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Roy L. Prosterman
University of Washington School of Law

LAMPADEPHORIA†

WITHHOLDING OF APPRAISMENT UNDER THE UNITED STATES ANTI-DUMPING ACT: PROTECTIONISM OR UNFAIR-COMPETITION LAW?

ROY L. PROSTERMAN*

The Anti-dumping Act of 1921 is, in the view of Professor Prosterman, in very real danger of being diverted from an antitrust law into a protectionist or tariff-like measure as a result of an unfortunate combination of administrative techniques built into the act and current practical pressures. The author discusses the cause of this diversion and offers some suggestions for reform which will prevent the anti-dumping law from growing into a protectionist device which is inimical to the current trends toward free trade.

The United States anti-dumping law[1] is, in the broad sense, an antitrust law or anti-unfair competition law. It is analogous in many ways to our Robinson-Patman Act,[2] which prohibits a manufacturer from discriminating unjustifiably among his domestic U.S. customers, except that the anti-dumping law is supposed to prevent foreign manufacturers from discriminating unjustifiably between their home-market customers and their U.S. customers. One must hasten to add that this protection is not aimed at a *higher* U.S. price because we are not concerned with any real possibility of competition between U.S. customers and the manufacturer's foreign customers buying at some putatively lower price—under Robinson-Patman we are, of course, concerned with such so-called "secondary line" effects of domestic discriminations between customers operating, so to speak, cheek by jowl—but rather under anti-dumping we are concerned with a price to U.S. customers which is *lower* than the price to home-market

† Lampadephoria is a new section in the *Washington Law Review.* For an explanation of its meaning see the Editor's Notes.

* Assistant Professor of Law, University of Washington. A.B., Chicago, 1954; LL.B., Harvard, 1958.

[1] Anti-dumping Act of 1921, §§ 201-12, 42 Stat. 11, as amended, 19 U.S.C. §§ 160-71 (1964). The author wishes to thank Seymour Graubard and Michael H. Greenberg of the New York bar and Alfred R. McCauley of the District of Columbia bar for making available their excellent analysis in the unpublished American Institute for Imported Steel, Inc.—Report, "United States Antidumping Policy—At Present and As Proposed by the Herlong-Hartke Bill," Dec. 15, 1965 (hereinafter cited as *Report*). A copy of the *Report* has been placed on file in the library of the School of Law, University of Washington.

[2] Sections 2-4, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964).

customers which may have an adverse competitive impact at what we call the "primary line" under Robinson-Patman, that is, an impact against domestic U.S. producers who are in a real sense in direct competition with the foreign exporting manufacturer.[3] When the anti-dumping act was passed in 1921 it was conceived roughly in terms of protecting supposedly infant U.S. industries against competition from ominous and powerful European "cartels" which would finance low-priced sales on the U.S. market out of monopoly profits made at home and thus stifle the growth of the U.S. industry and of an effective U.S. competition.[4] Like our Robinson-Patman Act policy, the earliest version of which was articulated in the Clayton Act[5] seven years before the anti-dumping act was passed, our anti-dumping provisions probably represent the most thorough-going framework for action against alleged discrimination in price thus far developed in any of the industrialized nations.

But how is this framework being used? Do changed facts or the experiences of actual administration suggest that it should be revised, and indeed, is it possible to address even more fundamental questions to the need for its existence at all?

I should like to deal principally with the question whether the anti-dumping law, which as I have said is an antitrust law and not at all a protectionist measure or tariff in the more customary sense, is being or is threatened to be diverted from its purposes and transformed into a protectionist measure by an unfortunate combination of administrative techniques built into the act and current practical pressures. If this diversion is occurring, is it possible to visualize the form that redress—which would be principally statutory, although

[3] For the development of the "primary line" and "secondary line" concepts under the Robinson-Patman Act, see FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1963); ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 141-204 (1962); *id.* (Supp. 1964). Rowe refers to the anti-dumping provisions as "parallel legislation." *Id.* at 82-83, n.153. The Robinson-Patman Act is, of course, available against a foreign exporting manufacturer's discrimination *among* his U.S. customers, although there are practical difficulties in obtaining jurisdiction and enforcement has been minimal. *Id.* at 81-83.

[4] See Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44, 45, 53, & text at nn.56, 57 (1958); *Report, supra* note 1, at 1-3. See generally H.R. REP. No. 1, 67th Cong., 1st Sess. (1921).

The Anti-dumping Act of 1916, 39 Stat. 798, 15 U.S.C. § 72 (1964), made it a criminal offense to import "at a price substantially less than the actual market value" if the importation was done "with the intent" of destroying or injuring a U.S. industry, but this provision has been virtually a dead letter (research has uncovered no reported decision involving a claim under this act over the past thirty years) largely because of the problems of proving the requisite intent and the comparative attractiveness of proceeding under the 1921 act.

[5] Section 2, 38 Stat. 730 (1914).

I shall make one suggestion which could be most directly met by a change in the regulations—might take? The practical pressure for diversion of the act from its purpose comes from domestic industries feeling the competitive bite from exports coming in under the steadily lower prevailing tariff rates of past years.[6] Pressure from the domestic steel industry and other industries has led to the introduction of a number of bills in Congress over the past few years to render much stricter the provisions of the anti-dumping law,[7] and attention now focuses on what has become known as the Herlong-Hartke bill,[8] but the present act unfortunately already contains provisions which can permit it to have a highly protectionist effect in the sense that a domestic industry complaint can stand a very good chance of freezing out exports from abroad even when there is absolutely no substantive validity to the charge that dumping is occurring and hence no actual occasion for the application of the anti-unfair competition policy embodied in the act.

This can occur because of the circumstances under which a withholding of appraisement of incoming goods by U.S. customs can take place under the administration of the act. Under the statutory scheme, there is basically a three-step procedure under which the Secretary of the Treasury first makes a determination that he has reason to believe or suspect that export sales to U.S. purchasers are taking place at "lower than foreign market value";[9] secondly, the Secretary makes a determination that the sales to the U.S. are occurring at less than *fair* value;[10] and finally, upon affirmative determination to that effect, the Tariff Commission takes jurisdiction for purposes of determining —which it must do within three months after the Treasury's second determination—whether the U.S. industry is being injured or is likely to be injured (or is being prevented from becoming established) by these less-than-fair-value sales by foreign exporters.[11] Only upon all of these determinations being made can a finding of dumping issue.

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[6] See note 17, *infra;* Baier, *Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States,* 17 STAN. L. REV. 409, 411 (1965).

[7] *Id.* at 411-12, 457-62; see also Note, *The Antidumping Act: Problems of Administration and Proposals for Change,* 17 STAN. L. REV. 730 (1965) (on the whole favoring a stricter approach); *Report, supra* note 1, at 20-42.

[8] Senator Hartke's bill was S. 2045, 89th Cong., 1st Sess. (1965). Representative Herlong's bill was H.R. 8510, 89th Cong., 1st Sess. (1965).

[9] Anti-Dumping Act of 1921, § 201(b), 42 Stat. 11, as amended, 19 U.S.C. § 160(b) (1964).

[10] Anti-Dumping Act of 1921, § 201(a), 42 Stat. 11, as amended, 19 U.S.C. § 160(a) (1964); § 1(3), 72 Stat. 583 (1958), 19 U.S.C. § 160(c) (1964).

[11] *Ibid.*

A special duty will then be levied against the incoming goods which are the subject of the finding; this duty is equal to the difference between the purchase price in the U.S. and the foreign market value.[12] The latter term refers generally to the price at which the goods are sold in the home market, and the act provides for adjustments of the actual U.S. purchase price to reflect costs of transportation, handling, import duties and other costs attributable to the importation of goods as well as its adjustment to reflect differences in quantities or other circumstances of sale—which may include such things as credit terms, special services rendered, advertising allowances, etc.—in order to back-calculate from the actual U.S. purchase price a figure which can be compared with the price at which the goods have been sold in the home market. In a sense, one can say that this is basically an arithmetical calculation in which both the actual home market sales price and the actual U.S. market price are traced back to an f.o.b. factory price for both lots of goods.[13] The statute gives no help in determining what factors go into the *further* determinations to be made with respect to less than *fair* value and with respect to *industry injury,* but one very significant point as it has turned out is that it is at the first stage—the stage at which the Secretary has reason to believe that sales are being made in the U.S. at less than foreign market value—that the Secretary "shall authorize"[14] withholding of appraisement. This means purely and simply that the importer has no way of knowing, from the time of this first determination (and indeed covering a period which may range up to several months preceding this determination[15]), up to the time of the final determina-

[12] Anti-dumping Act of 1921, § 202(a), 42 Stat. 11 as amended, 19 U.S.C. § 161(a) (1964).

[13] See Anti-dumping Act of 1921, §§ 202(b),(c), 205, 42 Stat. 11, 13, as amended, 19 U.S.C. §§ 161(b), (c), 164 (1964). In the *Report of the Secretary of the Treasury to the Congress on the Operation and Effectiveness of Antidumping Act,* published in *Hearings on H.R. 6006 & 5120 Before the House Committee on Ways and Means,* 85th Cong., 1st Sess., 10-29 (1957) [hereinafter cited as *Treasury Report*], it is noted that "In its simplest form the calculation can ordinarily be made by taking the f.o.b. factory price, in each case for the sale to the United States market and for the home consumption sale." *Id.* at 12-13. Again, "These prices must be adjusted so that they are properly comparable—which typically means a comparison f.o.b. factory." *Id.* at 16.

[14] Anti-dumping Act of 1921, § 201(b), 42 Stat. 11, as amended, 19 U.S.C. § 160(b) (1964).

[15] The dutiable period can extend prior to the notice of withholding of appraisement to cover merchandise "entered, or withdrawn from warehouse, for consumption, not more than one hundred twenty days before the question of dumping was raised by or presented to the Secretary" or his delegate, pursuant to the Anti-dumping Act of 1921, § 202(a), 42 Stat. 11, as amended, 19 U.S.C. § 161(a) (1964). The regulations have not taken advantage of the full power granted, but set the more normal dutiable period as one commencing with the publication of the notice of withholding of

tion by the Tariff Commission, what the duty is going to be on the goods imported if there should be an adverse finding. The importer thus must either continue to import the goods, reselling them to his own customers or incorporating them in his own products and standing ready to absorb a large additional liability for duty if the finding goes against him in the Tariff Commission, or else he must discontinue importation of the goods until the situation has been clarified by a final decision, which in practical effect may mean terminating the importing arrangement and looking for another source of supply. All too often, such suspension of imports *has* been the effect of the withholding of appraisement[16] and this has given potentially great leverage for effectively protectionist applications of the act on behalf of U.S. manufacturers who do not in fact have a very strong case to make.[17]

These factors have been even further exaggerated in the regulations and actual proceedings under the act. While the regulations[18] attempt to break down the stages of procedure in a somewhat more detailed fashion than the statute, it remains perfectly clear from the regulations and from the procedure under them that the investigation made by the Commissioner of Customs on behalf of the Treasury[19] which leads

appraisement (which follows the preliminary less-than-foreign-market-value consideration). 19 C.F.R. § 14.9(a) (1965).

[16] See Carbon Steel Bars & Shapes From Canada, 29 Fed. Reg. 12599 (1964). Ehrenhaft, *supra* note 4, 60-61 and text at nn. 94-97; *Report, supra* note 1, at 10-11: "Withholding of appraisements is the single most important threat which the exporter and importer face in a dumping proceeding."

[17] For the period commencing with the first keeping of complete records up to December 1965, the following breakdown may be schematized from *Report, supra* note 1, at 19-20:

	No. of Cases Processed by Bureau of Customs	Dismissed or Closed Out By Bureau	No Injury Found By Tariff Comm'n	Dumping Order Issued
Jan. 1, '34-Oct. 1, '54 (latter date marked shift of jurisdiction to determine injury to the Tariff Comm'n)	146	139	—	7
Oct. 1, '54-Dec. '65	341	294	37	10

Apart from this quantitative analysis it seems quite clear that a qualitative, economic analysis of the subjects of the proceedings initiated would show a strong trend towards involvement of product groups of increasingly important industries. Imports competing with the domestic paint, cement and steel industries, for example, have been heavily involved in anti-dumping proceedings in recent years.

[18] 19 C.F.R. §§ 14. 6-14.13 (1965).

[19] The authority to make the initial investigation has been delegated by the Secretary to the Commissioner of Customs. See, *e.g.*, Treasury Decision 53654 (1964). *Cf.* C. J. Tower & Sons v. United States, 71 F.2d 438 (Ct. Cust. & Pat. App. 1934) (upholding an early delegation of similar authority to the Assistant Secretary).

to, (a) the determination that there are reasonable grounds to believe or suspect that sales to the U.S. are being made at less than foreign market value and, (b) to the all-important withholding of appraisement notice, is based purely on the essentially arithmetical back-calculation from the U.S. sales price to a price comparable with the home-market sales price.[20] Furthermore, it has been generally clear in practice that this determination will be forthcoming at a relatively preliminary stage of the investigation, very soon, so to speak, after the needle has moved from the region of the dial marked "colorable grounds" into the region of the dial marked "reasonable grounds," and that the possible opportunity for undoing the harm at a relatively early stage by a wide ranging *fair* value inquiry has been completely ignored. The rest of the consideration by the Secretary and his delegate, leading up to a less than *fair* value determination by the Secretary, is essentially more of the same[21]—simply viewing more background for the arithmetical back-calculation and comparison of U.S. price and home-market price, without any opportunity for the consideration of such important additional factors as whether the lower U.S. price has been established to meet competition from U. S. manufacturers or from those exporting to the U.S. market from other countries.[22] This meeting-competition defense, which is one of the most important and universally applied elements in making Robinson-Patman act determinations,[23] has clearly been held by the Tariff Commission to be available to the foreign exporter and to be effective in preventing an ultimate substantive finding that prohibited dumping has occurred,[24] but it is equally clear that the exporter and importer

[20] See 19 C.F.R. § 14.6(b) (2), (e) (1965).

[21] 19 C.F.R. § 14.7 (1965).

[22] Eschewing the pouring of this or other kinds of new wine into the different terminological bottle represented by the statutory words "fair value," the 1957 *Treasury Report, supra* note 13, at 16-17, stated that:

> With regard to decisions as to dumping price, the Treasury sees no justification for regarding these as anything more than an exercise in arithmetic. The comparison to be made is between the price the exporter sells in the United States market and the price he sells, not for export, in his own country. These prices must be adjusted so that they are properly comparable—which typically means a comparison f.o.b. factory. If the price in the United States market is lower, then as a simple matter of arithmetic there is a sale at less than fair value. The word "fair" as used here simply means what one ordinarily conceives of as the "fair market" value—what a willing buyer will pay a willing seller. There is no connotation of "equitable" in this use of the word. For this reason the effect on American industry is not an element to be considered in connection with determinations as to fair value.

See also Ehrenhaft, *supra* note 4, at 63.

[23] See Standard Oil Co v. FTC, 340 U.S. 231 (1951); ROWE, *op. cit. supra* note 3, at 207-64.

[24] See, *e.g.*, Rayon Staple Fiber from West Germany, 26 Fed. Reg. 6537 (1961)

must *wait* for the Tariff Commission stage of the proceedings before any presentation of this defensive material can be made, and that the Secretary and his delegate will not consider materials relating to a meeting-competition defense at the earlier stages of the proceedings even if it would be clear that such materials would establish to the overwhelming satisfaction of all concerned that no substantive violation under the anti-dumping act had occurred.[25] And, of course, under the statute it is not until the Tariff Commission stage that the injury to the U.S. industry becomes a subject of inquiry,[26] even though it may be readily demonstrable that no injury has occurred or is likely to occur.

Thus the most dangerous aspects of the withholding-of-appraisement procedure are underlined and in a practical sense very much encouraged by the tenor of the Treasury proceedings under the statute. The importer may be confronted with a withholding of customs appraisement at a very early stage after the bringing of a complaint by an American manufacturer or by the Customs Service, and has to look forward to a potential period of many months before a final determination upon all the issues can be had, during all of which time he faces the prospect that goods which he imports and sells will be ultimately subjected to substantial additional duties which he will have to absorb.

This seems to me to present very serious possibilities for abuse; and indeed already to have led to some quite serious abuses. To redress the balance and make the procedural aspects of the act conform with its intended substantive aims, I think at least two kinds of reform can be suggested. The narrower, and perhaps easier—although I am not sure of this—might be cast in the form of adjusting the present customs regulations to make it possible for the foreign exporter to reassure his wavering importers and thus maintain the commercial arrangements involved by guaranteeing that the exporter will *bear the cost* of any special anti-dumping duty that ultimately is assessed.

(approving the meeting of competition from U. S. manufacturers); Hot-Rolled Carbon Steel Wire Rods from Belgium, 28 Fed. Reg. 6474 (1963); from Luxembourg, 28 Fed. Reg. 6476 (1963); from West Germany, 28 Fed. Reg. 6606 (1963); from France, 28 Fed. Reg. 7368 (1963) (all approving the meeting of foreign competition —from Japan—on the U. S. market). Certain other defensive matters relating to the substantive unfairness of the foreign competition, apart from the meeting-competition defense, have also been permitted consideration at the Tariff Commission stage. See Titanium Dioxide from France, 28 Fed. Reg. 10467 (1963); Nepheline Syenite from Canada, 26 Fed. Reg. 956 (1961); *Report, supra* note 1, at 17.

[25] See notes 21, 22 *supra.*

[26] See text accompanying note 11 *supra.*

The present regulation[27] discourages any such guaranty except for a narrow permit for a warranty of non-applicability of dumping duties which may be granted to an importer where the merchandise has been actually purchased or the agreement to purchase has been made *before* the withholding of appraisement notice has been published and where the merchandise is subsequently imported into the U.S. before the Secretary of the Treasury makes his final determination that sales are occurring at less than fair value and passes the case along to the Tariff Commission. If the guaranty oversteps these bounds and there is an ultimate adverse determination, this regulation has the effect of decreasing the appraiser's ultimate figure, on any particular lot of goods, for the U.S. purchase price, and of thereby increasing the dumping duty which is due. To take an example, if back-calculation or adjustment showed an f.o.b. factory price on certain goods of $12 per unit to Canadian purchasers and $10 per unit to U.S. purchasers the equalizing duty ordinarily assessed upon appraisement following an adverse determination of the Tariff Commission would be $2 per unit collected from the importer. But if the exporter had promised to reimburse the importer this amount, the appraiser would deduct those additional $2 per unit which the importer was to be reimbursed from the purchase price calculated for U.S. sales, reducing it from $10 to $8. Thereupon, the total equalizing dumping duty due would be $4 per unit. The additional $2 would either have to be paid by the importer, or if he was reimbursed for that too, would become an additional deduction from the original purchase price, et cetera.

If both the exporter and importer are convinced that they have a good defense which they can clearly make out before the Tariff Commission, such as a meeting-competition defense or a showing that there has been and is likely to be no injury to the U.S. industry, then presumably they can disregard the problem of withholding of appraisement because no additional duty will in fact be anticipated, and their arrangements will continue. If the importer is somewhat wary, how-

[27] 19 C.F.R. § 14.9(f) (1965):

> In calculating purchase price or exporter's sales price, as the case may be, there shall be deducted the amount of any special dumping duties which are, or will be, paid by the manufacturer, producer, seller, or exporter, or which are, or will be, refunded to the importer by the manufacturer, producer, seller, or exporter, either directly or indirectly, but a warranty of nonapplicability of dumping duties granted to an importer with respect to merchandise which is (1) purchased, or agreed to be purchased, before publication of a "Withholding of Appraisement Notice" with respect to such merchandise and (2) exported before a determination of sales below fair value is made, will not be regarded as affecting purchase price or exporter's sales price.

ever, even though the exporter is sure of his defense or is willing to maintain the flow of products even at some risk during the withholding of appraisement period, the regulation presents him with an impossible situation in which he cannot give a credible guaranty to the worried importer beyond the very narrow exception described above.

My first, and I think very modest, suggestion for reform is simply that the exception in the regulation be broadened. Since the Treasury consideration of the question between the withholding-of-appraisement notice and the final less-than-fair-value determination is essentially, as we have seen, "just more arithmetic," there seems no good reason why the exporter should not be allowed to *extend* his warranty of non-applicability of dumping duties from the date of that final Treasury determination to the date—which under the statute may be up to three months later—of the final determination of the Tariff Commission, a determination which will for the first time take into account such critical additional factors as the meeting-competition defense and injury to the U.S. industry.[28] Moreover, there seems to be no good reason for insisting that the warranty can apply only to goods purchased or agreed to be purchased before the withholding of appraisement notice was published. This seems to smack more of the economic isolationism of the twenties than the world trade realities of mid-twentieth century. If the concern is that gigantic orders may be placed by the importer after the withholding of appraisement notice but before the Tariff Commission decision, this can easily be remedied by limiting the effectiveness of the warranty to quantities which are not substantially in excess of those purchased during a base period preceding the issuance of the withholding of appraisement notice. Thus, my first proposal might take the form of suggesting that section 14.9(f) of the Customs Regulations[29] be changed to permit the exporter to warrant to the importer the non-applicability of dumping duties with respect to *all* goods purchased or exported between the date of the withholding of appraisement notice and the date of the final decision of the *Tariff Commission,* so long as the quantities involved are not substantially in excess of the quantities purchased or exported during comparable preceding periods of time. In this way, the exporter who believes he has a clear defense or who wishes to maintain the flow of goods despite the risk of an adverse finding

[28] See text accompanying notes 23-26 *supra.*
[29] *Supra* note 27.

can effectively allay his importer's fears as to the adverse effects of the withholding-of-appraisement notice.

My second suggestion relates to a possible reform of language of the statute itself, for the exporter as well as the importer may be intimidated by a withholding of appraisement, and unwilling to back up his importer with a warranty against dumping duties despite the existence of a strong defensive case. Basically, it seems to me that if appraisement is to be withheld on the basis of an essentially simple and arithmetical view of the facts there should be two sides to this arithmetical view. Withholding of appraisement with its potentially disastrous consequences for the flow of exports which may be quite innocent of the charge levelled should not occur until the Secretary has had an opportunity to form a reasonable belief, not only as to the comparative foreign market and U.S. price, but *also* as to the most immediately salient factors which bear on the possible merit of a meeting-competition defense or on the possible complete absence of injury or threat of injury to the U.S. industry concerned. Thus, I would like to suggest that some serious thought be given to a reform which might be cast as an amendment to the anti-dumping act which in effect would state, first, that the Secretary's determination that there is reason to believe that U.S. sales are occurring at less than foreign market value shall *not* be accompanied with a withholding of appraisement notice if the Secretary is *also* given reasonable grounds for believing that a substantial majority of the sales believed to be at less than foreign market value have been made at the price charged in good faith in order to meet the equally low price of a competitor selling in, or exporting from some other country into,[30] the U.S. market.

Secondly, in order for the withholding of appraisement notice to issue, the Secretary should *also* be required to find reasonable grounds

[30] The meeting of foreign competition may indeed be economically more relevant than the meeting of domestic competition, since a complex of economic factors makes it likely for many products that *all* foreign competitors will have to establish a price below that of any substantial domestic producer in order to obtain U. S. orders. The dissenting Commissioners in Carbon Steel Bars & Shapes From Canada, *supra* note 16, cite such relevant factors as long lead time, uncertainties over future supplies (paradoxically, it may be noted, as dumping proceedings disruptive of the flow of imports become more common, the U. S. customer may demand further price concessions to offset this new uncertainty factor as a condition of doing business with the foreign manufacturer), difficulties in making adjustments for damaged or defective merchandise (or, it might be added, more generally in getting effective legal redress if needed), and lack of close contact between customer and supplier. 29 Fed. Reg. at 12599. See the cases cited in note 24 *supra*, involving the meeting of foreign competition. The lawfulness of the foreign competitor's price—*i.e.*, whether he too was perhaps violating the anti-dumping act, or possibly

for believing that certain salient facts indicative of effects upon the U.S. industry could be demonstrated. This would, for one thing, give the U.S. industry an early chance to show that it was sufficiently concerned about what was happening to present the requested data to the Secretary. Procedural steps could, of course, be outlined for assuring that the data for one industry member was not made public or shown to other industry members.[31] The data required might, I should think, be data showing that either all U.S. producers of the product or at least two out of the leading three producers of the product could reasonably be thought to have suffered *declines* on the order of ten per cent with respect to at least one of the following four factors of their business during the time period for which the Secretary found reason to believe that exporter's sales at less than foreign market value were occurring: (1) a decline in the total value of their sales of the product in a relevant geographic market area comprising at least ten per cent of the population of the U.S., or (2) in their total number of units of sales in such a market, or (3) in their percentage share of the sales of such product made by *all* producers—domestic and foreign—in that market, or (4) in their total profits after tax attributable to all of their U.S. sales of that product; and that there was reason to believe that the decline thus found was or might be in substantial part the result of sales made by the foreign exporter at less than foreign market value. In essence, the United States industry or the leading U.S. producers would have to make out at least a *prima facie* arithmetical case of injury before withholding of appraisement could occur.

Nor, I might say in conclusion, do I think that the climate within the U.S. government is such that a good chance for proposing and getting such reforms does not exist. Despite the clamor of certain domestic industries and the publicity given the debate on the Herlong-Hartke bill, I think there are indications of strong undercurrents of attitude among those responsible for policy-making which would lead to a recognition of current international trade practices acknowledging different prices in different national markets, perhaps embodying this

Robinson-Patman—probably should not be a subject of inquiry at this pre-withholding-of-appraisement stage, although it probably should become relevant at the final Tariff Commission stage of the proceedings. The legality of the price met is, of course, relevant to ultimate substantive determinations under Robinson-Patman. See generally ROWE, *op. cit. supra* note 3, at 220-29.

[31] The general regulatory provision as to obtaining of confidential treatment for information submitted in antidumping proceedings, 19 C.F.R. § 14.6(a) (1965), may well be sufficient.

recognition in a multilateral treaty which, most consonant with the broad policies of GATT[32] and our national policies[33] favorable to freer trade, ensures against protectionist use of anti-dumping legislation.[34]

It may well be, in fact, that the most viable political framework for effecting the two reforms suggested above—as well as other needed reforms[35] in the anti-dumping act—is not to try directly for amendment of the regulations and the statute, but instead, to make these liberalizing reforms part of our country's *quid pro quo* in a multilateral treaty to supplement the very general language of Article VI of GATT[36] by ensuring that the various national anti-dumping laws do not grow into a strong under-current of protectionism working against the post-war tide of free trade. For trade policy abuses can, alas, be imitated by others and America today needs her exports[37] far more than she needs a new system, or effectively becoming such, of protection from competing imports, which is made indiscriminately available to private parties.

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[32] General Agreement on Tariffs and Trade, 61 Stat. A3 (1947).

[33] See, *e.g.*, the Trade Expansion Act of 1962, §§ 101-405, 76 Stat. 872, 19 U.S.C. §§ 1801-991 (1965), which permits the President to enter into agreements cutting deeply into existing tariff levels.

[34] A not-yet-published memorandum of remarks said to have been submitted recently by the U. S. at the GATT meeting in Geneva supposedly points in this direction. Resolutions were introduced at the last sessions of the Senate and House proposing an international agreement to harmonize anti-dumping administration. S. Res. 133, 89th Cong., 1st Sess. (1965); H.R. Res. 405, 89th Cong., 1st Sess. (1965). See the remarks of Representative Curtis, 112 CONG. REC. 5112-16 (daily ed. March 8, 1966).

[35] See Ehrenhaft, *supra* note 4.

[36] General Agreement on Tariffs and Trade, *supra* note 32, art. VI.

[37] Note that the central Robinson-Patman provision, § 2(a), scrupulously avoids any impact on U.S. exports, and places no restrictions on "dumping" abroad by U. S. manufacturers. It applies only to commodities sold for use, consumption or resale within the United States, its territories or possessions. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964). See ROWE, *op. cit. supra* note 3, at 81-83.