93d Congress
2d Session } CONFIDENTIAL COMMITTEE PRINT

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STAFF DATA ON THE TRADE REFORM ACT

RELIEF FROM UNFAIR TRADE PRACTICES

(Title III)

COMMITTEE ON FINANCE
UNITED STATES SENATE

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AUGUST 1974

Prepared by the staff and printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE
37-559 WASHINGTON : 1974

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Relief From Unfair Trade Practices

(Title III)

House Bill.—Whereas Title II deals with providing relief from injury caused by "fair" albeit injurious import competition, Title III deals with "unfair" and "illegal" trade practices affecting U.S. exports or foreign imports into the United States.

A. FOREIGN IMPORT RESTRICTIONS AND EXPORT SUBSIDIES, CHAPTER 1 OF TITLE III (SECTIONS 301–302)

Retaliation Authority

The bill would broaden existing authority to retaliate against "unreasonable" or "unjustifiable" foreign import restrictions adversely affecting United States exports. The authority would continue to be wholly discretionary in the hands of the President. There is no complaint procedure, with time frames, to force a decision on any unfair foreign trade practice of foreign governments described in section 301 of the bill. But, if the President decides to act against unfair foreign trade practices he would have to hold a hearing for *any* interested person. In general, section 301 would authorize the President to suspend concessionary treatment for, and to impose duties or other import restrictions on, the imports of any foreign country which maintains unjustifiable or unreasonable tariff or other import restrictions, discriminatory or other acts or policies or subsidies on its exports to third countries which burden or discriminate against United States exports. Under the TEA, the President has full authority to impose duties and other import restrictions only when acting against "unjustifiable" (which has been interpreted by the Executive to connote an illegal act, i.e., a violation of GATT articles) foreign import restrictions aimed at U.S. agricultural exports. Section 301 of the proposed bill would extend this authority to cover unreasonable as well as unjustifiable foreign acts which adversely affect any U.S. export. The House report indicates that unjustifiable acts refer to restrictions which are illegal under international law or inconsistent with international obligations while "unreasonable" acts refer to restrictions which are not necessarily illegal but which nullify or impair benefits accruing to U.S. trade.

The President would also be given authority to act against countries which provide subsidies on imports to the United States, which have the effect of substantially reducing sales of competitive U.S. products in the United States. However, the President could *only* act in such cases if: (1) the Secretary of the Treasury finds that the country does provide subsidies, (2) the Tariff Commission finds that the subsidized imports do reduce sales of competitive U.S. products, and (3) the President finds that the Antidumping Act of 1921, and the Countervailing Duty law are inadequate to deter such practices.

In acting under this authority, the President would be required to consider the relationship of such action to the international obligations of the United States. Actions must be undertaken on a nondiscriminatory treatment basis (MFN), except that the President must act selectively with respect to specific countries which maintain unreasonable as opposed to unjustifiable restrictions.

Section 301 would require the President to provide an opportunity for the presentation of views concerning the kinds of import restrictions dealt with in this section. The bill also contains a new requirement that the President provide an opportunity for the presentation of views and for appropriate public hearings *prior* to the taking of any action under section 301. The President could also ask for the views of the Tariff Commission as to the probable impact on the U.S. economy of the taking of any action under this section.

Congressional Veto Procedure

Section 302 would subject any measure taken under section 301 to the Congressional veto procedure. Thus any such action would remain in effect only if, before the close of the 90-day period following receipt of the Presidential document setting forth such action, neither House of Congress by an affirmative vote of a majority of those present and voting has adopted a resolution of disapproval with respect to such action.

1. Complaint Procedure

Staff Suggestion.—The Executive has exercised its retaliation authority under section 252 of the Trade Expansion Act only once in the so-called "chicken war". The retaliation in that case was "too little-too late" and has not served the purpose of removing the foreign unfair trade practices.

It would appear that one of the weaknesses in the existing provision (252) is the lack of adequate complaint procedures. The staff suggests that there be a specific complaint procedure, under which any interested party could file a complaint with the Office of Special Trade Representative concerning foreign import barrier or export subsidy

which he felt was unreasonably or unjustifiably restricting U.S. exports. The Special Trade Representative would then summarize the complaints and provide them, on a quarterly basis, to the Committee on Finance and the Committee on Ways and Means. Within six months after receiving the complaint and after appropriate hearings were held, he would make a determination as to whether the foreign barrier or export subsidy met the statutory criteria. He would make public his finding. If the determination was positive, i.e., foreign barrier or export subsidy was unjustifiably or unreasonably restricting U.S. commerce, he would seek a negotiated solution. If he failed to obtain a satisfactory negotiated solution within three months after making the finding positive, the President would be directed to take the retaliatory action called for by section 301.

The staff also feels that section 301(a)(3) should be modified to exclude provisions for relief against subsidies on exports to the United States since such subsidies would be subject to countervailing duties under present law. However, the authority to act against subsidies on exports to other foreign markets could be retained since these are not covered by the countervailing statute. The issue of strengthening the countervailing duty law will be dealt with later in this document.

2. Expansion of Authority To Include Services

It seems appropriate to expand the area of possible retaliation against foreign discrimination to services, including shipping, insurance and perhaps even investment. Trade in goods is only one aspect of our international economic relationships. It would seem appropriate that the Committee be as concerned about discrimination in other areas of commerce involving American commercial interests as it is in the merchandise trade area. There has been considerable support for such an amendment by the insurance industry, air transport industry, and the merchant shipping industry. Consequently, the staff suggests that the bill be amended to make it clear that discrimination "against U.S. commerce" includes discrimination against all commercial services associated with the interchange of goods. This is consistent with what the House intended, according to its Committee report, but the staff feels that the statute ought to reflect a concern over discrimination in services as well as goods.

3. Eliminate Most-Favored-Nation Retaliation

It would seem logical that if the President were to retaliate against unreasonable or unjustifiable foreign import restrictions which discriminate against U.S. commerce, he would do so selectively, i.e., only against those countries who are discriminating against U.S. commerce. Under existing law and under the language of the House bill, the President would be required to consider the relationship of such retaliation to the international obligations of the United States, a term which generally refers to most favored nation obligations. Thus, when we retaliated in the "chicken war" we not only hit the guilty but also the innocent. The staff suggests deleting the language in 301(b) of the House bill referring to "international obligations" and making it clear that the President's authority under this section is to be used only against countries which are found to discriminate against U.S. commerce.

4. Delete Congressional Veto Procedure and Hearing Requirement

The Congressional veto has traditionally been applied when the President failed to act to protect United States interests. It seems singularly inappropriate to provide a Congressional veto procedure in the case of a Presidential action against foreign discriminatory practices. It also seems inappropriate to require a hearing under 301(e) to get the views of potentially affected importers on prospective retaliation. Obviously, importers would object to any retaliation. They are not interested in removing foreign nontariff barriers against U.S. exports. The Committee may wish to delete section 301(e) or as an alternative, the Committee may wish to authorize the President to take action under section 301 before holding public hearings, when he determined it to be in the national interest.

B. ANTIDUMPING DUTIES, CHAPTER 2 OF TITLE III (SECTION 321)

Time Limits and Procedures

House Bill.—Section 321 would make several significant procedural changes in the present antidumping statute. In the first place, the Secretary of the Treasury would be given a time limit in which to make his findings as to whether there is reason to believe that there have been sales at less than fair value (generally sales at prices below those in the home markets of the exporting country). The Secretary would make such findings within 6 months or, in more complicated investigations, within 9 months after the question of dumping has been raised or presented to him, in accordance with regulations to be issued by the Secretary.

As under existing law, the Secretary upon determining that there is reason to believe that there have been sales at less than fair value,

would be authorized to order the "withholding of appraisement" of merchandise entered or withdrawn from warehouse not more than 120 days before the question of dumping was raised by or presented to him. The bill would allow the Secretary, even if his initial determination were negative, to order the withholding of appraisement within 3 months of his published notice of negative determination, if within that time period he had reason to believe that there might be sales at less than fair value.

In practice, the Secretary's final determination of sales at less than fair value is made within 3 months after his initial determination. Following his determination, the Tariff Commission would have 3 months in which to make its injury determination, as under existing law. New provision would also be made in the bill for the holding of hearings by both the Secretary of the Treasury and the Tariff Commission, which must make a finding of injury following the Secretary's finding of sales at less than fair value. Any interested party may be allowed to appear. However, only foreign manufacturers, exporters, and domestic importers of the foreign merchandise in question would have an automatic right to appear at such hearings. Thus, U.S. manufacturers of the articles in question would be required under the bill to show good cause before they could present their views. Any determinations made by the Secretary of the Treasury or the Tariff Commission at such hearings would be published in the Federal Register together with a statement of findings and conclusions and reasons thereof.

Definitional Changes

Certain substantive changes in the antidumping statute would also be made by the bill. Under the 1921 Antidumping Act, sales at less than fair value are defined as occurring when the purchase price (in the United States) or the exporter's sales price is less than the foreign market value (generally defined as the price in the domestic market of the country of export). If the purchase price or exporter's sales price is less than the foreign market value, and if the Tariff Commission finds that the importation of such product results in injury to, or prevents from being established, a United States industry, an antidumping duty shall be levied in an amount equal to the difference between the foreign value and the U.S. price (dumping margin). The bill would make certain amendments with respect to the sections of the Antidumping Act which define purchase price and exporter's sales price so that the dumping margin, if any, will not be artificially reduced or distorted through an improper treatment of foreign export taxes and indirect taxes effecting such products. Provision would also be made

to coordinate this section with the countervailing duty law so that imports which have already been made subject to countervailing duties as a result of a finding of export subsidy would not be doubly penalized under the Antidumping Act.

In order to determine the foreign market value of a particular product, the Secretary of the Treasury is directed to consider the price at which that product has been sold in its home market or in the representative third country markets. However, if a manufacturer were to make foreign sales at prices below the cost of production, it would be inappropriate to use such prices as a measure of foreign value. Accordingly, the bill would direct the Secretary, where he determines that sales have been made at prices less than the cost of producing such merchandise and that certain other requirements are met, to construct the foreign market value according to section 206 of the Antidumping Act. Under Section 206, the foreign market value is constructed by adding together the estimated cost, expenses and profits which would be incurred in producing such merchandise. A similar provision would be added in the case of State controlled economies (i.e., the communist countries). If the Secretary determines that the economy of a country is state-controlled to such an extent that sales of merchandise do not permit a determination of foreign market value, he would determine such value either on the basis of the prices at which such or similar merchandise is sold by a non-state-controlled economy country for home consumption or to third countries, or on a constructed value basis.

Section 321 of the bill would also make certain other technical changes in the 1921 Antidumping Act relating to the comparison of foreign and U.S. prices of the same manufacturer and would provide transitional provisions regulating the phasing in of the amendments to this Act.

Staff Suggestions.—The staff feels that vigorous but fair enforcement of the Antidumping Act is in our national interest. The Antidumping Act has its analogue not in "protectionist legislation" but in domestic price discrimination statutes, including the Robinson-Patman, Sherman and Clayton anti-trust acts.

Chairman Long noted that:

> * * * Congress has declared price discrimination in domestic and foreign commerce to be unlawful; but since it is virtually impossible to prosecute producers guilty of dumping, Congress has provided an alternative remedy in the form of special dumping duties imposed on the offending goods under the Antidumping Act of 1921.[1]

Non-enforcement of our dumping laws is an incentive to make unfair attacks against U.S. industries and is the antithesis of free trade.

[1] Russell B. Long, *United States Law and the International Antidumping Code*, 3 International Lawyer 464, 467, (1967).

It also leads to shortages of productive capacity in the dumped-upon country and ultimately to greater inflation in that country.

Consistent with a policy of vigorous, but fair enforcement of our antidumping (price discrimination) statutes, the staff recommends the following amendments:

1. Require Collection and Periodic Publication of Home Market Prices

In 1957 the Treasury recommended that the antidumping laws could be improved if import invoices were required to show home consumption prices as well as the price charged the U.S. importer. Assistant Secretary Kendall appeared before the Committee on Ways and Means and supported this step by saying:

> We are going to use a new invoice form which right on the face of it, will have two figures, one the home consumption price and the other one the price to the United States. Those are both prices in the country of origin. If there is a price differential, it will be flagged down just like that and I think that that will go a long way toward improving the administration of the Act.

Accordingly, the staff suggests that the Secretary of the Treasury be directed to modify the certified import invoice requiring, to the extent practicable and consistent with the laws protecting confidential trade information, the inclusion of data reflecting the home market price and the purchase price of each article imported into the U.S. In addition, such information would be published on a regular basis.

2. Equal Hearing Rights

Under the House bill the foreign manufacturer or importer is guaranteed a hearing whereas the domestic manufacturer must show good cause. This would seem to make the adjudicatory process a single party interest procedure, and appears unfair to domestic producers The Committee may wish to give any domestic manufacturer, producer, or wholesaler merchandise of the same class or kind the same rights to appear by counsel or in person in a hearing, as is provided the foreign manufacturer or importer under the House bill. The Treasury supports this suggestion.

3. Time Frames

The staff recommends that the Secretary be required to make his antidumping proceeding notice within 30 days after receiving a complaint. This requirement comports with present administrative practice. The Secretary could have an additional five months to reach an initial determination of whether he has reason to believe there have been less than fair value sales. At that point withholding of appraisement would be ordered. The final Treasury determination of whether there have been LTFV sales would be made within three months after the initial determination. Thus, the Treasury would have a full nine months to reach a final determination. The Tariff Commission would continue to have three months after the Treasury final determination to determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established.

4. Publication of Findings

The final determination by the Treasury of less than fair value sales is an important decision. It triggers a Tariff Commission investigation and may lead to imposition of dumping duties. The staff feels that in publishing such a determination in the Federal Register (as required by law) the Secretary should provide information, consistent with the legal requirements protecting confidential trade data, with respect to the purchase price or exporters sales price, the foreign market value (or in the absence of such value then the constructed value and all adjustments made thereto). This information will prevent arbitrary changes in the margins of dumping and give all interested parties, including the Tariff Commission, a full understanding of the Treasury findings. Present Treasury practice has conformed to this suggestion, but in the past, many Treasury decisions were published without adequate information. This suggestion would help prevent a return to old Treasury practices.

5. Dumping From Non-Market Countries (Senator Curtis Bill S. 2374)

Senator Curtis and others have suggested amendments to the antidumping laws to deal with dumped imports from non-market economies in which price decisions and accounting practices are not based on market forces.

The Curtis bill (S. 2374) would use a "substitute constructed value" concept in cases in which a non-market country exports a product exclusively to the United States and where there is insufficient evidence to establish the usual constructed value based on third market sales. The "substitute constructed value" would be equal to the cost of similar U.S. merchandise. This approach would have limited application and the Committee may wish to consider it. However, the staff would request authority to make such changes as are necessary and appropriate without affecting the purpose of the proposal.

6. Multinational Corporation Dumping (Senator Nelson)

Section 205 of the Antidumping Act sets forth criteria for the determination of the foreign market value of a class or kind of merchandise which is being sold in the United States. In its present form, section 205 is interpreted by the Department of the Treasury to require that the price at which merchandise is imported into the United States be compared with the prices at which such or similar merchandise produced in the same country (i.e., the "country of exportation") is sold in the country in which it is produced or in exportation to third countries. Because of this interpretation, the Antidumping Act is now inapplicable to sales in the United States by a mulinational company which has production facilities in several countries and can thus subsidize discriminatorily low-priced exports from a facility in one country by selling at much higher prices the same or similar merchandise produced in a facility located in another country.

The proposed new subsection (d) would eliminate this discrepancy or loophole by requiring, under appropriate circumstances, that the prices of exports to the United States emanating from a facility in one country be compared with the prices of such or similar merchandise produced in a facility which, although located in another country, is owned or controlled by the same person.

The new subsection (d) would be applicable where information is presented to the Secretary of the Treasury indicating that two conditions exist. First, it must be shown that the merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person which also owns or controls, directly or indirectly, other facilities for the production of the same or similar merchandise which are located in another country. Second, the information presented must indicate that the sales of such or similar merchandise produced in one or more of the facilities outside the country of exportation are being made at prices higher than the prices charged for such or similar merchandise produced in the facilities located in the country of exportation. Such information would, in most cases, be brought to the Secretary's attention by the complaining party. However, the information might also be developed in the course of the Customs Service's investigation.

Where the information presented indicated the existence of these two conditions, the Secretary would be required to determine whether differences in taxes and costs of labor and materials justify the difference between the prices charged for merchandise produced in the country of exportation and the higher prices charged for merchandise produced in the facilities located outside the country of exportation.

If he determines that the difference in price is not cost-justified, the amendment would require that foreign market value be determined on the basis of the prices (after the adjustments required by section 205(a) and 202 of the Act) of such or similar merchandise produced in the facilities whose production the Secretary determines is being sold at the highest prices. In determining foreign market value on this basis, the Secretary is required to make appropriate allowance for differences between taxes and costs of labor and materials in the country of exportation and taxes and costs of labor and materials in the facilities located outside the country of exportation.

It should be noted that this proposal deals with a different problem than does section 321(e) of the House trade bill which provides, in substance, that sales made at prices below cost of production shall in certain circumstances be disregarded in computing foreign market value. The effect of this proposal would be that, in cases where sales made from Country A are made at prices below cost of production, the "constructed value" provisions of the Act would be invoked to determine whether dumping has taken place.

Section 321(e) was never intended to reach the issue of dumping by multinational corporations, nor would it provide effective relief against such discriminatory pricing. A multinational corporation can export the entire production of its plant in Country A at prices far below those which it charges for such merchandise produced in its plants in other countries and still avoid section 321(e) by not selling any or much of the output of the Country A plant at prices below cost of production. There is no evidence that multinational corporations are selling all or substantially all of the production of their export plants below cost. There is evidence that multinational companies are making export sales from facilities in one country at prices so close to cost that they can provide little or no return on investment, and that these low export prices are being subsidized by the profits gained from selling the same merchandise at far higher prices from plants located in other countries. While the staff feels there is considerable merit in the proposal it would request authority to make changes consistent with the purposes of the proposal.

7. Judicial Review

The House bill does not provide an explicit provision for judicial review of negative antidumping decisions by the Secretary of the Treasury. Neither the House nor the administration appear to be opposed to such judicial review; but rather the House report makes references to the opinion of the Treasury Department that existing

law provides for judicial review of negative antidumping decisions on the part of U.S. producers and manufacturers. It is the view of the Committee staff that some question remains as to the ability of American manufacturers and producers to obtain judicial review of negative antidumping determinations under section 516 of the Tariff Act of 1930. Accordingly, the staff recommends that section 516 be amended to make such judicial review explicit. This should encounter no opposition from the administration nor the House of Representatives since they are of the view that such review is already afforded by existing law.

Committee Report.—Rather than codifying in the statute certain practices relating to such matters as "technical dumping," injury, industry causation linkages and reconsideration of formal determinations, the staff recommends that these matters be clarified and defined, to the extent deemed appropriate, in the Committee report. In doing so the staff will rely on past decisions which establish consistent precedents and practices.

C. COUNTERVAILING DUTIES, CHAPTER 3 OF TITLE III (SECTION 331)

House Bill.—Section 303 of the Tariff Act of 1930 requires the Secretary of the Treasury to impose countervailing duties upon imported merchandise whose manufacture, production, or export has been benefited directly or indirectly by a bounty or grant (subsidy). Section 331 of the bill would make major procedural as well as substantive changes in the countervailing duty law.

1. Time Limits

Under subsection (a) of the revised countervailing duty statute, the Secretary of the Treasury would be required to make determinations as to the existence of bounty or grant within 12 months after the date on which the question was presented to him. No time limit is contained in the present law.

Staff suggestion.—The 12-month time limit does not begin until the question is presented to the Secretary by his staff. Thus, if the question is not presented to him, the time limit will not apply. The staff feels that Section 331(a) should be revised to provide a total time of 12 months from the date the petition is filed with Treasury for a determination to be made, rather than within 12 months after the question is presented. It is also recommended that cases pending as of the date of enactment be acted upon within 6 months. The Chamber of Commerce supports these suggestions.

2. Extension to Non-Dutiable Items

Furthermore, under subsection (b) the countervailing duty law would be extended to cover non-dutiable items. However, in the case of such items, the bill would require an affirmative determination by the Tariff Commission that a United States industry is being, or likely to be, injured or prevented from being established as a result of the importation of the subsidized non-dutiable merchandise. The injury requirement would not apply to dutiable items. In the case of non-dutiable items, the injury requirement would be required only so long as the international obligations of the United States (GATT Article VI) require such a determination.

If the Secretary made an affirmative finding that a bounty or grant exists with respect to a non-dutiable import, he would be authorized to order the suspension of liquidation with respect to such merchandise entered or withdrawn from warehouses on or after the 30th day after publication of such determination in the Federal Register. If the Tariff Commission then made a positive injury determination, it would take effect as of the date of the original subsidy determination by the Secretary of the Treasury, as in the case with dutiable imports.

3. Articles Subject to Quotas

Under new subsection (d), the Secretary of the Treasury would be authorized to refrain from applying countervailing duties, even if a subsidy were found to exist, to an article already subject to import quotas or to voluntary restraint agreements if he determined that such limitations were an adequte substitute for the imposition of such a duty.

4. Discretionary Moratorium While Negotiations Are in Process

Subsection (e) would add a wholly new concept to the unfair foreign trade statutes. During a 4-year period following the date of enactment of the bill, the Secretary of the Treasury would have *discretion to refrain from imposing a countervailing duty where he determined that such action would seriously jeopardize the satisfactory completion of trade negotiations contemplated under Title I of this bill.* The Secretary's discretion would only remain in effect for one year following enactment of the bill in the case of articles produced in facilities owned by or controlled by a developed country where the investment in, or operation of, such facilities was subsidized. This whole subsection appears to say the law does not mean what it says while we are negotiating. It may be considered an open invitation to subject U.S. industry to injurious subsidized imports.

Apparently, the discretion provision was designed to provide the Executive Branch with the opportunity to negotiate internationally agreed-upon rules with respect to export subsidies during the 5-year period of trade agreements authority (5 years discretion is provided by adding the 4 years of discretionary authority to the 12-month period in which the Secretary must make his determination).

Staff Suggestions.—The staff does not see the logic of a total discretionary grant of authority to refrain from imposing countervailing duties whenever the Secretary determines that such actions would jeopardize the satisfactory completion of trade negotiations. That type of provision would effectively serve as a moratorium on the use of countervailing duties at a time when other governments are likely to be tempted to subsidize exports in order to pay for their increased energy import bills. Moreover, it would put the administrator of the statute in an impossible position of having foreign countries suggest that if he did not use his discretionary authority, he would seriously jeopardize international trade negotiations. The staff suggests deleting section 303(e), as currently written.

There is one area however where discretionary authority might be useful as a negotiating technique. This concerns the rebate of value added taxes. It would seem that such tax rebates together with U.S. export subsidies such as DISC could be part of a negotiation on subsidies. The Committee could make clear that in the case of value-added-tax rebates, the countervailing duties statute would not have to be applied for three years pending the outcome of the negotiations.

If a satisfactory international agreement on subsidies is concluded, the U.S. Congress could agree to include an injury requirement in the law, on both dutiable and nondutiable products, under the nontariff barrier authority agreed to by the Committee. This could be made clear in the Committee report.

5. Judicial Review Rights

Section 331 of the bill would also amend section 516 of the 1930 Tariff Act in such a way as to provide American manufacturers, producers, or wholesalers, the right to seek judicial review of negative countervailing duty determinations by the Secretary of the Treasury. Under existing law, judicial review can only be had after the Secretary makes an affirmative finding of bounty or grant and levies countervailing duties. Thus, the present review system is only of benefit to importers and others adversely affected by countervailing duties. The bill would amend section 516 of the 1930 Tariff Act so that manufacturers and others could petition the Secretary of the Treasury to reconsider his detemination that countervailing duties should not be

levied in a particular case. There would be no time frame for the Secretary to reach a decision on the merits of the complaint by the petitioner. However, if the Secretary decides that his negative countervailing duty decision is correct the petitioner could serve notice that he will contest it in the Customs Court and thereby initiate the process of judicial review.

D. UNFAIR IMPORT PRACTICES, CHAPTER 4 OF TITLE III (SECTION 341)

Section 337 of the Tariff Act of 1930 authorizes the Tariff Commission to investigate alleged unfair methods of competition in the importation of articles or in the sale of imported articles in the United States. It has been most often applied to articles entering the United States covered by claims under U.S. patents. If the Tariff Commission finds the effect of such methods is to destroy or substantially injure an industry efficiently and economically operated in the United States, to prevent the establishment of an industry or to restrain or monopolize trade or commerce in the United States, the articles involved may be excluded from entry into the United States by the Secretary of the Treasury at the direction of the President.

Tariff Commission Power To Exclude Articles in Patent Infringement Cases

House Bill.—Section 341 of the bill would amend section 337 of the Tariff Act of 1930 to authorize the Tariff Commission, itself, to order the exclusion of articles involved in unfair methods and acts based upon United States patents. In the patent-based cases, the President would no longer have any responsibility under section 337. The bill would not alter the existing roles and authorities of the President and the Tariff Commission with respect to unfair import practices not involving patents.

Under the proposed amendments the Tariff Commission would be authorized to provide for the temporary exclusion of imported articles. In patent-based cases, whenever the Commission has reason to believe that any article entered into the United States in violation of section 337 would, in the absence of exclusion, result in immediate and substantial harm, it would so notify the Secretary of the Treasury. The Secretary would then exclude such articles from entry until an investigation by the Commission could be completed. Such articles, however, would be entitled to entry under bond.

Under the proposed amendments, if the existence of such unfair methods and acts were established to the satisfaction of the Commission in patent-based cases, such article would be excluded by the Secretary from entry into the United States until such time as the

Commission found that the conditions leading to such refusal of entry no longer existed. No lesser remedies than outright exclusion would be provided.

Hearings and Judicial Review

Any order entered into under this section would be made on the record after opportunity has been made for a full hearing, including the opportunity to present legal defenses. Any person adversely affected by an action of the Commission or the refusal of the Commission to act would have the right to seek judicial review.

1. Extend Section 337 to Other Than Patent Cases

Staff Suggestions.—The staff supports the provisions in the House bill that would amend section 337 to authorize the Tariff Commission (rather than the President) to provide for the exclusion from entry of articles involved in unfair methods or acts based on U.S. patents. It would seem logical to extend the provision in the bill to cover all unfair methods or acts under section 337, e.g., to include other unfair practices which are commensurate with our own anti-trust theories of competition.

2. Presidential Intervention

If, as recommended above by the staff, the Tariff Commission is given jurisdiction to provide for the exclusion from entry of imported articles involved in any unfair method or act in their importation or sale, whether such method or act is patent based or otherwise, then the staff would also recommend that the President be given authority to intervene and prevent relief in appropriate cases when the unfair method of competition or unfair act is not patent based. The granting of relief against imports could have a very direct and substantial impact on United States foreign relations, economic and political, and it therefore seems appropriate to permit the President to intervene before such relief becomes effective when he determines that such intervention is required by important international interests of the United States. In order to prevent such intervention by the President from being too freely exercised and from delaying meritorious relief, it is suggested that the President be required to specify the important interests to be protected and the effect which the contemplated relief would have on such interests, and to intervene within a set time, such as 60 days. The power to intervene should go to both Tariff Commission determinations of a reason to believe there is a violation of section 337, as well as final findings of violations of the section. The Administration has indicated, by its provisions in H.R. 6767, the precursor to the present House bill, that it is willing to relieve the

President from *any* role in patent-based cases. Therefore, it seems appropriate to limit the President's authority to intervene to cases involving non-patent based unfair methods and acts.

3. Flexible Remedies

The staff suggests that the Committee may also wish to give the Tariff Commission other powers besides exclusion, such as the issuance of a cease and desist order, since it is clear that the existing exclusion remedy is so extreme it is unlikely to be used very often or to be very effective in promoting the purposes of the section.

4. Time Limits

Under neither the current law nor section 337 as it would be amended by the bill, is there any time limit for determinations by the Tariff Commission or the President (in the non-patent areas). The Committee may wish to establish specific time limits for determinations under section 337, such as 1 year, so as to make it a more useful tool against imports involving unfair trade practices.

5. Judicial Review

Under present law judicial review may only be had where the President takes affirmative action following an affirmative recommendation by the Tariff Commission. No judicial review is available in those situations where the President refuses to act. Since the recommendation of the Tariff Commission is only advisory in nature, it does not form a proper basis for judicial review by a constitutional court. On the other hand since the President in these cases has not chosen to act in any manner, there is no decision which can be made subject to judicial review. The bill as presently drafted would cure the situation with respect to patent-based cases. In those cases the decision of the Tariff Commission is final and may be made the subject of a judicial review in the Courts. If the Tariff Commission were given exclusive jurisdiction with respect to all unfair import practices, as has been recommended by the staff, the problem of providing judicial review in non-patent-based cases—where the President does not act after a Tariff Commission affirmative recommendation—would be solved automatically, since the Commission decision would again be final.

While the present House bill provides for judicial review of both Tariff Commission determinations of a reason to believe there is a violation of section 337 as well as a finding of such violation, it is believed that judicial review of Commission determinations of a reason to believe there is a violation is not necessary. Such a determination leads

to only temporary relief, and, in any case, there is provision for entry under bond in case of exclusion. On the other hand, the provision for review of temporary actions could tie up Commission resources in review litigation and could slow investigations.

6. Transitional Measures

The staff also recommends that provisions be added to the bill for transitional purposes. Transition measures should be provided with respect to the application of the amendments to section 337 to the approximately 20 cases currently pending before the Tariff Commission.

7. Res Judicata, Collateral Estoppel

The staff recommends that appropriate explanations be incorporated in the Committee report explaining the nature of the Tariff Commission's jurisdiction and its relationship to the Federal Courts so as to make clear that the decisions by the CCPA reviewing Tariff Commission determinations should not be held to serve as res judicata or as collateral estoppel in cases before such courts and that Tariff Commission proceedings should not necessarily be enjoined by the Federal Courts before which cases are pending in which the parties and subject matter are in some respects the same.

The relief provided for violations of section 337 is "in addition to" that granted in "any other provisions of law". The criteria of section 337 differs in a number of respects from other statutory provisions for relief against unfair trade practices. For example, in patent-based cases, the Commission considers, for its own purposes under section 337, the status of imports with respect to the claims of U.S. patents. The Commission's determinations neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts. Therefore, it seems clear that any disposition of a Tariff Commission action by a Federal Court should not have a res judicata or collateral estoppel effect in cases before such courts. Analogously, since Tariff Commission cases are different in their criteria and jurisdictional basis from cases in the Federal courts, it also seems clear that Tariff Commission proceedings should not be enjoined, when kindred cases may be before the Courts, on the basis of any theory of primary jurisdiction.

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