The U.S. International Trade Commission's 30-Day Inquiry Under the Antidumping Act: Section 201 (c)(2)

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In 1921, a new antidumping act was enacted into domestic law.\(^1\) The Antidumping Act of 1921 was part of a coordinated effort by the U.S. government to protect infant U.S. industries, particularly the petrochemical industry which burgeoned during World War I, from the increasing competition of European industries seeking markets to utilize capacity which had been devoted to war efforts.\(^2\) The Act was directed against international price discrimination, and the substance of its principal operative provision remained unchanged through a series of amendments.\(^3\) Basically, the Antidumping Act provides that articles imported into the United States will be subject to a special duty when such articles are being,
or are likely to be, sold at less than fair value\(^4\) and an industry in the United States is being, or is likely to be, injured or is prevented from being established by reason of the importation into the United States of the articles.

Although the substance of the principal operative provision of the Antidumping Act has been constant, there have been several significant amendments with respect to its administration. One such amendment occurred in 1954; it transferred from the Secretary of the Treasury to the U.S. International Trade Commission (at that time the U.S. Tariff Commission)\(^5\) the basic statutory determination of whether an industry in the United States is suffering the requisite injury set forth in the statute: that it is being, or is likely to be, injured or is prevented from being established. The Secretary of the Treasury retained the authority to determine whether less-than-fair-value (LTFV) sales are being, or are likely to be made. The primary reason for the amendment to have the Commission determine the question of injury was the Commission’s generally recognized expertise in dealing with the complexities of reaching such a determination.\(^6\) This amendment established the Commission’s function in the administration of the Antidumping Act, and that function remained unchanged until the enactment of the Trade Act of 1974.\(^7\)

The Commission’s function under the Antidumping Act was supplemented by the addition of section 201(c)(2) to that Act.\(^8\) The provisions of the Antidumping Act, almost without exception, are activated by the filing of a petition with the Department of the Treasury on behalf of a domestic industry. Upon the filing of a petition, the proper authorities in the Treasury Department must determine whether to institute a formal investigation based upon such petition. Section 201(c)(2) is applicable at this point, and provides:

> If, in the course of making a determination under paragraph (1) [a determination of whether to institute an antidumping investigation], the Secretary concludes, from the information available to him, that there is substantial doubt whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, he shall

\(^{4}\) Sold at less than fair value generally means sold for less in the United States than in the home market of the exporter.


\(^{8}\) Section 201(c)(2) was added by §321(a) of the Trade Act, 88 Stat. 2044, codified at 19 U.S.C.A. §160(c)(2) (Supp. 1976).
The possibility of terminating at an early stage formal proceedings under the Antidumping Act makes section 201(c)(2) a potentially significant addition to the Act. This article will explore the activity under section 201(c)(2) since its enactment more than a year ago, including the procedures being followed in the administration of that section by the Treasury and the Commission and the interpretation being given to the language of that section.

I. BACKGROUND OF SECTION 201(c)(2)

The 1974 Trade Act, which, as indicated, added section 201(c)(2) to the Antidumping Act, is the result of a series of legislative proposals that began with the introduction of an administration bill (H.R. 6767) into the House of Representatives during the first session of the 93d Congress on April 10, 1973. This bill was referred to the Committee on Ways and Means of the House. After consideration of H.R. 6767, the Committee introduced its own bill (H.R. 10710) on October 3, 1973, and that bill was reported out of the Committee without amendment on October 10, 1973. As reported out and as finally passed by the full House of Representatives on December 11, 1973, H.R. 10710, like H.R. 6767, did not contain a provision comparable to section 201(c)(2). H.R. 10710 was sent to the Senate, where it was referred to the Committee on Finance. Late in the consideration of the bill by the Finance Committee, during the “mark-up” of the bill in executive session of the Committee, the Treasury Department suggested the amendment which ultimately became section 201(c)(2). H.R. 10710, with the new amendment, was reported out of the Finance Committee on November 26, 1974, and passed the full Senate on December 13. The Conference Committee, convened to reconcile the different versions of the bill passed by the House and Senate, accepted the addition of section 201(c)(2) as proposed by the Senate, and the conference report was accepted by both houses, which passed H.R. 10710 on December 20. The

\[19 U.S.C.A. \$160(c)(2) \text{ (Supp. 1976).}\]
President signed it on January 3, 1975, making it the Trade Act of 1974. Section 201(c)(2) became effective immediately.¹⁰

The legislative history pertaining to section 201(c)(2) contains very little guidance regarding its specific purpose. The report of the Finance Committee on the bill which became the Trade Act of 1974 indicates that:

Under the present Act, the Secretary of the Treasury must complete his entire investigation as to sales at less than fair value before the matter can be referred to the International Trade Commission for its injury determination. The Committee felt that there ought to be a procedure for terminating investigations at an earlier stage where there was no reasonable indication that injury or the likelihood of injury could be found. Therefore, the Committee adopted a new provision, section 201(c)(2), which provides for the elimination, at an early stage of the antidumping proceedings, of those cases in which there is no reasonable indication that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of the merchandise concerned into the United States. The amendment is designed to eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade.¹¹

There are no additional legislative materials which provide insight into the purpose of section 201(c)(2).

One can speculate that another purpose in the enactment of this section was to remove all questions respecting injury, including preliminary ones, from the Treasury and place them with the Commission where the basic ultimate determination under section 201(a) of the Antidumping Act regarding the requisite injury to a domestic industry has been lodged and where, presumably, the expertise to make such determination is found. Treasury’s rules of procedure since July 1, 1968, but before enactment of section 201(c)(2), required a petitioner to furnish “information indicating that an industry in the United States” was suffering the requisite injury¹² and provided that petitions which did not conform to this requirement could be rejected.¹³ The Treasury rules also provided for a summary investigation of the information presented; if it was determined as a result that further investigation was not warranted because “the information is patently in error, or that merchandise of the class or kind is not being and is not likely to be imported in more than insignificant quantities, or for other reasons,” Treasury’s investigation would be terminated.¹⁴ It has been argued that Treasury lacked the authority to terminate its proceedings

¹³ Id. at §153.28.
¹⁴ Id. at §153.29.
after the summary investigation, provided for in the rules, with respect to
the question of requisite injury under the Antidumping Act. In fact, Treasury has never so terminated its proceedings.

Thus, the contention may be made that section 201(c)(2) was enacted
to permit Treasury to refer preliminary questions of injury to the Commission so that the Commission could determine whether the information available with respect to injury was sufficient to continue Treasury's proceeding, removing all question of ultra vires activities on the part of Treasury and bringing to bear on injury questions the Commission's experience in the area. There is no support in the legislative history for this reasoning, but it is certainly possible that such could have been a purpose of the section. Whether it was a purpose or not, it is, in fact, the result of the addition of section 201(c)(2) to the Antidumping Act. In view of the specific statutory provision providing for the manner in which preliminary questions of injury are to be dealt with, whatever authority Treasury may have had with respect to such matters is no longer available.

One could speculate further that yet another purpose of section 201(c)(2) was to conform the administration of the Antidumping Act to the requirements of the International Antidumping Code. The Code requires, in effect, a concurrent examination of the issues of LTFV sales and injury. As indicated in the Finance Committee Report, the procedure followed under the U.S. Antidumping Act prior to the addition of section 201(c)(2) was for Treasury to make its determination with respect to LTFV sales, followed by the Commission determination with respect to injury. Perhaps section 201(c)(2) could result in a concurrent consideration of the question of LTFV sales and injury, since Treasury under the section could refer preliminary questions of injury to the Commission.

However, it is extremely doubtful that conformity with the Antidumping Code was a purpose in the enactment of section 201(c)(2). First, the legislative committee which proposed the amendment, the Senate Finance Committee, historically has been opposed to reading the provisions of the Antidumping Act to conform to the requirements of the Antidumping Code and surely would not amend the Antidumping Act to conform to it. Further argument that such a termination was an ultra vires act was premised upon the 1954 amendment to the Antidumping Act, 68 Stat. 1138, which bifurcated the proceedings, providing for a determination by Treasury of LTFV sales only and giving to the Commission the authority to determine questions of injury.

Section 201(c)(2) provides for the Commission to find no reasonable indication and report this to the Secretary of the Treasury within 30 days in order for any Treasury investigation being conducted to be terminated. In view of this, it is probable that if the Commission were not to meet the 30-day time limit, the Treasury investigation does not terminate as a matter of law.

See Hearings on the International Antidumping Code Before the Senate Committee
thermore, since the addition of section 201(c)(2), Treasury, which refers proceedings under that section to the Commission, has not referred all proceedings filed under the Antidumping Act since the section requires Treasury first to determine that there is a "substantial doubt" of finding the requisite injury. Complete referral would appear to be necessary if the purpose of the section were to conform to the requirements of the International Antidumping Code, since less than that would result in only a cursory concurrent examination by Treasury, not likely to satisfy the requirements of the Code. Indeed, even referral in every case may not satisfy the Code since the Commission's activities under section 201(c)(2) last no more than 30 days, while Treasury's investigation of the question of LTFV sales lasts many months.

II. Administration Of Section 201(c)(2)

The impact of section 201(c)(2) on the course of proceedings under the Antidumping Act is dependent to a significant degree upon how the Treasury and the Commission administer the section. As will be seen, both agencies have wide discretion in such administration. Inasmuch as proceedings under section 201(c)(2) are begun at Treasury, the following will examine Treasury's proceedings, and then turn to a consideration of the Commission's proceedings.

A. Administration By The Department Of The Treasury

The basic requirements and procedures for filing for relief from dumping did not change with the passage of the Trade Act of 1974. The Treasury's administration of antidumping investigations continues to be split between the Customs Service and the Office of Tariff Affairs at Treasury. The Customs Service does the statistical gathering—the leg work—and the Office of Tariff Affairs monitors this work for both statistical and legal accuracy and makes all determinations called for by the Antidumping Act. For convenience, the general term "Treasury" will be used hereafter to refer to the Customs Service, the Office of Tariff Affairs, and the Secretary of the Treasury with respect to their activities under the Antidumping Act since several subdelegations of authority have occurred.

Before enactment of the Trade Act of 1974, the initiation of an anti-
dumping investigation began with the filing of information on price discrimination and injury with the Commissioner of Customs. Although this information could have been submitted by any district director of Customs, this rarely was done. Generally, information was received in writing with the Commissioner of Customs, pursuant to a regulation which provided that any person who suspected dumping was occurring could file information to begin an investigation. So as to conform to U.S. international obligations, whoever filed before Customs had to do so "on behalf of an industry" in the United States. The vast majority of submissions were filed by domestic producers. Prior to the passage of the Trade Act, the information required of the petitioning person included detailed price data which indicated less-than-fair-value sales and "information indicating" that an industry in the United States is being, or is likely to be, injured or is prevented from being established because of the allegedly unfairly priced imports. If the information on either pricing or injury was not adequate, the Commissioner returned the communication to the filing party with reasons why it did not conform to the regulations.

As indicated above, it was an administrative requirement that injury information be received by the Customs Service. As a matter of practice, however, it was an exception for Customs to return a communication on the basis of inadequate injury information. This pro forma treatment given to injury information perhaps was based upon a belief held by the Customs Service that the question of injury to an industry was best evaluated at a latter stage by the Commission. Nonetheless, if an Antidumping Proceeding Notice was published, it was necessary that a stipulation be included that some evidence was on record indicating injury.

22. Id. at §153.26 (1975).
23. On June 30, 1967, the United States signed an "Agreement on Implementation of Article VI of the GATT," the most important provisions of which are referred to as the International Antidumping Code, 4 U.S.T. 4348, T.I.A.S. No. 6431 (1968). Article 4 of the code states that the phrase "domestic industry" generally refers "to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production. . . ." As for the initiation of an antidumping investigation, article 5 provides, in part:

(a) Investigations shall normally be initiated upon a request on behalf of the industry affected, supported by evidence both of dumping and of injury resulting therefrom for this industry. If in special circumstances the authorities concerned decide to initiate an investigation without having received such request, they shall proceed only if they have evidence both on dumping and on injury resulting therefrom.

26. This notice is provided for in 19 C.F.R. §153.30(b) (1975) and informs the public that the Treasury has begun a formal investigation with respect to determining whether dumping is in fact occurring.

After the receipt by the Commissioner of Customs of information in conformity with the regulations, a “summary investigation” was initiated. This proceeding was terminated if the information received was “patently in error” or if for other reasons “further investigation was not warranted.” Generally, within 30 days after receiving information in conformity with the regulations, the Commissioner of Customs published an Antidumping Proceeding Notice in the Federal Register. At this point, a full scale investigation was begun by the Customs Service.

On January 3, 1975, when the Trade Act became law, the antidumping amendments became effective. The immediate implementation of new section 201(c) of the Antidumping Act necessarily required the Treasury to conform its regulations governing antidumping procedures with the provisions of the Trade Act. For interested persons filing on behalf of an industry allegedly injured from international price discrimination, the new statutory provisions and proposed regulations implementing the new provision meant considerably more detailed information would be necessary before the Treasury would accept the petition.

The proposed regulations do not change the standards for those who have standing to petition, and there are no significant changes regarding the pricing information required. Reflecting the new statutory language, the primary thrust of the regulations is directed to the receipt by Customs of substantial information pertaining to injury or likelihood of injury or the prevention of establishment of an industry in the United States. The new requirements, as reflected in the proposed regulations are in sharp contrast to the old requirements, since the old requirements simply called for general information indicating injury to an industry. The proposed rules require a petitioner to furnish the Customs Service substantial facts relating to injury, including, for example, information on domestic production, sales, and prices on profitability and unemployment in the industry, and on the volume of imports and market share of the imported merchandise. As of this writing, information available to us indicates that every petition filed with the Customs Service since the effective date of section

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30. See text supra at note 10.
31. The proposed new regulations were published in 40 Fed. Reg. 30825 (July 23, 1975). As of this writing, the proposed regulations have not become effective. Shortly after passage of the Trade Act, the Customs Service sent petitioners an “Antidumping Questionnaire,” which furnished interested petitioners with the new requirements for a proper petition. Experience gained from the practice of sending the questionnaire led to the proposed regulations, which were drafted in mid-June. This “Antidumping Questionnaire” was only a temporary measure pending the promulgation of new rules and should not be confused with the questionnaire distributed by Customs following the publication of an Antidumping Proceeding Notice.
201(c)(2) has been returned at some point for inadequacy of injury information.

Thirty days after the receipt of a properly filed petition, Treasury, based on decisions in the Office of Tariff Affairs, must determine whether to initiate an investigation and thus publish in the Federal Register an Antidumping Proceeding Notice.\textsuperscript{33} During this 30-day period, a preliminary investigation is conducted by the Customs Service to determine the validity of the information furnished by the petitioner. The resources drawn upon for information during the preliminary investigation are almost entirely intra-governmental. Thus, for example, the U.S. International Trade Commission may be requested to furnish a produce description, and the Customs Service headquarters in Washington may contact the U.S. ports of entry to determine from import specialists whether invoice prices for the articles being investigated correspond to those prices found in the petition.

If an antidumping investigation is instituted, practice to date has shown that at the time of publication of the notice thereof, section 201(c)(2) may be activated.\textsuperscript{34} If Treasury at that time concludes that there is substantial doubt whether an industry in the United States is being, or is likely to be, injured or is prevented from being established by reason of the importation of the subject merchandise, it will transmit to the U.S. International Trade Commission the reasons for such substantial doubt. The Treasury also must transmit to the Commission a "preliminary indication," based upon whatever price information is available, concerning sales at less than fair value. Moreover, the preliminary indication and information must include possible margins of dumping and the volume of trade.

During the pendency of any U.S. International Trade Commission inquiry pursuant to section 201(c)(2), the Treasury continues with its investigation. Shortly after the publication of the notice of institution of the investigation, the Customs representatives in the home market where the subject merchandise is being manufactured are contacted. Before the U.S. International Trade Commission completes its 30-day inquiry, the foreign manufacturers receive a Treasury questionnaire. There is no contact with domestic parties unless they are importers related to the foreign manufacturer, in which case a questionnaire is sent to them.

In deciding whether substantial doubt exists within the meaning of section 201(c)(2) so as to warrant referral of the matter to the U.S. Interna-

\textsuperscript{33} The determination to initiate an antidumping investigation must now be made within 30 days of receipt of a properly filed petition as a result of an amendment made by the Trade Act. Section 321(a) of the Trade Act of 1974, 88 Stat. 2043, adding §201(c)(1) to the Antidumping Act. Prior to this amendment, Treasury had no time limit applicable to such determination except by way of regulation which imposed a discretionary 30-day period.

\textsuperscript{34} In all the investigations in which Treasury has used the provisions of section 201(c)(2), the practice noted in the text has been followed. Under section 201(c)(2), however, its provisions could be invoked at any time during Treasury's 30-day summary investigation.
tional Trade Commission, Treasury apparently examines and places special emphasis on the capacity utilization of the domestic industry, as well as on the increasing or decreasing volume of imports. Even if the margins of dumping are alleged to be significant, if import penetration is low, or if no causal connection is apparent between the alleged high margins and the alleged injury, as required by the Antidumping Act, the case probably will be sent to the U.S. International Trade Commission on the basis of substantial doubt. However, if the alleged margins of dumping are 100%, information available to us indicates that Treasury probably would continue its investigation without referring the matter to the Commission for an inquiry.

Since the addition of section 201(c)(2), Treasury has had an occasion to examine a petition based, not upon injury, but upon the likelihood of injury to a U.S. industry. Treasury found that substantial doubt that an industry would be likely to be injured existed, based upon the fact that in order for injury to possibly occur in the future, the foreign manufacturer's entire production would have to be exported to the United States. Treasury determined that the possibility that this would happen was not likely.

It is clear from an examination of the petitions filed with Treasury so far, that it intends to actively apply section 201(c)(2). From January 3, 1975, to December 31, 1975, Treasury received and initiated 23 investigations under the Antidumping Act. In ten of these investigations (43.5% of the total number of investigations), Treasury found substantial doubt of the requisite injury and referred the matter to the Commission for a determination under section 201(c)(2). This activity by the Treasury under section 201(c)(2) is surprising, since most knowledgeable trade officials

35. For example, the letter from Treasury of March 24, 1975, pertaining to the alleged dumping of butadiene acrylonitrile rubber from Japan and notifying the Commission of Treasury's substantial doubt regarding the requisite injury determination, noted that "domestic production capacity has been at 95 percent utilization with imports from Japan during 1974 amounting to less than 1% of domestic consumption." The letter is contained in the public docket file of the Commission for Butadiene Acrylonitrile Rubber From Japan, Inquiry No. AA1921-Inq.-1.

36. A margin of dumping, as calculated by Treasury, is generally equal to the ratio, expressed as a percentage, of the difference between the price for which the article in question is sold in the United States and the home market value, and the price in the United States.

37. See the letter from Treasury of November 18, 1975, pertaining to the alleged dumping of Portland Hydraulic Cement, Other Than White Nonstaining Cement, From Mexico. The letter is contained in the public docket file of the Commission for Portland Hydraulic Cement, Other Than White Nonstaining Cement, From Mexico, Inquiry No. AA1921-Inq.-2.

38. See, e.g., the letter from Treasury cited supra at note 37, in which the petitioner is quoted as stating, "the entire cement industry in the United States is in a period of oversupply due to great decline of domestic demand due to the current economic conditions in the United States."

39. The investigations in which referral to the Commission occurred included one concerning butadiene acrylonitrile rubber, eight concerning passenger automobiles, and one concerning Portland cement.
familiar with the inclusion of the section in the Trade Act, including those from the Treasury, did not anticipate the use of section 201(c)(2) except on very infrequent occasions. Indeed, it reportedly was suggested that the frequency would be no more often than once in 15 or 20 investigations. In any event, the frequent resort to section 201(c)(2) by the Treasury is of some interest and of considerable significance to petitioners and importers alike.

B. Administration By The U.S. International Trade Commission

After Treasury has acted by forwarding to the Commission the reasons for its substantial doubt and the information available on possible LTFV sales, the Commission begins its activities under section 201(c)(2). Prior to receipt of such reasons and information, the Commission generally will not have been even aware of the petition before Treasury, and even if aware, most probably will not have taken any steps on the basis thereof. Section 201(c)(2) provides, with respect to the Commission, as follows:

If within thirty days after receipt of such information from the Secretary, the Commission, after conducting such inquiry as it deems appropriate, determines there is no reasonable indication that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, it shall advise the Secretary of its determination and any investigation under subsection (b) then in progress shall be terminated."  

In administering this language since its effective date over one year ago, the Commission has developed procedures for the conduct of its function, and interpretations of key elements of the language.

Developing Commission Procedures

The Commission has not published rules to govern section 201(c)(2) proceedings, and it is unknown at present when, or if, such rules will be forthcoming. However, the Commission to date has conducted three inquiries under the provisions of section 201(c)(2), and during that period there has developed a procedural framework by which the Commission has carried out its functions under the section. The procedures described may well not be immutable, especially in light on the wide discretion given to the Commission by the language of the section and in view of the short period in which the Commission has to make its determination.

The nature of the proceedings of the Commission under section 201(c)(2) are governed to a great extent by two basic factors. First, the information submitted to the Commission from Treasury will be very limited in the

vast majority of cases; the statutory 30-day time limit, measured from the
date of receipt of a petition by Treasury, within which Treasury must
determine whether to refer a matter to the Commission under section
201(c)(2), will permit only a cursory review of the petitioner's information
and little if any chance for the development of new data. Second, the
Commission itself has only 30 days after receipt of the information from
the Treasury in which to arrive at its determination regarding "no reasona-
ble indication." Thus, there is a need to collect as much information of a
usable type as possible in a very short period, and this is reflected in the
procedures developed by the Commission over the past year.

Generally, within 48 hours of receipt of Treasury's letter noting substan-
tial doubt, the Commission will act to formally institute an inquiry into
the matter. The act of instituting such an investigation is done at a formal
Commission meeting, and a notice of such action is published in the
Federal Register, stating the product involved, the nature of Treasury's
advice, and the nature of the Commission's inquiry in the terms of section
201(c)(2). Such notices also have solicited written views of any interested
person, and any known parties are contacted personally by the Commiss-
ion's staff, initially by phone and most often with a follow-up letter en-
closing a copy of the Commission's notice.

While not required by statute, the Commission in each of its three
inquiries has held a public hearing. The basis for providing such hearing
is apparently the desire to permit interested parties a chance to confront
each other and to have as much opportunity to present their data and
arguments as possible, as well as a belief that a hearing is a useful
information-gathering device. The Commission's notice of inquiry contains
a notification of the date of the public hearing, which generally is set for
about two weeks from the date of the institution of the inquiry and which
usually is held in Washington.

41. The practice of the Commission in the three inquiries it has conducted under section
201(c)(2) has been to take the full 30 days provided for its determination and, in light of the
Commission's need for as much information as possible in order to make its determination
under section 201(c)(2), it is unlikely to change this practice.

42. Section 201(c)(2) provides only that the Commission shall conduct "such inquiry as
it deems appropriate." Further, the amendments made to the Antidumping Act by section
321(a) of the Trade Act, include the addition of section 201(d)(1), 19 U.S.C.A. §160(d)(1)
(Supp. 1976), which requires the Commission in specified instances to hold a hearing during
the course of its proceedings with respect to the basic injury determination under section
201(a), but significantly makes no reference to any hearings during the course of a section
201(c)(2) inquiry by the Commission.

43. Recent practice of the Commission under several of its statutory authorities has been
to conduct hearings outside of Washington. This practice already has appeared under section
201(c)(2). The public hearing in the inquiry concerning Portland Hydraulic Cement Other
Than White Nonstaining Cement, From Mexico, Docket Inquiry No. AA1921-Inq.-3, was held
in El Paso, Texas.
The purpose of the inquiry conducted by the Commission is to gather data useful to making its determination. The Commission has not been content to merely examine the accuracy of the data supplied by the petitioner before Treasury. Pursuant to its wide discretionary authority to conduct such inquiry as it deems appropriate, the Commission has sought a variety of information in addition to petitioner's information, including: (1) the total quantities and value of U.S. imports of the subject articles, as well as only the quantities of imports of those importers possibly selling at LTFV; (2) the number, size and location of U.S. producers of articles similar to the imported articles; (3) the quantity and value of U.S. producers' shipments of articles similar to the imported articles; and (4) pricing information, including prices of the possible LTFV imports and of the similar domestic articles. When available, the Commission also has looked at and sought information on lost sales and unemployment in the domestic industry. Profit and loss information has not yet been available.

Because of the pressure of time, the Commission has sought data for the period of possible LTFV sales, for as much of the current year as possible, and usually for the preceding two or three years; of course, if data is available for prior years, that data also is considered. The technique used in each inquiry to date to gather the data has been the sending of questionnaires, which the Commission has authority to require be filled out and returned. These are mailed generally within seven days of the date of institution of the inquiry to domestic producers and importers and are relatively simple, compared with questionnaires sent out in other Commission investigations; they are generally returnable within 10 days from date of mailing. Field trips by Commission staff generally have not been conducted, although where a hearing is held outside of Washington, D.C., the staff may do field work at the site of the hearing, which is selected because of its convenience to several parties. The Commission also acquires much information by way of telephone contacts and from its permanent files and data bank.

Upon the completion of the hearing and the data collection, which usually occurs within 25 days of the date of receipt of Treasury's advice of substantial doubt, a staff report to the Commission is prepared. This staff report is not available to the parties. It collects and analyzes the information gathered by the Commission but has not to date included a recommendation as to how the Commission should decide the case.

The Commission has adopted the practice of publishing its determination in each inquiry conducted under section 201(c)(2), and most of the Commissioners have presented a statement of reasons for their determina-
tion. Publication occurs in the Federal Register, and the Commission prepares separate copies for distribution. This practice parallels that followed by the Commission under the basic injury provision of the Antidumping Act.

The publication of the decision and the presentation of reasons have developed even though under the statute they are not required. Read literally, section 201(c)(2) requires notification of the Treasury only when the Commission finds no reasonable indication of the requisite injury. Further, the Antidumping Act does require publication of the Commission's injury determination under section 201(a), but publication is not statutorily provided for with respect to its section 201(c)(2) determination. Also, while the legislative history does not say anything about publication of a Commission determination and the reasons therefor under section 201(c)(2), legislative history does suggest with respect to the Treasury's analogous ability to terminate work on a petition during the first 30 days after receipt of a complaint under section 201(c)(1) that a public announcement of such termination is not needed.

Criteria

As indicated above, section 201(c)(2) requires that the Commission determine if

there is no reasonable indication that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. . . . (Emphasis added.)

If the Commission so determines and reports this to Treasury, any Treasury proceedings with respect to the merchandise in question are terminated. Crucial to any determination under the statute is the Commission's interpretation of the italicized statutory words. As of March 1, 1976, the Commission has not published interpretative rules regarding such section or otherwise considered the meaning of the words except in the three opinions issued by the Commission since the effective date of section 201(c)(2).

46. Section 201(d)(2) of the Antidumping Act, 19 U.S.C.A. §160(d)(2) (Supp. 1976), as added by §321(a) of the Trade Act, 88 Stat. 2045 (1974), requires publication of the Commission determination and reasons therefor only with respect to the determination made under section 201(a) of the Antidumping Act.

47. See Finance Committee Report, supra note 11 at 170, wherein it is flatly stated:

Although such negative determinations [to institute an investigation] shall not be published, it is the assumption of the committee that the party presenting the information . . . shall be informed of the discontinuance of the inquiry.

48. This is especially so in this instance because of the wide discretion which the Commission has in interpreting such terms with virtually no possibility of judicial review, as discussed in the text accompanying notes 87-90, infra.
The phrase, "no reasonable indication," is new to the Antidumping Act and sets the standard by which causation and injury are measured under section 201(c)(2).

The parties to the three inquiries conducted by the Commission under section 201(c)(2 have offered various interpretations of this language. One party has suggested that no reasonable indication of injury should be found only when the Commission's inquiry fails to produce any information which sustains an indication of injury. Another party has asserted that the Commission should find no reasonable indication of injury where the indications of injury are mere assertions lacking adequate factual support or are clearly rebutted by other information before the Commission. The party further asserts that the Commission should not engage in speculation, but should determine whether the available information reasonably indicates that the statutory test of injury would be met in a full three-month investigation under section 201(a) of the Antidumping Act. In contrast to the first suggested interpretation is the suggestion by one party that no reasonable indication should be found only when there is no objective evidence of a fair, credible, and persuasive kind that demonstrates with a fair degree of certainty that the imported articles in question have been a significant or appreciable cause of injury.

Individual Commissioners have considered the meaning of the phrase "no reasonable indication" in each of the three inquiries conducted under section 201(c)(2). The first inquiry involved butadiene acrylonitrile rubber from Japan. The Commission, after referral of the matter from Treasury in late March, 1975 and after conducting a 30-day inquiry, did not determine that no reasonable indication of injury existed. Noting that this was

49. See Brief on Behalf of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, pp. 13-14, filed in New, On-the-Highway Four-Wheeled, Passenger Automobiles from Belgium, Canada, France, Italy, Japan, Sweden, the United Kingdom, and West Germany, Docket Inquiry No. AA1921-Inq.-2 [hereinafter Inquiry No. AA1921-Inq.-2).
50. See Brief on Behalf of Japan Automobile Manufacturers Association, p. 7, filed in Inquiry No. AA1921-Inq.-2, supra note 49.
53. The Commission majority consisted of then Chairman Bedell (now Commissioner), then Vice Chairman Parker (now Commissioner), and Commissioners Leonard (now Chairman) and Moore. Commissioners Ablondi and Minchew, (now Vice Chairman) dissented, determining that there was no reasonable indication of the requisite injury to an industry. The negative phrasing of the statute causes the use of the double negative when the statutory standard is not met.
the first Commission determination under section 201(c)(2), three of the commissioners forming the majority undertook to explain their determination.\footnote{Commissioner Moore did not issue a statement of the reasons for his decision in this inquiry, nor has he done so in subsequent inquiries. Whether such a statement is required is discussed in the text accompanying note 47, supra.} These three Commissioners found that the phrase “no reasonable indication” should be interpreted to require the termination of an ongoing Treasury investigation only when there is

a clear and convincing showing that there is “no reasonable indication”
that a full investigation might develop facts which could afford a basis for
an affirmative injury determination under the act.\footnote{Butadiene Acrylonitrile Rubber, supra note 52 at 5.}

These Commissioners then found that the 30-day inquiry had disclosed

the existence of evidence which indicates a possibility of injury or possibility of likelihood of injury. The evidence, in our judgment, is certain

ly sufficient to negate a determination at this time that there is no reasonable indication of injury or likelihood of injury from possible less-than-fair-value imports.\footnote{Id. [emphasis added].}

The evidence referred to consisted of “some evidence . . . which tends to show” under-selling of the domestic article by the Japanese article and of “some evidence to indicate” that there were below-cost sales of the Japanese article and that sales of the domestic article have been lost to Japanese imports.\footnote{Id. at 6.} A strict reading of this statement leads to the conclusion that these Commissioners did not determine that, absent a possibility of injury or possibility of likelihood of injury, they must find “no reasonable indication” of the requisite injury, thus resulting in the termination of the investigation. They found only that a possibility of injury or possibility of likelihood of injury is certainly sufficient to negate a finding of “no reasonable indication.”

To arrive at their interpretation, the three Commissioners referred to the language in the Senate Finance Committee Report concerning the intent “to eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade.”\footnote{FINANCE COMMITTEE REPORT, supra note 11 at 171.} They indicated that they did not believe it was the intent that section 201(c)(2) be used to weaken—or to deny U.S. industry—the protection of the Antidumping Act.\footnote{Butadiene Acrylonitrile Rubber, supra note 52 at 5.}

In their dissenting statements, Commissioners Ablondi and Minchew found that the evidence developed in the inquiry was insufficient to indi-
cate injury or the likelihood thereof at the time. They therefore determined that no reasonable indication of injury existed. Both Commissioners used phrases such as the "evidence of underselling ... does not appear to have had sufficient impact to cause an injury or the likelihood thereof" and "the market penetration of LTFV sales is not significant. ..." The minority Commissioners stated that their interpretation gave meaningful effect to the language of the Finance Committee Report cited by the majority.

The second inquiry conducted by the Commission involved imports of certain new, on-the-highway, four-wheeled, passenger automobiles from Belgium, Canada, France, Italy, Japan, Sweden, the United Kingdom, and West Germany (hereinafter Passenger Automobiles). This matter, which involved $7.5 billion in trade, was referred to the Commission by the Treasury in August, 1975. Upon conclusion of the 30-day inquiry, once again the Commission did not determine that no reasonable indication of injury existed.

In this second inquiry, some refinement was made in their statements of reasons by various members of the Commission regarding the interpretations given to the phrase "no reasonable indication." Chairman Leonard in a separate statement found, in effect, that "no reasonable indication" means

that the allegations made by the complainant before the Treasury and the information available as a result of the Commission's inquiry reveal issues of injury and causation to be so clearly lacking in substance that the resources of the government should not be used to any further extent in considering the matter, and that trade should not be disrupted further by such consideration.

The Chairman examined the congressional purpose in enacting the statute and also the circumstances (of which he considered Congress to be aware) in which the Commission performs its functions under section 201(c)(2). Because of the language of section 201(c)(2) and the shortness of the time allowed Treasury to consider a petition prior to deciding whether to institute an investigation, and after noting the oft-quoted congressional purpose of section 201(c)(2), he asserted that Congress would be

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60. Id. at 9.
62. The Commission majority consisted of Chairman Leonard and Commissioners Moore, Bedell, and Parker, with Commissioner Ablondi joining them with respect to imports of automobiles from Japan, West Germany, and Italy. Vice Chairman Minchew dissented and determined that there was "no reasonable indication" of the requisite injury and was joined by Commissioner Ablondi with respect to automobiles from Belgium, Canada, France, Sweden, and the United Kingdom.
63. Passenger Automobiles, supra note 61 at 8-9.
aware that the Commission would be receiving from Treasury very limited information, not concrete or likely to aid the Commission in carrying out its functions. He considered Congress also to be aware that the 30-day period provided for the Commission's inquiry would severely limit data-gathering, the testing of the reliability of such data, and the Commission's consideration of whatever information was gathered.

Chairman Leonard then noted that Treasury, during its 30-day period under section 201(c)(1), was not expected to do more than have information of possible LTFV sales and indicated, in effect, that one could expect no more than an analogous requirement of the Commission. Further, he said the Commission was not required under section 201(c)(2) to find the requisite injury to a domestic industry as a result of the requisite cause, as it is required to do under section 201(a) of the Antidumping Act, and was not required to make a "reason to believe" determination or a determination that sufficient allegations concerning injury and causation have been made on the face of the complaint filed with Treasury to state a cause of action. Presumably, if Congress had intended the Commission to perform those functions, the statute would have said so. Finally, Chairman Leonard noted that the statutory phrase was "no reasonable indication," and he considered this an indication that the statute thus placed the emphasis not on a positive justification for the continuance of antidumping investigation but in effect on a justification for its termination.

Commissioners Bedell and Parker, who along with Chairman Leonard and Commissioner Moore formed the majority in the Commission's first inquiry under section 201(c)(2), used language in their separate statement in this second inquiry similar to the language they used in the first inquiry. They indicated that a full investigation should not be aborted in the absence of a clear and convincing showing that there is no reasonable indication that an industry in the United States has been or is likely to be injured by the reason of importation of merchandise possibly sold at less-than-fair value.

Commissioners Parker and Bedell did not consider whether the evidence developed in this inquiry showed a possibility of injury or possibility of likelihood of injury. Their discussion of the evidence was in terms only of the lack of clear and convincing evidence of "no reasonable indication." Thus, nothing specifically is found in this statement which aids in under-

64. Id. at 6.
65. Id.
66. Id. at 7.
68. Passenger Automobiles, supra note 61 at 7.
69. Id. at 8.
70. Id. at 16-17.
standing how they interpret the phrase "no reasonable indication."

Commissioner Ablondi, in his separate statement of reasons for finding in part that there was no reasonable indication of injury to an industry, indicated that the Commission standard should be to "eliminate investigations under section 201 when such investigations clearly are unnecessary because there is no reasonable indication that a domestic industry is being or is likely to be injured." Commissioner Ablondi further indicated in making his statement with respect to imports of automobiles from Belgium, the United Kingdom, Sweden, and France, that import penetration by any one country of less than one percent of United States consumption on a national basis is insignificant and could not warrant an injury determination.

In a separate statement, Vice Chairman Minchew indicated that a working definition of the term "no reasonable indication" still is being developed. The standard of evidence clearly is different from that required for a full investigation. However, a very low standard for what constitutes "no reasonable indication" could lead to a negative finding in virtually every 30-day investigation. Consequently, the standard must be considerably higher than a finding that new evidence added to present evidence possibly would show injury caused by LTFV imports.

Vice Chairman Minchew went on to say:

Congress apparently felt that complainants must present sufficient evidence to support sustaining an investigation, not that respondents must establish reasons why the investigation should not go forward. Raising the standard of evidence to support the complainants' case accomplishes the Congressional purpose.

The third inquiry decided by the Commission under section 201(c)(2) involved imports of portland hydraulic cement, other than white nonstaining cement, from Mexico. After being advised by Treasury on November 18, 1975, of the existence of substantial doubt, the Commission conducted this inquiry and again did not find that no reasonable indication of injury existed. Commissioner Leonard in his statement in this inquiry referred to his statement in the second inquiry that "so clearly lacking in sub-

71. Id. at 23.
72. Id. at 29.
73. Id. at 32-33 [emphasis in original].
74. Id. at 33.
76. The Commission majority consisted of Chairman Leonard and Commissioners Bedell, Parker, Ablondi and Moore. Vice Chairman Minchew dissented, finding no reasonable indication of injury.
stance” is the standard for finding no reasonable indication. Commissioners Parker and Bedell did not expand upon the explanation regarding “no reasonable indication” given in their statement in the second inquiry. Commissioner Ablondi indicated that he found a U.S. industry may be threatened with injury if the Mexican cement producer, accounting for the bulk of the imports being considered, gained entry into the market for bulk cement by means of LTFV sales.77

Vice Chairman Minchew once again found no reasonable indication of injury. He commented that it is necessary in order to find no reasonable indication to determine that none of the usual indices of injury are present.79 He added:

[V]ery little guidance is obtained from the statute as to how high or how low the threshold of reasonable indication should be. For me the threshold will have to be higher than one so low that even the weakest cases are returned to Treasury.80

Vice Chairman Minchew indicated that before Treasury the petitioner has produced some evidence that the Mexican producer involved had attempted to penetrate the cement bulk sales market. He stated however, that

can succeed in penetrating the domestic market, I do not feel that we should continue to investigate.81

From an examination of the statements of reasons in the three inquiries, certain conclusions may be drawn. First, it would appear that a majority of the present Commission considers that the wording of section 201(c)(2) should be read literally and that what must be demonstrated to terminate a pending investigation in Treasury is that there is no reasonable indication of injury. Thus, assuming sufficient allegations of injury to satisfy Treasury's petitioning requirements, it would appear that absent an affirmative showing of no reasonable indication, the Commission will not so find. In other words, if the allegations cannot be rebutted or overwhelmed by positive indications of no injury to an industry, whether developed by the Commission or by those in opposition to the petition in Treasury, the Commission will not determine that there is “no reasonable indication.” The burden is clearly upon the opponents to the investigation. Only Vice Chairman Minchew has definitely rejected this formulation; he would require the demonstration of a reasonable indication of injury.

77. Portland Cement, supra note 75 at 3.
78. Id. at 5.
79. Id. at 7.
80. Id.
81. Id. at 9.
Further, it would appear that a present majority of the Commission requires that "no reasonable indication" of injury be shown by "clear and convincing evidence" or by evidence "clearly" showing this. The standard is higher than that required in a full investigation under section 201(a) and clearly shows the slant of the Commission toward not terminating Treasury investigations under section 201(c)(2). The Commission appears unanimous in considering that the decision must be based on evidence discovered at the time of the decision, and not upon speculation as to what evidence may be uncovered in the future.

Finally, a majority of the Commission has not really expressed in clear terms an interpretation of "no reasonable indication." Commissioner Moore has made no statements about his interpretation of the phrase. Two Commissioners have indicated that a finding that there exists the possibility of injury or the possibility of the likelihood of injury is enough to negate "no reasonable indication," but have not indicated that this is the basic standard to be applied—only that it is certainly sufficient to lead to a negative finding. Chairman Leonard has indicated positively that the standard is that the information available with respect to the issues of injury and causation must be

so clearly lacking in substance that the resources of the government should not be used to any further extent in considering the matter and that trade should not be disrupted further by such consideration.\(^8\)

Commissioners Ablondi and Minchew have used terms such as "not . . . sufficient impact," "not significant," and "insignificant" when referring to indicators of injury and arriving at a finding of no reasonable indication. Vice Chairman Minchew has indicated that "the standard must be considerably higher than a finding that new evidence added to present evidence possibly would show injury caused by LTFV imports."\(^9\)

In any event, it appears that a majority of the Commission has adopted a rather high standard of what must be shown to demonstrate "no reasonable indication." In at least two of three inquiries there was very little evidence of market penetration or of other traditional indicators of injury. It seems that the majority of the Commission believes that there actually must be no single indication of injury, unless completely rebutted or overcome by other indicators, before a finding of "no reasonable indication" will be made.

_Industry in the United States is being or likely to be injured, or is prevented from being established by reason of_

Section 201(a) of the Antidumping Act, which establishes the criteria for

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9. _Id._ at 32-33.
the Commission's basic determination of injury under the act, provides that "the Commission shall determine . . . whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation" of the articles concerned. Since there is no indication in any legislative history that the meaning of the terms used in both sections 201(a) and 201(c)(2) should be interpreted differently, it appears that the terms should be interpreted in the same way. While only Chairman Leonard has stated this conclusion, no other Commissioner has stated a different conclusion and there are no indications that they would do so.

While the terms may have the same meaning under both sections, this does not mean that the determination under each section is the same. Under section 201(c)(2), the determination is one of no reasonable indication of injury, not one of the injury itself, as under section 201(a). Further, with respect to the phrase "by reason of," Chairman Leonard noted in the Passenger Automobiles inquiry:

Turning to the phrase "by reason of" in section 210(c)(2), again there is no basis to conclude that Congress intended this phrase to have any meaning different from the one given to the same phrase employed in section 201(a) of the Act; that is, the same degree of causality is expressed by the use of the identical phrase in both sections. Since the Commission, however, under section 201(c)(2) is dealing with only the merchandise the subject of Treasury's investigation, and is determining if there is "no reasonable indication" of the requisite causal relationship, as opposed to dealing under section 201(a) with merchandise actually found by Treasury to be, or likely to be, sold at less than fair value and determining if the requisite causal relationship actually exists, the distinct determinations under these section are totally different.

Thus, the determination under section 201(c)(2) does not predetermine the outcome under section 201(a). The development of information during the three-month investigation under section 201(a) may well call for a determination that the criteria of the Antidumping Act with respect to injury are not satisfied, even though the Commission did not find "no reasonable indication" of injury under section 201(c)(2).

C. Judicial Review

Under section 201(c)(2), if the Commission determines that there is "no reasonable indication that an industry in the United States is being injured," it shall advise the Secretary of the Treasury of its determination and any Treasury investigation then in progress shall be terminated. If the
Commission does not make such a determination, any Treasury investigation then in progress may continue. The question arises as to whether judicial review is available with respect to any such determination of the Commission.

It is clear that section 201(d)(2) of the Antidumping Act was added by the Trade Act so that parties would have sufficient information for the purpose of appeal of a determination under section 201(a) of the act. In reference to the requirement that the Commission must publish a "complete statement" of reasons for a section 201(a) determination, the Finance Committee Report states:

The Committee is making clear its intent that sufficient information be provided in the case of each determination, to enable all interested parties to be aware of the reasons for, and details of, such determinations and to effectively protect their rights . . . in the courts.\footnote{\textsc{Finance Committee Report}, supra note 11 at 171 [emphasis supplied].}

Unlike the requirement of section 201(d)(2) of the Antidumping Act, with respect to section 201(a) the Commission does not have to issue a statement of findings and conclusions under section 201(c)(2).\footnote{See text accompanying notes 46 and 47, supra.} Indeed, if the Commission does not determine that there is no reasonable indication of injury to an industry, it does not have to transmit anything in writing to the Treasury. However, as has been seen in the discussions of the three inquiries decided so far, the Commission has adopted the procedure of issuing an opinion to the Treasury.

It appears that the requirements for issuing statements of findings and reasons affect the ability of parties to appeal a section 201(c)(2) determination. The absence of a requirement in the act to issue section 201(c)(2) statements by the Commission, while statements are required under section 201(a), is persuasive that judicial review of section 201(c)(2) findings is not available.

Furthermore, a determination under section 201(a) is treated as a final determination and, therefore, mandatory. The nature of the Treasury's action in issuing a dumping finding is purely ministerial, since the Commission finding under section 201(a) is final. However, the Commission's determination under section 201(c)(2) is not a final act in the administrative process in antidumping proceedings unless there is a determination of no reasonable indication. Thus, in cases where there is not a finding of no reasonable indication, the Treasury, upon further investigation of whether there are LTFV sales, could terminate the proceedings. This leads us to conclude that such determinations are not final and hence are not ready for review.

Even if judicial review under section 201(c)(2) is available, it is ex-
tremely unlikely that a court would overrule the Commission's determination. On several occasions, the courts have reviewed antidumping determinations. In each judicial examination, the courts have limited their review to the question of whether the Commission has exceeded its delegated statutory authority. Unless the Commission misconstrues the law, clearly abuses its discretion, or makes a determination without support of substantial evidence, it will not be overturned. To date, no injury determination has been overruled or modified by the reviewing courts. Moreover, this article has described the limited legislative assistance which has been provided the Commission in its task of interpreting the language contained in section 201(c)(2); the absence of any clear interpretative remarks provides the Commission great discretion in determining the meaning of the language.

Although it appears, then, that there is no judicial review available to parties adversely affected by a Commission determination under section 201(c)(2), even if such review were made, there is no reason to conclude that the great flexibility permitted the Commission by the courts under section 201(a) would not also be given the Commission in its interpretation of the language contained in section 201(c)(2).

III. Conclusion

The addition of section 201(c)(2) to the Antidumping Act presented the possibility of significant changes in the administration of that Act by the Treasury and the U.S. International Trade Commission. The Treasury has had to resort to this section rather frequently. However, the interpretation given to the language of section 201(c)(2) by a present majority of the Commission indicates that in fact it will be relatively rare that a pending Treasury antidumping investigation will be terminated under this section. The Commission interpretation seems well founded, although the wide discretion available to the Commission in the interpretation of the language leaves open the possibility of a change in interpretation as membership in the Commission changes.

90. See City Lumber Co. v. United States, 290 F. Supp. 385 (Cust. Ct. 1968). However, the "substantial evidence" rule is an Administrative Procedure Act requirement and may not be applicable to Commission proceedings under section 201(a) or section 201(c)(2). See Imbert Imports, Inc. v. United States, 475 F.2d 1189 at 1192 (C.C.P.A. 1973).