the lower price) serve to require American consumers to pay more for the foreign goods than they would otherwise have to. On the other hand, acceptance of the price undertaking by the Treasury prevents the Tariff Commission from undertaking an injury investigation, and in this respect it not only becomes equivalent to an injury determination by the Treasury Department, but also constitutes a loophole for sporadic dumping of foreign goods into this country. This would particularly be true of assurances with respect to regional marketing areas.

The committee understands the Treasury Department's role in dumping proceedings is merely to make the arithmetical calculation of price. Any exercise by it partaking of an injury determination, or precluding an injury determination when there have been sales at less than fair value, is an infringement of the statutory responsibility of the Tariff Commission.

For these same reasons, terminations of investigations by the Treasury Department, because in its judgment the amounts involved are not more than insignificant, are functions which it should not perform under the act.

Miscellaneous.—The illustrations demonstrate many of the ways in which the antidumping law as it has developed over nearly five decades, would be modified by the International Antidumping Code. There are other, more subtle, features of the code which also restrict the effectiveness of the domestic law. For instance, article 3 of the code requires that in determining injury such factors as profits, prices, employment, export performance, utilization of domestic productive facilities, and the productivity of these facilities must be considered along with the volume and prices of undumped imports, competition between domestic producers, and changes in demand due to substitution of other products or to changes in consumer tastes.

These are all factors that tend to discount the effect of dumping. Coupled with the requirements that those factors which are adverse be lumped together and "weighed" against the effect of dumping—and that if dumping survives this test, it must next be compared to the totality of factors affecting an industry (both adversely and favorably)—the care with which these nondumping factors are specifically enumerated in the code casts serious doubt on whether dumping could ever be found to cause injury to an industry which otherwise exhibits any sign of economic health.

Two observations are called for. First, the statute—the Antidumping Act of 1921—does not restrict its remedy to instances where injury actually exists. Rather it is specifically applicable even in situations where there is no present injury but where there "is likely to be" injury from the dumped imports. In large measure the code appears to completely neutralize this "likely to be injured" concept.

Second, under the statute, the question to be explored is whether the dumped imports cause (or threaten) injury, not the extent to which other factors unrelated to the dumped imports may discount the effects of dumping. An industry which is prospering can be injured by dumped imports just as surely as one which is foundering although the same degree of dumping would have relatively different impacts depending upon the economic health of the industry.

Applying the literal language of article 3 could lead to the absurd result that an industry which is suffering reverses for reasons unrelated to dumping could get no relief from dumping because other factors were causing its troubles; and that an industry which is prospering despite dumping could get no relief because it is not suffering. Thus, under the code it would appear that relief from dumping would be available only in the rare instance where an industry is found to be in excellent economic health immediately before the dumping begins and to be suffering losses soon after the dumping begins, and no other reason can be found to account for the reversal. Such a sharp change from the concept in present law of finding injury when it is more than de minimis cannot be effected without a change in the law.

In another provision the code states that where dumping and injury are found with respect to a region of the country, dumping duties shall be assessed only against imports into that region. Such a requirement not only is contrary to the domestic law but also it violates the provision in the Constitution which requires that duties be assessed as a geographically uniform basis.

In still another provision the code urges that duties amounting to less than the full margin of dumping be assessed if they are sufficient to remove the injury to the domestic industry. The domestic law does not provide for partial dumping duties. To the contrary it specifically requires a duty equal to the full amount of the difference between the dumped price and the fair price.

Legal Status of the Code

Despite these sharp and unreconcilable differences between the International Antidumping Code and the domestic laws relating to unfair trade practices, it has been argued that the domestic law should be interpreted in such a way as to avoid conflict with the international obligations of the United States. Under this rule of construction, it is stated that if a statute can be interpreted either in a manner consistent with an international obligation or in a manner inconsistent with it, a court will interpret it in favor of consistency. Applying this rule of construction to the International Antidumping Code and the relevant U.S. statutes including the Antidumping Act of 1921, as amended, it is said that such statutes should be interpreted to avoid inconsistency with the code.

The committee questions whether such a construction is properly applicable where the international obligation in question postdates the existing statutes by 46 years or more. In the authority cited in favor of this proposition, the facts would suggest that it is not applicable in such a case. The Restatement of the Law of Foreign Relations illustrates the application of the rule in terms of a statute followed by an international agreement which in turn is followed by reenactment of the identical statute. The statute being construed in this illustration was enacted in the light of the preexisting international agreement and was properly construed so as not to conflict with it. Other cases also support this construction in like situations where the international agreement was already in existence at the time the statute being construed was enacted.

A more appropriate rule of construction would interpret a new international obligation in such a way as to avoid conflict with an existing statute. The objective of statutory construction should be to try to fit a new statute or a new international obligation into the framework or pattern of existing law. When a new statute is passed, or a new international agreement is entered into, unless it expressly overrules an existing statute or agreement, it can be presumed that Congress (or the Executive) understood the existing rules and did not intend for the new document to change them. It should be presumed that the President would not knowingly exceed his authority in negotiating new undertakings, but would seek implementing legislation if he did so. Therefore, the new document, whether it is an act of Congress or an international obligation, should be interpreted to conform to the framework or pattern of existing law.

Moreover, in comparing the new document with the existing pattern the effect of the new document on decided cases should not be ignored. These cases play a significant role in giving the statutory law a recognizable meaning. Certainly this is true of the Antidumping Act of 1921. This act is cast in broad and undefined terms, and, without the history built up through 46 years of operation, a different interpretation could be placed on it without raising any question of conflict between it and an international obligation.

Blindly applying the rule that a statute be interpreted so as to avoid conflict with an international agreement (as some suggest) would enable the contracting parties to an agreement, in effect, to apply their interpretation to an act of Congress contrary to the express or implied intent of the Congress. The committee believes that a rule of construction having this effect must yield to a rule that a statute must be construed so as to carry out the intent of Congress. If the absence of amendment implies that Congress is satisfied with the statute, then an international obligation subsequently undertaken which would change the results under the statute must be found to be inconsistent with the statute, and the international obligation cannot be carried out until Congress conforms the statute.

The Constitution states that (1) the Constitution, (2) laws made within pursuance thereof, and (3) treaties made under the authority of the United States, shall be the supreme law of the land. The International Antidumping Code is not a law made pursuant to the Constitution nor is it a treaty. No one has argued that it is. Thus, it does not stand as an equal to an act of Congress and should not be interpreted under any rule of construction as if it were equal or superior to statutory law, nor should it be construed to lead to a result contrary to the result achieved under the statutory law.

Even if the International Antidumping Code had been negotiated as a treaty, it could not be implemented in the absence of enabling legislation. This is so because of our constitutional system of checks and balances which vests in Congress the sole authority to impose tariffs and to regulate foreign commerce and confers on the President the sole authority over foreign affairs. The Antidumping Act of 1921, as well as being an act to regulate foreign commerce, is also a tariff act. Its basic purpose is to remedy unfair pricing of imports into the United States by imposing a special dumping tariff. Dealing as it does with the constitutional authority of Congress and with the President's authority over foreign affairs, the International Antidumping Code involves an area where neither Congress nor the President has sufficient power to act independently of the other. Thus, while the President may enter into an agreement relating to the Antidumping Act, he may not place it into effect without the participation of Congress. The statute must first be amended to reflect a change in the tariff-imposing features of the Antidumping Act.

While it is true that the President has authority to instruct the Treasury Department, an agency of the executive branch, with respect to the duties and functions entrusted to it under the Antidumping Act of 1921, he has no similar authority with respect to the duties and functions entrusted to the Tariff Commission under that act. The more important functions dealt with by the International Antidumping Code that are in question—the scope of an industry and the degree of injury required to invoke a dumping duty—are functions entrusted to the Tariff Commission and the Tariff Commission's determinations as to these matters are final without regard to the attitude of the executive branch. The Tariff Commission's report to this committee outlining the many inconsistencies between the code and the domestic status attest to this independence from the executive branch. In the opinion of the committee because of the unique position of the Tariff Commission as an arm of the Congress, the ordinary rules which bind the executive departments to positions taken by the President in international agreements do not apply.

To summarize: The International Antidumping Code was negotiated without advance delegations of congressional authority. It was negotiated in the face of strict admonitions of the Senate not to tinker with the Antidumping Act. It modifies the unfair trade laws of this country in a number of important respects and substantially neutralize these laws as bulwarks against predatory price fixing by foreigners who by and large cannot be reached by our criminal laws. It has been placed into effect (as of July 1, 1968) through regulations published by the Treasury Department.

Explanation of Amendment

Because it cannot be reconciled with the domestic law, the International Antidumping Code cannot and must not be applied in this country until the doemstic law has been amended to eliminate the inconsistencies. For these reasons, the Committee on Finance has approved an amendment to specifically bar the operation of the code until the law is subsequently amended to authorize it. Under the amendment the new Treasury regulations would be suspended and the Secretary of the Treasury would be directed to perform his duties and functions under the Antidumping Act as he did prior to July 1. However, he would not be authorized to exercise discretion with respect to the question of injury. This injury determination was transferred by statute out of Treasury jurisdiction and placed in the Tariff Commission back in 1954.

In addition, the Tariff Commission would be directed by the amendment to perform it duties and functions under the Antidumping Act in accordance with precedents established prior to July 1 in affirmative findings of injury.

Finally, the amendment directs both the Tariff Commission and the Treasury Department to perform their duties and functions under the Antidumping Act without regard to the provisions of the International Antidumping Code until such time as Congress enacts legislation to implement it.

INTERNATIONAL COFFEE AGREEMENT

The Committee on Finance has approved an amendment which provides the authority for continued U.S. participation in the International Coffee Agreement for a period of 2 years, until September 30, 1970.

The committee amendment is similar to legislation approved by the Committee on Ways and Means of the House of Representatives, except that it—

(*a*) Provides authority to implement the agreement for 2 years instead of 5 years;

(*b*) Includes a remedy against discriminatory shipping practices in the coffee trade; and

(*c*) Requires reports to the Congress with respect to coffee transportation and discriminatory shipping practices.

Purpose

The purpose of this amendment is to authorize the President to carry out and enforce the provisions of the International Coffee Agreement, 1968. The Senate has given its advice and consent to ratification of this agreement. The agreement extends for a period of 5 years with certain modifications, the International Coffee Agreement of 1962 which expires September 30 1968. This implementing legislation is necessary to permit the United States to carry out fully its obligations under the new treaty.

The Committee on Finance does not have jurisdiction with respect to the treaty itself. However, it does have jurisdiction with respect to the legislation implementing the agreement. The procedures established by this amendment are reasonable for that purpose.

Authority Granted by the Amendment

The committee amendment provides for a 2-year period—

The necessary authority for the United States to require valid certificates or origin to accompany coffee imports, to limit coffee imports from countries not members of the agreement, and to impose special fees and other measures to offset discriminatory treatment by other governments in favor of the export or reexport of processed coffee;

The suspension of this authority if discriminatory shipping practices by foreign entities continue to effect U.S.-flag vessels after other remedies have failed to remove the discrimination;

The requirement of certificates of origin or reexport, for exports of coffee from the United States, and the keeping of certain records, statistics, and other information;

An annual report to the Congress by the President concerning the operation of the agreement;

That should the President determine that there has been an unwarranted increase in the price of coffee, he shall request the International Coffee Council and the Executive Board to take appropriate action; and

That the President shall report such determination to the Congress, and, if the Council fails to take appropriate action, the President shall transmit to the Congress such recommendations as he may consider appropriate to correct the situation.

General Statement

The world coffee market had a long history of severe price fluctuations, arising from the fact that coffee is a tree crop that takes 5 to 10 years to mature. When prices are high, as they were in the early 1950's, plantings increase and after 5 years or so, the crop comes on the market and creates a glut as it did in the early 1960's. Coffee prices are of critical significance to the developing countries of Latin America, Africa, and Asia. Coffee is their single most important agricultural export, earning about $2.3 billion in foreign exchange for them in 1966 and 1967. Coffee accounts for more than 25 percent of the total export earnings of 10 sub-Saharan African countries, and over 40 percent of the export earnings of six Latin American countries. (See table 1.)

When it became clear in the early 1960's that losses from declining coffee prices offset our development aid and frustrated our efforts to promote growth and stability in Latin America through the Alliance for Progress, the United States joined with 53 other coffee producing and consuming countries in the International Coffee Agreement of 1962. The purpose of the agreement was to stabilize the price of coffee at a level fair to both producers and consumers. This was understood to mean a price somewhat above the 1962 level of green coffee—a 14-year low. The 1962 agreement was initialed by the United States September 28, 1962; the Senate approved ratification of the treaty May 21, 1963, and the necessary implementing legislation was signed by President Johnson May 22, 1965. Until the implementing legislation became law, the United States was a member of the agreement, but unable to fully meet its obligations.

The 1950's saw the average annual retail price of roasted coffee vary from a high of $1.11 per pound in 1954 to a low of $0.78 in 1959. In 1967, the average annual price for that same pound of roasted coffee was down to $0.77. The 1967 average annual price of green coffee imports was $0.34 per pound—25 percent lower than the average between 1953 and 1962, 10 percent higher than during the world coffee slump of 1962, and 9 percent lower than the average price in 1965 when the original implementing legislation was under final consideration by the Congress. (See table 2.)

The period of the 1962 coffee agreement saw the coffee earnings of the producing countries increase approximately $500 million per year from a preagreement $1.8 billion to $2.3 billion in 1966 and 1967. While prices held generally stable at moderate levels, the producers increased their earnings by expanding the volume of their exports, particularly to Europe. (See table 3.) World coffee imports in 1966 totaled 49.9 million bags, of which the United States consumed 44.2 percent. Total imports increased 13.7 percent over the comparable figure for 1961. During this same period, total European imports grew by 28.7 percent to 22.9 million bags while U.S. imports actually declined 1.6 percent to 22.1 million bags. (See table 4.)

The International Coffee Agreement, 1968, was negotiated by the International Coffee Council in London in the winter of 1967–68 and was opened for signature at United Nations Headquarters in New York through March 31, 1968. It was signed on behalf of the United States on March 21, 1968. The agreement was presented to the Senate as a treaty, and advice and consent to its ratification was given on June 28, 1968. Upon deposit of the instrument of ratification, the United States will assume the obligations of a member of the International Coffee Organization established by the treaty.

Explanation of Committee Provisions Added to 1968 Implementing Legislation

The authority granted by this amendment enables the United States to meet fully its obligations under the coffee agreement. It continues, with slight revision, the International Coffee Agreement Act of 1965.

Two-year extension.—The committee amendment authorizes the implementation of the agreement for 2 years, instead of the full 5-year period for which the agreement is to apply. This will provide an opportunity for Congress to review the effectiveness of the agreement while it is in operation, rather than when it is expiring. The shorter implementation period will also permit a review of the consequences of the agreement on domestic coffee processors, the shipping industry, the American consumer, and the balance of payments, as well as its impact on our participation in the Alliance for Progress.

Discriminatory shipping practices.—Concerned with reports that U.S.-flag vessels are being discriminated against in the coffee trade, the committee amendment requires the President to investigate complaints that any country, which is a member of the International Coffee Agreement or group of countries which include a member of the agreement, is engaged in discriminatory malpractices against a U.S. vessel. If he finds such discrimination, or threat of discrimination exists, the President is to notify the Federal Maritime Commission which must promptly take appropriate action under section 19 of the Merchant Marine Act, 1920, as amended. If, after a reasonable period of time, the President finds that the effect of discrimination, or the threat thereof, continues to exist, the authority conferred by this amendment is suspended until such time as the effect of discrimination has ceased to exist.

Under this amendment the Federal Maritime Commission is directed to act under section 19 whenever the President finds that the effect of such discrimination on U.S.-flag vessels amounts to anything more than de minimis. An action taken under section 19 pursuant to this statute is to be rescinded only when the conditions specified in this statute are satisfied; that is, the discrimination, or threat thereof, has ended. On the other hand, this new statute is not intended in any way to limit the authority of the FMC, or any other agency, to apply other provisions of law relating to unfair practices.

Section 19 authority.—The authority vested in the Federal Maritime Commission under section 19 of the Merchant Marine Act, 1920, as amended, is sufficiently broad to enable the Commission to take virtually any action it deems advisable and necessary to cope with foreign discrimination against U.S. shipping. Moreover, the Board's action under section 19 is mandatory rather than permissive. In the words of section 19:

> The board is authorized and directed * * *:
>
> (a) To make all necessary rules and regulations to carry out the provisions of this Act;
>
> (b) To make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or result from foreign laws, rules, or regulations, or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country;
>
> (c) To request the head of any department, board, bureau, or agency of the government to suspend, modify or annul rules or regulations which have been established by such department * * *, or to make new rules or regulations affecting shipping in the foreign trade other than such rules or regulations relating to the Public Health Service, the Consular Service, and the Steamboat Inspection Service. * * *

Examples of Federal Maritime Commission action under section 19.—Thus, the Federal Maritime Board is empowered and directed to take action in case of any discriminatory practices by foreigners against vessels documented under the law of the United States. The Board has on several occasions taken retaliatory action under section 19. The following cases are examples:

(1) Country A issued a decree which levied a tariff or fee upon merchandise imported into country A in an amount equal to 8½ percent of the f.o.b. value if the goods were imported on the vessels of country A, and 9½ percent of the value if the cargo was shipped in other vessels, including vessels of U.S. registry.

The Board issued an order which levied an equalizing charge against cargoes carried by country A ships into the United States. Upon issuing this order, the government of country A equalized the tariff and ended the discrimination.

(2) Country B established preferences for goods shipped on its vessels as follows:

(a) Articles, merchandise, products, and goods imported in national-flag dry cargo ships were exonerated from 50 percent of the surcharge established by a governmental decree;

(b) Articles, etc., not subject to surcharge were exempted from the 6-percent tax on transfer of funds abroad, if the goods were carried on a national-flag line.

The Federal Maritime Board issued an order establishing an equalizing fee on the owners or operators of the favored vessel carrying exports between the United States and country B. After the issuance of this order, the government of country B, through regulations of its central bank, removed any preference for national-flag vessels, and ended the discrimination.

Under this amendment, the committee expects discriminatory shipping practices in the coffee trade to be ended. It hopes there will be few instances of discrimination calling forth complaints under this provision and that those which do arise will promptly be settled without the need for sanctions.

Examples of discrimination in coffee trade.—Discrimination against U.S.-flag vessels in the coffee trade has taken two principal forms. The first involves a two-price system for coffee to U.S. importers: one if the coffee is to be transported on a vessel of the purchaser's choice (which is often a U.S. vessel because of superior service) and a materially lower price if the coffee is to be transported on a vessel of the seller's choice, usually its own national flag. This practice has resulted in discrimination against U.S. carriers, and deprives our importers of their choice of carriers. Under this amendment the President would direct the Federal Maritime Commission to deal promptly and effectively with this form of discrimination.

Another form of discrimination is the forced sharing of carriage in the coffee trade through so-called pooling arrangements. Such arrangements can have the result of sharply reducing the participation of U.S.-flag vessels in the coffee trade. Like the two-price system, this type of discriminatory arrangement can reduce U.S.-flag line revenues and endanger its service, and also can limit our importers freedom to choose that service. This is another form of discrimination which could be dealt with by this amendment.

These two cases are illustrative of foreign discrimination against U.S. vessels in the coffee trade. They, and all other acts, which effectively discriminate, or threaten to discriminate, against U.S. shipping are expected to be dealt with promptly and effectively under the committee's amendment.

Differences Between the International Coffee Agreement Act of 1965 and this Amendment as Reported

This amendment does not contain several provisions which are contained in the 1965 act. (The differences between the texts of the

International Coffee Agreement Act of 1965 and this amendment are set forth later in this report.) The most significant provisions which are not retained in this amendment are—

(1) The authority in section 2 of the 1965 act to permit the Congress by concurrent resolution to terminate the legislation upon a finding that there has been an unwarranted price increase. Although this provision was not contained in this amendment, there is a provision that should the President determine that there has been an unwarranted increase in the price of coffee, he shall request the International Coffee Council and the Executive Board to take appropriate action. The enabling legislation also provides that the President shall report such determination to the Congress, and, if the Council fails to take appropriate action, the President shall transmit to the Congress such recommendations as he may consider appropriate to correct the situation.

(2) Section 6 of the 1965 act which deals with authorizations. The treaty constitutes an authorization for the expenditure of funds and provides a mechanism that results in a U.S. assessment of 20 percent of the organization's budgeted expenses. The section authorized appropriations and restricted the U.S. contribution for any fiscal year to the lower of either 20 percent of the total contribution, or $150,000. Continuation of the limitation would have effectively prevented the International Coffee Organization from assuming the expanded role in export controls and production control envisaged in the new agreement, by denying the Organization the necessary funds.

Fixing of Quotas

The heart of the coffee agreement is the fixing of quotas. Under the treaty, quotas must be fixed annually by the International Coffee Organization on the basis of estimates of coffee consumption for the forthcoming year. If a quota is not agreed to by the Council, there would be no limitation on imports or exports of coffee.

As in the earlier agreement, the consuming nations of the world are able to prevent quotas from being established at too low a level. The consuming nations, voting separately, must agree to the quotas by two-thirds majority. The United States, which has more than one-third of the votes of the consuming nations, has a virtual veto over the setting of quotas. In excercising its veto the United States needs the support of only one other consuming nation.

The 1968 agreement contains several modifications which reflect the result of experience under the old agreement. One of these is more flexible provisions for adjusting export quotas so as to distinguish between the different types of coffee and to avoid sharp price fluctuations within brief periods. The new agreement has also improved the mechanism for enforcement of quotas, principally through the requirement of certificates of origin and reexport, and has more stringent penalties for noncompliance with quotas.

Protection for U.S. Consumers

Price performance under the old agreement has reassured the committee that the treaty safeguards the interests of the U.S. coffee-consuming public. The prices of both green and roasted coffee are cheaper today than they were in 1965 when the committee considered the old agreement. (See table 1.) The new agreement contains several improvements which should further assure the consumer of ample supplies of the type of coffee desired at reasonable prices. An additional safeguard is provided in the requirement of Presidential action in the event of an unwarranted increase in the price of coffee, and notification of the Congress.

Conclusion

The committee believes that legislation to carry out the obligations of the United States under the International Coffee Agreement, 1968, should be enacted.

TABLE 1.—*Importance of coffee exports to 16 producing countries, 1966*

Country	*Coffee as percent of total exports*
Ethiopia	87.5
Rwanda	80.0
Burundi	70.6
Colombia	67.0
Uganda	56.0
Haiti	54.3
Angola	48.5
El Salvador	47.2
Guatemala	45.9
Brazil	44.7
Costa Rica	42.1
Ivory Coast	36.6
Togo	32.1
Madagascar	31.5
Kenya	30.4
Central African Republic	28.8

TABLE 2.—UNITED STATES: ANNUAL AVERAGE GREEN AND RETAIL COFFEE PRICES, 1953-67

[In U.S. cents per pound]

	Green import price (annual average)	Retail price,[1] roasted coffee (pound can)	Retail price,[1] instant coffee (6-oz. jar)
1953	52.7	89.2	(2)
1954	65.7	110.8	(2)
1955	52.2	93.0	(2)
1956	51.2	103.4	(2)
1957	49.8	101.7	(2)
1958	43.9	90.5	(2)
1959	35.7	77.9	(2)
1960	34.3	75.3	(2)
1961	32.4	73.6	(2)
1962	30.4	70.8	90.8
1963	30.3	69.4	92.2
1964	39.6	81.6	106.7
1965	37.6	83.3	95.2
1966	36.5	82.3	90.9
1967	34.2	76.9	87.9

[1] Source: Bureau of Labor Statistics.
[2] Not available.

TABLE 3.—INDEX OF GROWTH OF COFFEE IMPORTS BY MAJOR CONSUMER AREAS, 1951-66

[1956=100]

	1951	1956	1961	1966
United States	96	100	106	104
Canada	81	100	135	140
Other Americas	107	100	111	131
EC	62	100	129	152
Other Western Europe	76	100	141	193
Eastern Europe	30	100	288	600
Africa	82	100	100	92
Asia and Oceania	81	100	151	394
Total world imports	85	100	118	134

Source: Annual coffee statistics 1966, Pan American Coffee Bureau.

TABLE 4.—WORLD COFFEE EXPORTS AND U.S. IMPORTS BY VALUE AND VOLUME

[U.S. dollars in billions. Bags in millions.)

	World exports		U.S. imports	
	Amount	Bags	Amount	Bags
1953	$2.45	34.1	(1)	21.1
1954	2.54	30.1	$1.49	17.1
1955	2.18	34.0	1.36	19.7
1956	2.41	37.2	1.44	21.3
1957	2.29	36.9	1.38	20.9
1958	2.0	36.9	1.17	20.2
1959	1.96	41.9	1.10	23.3
1960	1.84	42.5	1.0	22.1
1961	1.75	43.9	.96	22.5
1962	1.72	46.9	.99	24.6
1963	1.93	48.0	.96	23.9
1964	2.38	48.6	1.20	22.9
1965	2.16	47.2	1.10	21.4
1966	2.38	49.9	1.10	22.1
1967	(1)	(1)	.96	(1)
Average, 1963-66	2.21			
Average, 1959-62	1.85			
Average, 1953-62	2.11			

[1] Not available.

Source: PACB annual statistics, 1966.