Effective Judicial Review of Antidumping Determinations

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Increasing competition from foreign firms in domestic markets is focusing attention on the administration of the U.S. Antidumping Act.\(^1\) The Act authorizes the imposition of additional duties on goods that injure domestic industries through their importation into the United States at a price lower than their home market price.\(^2\) Although Congress designed the Act as a means of controlling unfair competition in international trade,\(^3\) domestic producers can manipulate the Act’s provisions to impede fair competition in American markets.\(^4\) The steady increase in the number of antidumping complaints processed by the two agencies that administer the Act\(^5\) and the rise in the number of affirmative dumping determinations requiring the imposition of special duties\(^6\) stress the need for additional safeguards to ensure the effective and impartial application of the Act.\(^7\) Suggested procedural reforms include the adoption of a “meeting competi-

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tion” defense to antidumping allegations, application of the Administrative Procedure Act (APA) to such investigations, and expansion of the scope and standard of review of dumping determinations.

This Note will examine this third suggestion: ensuring effective judicial review of antidumping determinations. First, the procedures presently employed in the determination of and appeal from dumping findings will be described. Second, the Note will explore the limitations of the existing scope of judicial review of these findings. Finally, three alternative approaches for expanding the scope of review and clarifying the appropriate standard will be discussed.

I
ADMINISTRATION OF THE ANTIDUMPING ACT

A. THE DUMPING FINDING


11. “...determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value...” 19 U.S.C. § 160(a) (1976). The Secretary’s finding is normally referred to as the “less than fair value (LTFV)” determination and amounts to a comparison of the home market price of the import (or its fair value) to the price charged in the United States. The regulations
mission conducts investigations into allegations of injury to domestic industries caused by the questioned importation.\textsuperscript{12} Dumping duties are imposed only if each of the four steps of the antidumping investigation results in an affirmative determination.

First, the Secretary of the Treasury conducts an informal investigation to determine the probable validity of the dumping allegation.\textsuperscript{13} A finding that allegations of either discriminatory pricing or domestic injury are unwarranted terminates the proceedings. If substantial doubt appears as to the substance of the alleged injury, the International Trade Commission conducts an expedited investigation of this question.\textsuperscript{14} If the Commission finds no reasonable indication of injury, the Secretary of the Treasury halts the proceeding.

Second, a formal dumping investigation commences in which the Secretary of the Treasury inquires into the existence or likelihood of sales at less than fair value.\textsuperscript{15} The Secretary publishes the determination and a negative finding terminates the investigation.

Third, the International Trade Commission institutes a companion investigation to determine the existence or likelihood of injury to a domestic industry.\textsuperscript{16} A finding of injury does not necessarily follow from a finding confirming sales at less than fair value. A negative injury determination closes the investigation but an affirmative finding results in the entry of a dumping finding by the Secretary of the Treasury.

Fourth, customs officials must determine the existence of a “dumping margin” on each entry of imported merchandise covered by the dumping


\textsuperscript{12} The Act directs the International Trade Commission to 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 such [less than fair value] merchandise into the United States.” 19 U.S.C. § 160(a) (1976). Substantive analyses of the Commission’s injury determinations appear in Coudert, supra note 4, at 204-16; Myerson, supra note 11, at 181-87; and Note, supra note 6.

\textsuperscript{13} 19 U.S.C. § 160(c)(1) (1976). This preliminary investigation must be conducted within 30 days of the Secretary’s receipt of a dumping allegation. Id.

\textsuperscript{14} The Commission conducts its inquiry within 30 days. Id. § 160(c)(2). For an analysis of this provision, see McDermid & Foster, The U.S. International Trade Commission’s 30-Day Inquiry Under the Antidumping Act: Section 201(c)(2), 27 Mercer L. Rev. 657 (1976).

\textsuperscript{15} This inquiry normally lasts six months but the Secretary of the Treasury may extend it by three months in more complicated cases. 19 U.S.C. § 160(b)(2) (1976).

\textsuperscript{16} The International Trade Commission’s investigation commences after the Secretary of the Treasury issues an affirmative finding of less than fair value sales and is limited to three months, with no provision for extension. Id. § 160(a).
finding. The dumping margin is the difference between the foreign market value and the purchaser’s or exporter’s sales price.\textsuperscript{17} All unappraised merchandise\textsuperscript{18} described in the dumping finding is subject to special dumping duties in an amount equal to the dumping margin calculated for each separate entry of the goods.\textsuperscript{19} However, dumping margins do not exist in all instances in which goods are subject to a dumping finding.\textsuperscript{20}

B. PROCEDURAL SAFEGUARDS

Although Congress delegated vast discretion to both the Treasury Department and the International Trade Commission to conduct such investigations “as [they] shall deem necessary,”\textsuperscript{21} it also placed important limitations upon the exercise of this discretion. Congress limited the duration of the antidumping investigation to nine months\textsuperscript{22} and provided for the expedition of the proceedings in doubtful cases\textsuperscript{23} to curtail harassment of importers and foreign manufacturers through the institution of unfounded antidumping complaints. As a further safeguard, the Treasury Department

\textsuperscript{17} Although in form the “dumping margin” conforms to the less than fair value formula, the former calculation is more precise and may point to the conclusion that no dumping occurred or that it was de minimus. \textit{See Note, supra note 11, at 934.}


\textsuperscript{19} 19 U.S.C. § 161(a) (1976) provides:

   In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding . . . , entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary . . . and as to which no appraisement has been made before such finding has been so made public, if the purchase price or the exporter’s sales price is less than the foreign market value . . . there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

\textsuperscript{20} \textit{See} SCM Corp. v. United States, 450 F. Supp. 1178, 1180 (Cust. Ct. 1978). Customs officials determine dumping margins for each individual entry and subsequent entries of the merchandise subject to the dumping finding may reflect price increases commensurate with the dumping margin. \textit{But see note 68 infra} and accompanying text.

\textsuperscript{21} 19 U.S.C. § 160(a) (1976). The adoption of regulations outlining the procedures followed and information considered by each agency helped define the scope of the investigation “deemed necessary.” \textit{See} 19 C.F.R. § 153 (1978) (Treasury guidelines); \textit{id.} §§ 201, 207 (International Trade Commission guidelines). However, both agencies retain extensive latitude in gathering information. Treasury Department investigators may obtain any information not expressly provided for in the regulations as deemed necessary to enable the Secretary to reach a determination. \textit{id.} § 153.31(a). For a similar provision governing Commission activities, see \textit{id.} § 201.9.

\textsuperscript{22} \textit{See notes} 15-16 \textit{supra}.

\textsuperscript{23} \textit{See note} 14 \textit{supra} and accompanying text.
and the International Trade Commission are required to hold a hearing upon the request of any party to the investigation. But to preserve the "informal and nonadversary nature of the proceedings," Congress specifically exempted these hearings from the procedural requirements of the Administrative Procedure Act.26

The Antidumping Act also requires notice by publication of the commencement of an antidumping investigation and of the individual determinations of each agency so that the parties can effectively assert their interests before the agency or a court. In addition, a statement of findings and conclusions, including the supporting substantive reasons, must accompany the publication of each dumping determination.

C. PROTEST AND APPEAL

The Antidumping Act does not specifically grant the right to appeal less than fair value and injury determinations. Rather, protests and appeals

Before making any determination . . ., the Secretary or the Commission, as the case may be, shall, at the request of any foreign manufacturer or exporter, or any domestic importer, of the foreign merchandise in question, or of any domestic manufacturer, producer, or wholesaler of merchandise of the same class or kind, conduct a hearing at which—
(A) any such person shall have the right to appear by counsel or in person; and
(B) any other person, firm, or corporation may make application and, upon good cause shown, may be allowed by the Secretary or the Commission, as the case may be, to intervene and appear at such hearing by counsel or in person.


26. 19 U.S.C. § 160(d)(3) (1976). This subsection provides that the antidumping hearings are not governed by 5 U.S.C. §§ 554-557, 702 (1976). These provisions deal with formal adjudicative hearings and the right of judicial review. As nonadjudicative proceedings, the hearings held in the course of an antidumping investigation do not produce a complete record for review.

27. 19 U.S.C. § 160(d)(2) (1976) provides:
The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the Commission, upon making its [injury] determination . . . shall publish in the Federal Register such determination, whether affirmative or negative, together with a complete statement of findings and conclusions, and the reasons or bases therefor, on all the material issues of fact or law presented (consistent with confidential treatment granted by the Secretary or the Commission, as the case may be, in the course of making its determination).

In adding this provision, Congress intended
that sufficient information be provided in the case of each [less than fair value and injury] 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 proceedings before the Department of the Treasury and the Commission, as well as in the courts.

of the imposition of dumping duties are permitted only as provided in the general provisions of the tariff laws.\textsuperscript{28}

Sections 514 and 516 of the Tariff Act of 1930 govern protests of customs duties.\textsuperscript{29} These sections limit both the class of complainants and the subject of its protests. Section 514 permits those persons directly associated with the importation of the goods in issue\textsuperscript{30} to protest the "decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same" relating to the assessment of customs duties.\textsuperscript{31} Section 516 allows American manufacturers, producers, or wholesalers to contest the classification, rate, or amount of duties imposed as well as the failure to assess special dumping duties.\textsuperscript{32} In addition, one subsection of section 516 permits these domestic parties to contest negative less than fair value determinations.\textsuperscript{33}

The United States Customs Court possesses exclusive jurisdiction over all civil actions involving administrative orders imposing dumping duties\textsuperscript{34} and all actions brought by domestic parties under section 516.\textsuperscript{35} As prerequisites for suit under section 514, a protest must be filed and denied,\textsuperscript{36} and all duties, charges, or other exactions must be paid in full.\textsuperscript{37} For actions brought under section 516, all remedies provided under that section must be exhausted.\textsuperscript{38} The United States Court of Customs and Patent Appeals entertains appeals from the decisions of the Customs Court.\textsuperscript{39}

\begin{itemize}
  \item \textsuperscript{28} The determination of the appropriate customs officer as to the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and the action of such customs officer in assessing special dumping duty, \textit{shall have the same force and effect and be subject to the same right of protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of protests relating to customs duties under existing law.} 19 U.S.C. § 169 (1976) (emphasis added).
  \item \textsuperscript{29} \textit{Id.} §§ 1514, 1516.
  \item \textsuperscript{30} The statute restricts the right of protest to the "importer, consignee, or any authorized agent of the person paying any charge or exaction, . . . or seeking [the] entry or delivery [of goods upon which customs duties are imposed]." \textit{Id.} § 1514(b)(1).
  \item \textsuperscript{31} \textit{Id.} § 1514(a). Importers may protest decisions as to appraised value, classification, rate and amount of duties charged, and exclusion orders. \textit{Id.}
  \item \textsuperscript{32} \textit{Id.} § 1516(a).
  \item \textsuperscript{33} \textit{Id.} § 1516(d). Section 1514 does not grant a comparable right to contest affirmative less than fair value determinations to the parties within its scope.
  \item \textsuperscript{34} 28 U.S.C. § 1582(a) (1976).
  \item \textsuperscript{35} \textit{Id.} § 1582(b).
  \item \textsuperscript{36} \textit{Id.} § 1582(c)(1). The protest must be filed in accordance with § 514, and denied pursuant to § 515, 19 U.S.C. § 1515 (1976).
  \item \textsuperscript{37} 28 U.S.C. § 1582(c)(2) (1976).
  \item \textsuperscript{38} \textit{Id.} § 1582(c)(1).
  \item \textsuperscript{39} \textit{Id.} § 1541.
\end{itemize}
II

PRESENT SCOPE OF JUDICIAL REVIEW

A. THE TRADITIONAL STANDARD OF LIMITED REVIEW

Although the Customs Court regards dumping findings as reviewable,\(^4\) it retains a marked aversion to scrutinizing the facts culminating in such determinations. The touchstone for analyzing the scope of judicial review remains the early case of Kleberg & Co. v. United States.\(^4\) The importer in Kleberg challenged the validity of the Secretary of the Treasury's affirmative dumping finding and urged the court to assess independently whether the facts justified the finding. The Court of Customs and Patent Appeals declined, ruling that so long as the Secretary follows "every statutory step required by the law,"\(^4\) the court "may not judicially inquire into the correctness of his conclusions . . . . [T]he judicial power extends only to a correction of his failure to proceed according to and within the law."\(^4\)

In applying the Kleberg rule, the court may not substitute its judgment for that of the agency to which Congress delegated the discretion to determine dumping violations.\(^4\) As the Kleberg court stated, "[W]e are not at liberty here to go into an investigation as to whether the facts shown on the trial below justified the issuance of the order complained of."\(^4\) Although the Kleberg rule prohibits inquiry into exercises of discretion entrusted to the Secretary of the Treasury or the International Trade Commission, it does require judicial review of the application of the law by these agencies. The court assesses only whether the agency exceeded its statutory authority in construing such terms as "fair value," "industry," or "injury."\(^4\)

The court in Ellis K. Orlowitz Co. v. United States\(^4\) further clarified

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\(^4\) 71 F.2d 332 (C.C.P.A. 1933).

\(^4\) Id. at 334.

\(^4\) Id. at 335.

\(^4\) See, e.g., United States v. Elof Hansson, Inc., 296 F.2d 779 (C.C.P.A. 1960), cert. denied, 368 U.S. 899 (1961). Citing the operant language of Kleberg without further comment, the Hansson court refused to substitute its findings for those of the Treasury Secretary by declining to reevaluate the evidence forming the basis of the Secretary's injury determination. 294 F.2d at 783.

\(^4\) 71 F.2d at 335.

\(^4\) One issue considered in Kleberg was the proper construction of "fair value." The Secretary defined the term in accordance with a Treasury regulation and the court sustained the reasonableness of this definition following discussion of the common meaning of the words and intent of Congress. Id.

the scope of review under *Kleberg*. As in *Kleberg*, the importer attacked the validity of a dumping order, focusing upon the Tariff Commission’s interpretation of “industry” in its injury determination. The court deemed determinations made pursuant to an agency’s “executive discretion” to be free from judicial interference. Excesses or abuses of executive discretion, however, represented appropriate subjects for judicial review.\(^{48}\) The court thus distinguished between review of the agency’s fact-finding function—“the discretion . . . to find from duly presented facts that there is actual or threatened injury”\(^{49}\)—and review of the agency’s statutory interpretation. This distinction reflected the court’s respect for the agency’s expertise in assessing the technical economic data assembled in antidumping investigations, yet acknowledged the court’s own expertise on questions of law.

In two more recent cases, the United States Customs Court attempted to expand the restrictive scope of review established in *Kleberg* by relying on the standards of the Administrative Procedure Act. In *City Lumber Co. v. United States*,\(^ {50}\) the court incorporated that Act’s substantial evidence standard into the *Kleberg* rule before dismissing an importer’s appeal of an injury determination. The importer argued that the Tariff Commission exceeded its statutory authority by basing its injury determination on impermissible data.\(^ {51}\) But the court found that an “examination of the voluminous record discloses substantial evidence in support of the facts set forth in the [Tariff Commission’s] majority statement . . . .”\(^ {52}\) This use of the substantial evidence standard exceeded the boundaries of the rule limiting factual review laid down in *Kleberg*. The court’s use of this new standard apparently resulted from its conclusion that “legal and proper” dumping findings must be based upon less than fair value and injury determinations supported by substantial evidence.\(^ {53}\) By this reasoning, the reviewing court would incorporate an additional procedural requirement into the statute: agency determinations must be based upon substantial evi-

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\(^{48}\) “While judges should refrain from reviewing executive discretion, they should be slow to deny to litigants the opportunity which our constitutional system affords for a judicial review of executive compliance with the terms laid down by the legislature, under which the delegated discretion is to be exercised.” \(\textit{Id.}\) at 305.

\(^{49}\) \(\textit{Id.}\)


\(^{51}\) The antidumping investigation concerned portland gray cement imported from Portugal. The plaintiff contended that the Tariff Commission predicated its injury determination upon importations of this type of cement from countries other than Portugal. 290 F. Supp. at 387.

\(^{52}\) \(\textit{Id.}\) at 390.

\(^{53}\) In its second conclusion of law, the court determined that substantial evidence supported the injury finding and “it follows that the finding of dumping was legal and proper.” \(\textit{Id.}\) at 394.
dence as revealed by the record. The Appellate Term of the Customs Court expressly adopted the trial court’s approach.\textsuperscript{54} The Court of Customs and Patent Appeals approved the result but refused to modify the \textit{Kleberg} rule to allow the courts to “weigh the evidence before the Commission or to question the correctness of [its] findings.”\textsuperscript{55}

The importer in \textit{Imbert Imports, Inc. v. United States}\textsuperscript{56} claimed that the Tariff Commission acted arbitrarily and without the support of substantial evidence in reaching its affirmative injury determination. Rejecting that claim, the trial judge explained that the appropriate scope of review in antidumping proceedings focuses on two areas: procedure—whether the agency acted within its delegated authority—and theory of law—whether the agency correctly construed the pertinent statutory language.\textsuperscript{57} Although entitling the plaintiffs “to a measure of review,”\textsuperscript{58} this approach did not permit the more extensive factual review they sought.

The Appellate Term suggested that review might extend to arbitrary and capricious acts, but did not reach that issue since it remained unpersuaded that the injury finding was “arbitrary, an abuse of discretion or otherwise contrary to law.”\textsuperscript{59} The court, however, did expressly disapprove the use of the substantial evidence standard in the review of injury determinations.\textsuperscript{60} The Court of Customs and Patent Appeals agreed in dictum that the injury determination in issue was not arbitrary, but declined to rule on whether this standard applied to antidumping proceedings.\textsuperscript{61} Returning to the \textit{Kleberg} formulation, the court held that “the Commission here acted within its delegated authority and correctly interpreted and applied the law.”\textsuperscript{62}

Despite the dissent of the lower courts, the Court of Customs and Patent Appeals thus adheres to the standard enunciated in \textit{Kleberg} and re-

\textsuperscript{54} Noting that the court below “properly considered all of the evidence in the case, and [its] findings of fact are fully supported by the substantial weight of the evidence,” the Appellate Term expressly adopted “each and every finding of fact and conclusion of law” made by that court. 311 F. Supp. at 349.

\textsuperscript{55} 457 F.2d at 994. Rather, the court reaffirmed the \textit{Kleberg} rule by holding: “As stated in \textit{Kleberg}, our review of determinations of injury or likelihood of injury in antidumping cases does not extend beyond determining whether the Commission has acted within its delegated authority, has correctly interpreted statutory language, and has correctly applied the law.” \textit{Id.}


\textsuperscript{57} 314 F. Supp. at 787.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} 331 F. Supp. at 1405.

\textsuperscript{60} The court labelled the substantial evidence standard “inappropriate in reviewing injury determinations.” \textit{Id.}

\textsuperscript{61} 475 F.2d at 1192. The court also found the findings of the Commission to be supported by substantial evidence but it did not consider the appropriateness of that standard. \textit{Id.}

\textsuperscript{62} \textit{Id.}
stricts its inquiry to questions of procedure and statutory interpretation. This approach prohibits review of the facts supporting the dumping finding.

B. THE NEED FOR REFORM

The present framework for appealing dumping orders and their underlying factual determinations contains several disquieting aspects. Some domestic groups, such as labor unions and consumer groups, insist that their interests are not adequately represented in antidumping proceedings. Unequal treatment of importers and domestic producers under the Antidumping Act persists despite congressional concern. In addition, the judicial gloss upon the statutory mechanism of appeal has increased uncertainty concerning the applicable scope and standard of review.

Labor unions or trade associations whose members face layoffs as a result of the injury caused domestic producers by dumping desire to intervene in antidumping proceedings. Similarly, consumer groups seek a voice in these proceedings to argue against the artificially high domestic prices that result from the imposition of dumping duties. Under existing law, however, none of these groups can participate in the antidumping proceedings.

Importers and foreign manufacturers cannot obtain prompt review of the findings underlying the imposition of dumping duties. Unlike domestic parties, who may contest negative less than fair value determinations immediately upon notification of the agency’s decision, importers and their affiliates must wait to contest until dumping duties are assessed and liquidated. Because of this framework, many importers may not even attempt to avail themselves of the reappraisal procedure and may instead raise prices by the amount of dumping duties assessed.

The mechanism governing appeals from dumping orders reflects the

65. For example, the Court of Customs and Patent Appeals resolved Orlowitz eight years after the injury determination and dumping finding were made. See Metzger & Musrey, Judicial Review of Tariff Commission Actions and Proceedings, 56 CORNELL L. REV. 285, 330 (1971). Situations such as this one may not occur as frequently in the future because of provisions for expedited review.
67. See text accompanying notes 36-37 supra.
68. By so doing, the importer does not forfeit the amount of the dumping margin to the U.S. Government but does lose his chance to contest the imposition of the dumping duty. But see Hendrick, The United States Antidumping Act, 58 AM. J. INT'L L. 914, 932-33 (1964) (only
confusion created through a broad judicial reading of a narrow statute. The Antidumping Act restricts appeals to classification and appraisal controversies arising from the actions of customs officers. 69 By their nature, these reappraisal actions also entail some review of less than fair value determinations. 70 But no comparable review of injury determinations is within the literal terms of the Act. The courts, however, consider less than fair value and injury determinations as well as dumping orders to be reviewable. 71 To achieve this result, the courts have expanded review of the imposition of dumping duties and the failure to assess such duties to encompass review of the determinations forming the basis of such action. 72 Through its creative reading of the statute, the judiciary achieves review of all elements of antidumping protests but at the cost of a rational standard of review.

The usual review authorized for customs litigation is trial de novo. 73

21% of cases between 1955 and 1964 clearly indicate such price revision. See also Coudert, supra note 4, at 217-18.

69. The Antidumping Act authorizes only review of the actions of customs officers. See note 28 supra.

70. The determination of the dumping margin by customs officers is somewhat similar to the less than fair value determination by the Treasury Department. See note 17 supra.


72. In a recent decision, the Customs Court affirmed its jurisdiction to review the validity of not only the final dumping order but also the intermediate negative less than fair value and injury determinations. SCM Corp. v. United States, 450 F. Supp. 1178 (Cust. Ct. 1978). SCM argued against the reviewability of no injury determinations on the ground that although § 1516(d) expressly provides for review of negative less than fair value determinations no comparable section authorizes review of no injury determinations. In rejecting this argument, Chief Judge Re examined the legislative history of §§ 1516(c)-(d). Finding no congressional intent to preclude judicial review of no injury determinations, he interpreted the scope of review of the “failure to assess antidumping duties” under § 1516(c) to include the review of negative less than fair value and injury determinations.

The validity of this interpretation of the legislative history is questionable because Congress apparently equated “negative antidumping determinations,” the statutory objects of review, with “negative price discrimination (LTFV) determinations” and made no mention of negative injury determinations. See S. Rep. No. 1298, supra note 25, at 178, reprinted in [1974] U.S. Code Cong. & Ad. News 7186, 7314-15. The conclusion that the failure of the statutory scheme to include review of no injury determinations resulted from omission is bolstered by the fact that the legislative history provides no clue as to why expedited treatment is granted review of negative less than fair value determinations but not negative injury determinations. This analysis supports the proposition that the “failure to assess antidumping duties” refers to the customs officer’s failure to impose dumping duties on particular merchandise (a classification issue) and does not provide for comprehensive review of antidumping determinations.

Most appeals involve questions concerning classification, rate, or amount of duty and such actions lend themselves well to recompilation of the pertinent evidence before the court. Pure de novo adjudication does not occur, however, since the court does not independently adjudge the contested issues. Agency determinations carry a presumption of validity and the burden of proving these incorrect rests upon the challenging party. The review of antidumping proceedings does not neatly fit this format. The data collected and relied upon in formulating agency determinations is quite technical and beyond the expertise of the courts. In addition, judges should not be permitted to assess independently the relevance of these facts in light of the congressional intent that the agency exercise this function.

Recognizing the inappropriateness of de novo review to antidumping proceedings, the courts have attempted to fashion a standard of review that does not usurp the function of the agency. The standard which resulted, that of Kleberg, permits limited but not necessarily effective review. Indeed, the method presently employed by the courts provides only cursory review of dumping findings and assumes that the underlying factual determinations of price discrimination and injury are not reviewable. The statutes restrict review to the legality of dumping findings; Kleberg limits review of legality to a question of conformity with the statutory procedures. Although the Treasury Department and the International Trade Commission promulgated detailed regulations governing their procedures for processing antidumping complaints, these do not represent statutory procedures. Failure to follow these regulations may well be an arbitrary or unreasonable action, but under Kleberg such action falls outside the existing scope of judicial review.

The courts could alter this framework by recognizing their inherent power to review arbitrary and capricious agency actions. The delegation of discretion by Congress to the Treasury Department and the International Trade Commission did not include the power to act arbitrarily or unreasonably. To the extent that an agency abuses its discretion by acting irrationally or without a reasonable basis in law, the courts possess the power to

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74. Id.
76. Id. Although Sneaker Circus involved a district court's review of a "good cause" determination under § 201 of the Trade Reform Act of 1974, 19 U.S.C. § 2251 (1976) (import relief), the court's discussion of review is sufficiently general to be of interest here. The court argued that the "good cause" determination could not be judicially reviewed because it entailed a determination within the sole discretion of the agency.
78. The courts would apply due process analysis. See Berger, Administrative Arbitrariness and Judicial Review, 65 COLUM. L. REV. 55, 88-89 (1965), and cases cited therein.
overrule such action. By limiting review to the Kleberg standard, however, the courts have refused to expand the scope of their review of dumping findings to this point without legislative direction.

Until recently, Congress apparently endorsed the judiciary's construction of the Antidumping Act. In 1974, it declined to include specific provisions for review of individual agency determinations in its extensive reform of the trade laws. Congress considered the present review procedures adequate and relied on the authority granted the Treasury Department and the International Trade Commission to "review, modify or revoke their decisions." These two agencies review and revoke prior determinations upon showings of discontinued less than fair value sales or changes in industry conditions. In both instances, the proceedings do not really amount to a reconsideration of the facts supporting the original determinations or an assessment of whether the facts justified the determination; the revocation proceedings consist of independent findings based upon an allegedly new factual situation. At least one other difficulty that prevents the revocation proceedings from providing effective review of agency determinations is the time lag: in most cases, two years must elapse before either agency considers initiating revocation proceedings.

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79. Id. at 64; see also Metzger & Musrey, supra note 65, at 330 (standard of review should be rational basis in law for determinations).


81. Id.

82. The Treasury Department permits modification or revocation of less than fair value determinations upon a showing of the abandonment of discriminatorily priced sales for a substantial period accompanied by assurances of no resumption of the practice. 19 C.F.R. § 153.44(a) (1978). The International Trade Commission reviews injury determinations if changed circumstances exist indicating that upon revocation or modification of a dumping finding no actual or threatened injury would occur to a domestic industry through the continued importation of the merchandise in question at less than its fair value. Id. § 207.5(a). "Changed circumstances" warranting revocation of an injury determination include the present well-being of the domestic industries concerned, their future prospects (demand for the product, production capacities, present operative capacity), present dumping margins, and the failure to identify future less than fair value sales as a possible cause of future injury. For examples of changed circumstances proceedings, see Primary Lead Metal from Australia and Canada, 41 Fed. Reg. 17,628 (1976), and Northern Bleached Hardwood Kraft Pulp from Canada, 39 Fed. Reg. 34,718 (1974).

83. In addition, there exists the obvious problem of the reviewing agency being one and the same as the agency under review.

84. The Treasury Department entertains petitions for review after two years, but will revoke a finding on its own initiative after four years if satisfied that "there is no likelihood of resumption of sales at less than fair value of the merchandise concerned." 19 C.F.R. §§ 153.44(a)-(b) (1978). The International Trade Commission normally conducts reviews only after two years, but will expedite its review upon a showing of good cause. Id. § 207.5(c).
III
TOWARD MORE EFFECTIVE JUDICIAL REVIEW OF ANTIDUMPING DETERMINATIONS

Even though the courts have never overturned an agency finding under the Antidumping Act, the availability of effective review should supply a check upon the agencies and assure interested parties of the fair resolution of issues presented. However, the application of the antidumping law to date has not ensured effective review of the factual determinations preceding the issuance of a dumping finding. It is questionable whether some determinations disposing of antidumping complaints are reviewable at all, and the treatment of those that are differs depending on the party pressing for review. This section will examine three alternative modifications of the present system to determine their effectiveness in providing judicial review.

A. ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (APA) was enacted more than a decade after the Court of Customs and Patent Appeals decided Kleberg. Although the APA carried a strong presumption of applicability to all agency actions in the absence of a congressional directive to the contrary, the Court of Customs and Patent Appeals has refused to rule definitively on whether the APA governs antidumping proceedings. While the court awaits more specific legislative instructions, confusion persists concerning the APA’s relevance to antidumping actions.

The APA subjects an agency action to judicial review unless a statute precludes review or the “action is committed to agency discretion by law.” Although the Antidumping Act expressly provides only for judicial review of appraisal actions, it does not explicitly prohibit review of the intermediate determinations of the Secretary of the Treasury and the International Trade Commission. This silence regarding review of these factual

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85. The Customs Court has reversed other determinations of the International Trade Commission on narrow points of law but has not addressed the adequacy of the evidence essential to an agency decision even though such review is routinely extended to the actions of other regulatory agencies. No decision relating to less than fair value by the Secretary of the Treasury has been overturned, but the court did reverse a countervailing duty determination, which involves similar findings. See Energetic Worsted Co. v. United States, 53 C.C.P.A. 36 (1966).
86. See Berger, supra note 78, at 64.
87. Enactment of the Administrative Procedure Act occurred in 1946; the Court of Customs and Patent Appeals decided Kleberg in 1933.
89. See, e.g., Imbert Imports, Inc. v. United States, 475 F.2d 1189, 1192 (C.C.P.A. 1973).
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Determinations could imply a congressional intent to preclude review, but such inferred intent does not satisfy the constitutional requirement of clear and convincing evidence of a legislative intent to restrict access to judicial review.91

Whether these intermediate determinations are committed to agency discretion presents a more difficult question. The trend is to view this exception quite narrowly; only in rare instances, when the statute is drawn so broadly that no law exists for a reviewing court to apply, does the exception govern.92 Arguably, the Antidumping Act is such a statute since it confers broad discretion upon the Secretary of the Treasury and International Trade Commission to conduct their individual determinations. The 1974 amendments to this Act, however, gave some structure to these exercises of discretion by requiring the preparation of a statement of reasons for each less than fair value and injury determination.93 These statements could provide some guidelines for the courts to apply in reviewing antidumping determinations.94 Whether these guidelines would be sufficient to remove antidumping proceedings from this narrow exception to the APA remains an open question.

In the event that Congress expressly subjects antidumping proceedings to the provisions of the Administrative Procedure Act, attention will focus on the scope and applicable standard of review. To some extent, the scope of review under the APA overlaps that of Kleberg in allowing the courts to set aside actions outside an agency's delegated authority.95 The APA extends further, however, and allows the courts to "hold unlawful and set aside agency action, findings and conclusions" found to be arbitrary and capricious, unsupported by substantial evidence as revealed by an evidentiary record, or unsupported by the facts compiled by the court during a

92. Id. (citation omitted).
93. See note 27 supra and accompanying text.
94. Perhaps this argument proves too much. If no law exists for a reviewing court to apply before an agency renders its decision, can a series of such decisions be said to create the law? The meaning of "committed to agency discretion" remains a mystery; one commentator suggests that whenever law is applied, the action is reviewable. K. Davis, Administrative Law of the Seventies, § 28.16 (1976). While the formula for the less than fair value standard is set out in the regulations, see note 11 supra, no formalized standard of injury exists. See note 12 supra.
95. Exceeding delegated authority is a form of abusing discretion that is reviewable under the Act. 5 U.S.C. § 706(2)(A) (1976). Kleberg also permits review of such agency action to determine whether the agency stayed within its statutory boundaries. See text accompanying note 46 supra.
Problems will arise, however, in applying this broader review to antidumping proceedings.

The existing framework for appeals under the Antidumping Act would frustrate the effective use of either the arbitrary and capricious or substantial evidence standard. Confidential treatment renders much of the information on which the agency bases its determinations unavailable to the litigants and the courts. The record before the reviewing court may not even contain the data that the agency considered most persuasive. In addition, the parties are not permitted to test the assumptions, evidence, and conclusions advanced by their opponents. The hearing allowed to the interested parties involves the submission of information and presentation of a statement to the agency but does not permit cross-examination of the opposition. The agency may weigh the hearing as it chooses in its final determination, thus often reducing it to a device for placating the interested parties. With such a meager record before it, a reviewing court could neither evaluate the capriciousness of an agency determination nor search for substantial evidentiary support for that action. In addition, the prevailing view in the courts rejects the arbitrary and capricious, substantial evidence, and trial de novo standards as inappropriate for antidumping review.

Problems will also arise from the difficulty of characterizing agency determinations as “rulemaking” or “adjudication.” In all cases under the

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96. 5 U.S.C. § 706 (1976) provides:
The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence . . . reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

97. The Treasury Department accords material confidential treatment if disclosure will cause “substantial harm to the competitive position” of the informant, have a “significantly adverse effect” upon such person, or “impair the Secretary’s ability to obtain necessary information in the future.” 19 C.F.R. § 153.23(a) (1978). Information usually considered confidential includes business or trade secrets, production costs, distribution costs unless freely available, names of particular customers, and the prices at which particular sales occurred. Id. § 153.23(c). The International Trade Commission follows a similar approach. See id. § 201.6(a).

98. See notes 56-62 supra and accompanying text.

99. See notes 50-55 supra and accompanying text.

100. See notes 74-75 supra and accompanying text.
APA, a reviewing court may set aside agency action that fails to meet statutory, procedural, or constitutional requirements, or is otherwise arbitrary and capricious.\textsuperscript{101} If the action represents rulemaking\textsuperscript{102} or adjudication,\textsuperscript{103} the standard of substantial evidence will also apply.\textsuperscript{104} Anti-dumping determinations do not fit easily into this construct because they constitute a mixture of rulemaking and adjudication. Rulemaking is considered "legislation on the administrative level," directed not so much at particular parties as towards situations.\textsuperscript{105} Dumping orders, although formulated in the context of a particular entry of merchandise, affect future entries of merchandise of the same kind or class. For this reason, some consider dumping investigations to be rulemaking.\textsuperscript{106}

Since the dumping investigation concentrates on a particular importation of goods and affects the substantial property interests of the importer or owner of the goods, the proceedings also contain elements of adjudication.\textsuperscript{107} The amendments made to the Antidumping Act to provide procedural safeguards for the interested parties manifest some congressional recognition of the adversarial nature of the proceedings.\textsuperscript{108} The proceedings, however, still fail to conform to the APA's model of adjudication based on a public hearing. The hearings conducted pursuant to the Antidumping Act are exempted from the rigorous requirements of the Administrative Procedure Act and are but one factor in each agency's determination.\textsuperscript{109} It could be argued that since the administrative actions in antidumping investigations do not fall entirely within either category of rulemaking or adjudication, the findings should not be reviewed on the basis of the substantial evidence standard. The better approach, however,

\textsuperscript{102} Rulemaking refers to the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (1976). A "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ."  Id. § 551(4).
\textsuperscript{103} Adjudication is the "agency process for the formulation of an order."  Id. § 551(7). An "order" is defined as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making. . . ."  Id. § 551(6).
\textsuperscript{106} Id.
\textsuperscript{107} See Fisher, supra note 3, at 149; Metzger & Musrey, supra note 65, at 327-28.
\textsuperscript{108} See text accompanying note 24 supra.
\textsuperscript{109} The International Trade Commission inserts a boilerplate paragraph into each determination:

In arriving at its determination the Commission gave due consideration to written submissions from interested parties, evidence adduced at the hearing, and all factual information obtained by the Commission from questionnaires, personal interviews, and other sources.

See, e.g., Primary Lead Metal from Australia and Canada, supra note 82, at 17,629.
would be to acknowledge that the proceedings represent a hybrid of rule-making and adjudication, and thus should be afforded the added scrutiny of the substantial evidence test.

The blind application of the Administrative Procedure Act to antidumping proceedings would fail to ensure effective judicial review. Such a step must be accompanied by an assessment of the nature of antidumping determinations in order to resolve effectively the issues of reviewability and the applicable standard of review. Resolving both of these issues requires clarification of the legislative intent underlying the Antidumping Act, which, in part, explains the courts' reluctance to confront the issue of the APA's applicability. In addition, the review envisioned by the Administrative Procedure Act does not fuse easily with the existing provisions of the Antidumping Act. The informality of antidumping proceedings thwarts the courts' efforts conscientiously to assess the bases of the agency's determination. The need for specifically adapting the standards of review available under the Administrative Procedure Act to the objectives embodied in the Antidumping Act is apparent.

B. PROPOSED LEGISLATIVE REFORM: S. 2857

The 96th Congress will attempt to rationalize the administration of the Antidumping Act through a number of bills, the principal one being S. 2857. In its present form, this bill purports to restructure the system of judicial review of antidumping proceedings by broadening the statutory scope of review, clarifying the appropriate standard, and extending standing to challenge determinations of the Treasury Department and the International Trade Commission to "[a]ny person adversely affected" by such a determination. Unfortunately, the bill does not successfully resolve the complex issues surrounding these concerns.

The bill does not expressly mandate review of dumping orders or affirmative less than fair value and injury determinations. It does, however, acknowledge the judicial expansion of the present statutory scope of

110. See bills cited in note 1 supra.
111. Customs Court Act of 1978, S. 2857, 95th Cong., 2d Sess. (1978) [hereinafter cited as S. 2857]. All citations are to the revised draft contained in Hearing on S. 2857, supra note 63, at 270-83. First introduced in the second session of the 95th Congress, the bill must be reintroduced before the present Congress may take action upon it. Proponents of the bill expect to submit a revised draft to Congress in mid-1979. Interview with Michael J. Altier, Deputy Counsel, Subcomm. on Improvements in Judicial Machinery, Feb. 2, 1979.
112. S. 2857, supra note 111, § 601(g) (proposed 28 U.S.C. § 1516(i)(1)).
113. No mention of such review is made in the text of the bill. A summary of the bill's key reforms similarly omits such review. See Hearing on S. 2857, supra note 63, at 56 (Statement of Barbara Babcock, Assistant Attorney General, Civil Div., U.S. Dep't of Justice).
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review by permitting domestic manufacturers and producers to immediately appeal negative less than fair value and injury determinations. Thus, the unequal treatment presently accorded importers and domestic producers will continue under this proposed legislation.

Closely allied to the provision on the scope of judicial review is that dealing with the standard to be applied in such review. As a consequence of this relationship, the inequities of the former are not only repeated but also magnified in the latter. The basic standard of review for appraisal protests would remain trial de novo. However, use of this piercing standard of review would be hedged with two important qualifications. First, the bill expressly provides that this standard would not apply to the review of “a particular issue . . . of a type traditionally viewed as suitable for determination under any other standard of review.” Presumably this clause would cover review of the factual determinations underlying dumping findings. Even if it is not so interpreted, the bill further provides that negative less than fair value and injury determinations shall be reviewed according to the standards enumerated in the Administrative Procedure Act with the exception of the substantial evidence and trial de novo standards. Thus, the bill appears to provide less extensive review of factual determinations in actions brought by domestic parties than in those brought by importers. In reality, the failure to provide explicitly for review of affirmative dumping findings in actions brought by importers would limit review in these actions to the *Kleberg* standard, which is much less extensive than those of the APA.

The treatment on appeal of affirmative and negative determinations would also differ in the record forwarded to the court. An importer ap-

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114. *See* notes 71-72 *supra* and accompanying text.

115. *S. 2857, supra* note 111, § 601(e) (proposed 19 U.S.C. § 1516(d)). The right of domestic producers to appeal and contest negative less than fair value determinations was initially provided by the Trade Reform Act of 1974. *See* text accompanying note 33 *supra*.


117. *Id.* (proposed 28 U.S.C. § 2640(a)).

118. *See* *Hearing on* *S. 2857, supra* note 63, at 158 (Statement of Andrew P. Vance, Attorney Representing the Customs Bar).

119. *See* note 96 *supra*.

120. *S. 2857, supra* note 111, § 402 (proposed 28 U.S.C. § 2640(b)).

121. The bill attempts to preserve the standard of review presently applied to affirmative dumping determinations. The courts have never used the more exacting scrutiny of trial de novo in such review. *See* *Hearings on* *S. 2857, supra* note 63, at 84 (Statement of Michael H. Stein, General Counsel, International Trade Commission). *See also* text accompanying notes 73-75 *supra*.

122. *See* text accompanying notes 95-96 *supra*.

123. The bill would require the Customs Court to “determine the matter upon the basis of the record made before [it].” *S. 2857, supra* note 111, § 402 (proposed 28 U.S.C. § 2634(a)). The record would consist of “(1) consumption or other entry; (2) commercial invoice; (3) spe-
pealing the imposition of dumping duties presumably could offer the published dumping finding and perhaps even a hearing transcript as part of the record. The evidence compiled in the Customs Court during review of no injury and negative less than fair value determinations would be far more comprehensive, however, and would even allow in camera review of confidential information possessed by the International Trade Commission or Treasury Department.\footnote{Id. (proposed 28 U.S.C. § 2634(b)). In a negative less than fair value appeal, the bill would require the Secretary of the Treasury to furnish the “contested determination, the findings or report upon which it is based, a copy of any reported hearings or conferences conducted” and “any documents, comments or other information obtained on a confidential basis and including with the latter a nonconfidential description of the nature of said confidential documents, comments, or information.” \textit{Id.} Further, “[t]he confidentiality afforded such documents, comments, or information shall be preserved in the litigation, but the courts may examine the confidential material \textit{in camera} if necessary to the disposition of the litigation.” \textit{Id.}}\footnote{A similar provision would govern no injury appeals. \textit{Id.} (proposed 28 U.S.C. § 2634(c)).}

The bill would open antidumping protests to “any person adversely affected or aggrieved” by a negative determination.\footnote{Id. (proposed 28 U.S.C. § 601(g) (proposed 19 U.S.C. § 1516(j)(1))).} This change would extend the protection of the antidumping laws to domestic producers engaged in a type of business related to that which is directly affected by the imported goods as well as those persons employed in the industry directly experiencing injury. Although these parties may suffer injury as a result of the importation, they traditionally were denied access to the courts to contest dumping determinations.\footnote{See notes 63-64 \textit{supra} and accompanying text.}\footnote{S. 2857, \textit{supra} note 111, § 601(g) (proposed 19 U.S.C. § 1516(c)(4)).} The bill would provide these parties with limited judicial review of actions taken by the Secretary of the Treasury or International Trade Commission.

Three limits would be placed on this type of review. First, these parties could obtain review of an agency determination only after a domestic producer protested to the agency and the agency reviewed its own determination.\footnote{Id. (proposed 19 U.S.C. § 1516(j)(2)).} Thus, in the absence of such a protest, no review would be available to these adversely affected parties. Second, the power of the reviewing court would be limited to affirming the agency decision or remanding it to the agency for further consideration; the reviewing court could not modify the agency determination.\footnote{Id. (proposed 19 U.S.C. § 1516(i)(2)).} Third, the standard of review for “adversely affected” petitioners would be quite restrictive and limit review to scrutiny of the record of the agency’s decision.\footnote{Id.} The factual findings of
the Secretary of the Treasury and the International Trade Commission would be conclusive on the court and the parties, with remand occurring only if the action was found to be "arbitrary, capricious, or contrary to the applicable statute."130

The enactment of this bill would greatly increase the opportunity to use the Antidumping Act to harass importers with baseless dumping allegations and generally to subvert the Act to serve protectionist ends. The provisions enumerating standing for adversely affected parties lean heavily on the side of domestic interests. No provision allows a person adversely affected by an affirmative determination to contest it even though the importer of the goods might choose not to pursue his remedy.131 If adversely affected persons are to be given standing under the Antidumping Act, the Act should provide for judicial review for persons adversely affected by affirmative as well as negative determinations.132 Similarly, if domestic producers are to be given the right to appeal negative injury determinations, a comparable right to appeal affirmative agency findings should be provided to importers.133 Lastly, the same standard—that of substantial evidence—should apply to the review of all actions brought under the Act.134 What S. 2857 would provide, then, is increased protection of domestic producers and related parties rather than the necessary clarification and reform.

C. A SUGGESTION TO FACILITATE EFFECTIVE REVIEW

Legislative action is necessary to rationalize the law governing the review of dumping determinations. Blanket application of the Administrative Procedure Act will not solve the issues surrounding reviewability and the appropriate standard of review. Enabling legislation would be required to adapt the Act to the specific problems addressed by the antidumping laws. Unfortunately, S. 2857 does not ensure effective review because it fails to offer comprehensive reform.

130. Id. (proposed 19 U.S.C. § 1516(i)(3)).
131. See Gerhart, supra note 73, at 1165. Gerhart postulates that an importer possesses no incentive to contest erroneous decisions of customs officers under the present procedures. But an importer loses potential business by being forced to raise his prices upon imposition of dumping duties. Thus, importers of a class or kind of merchandise subjected to a dumping order possess a substantial economic incentive to contest erroneous orders.
132. One bill currently pending in Congress would amend the Antidumping Act to allow adversely affected foreign manufacturers this right of protest. S. 223, supra note 1, § 207.
133. S. 223 would explicitly allow review of any finding or order in whole or in part. Id.
134. S. 223 would mandate affirmance of agency determinations “if supported by substantial evidence on the record as a whole,” irrespective of which party initiates the action. Id. §§ 207-208.
Any proposal for reform must first outline the scope of review. A provision should be added to Title 19 of the United States Code expressly authorizing judicial review of dumping orders for their factual bases. This would end the current practice of inferring the court's power to review dumping orders from statutes designed to govern only classification and appraisal controversies.

Opportunities to contest agency determinations should be provided equally to importers and domestic producers. Importers should be allowed to seek review of affirmative less than fair value and injury determinations and no longer be limited to review of procedural regularity. Domestic producers must be provided comparable procedures for review of negative less than fair value and injury determinations. Since American manufacturers receive immediate review of negative findings, importers should be treated equally and not be forced to await the actual liquidation of dumping duties. An importer whose merchandise is the subject of an antidumping investigation should be allowed to contest the validity of a dumping order upon its issuance. To avoid abuse of this right, however, the determination of a dumping order's validity should be given res judicata effect. In this way, once the dumping order is upheld, protests would be restricted to issues involving the action of the customs officer in imposing dumping duties on a particular entry of merchandise as now governed by existing legislation.

Although this suggestion would separate the determination of the validity of a dumping order from the protest of the imposition of dumping duties, it need not unduly prolong the imposition of dumping duties. The dumping order is a final determination pertaining to a certain class or kind of imported merchandise; the actual imposition of dumping duties is a sanction applied to particular entries falling within the scope of the original dumping order. Presently, the dumping duties must be liquidated before the courts will entertain protests of the dumping order or actual assessment. In the case of invalid dumping orders, this process is inefficient and potentially devastating to the importer. It would be just as efficient to allow an importer to contest immediately the dumping order while permitting customs officers to continue their function of implementing the


136. See Myerson, supra note 11, at 196.

137. There is some support for advancing the date of the imposition of duties by requiring the payment of estimated duties immediately following an affirmative dumping finding. See S. 264, supra note 1, § 208; S. 223, supra note 1, § 104. S. 223 would accompany this change with a provision allowing immediate appeal of affirmative dumping orders. Id. § 207.

order and calculating the special duties to be assessed. Protests of the imposition of dumping duties would still require liquidation of duties prior to judicial review. An importer could elect to protest the dumping order and the assessment separately, but would only bear this added expense after weighing the strength of his claim against the probability that liquidation will be unduly delayed by contesting the validity of the order.

In addition to clarifying the scope of review, reform must also resolve the confusion over the appropriate standard of review. Protests of dumping findings, whether brought by importers or domestic producers, should be subject to one standard of review after equivalent records are compiled in the reviewing courts. Review should not be limited to the arbitrary and capricious standard which allows a court to uphold an agency action if some evidence justifies it. Nor should review extend to the substitution of the court’s judgment for that of the agency entrusted with the original determination. The appropriate standard of review should be the substantial evidence test, but the burden should be upon the agency to prove its action correct. Use of this standard would prevent abuses of agency discretion without involving the reviewing court in the actual determination process.

The recent amendments to the Antidumping Act facilitate review under the substantial evidence standard but do not go far enough. The Act now requires publication of the reasons underlying the dumping order. Review predicated solely on this record is inadequate, however, because the Secretary of the Treasury and the International Trade Commission often base their decisions upon confidential information. All information gathered by the relevant agency should be accessible to the reviewing court. If the evidence contained in the public record does not substantially support the agency finding, the court should be allowed to conduct in camera review of the confidential information.

The question remains whether a transcript of the hearing conducted at the request of the parties to an antidumping investigation should be included as part of the record considered by the reviewing court. The hearing procedure developed under the Antidumping Act was not designed

139. This analysis suggests that the arbitrary and capricious, substantial evidence, and de novo standards of review lie on a continuum with the first representing the least piercing review. At least one noted commentator suggests that the arbitrary and capricious standard has merged with the substantial evidence standard. See K. Davis, supra note 94, at ¶ 29.00.

140. This change would amount to a reversal of the present allocation of the burden of proof. See text accompanying note 74 supra.

141. One bill pending in Congress would include the hearing transcript in the record forwarded to the reviewing court. S. 223, supra note 1, §§ 207-208.
to produce a record important to an agency decision.\footnote{See Hearing on S. 2857, supra note 63, at 84 (Statement of Michael H. Stein, General Counsel, International Trade Commission).} In fact, the hearing fails to further the interest of either party to the investigation and amounts to little more than an empty gesture. The parties should at least be afforded the opportunity to test the assertions of their opponents through cross-examination. Through this reform, the record of the hearing would become more valuable to a reviewing court as a realistic statement of the controversy rather than a collection of self-serving statements by the parties. The danger of such a hearing evolving into a formal and lengthy proceeding is obvious and the agencies involved must guard against this possibility. Although such a task might be difficult, it is far from impossible.

Finally, standing could be extended to those persons adversely affected by agency determinations—whether affirmative or negative. Given the adjudicatory nature of antidumping investigations and the danger of unnecessarily prolonging the proceeding, such a provision would be unwise. Other persons adversely affected indirectly by an antidumping decision should be allowed to intervene on appeal, but the antidumping protest should be restricted to those parties with direct interests at stake: the importer of merchandise subjected to dumping duties and representatives of the industry directly injured.

CONCLUSION

Both Congress and the United States Customs Court recognize the inadequacy of the review currently provided under the Antidumping Act. Although the Customs Court possesses some latitude in determining the appropriate scope of review, the proper solution lies with legislative reform. Unfortunately, the proposals offered by Congress to date fall short of providing effective review. Congress must explicitly provide for judicial review of the dumping finding and its factual basis. It must also delineate the appropriate scope of review—one that will allow the courts to go beyond "rubber stamping" an agency determination but will not permit the court to compile and weigh the evidence for itself. Use of the substantial evidence standard would give the courts this flexibility and ensure that the reasons given support the determination. Until Congress acts in the manner described, judicial review of antidumping proceedings will continue to be cursory and to treat the interested parties unequally.

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