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FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE CHAIRMAN

October 18, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

**COMMISSION
APPROVED**

Dear Mr. Chairman:

Thank you for your letter of September 26, 1985, requesting the views of the Federal Trade Commission concerning S. 1655, the "Unfair Foreign Competition Act of 1985." Like S. 236, proposed previously in this session, S. 1655 would amend both the Antidumping Act of 1916 and the Clayton Act. According to Senator Specter, sponsor of the bill, S. 1655 modifies S. 236 in the areas of venue, standing, and preferred remedies.¹ S. 1655 is apparently intended, like S. 236, to create additional disincentives to dumping and foreign subsidies.² The Commission opposes enactment of S. 1655.

By letter of June 17, 1985 (copy attached), the Commission expressed its views regarding S. 236. The Commission opposed passage of S. 236 because it could injure consumers by encouraging the formation of cartels between domestic producers and importers, by denying consumers the benefits of fairly traded imports, by discouraging competitive behavior by importers, and by causing confusion in the enforcement of the Clayton Act and the antidumping and countervailing duty laws. As discussed more fully in our June 17, 1985 letter, S. 236 could create these adverse effects through provisions, *inter alia*, that would grant a final determination under Title VII of the Tariff Act of 1930 *prima facie* status in a private antidumping suit for treble damages, expose domestic firms "related" to foreign sellers to the risk of treble damage actions, expand judicial discovery sanction powers to include injunctions against further imports, and impose treble damage liability without reference to competitive effects or purpose. In addition, the bill is inconsistent with Clayton Act provisions regarding standing,

¹ See comments by Senator Specter, 131 Cong. Rec. S11646-48 (daily ed. September 18, 1985). S. 1655 also creates a private right of action for customs fraud. The Commission expresses no views regarding the customs fraud provisions.

² Id. at S11646-47.

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venue, tolling, and injunctive relief. Furthermore, it includes subsidies in the calculation of the foreign value of allegedly dumped goods without reference to any subsidy determination or final action under Title VII. It therefore creates the potential for inconsistent enforcement of the antitrust and trade laws.

The Commission has carefully reviewed the provisions of the current bill, S. 1655, and found that the only significant changes in the new bill are the new section on customs fraud and the inclusion of the Court of International Trade as a forum for bringing private antidumping suits. Consequently, the Commission concludes that the objections previously expressed in relation to S. 236 apply equally to S. 1655. The added language in S. 1655 permits private antidumping suits to be brought in the Court of International Trade as well as in the district court of the District of Columbia. However, it does not resolve the Commission's concerns regarding the potential for confusion in the application of the Clayton Act and the antidumping and countervailing duty laws. In fact, it may increase this potential. Because the Court of International Trade does not have jurisdiction over traditional antitrust claims, it is possible that a single set of facts giving rise to allegations of both dumping and violations of the Sherman or Clayton Acts could be heard by two different courts and lead to inconsistent results.

Accordingly, while the Commission understands the desire of the sponsors of S. 1655 to ensure "vigorous enforcement" of trade laws by "nonprotectionist means,"³ for the reasons summarized above, the Commission opposes those provisions of S. 1655 that would amend the Antidumping Act of 1916 or the Clayton Act.

By direction of the Commission.



Terry Calvani
Acting Chairman

3 Id. at S11646.



OFFICE OF
THE CHAIRMAN

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 17, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of April 22, 1985, requesting the views of the Federal Trade Commission concerning S. 236, which would amend both the Antidumping Act of 1916 and the Clayton Act and, in our view, would also have the effect of amending the Federal Rules of Civil Procedure. The stated purpose of S. 236 is to create additional disincentives to dumping.¹ S. 236 may, however, encourage the formation of cartels, stimulate other anticompetitive acts harmful to the United States consumer, and produce confusion in the application of the Clayton Act as well as in the operation of the antidumping and countervailing duty laws of Title VII of the Tariff Act of 1930, as amended. The Commission, therefore, opposes S. 236.

I. S. 236 may injure consumers by denying them the benefits of fairly traded imports and by encouraging the formation of cartels

S. 236 would amend the Antidumping Act of 1916,² 15 U.S.C. §72, in three principal ways for the purpose of making it easier for plaintiffs to prevail in private civil litigation. These changes could also have the unintended effects of restricting fairly traded imports and fostering cartels between United

1 See comments by Senator Specter, 131 Cong. Rec. S 476-480 (daily ed. January 22, 1985).

2 S. 236 calls Section 801 of the Act of September 8, 1916, both the "Unfair Competition Act of 1916" and "An Act to raise revenue, and for other purposes." Courts generally refer to it as the Antidumping Act of 1916. See Zenith Radio Corp. v. Matsushita Electric Industries Co., Ltd., 723 F.2d 319, 322 (3d Cir. 1983).

States firms and foreign companies. First, S. 236 would eliminate the current provisions in the Antidumping Act of 1916 which establish liability provided that the dumping³ is done "commonly and systematically," is "substantial," and is "done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States" (emphasis added). 15 U.S.C. §72. Second, S. 236 would provide that a final determination by the Department of Commerce ("Department") and the International Trade Commission ("ITC") that there has been "dumping" in violation of Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. §§1673 et seq., is prima facie evidence of a violation of the Antidumping Act of 1916. Third, S. 236 would permit the District Court to enjoin the further importation of any allegedly dumped items by the defendant if the defendant fails to comply with discovery orders. These three changes will make a final determination by the Department and the ITC under Title VII a powerful sword in the hands of private plaintiffs and will, therefore, encourage additional antidumping petitions and the settlement of antidumping petitions brought, or threatened to be brought, under Title VII⁴ -- regardless of their possible merit.

3 "Dumping is 'price discrimination between purchasers in different national markets.'" Zenith Radio Corp. v. Matsushita Electric Industries Co., 723 F.2d 319, 322 (3d Cir. 1983) quoting J. Viner, Dumping: A Problem In International Trade 4 (1923, reprinted in 1966). Under the Antidumping Act of 1916 dumping is the difference between the price in the United States and the price in foreign countries. 15 U.S.C. §72. Under Title VII the dumping margin is the difference between the United States price and the foreign market value, with the foreign market value being either the price in the foreign country or the "constructed value." 19 U.S.C. §1673, as defined by 19 U.S.C. §§1677a and 1677b. Constructed value is the cost of materials and fabrication or other processing plus at least 10 percent for "general expenses" and at least 8 percent for "profit." 19 U.S.C. §1677b(e)(1). S. 236 adopts the Title VII definition.

4 The possible use of a final judgment in a government antitrust action as prima facie evidence in a private antitrust action encourages the settlement of government antitrust actions, since a consent order cannot be so used.

Congress, through the antidumping and countervailing duty laws, not only wished to exclude "unfair" competition in the United States, but also wished to assure that Americans realize the benefits of "fair" competition. Thus, if foreign firms are selling their products in the United States at a low price, not because of dumping, but rather because they are more efficient, then consumers are entitled to the benefits that they derive from the imported products. The effect of providing such additional power to private plaintiffs may be the withdrawal from the United States market of many fairly traded imports by firms leery of the risks and costs of litigation spawned by S.236. The result will be higher prices both for the imports that remain and for the competing domestic products, thereby imposing large costs on the United States economy and the United States consumer.⁵

Moreover, Congress has observed that settlements of Title VII dumping petitions may not be in the public interest and may lead to cartels. Section 604 of Title VI of the Trade and Tariff Act of 1984 amended the procedures, 19 U.S.C. §1673c, by which a Title VII dumping investigation may be terminated or suspended. This amendment reflects a Congressional "concern that the countervailing duty and antidumping laws can be used by domestic industries and foreign governments to obtain cartel or orderly marketing arrangements that may be contrary to the public interest . . ." H.R. Rep. 98-752, 98th Cong., 2d Sess. (1984) at 18. Congress indicated that "In most cases the [antidumping] investigation should be completed [by the Department and the ITC] and duties imposed rather than permitting the foreign country to continue unfair trade practices and using these laws to guarantee either the domestic industry of [sic] foreign producers a share of the U.S. market." *Id.* at 19. S. 236 will, however, have the effect of encouraging foreign firms accused of dumping under Title VII to settle rather than run the risk of having a final adverse determination by the Department and the ITC which could

5 See, for example, David G. Tarr and Morris E. Morkre, Aggregate Costs to the United States of Tariffs and Quotas on Imports: General Tariff Cuts and Removal of Quotas on Automobiles, Steel, Sugar, and Textiles (Bureau of Economics Report to the FTC, USGPO, 1984).

then be used as prima facie evidence in a private treble damage action⁶ against them or the United States firms who import their products.

The use in S. 236 of a final determination by the Department and the ITC as prima facie evidence in a private action lacks the safeguards built into the Clayton Act's use of "a final judgment or decree" as prima facie evidence in a private antitrust action.⁷ 15 U.S.C. §16(a). In an antitrust action brought by the Department of Justice, final judgment is rendered only after the District Court has followed the Federal Rules of Evidence and the Federal Rules of Civil Procedure. The Federal Trade Commission's proceedings⁸ are subject to the Administrative Procedure Act, 5 U.S.C. §§551 et seq., and the Commission adheres to procedures and evidentiary rules substantially analogous to

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- 6 The Antidumping Act of 1916 provides for treble damages. Section 2 of S. 236, by virtue of its making the Antidumping Act of 1916 an "antitrust law" within the meaning of Section 1 of the Clayton Act, apparently retains this treble damage provision.
- 7 We note that the Title VII findings of the Department and the ITC are admissible in private litigation under Rule 803(8)(C) of the Federal Rules of Evidence (the hearsay exception dealing with government investigations). Zenith Radio Corp. v. Matsushita Electrical Industries Co., 723 F.2d 238, 266-271 (3d Cir. 1983), cert. granted on other issues, 105 S. Ct. 1863 (1985).
- 8 In initiating and prosecuting antitrust actions under Section 5 of the FTC Act the Commission is obligated to act in the public interest, 15 U.S.C. §45(b), and the Clayton Act accords prima facie evidentiary status only to final judgments rendered in government, as opposed to private, antitrust suits. In contrast, Title VII permits private parties to initiate actions and act to some extent as the prosecutor of their substantive claims. Title VII also does not explicitly require the Department or the ITC to consider the public interest when making their determination of whether to impose dumping tariffs.

those governing District Court adjudications.⁹ However, Title VII proceedings before the Department and the ITC are specifically not governed by the Administrative Procedure Act,¹⁰ 19 U.S.C. §1677c(b), and neither agency accords parties

9 It is unclear whether final orders of the Federal Trade Commission are given prima facie effect under Section 5(a) of the Clayton Act. The Supreme Court has explicitly not stated an opinion on this question, Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317-18 (1965), and the lower courts are divided. Compare Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 66-76 (1st Cir. 1970) (Commission order under Section 2(a) of the Clayton Act is prima facie evidence) and Purex Corp. Ltd. v. Proctor & Gamble Co., 453 F.2d 288 (9th Cir. 1971), cert. denied, 405 U.S. 1065 (1972) (Commission order under Section 7 of the Clayton Act is prima facie evidence) with In Re Antibiotic Antitrust Actions, 333 F. Supp. 317, 322-23 (S.D.N.Y. 1971) (Commission order under Section 5 of the FTC Act is not prima facie evidence). In amending Section 5(a) of the Clayton Act in 1980 to provide that findings of the Commission are not to be given collateral estoppel effect, Congress left open the question of which Commission orders, if any, are prima facie evidence. Congress said "While the amended bill precludes application of collateral estoppel to certain types of agency findings in a subsequent proceeding under the antitrust laws, any agency findings qualified for section 5(a) [of the Clayton Act] treatment will continue to be eligible for prima facie effect." H.R. Rep. 96-874, 96th Cong., 2d Sess. (1980) at 7, reprinted in 1980 U.S. Code Congressional and Administrative News at 2757.

10 For example, the ITC and the Department are required merely to maintain a record of any ex parte meetings with interested parties or other persons. 19 U.S.C. §1677f(a)(3). The Federal Trade Commission's rules prohibit any ex parte meeting between either a Commissioner or Administrative Law Judge, on the one hand, and either an employee of the Commission or a nonemployee on the other hand. 16 C.F.R. §4.7.

in these proceedings the protection of, or even follows, rules resembling the Federal Rules of Evidence or the Federal Rules of Civil Procedure.¹¹

In sum, S. 236 would provide a powerful incentive for United States firms to bring, or threaten to bring, Title VII petitions in order to force a settlement with foreign rivals that could create a cartel. The effects of these settlements may be the withdrawal from the United States of fairly traded imports, higher prices for United States consumers, and large costs to the economy.

II. S. 236 may injure consumers by putting a "cloud" over imports

Section 801(a)(1)(C) of S. 236 gives a private cause of action against "any importer of such [dumped] article into the United States who is related to such manufacturer or exporter." S. 236 does not define "related," and the term could be construed to include a mere "buyer-seller" relationship. The threat of a treble damage action could discourage United States firms from importing foreign products, especially if United States rivals suggest, privately or publicly, that the foreign goods are being "dumped." Moreover, by proscribing even occasional sales at "dumped" prices, S. 236 may discourage firms from selling foreign goods in the United States, since these firms may not know the precise average price in the foreign market when they are setting the price in the United States. The imposition of such a "cloud" over our imports could well reduce competition and hurt United States consumers.

III. S. 236 may injure consumers by enjoining imports if defendants do not comply with discovery orders

Section 801(f) of S. 236 provides that the District Court of the District of Columbia may enjoin the defendant from further importation of the allegedly dumped articles if the defendant fails to comply with a discovery order. Admittedly, discovery from foreigners raises difficult problems in any court proceedings. However, none of the sanctions for failure to comply with discovery orders presently enumerated in Rule 37 of

11 These proceedings do, of course, provide for notice, hearings, and judicial review. However, the Department of Commerce does not permit cross-examination of witnesses under oath. 19 C.F.R. §353.47.

the Federal Rules of Civil Procedure specifically provides for the enjoining of the importation of foreign goods. S. 236 could, therefore, be construed as expanding the discovery sanction powers of a court in the case of antidumping suits. Our experience in obtaining evidence from foreigners, as part of our antitrust investigations, reveals that in some instances foreigners are prohibited by their own laws from complying with requests for evidence. Thus, under S. 236, a United States plaintiff might be able to achieve a halt in the importation of goods -- which, of course, could lead to an increase in the price paid by United States consumers -- merely by filing an antidumping suit and making a discovery request on a foreign defendant who is prohibited by foreign law from complying with the request, without regard to whether the goods are in fact being dumped.¹²

IV. S. 236 could discourage behavior that promotes competition

As Assistant Attorney General for Antitrust William Baxter said, when testifying in opposition to an earlier version of S. 236, "The policies underlying the antidumping laws may be to some extent at odds with the policies that form the basis of our antitrust laws." The Unfair Competition Act of 1983: Hearings on S. 127 and S. 418 Before the Senate Committee on the Judiciary, 98th Cong., 1st Sess. (1983) at 24. While the antitrust laws are designed to protect competition, the dumping laws are intended to protect domestic industries from low-priced imports.

Treble damages under the antitrust laws have traditionally been reserved for acts which have the purpose or effect of adversely affecting competition and which are, therefore, deemed to be particularly pernicious to a free market society. As discussed above, the Antidumping Act of 1916 predicates liability only on "commonly and systematically" importing goods at prices

12 Under Section 801(a)(2)(A) of S. 236, a successful plaintiff may recover damages and obtain "such equitable relief as may be appropriate." It is not clear whether such equitable relief would include a total ban on the imports at issue. Consequently, a plaintiff may be able to achieve greater prospective relief against dumped imports pursuant to the discovery sanction provisions of S. 236 than could be obtained were the plaintiff to prevail on the merits. This potential discrepancy could invite abuse in the form of non-meritorious, or marginally meritorious, actions in which the initiation of court proceedings and discovery is more important to the plaintiff than recovery on the merits.

"substantially" lower than the foreign market value, when done with the "intent" of injuring the domestic industry. 15 U.S.C. §72.

However, S. 236, while retaining the treble damage remedy of the Antidumping Act of 1916, permits an action to be brought based on a single sale involving even a very slight price differential, without regard to the seller's intent. S. 236 essentially adopts the standards of Title VII -- importation at less than fair value which threatens or causes material injury to "an industry in the United States" -- as the basis for awarding treble antitrust damages. Consequently, S. 236 would permit recovery of treble damages in instances involving procompetitive behavior on the part of an importer who, for example, engages in occasional sales at less than the foreign price in order to meet competition from United States rivals.

V. S. 236 may cause confusion in the enforcement of the Clayton Act and other statutes

1. Confusion with provisions of the Clayton Act

Section 2 of S. 236 amends Section 1 of the Clayton Act, 15 U.S.C. §12, so that the Antidumping Act of 1916 is deemed an antitrust law. This amendment may yield confusion in the enforcement of the Clayton Act in the areas of standing, venue, tolling of the statute of limitations, and injunctive relief, especially when the same activities are alleged to constitute dumping as well as violations of the Sherman or Clayton Acts. See, e.g., Zenith Radio Corp. v. Matsushita Electric Industries Co., 723 F.2d 238 (3d Cir. 1983), cert. granted, 105 S. Ct. 1863 (1985) (complaint alleging violations of the Antidumping Act of 1916, the Clayton Act, the Sherman Act, and the Wilson Tariff Act).

Section 4 of the Clayton Act, 15 U.S.C. §15, provides, in pertinent part, that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may sue in District Court. Section 801(a)(1)(C) of S. 236 provides "any person [who] is injured in his business or property by reason of such importation or sale [of dumped articles]" may sue. It is not clear which of these two standards for standing a plaintiff would have to satisfy.

Section 4 of the Clayton Act also provides, in pertinent part, that suit may be brought "in any district court of the United States in the district in which the defendant resides or is found or has an agent." See also Section 12 of the Clayton Act, 15 U.S.C. §22. Section 801(a)(1)(C) of S. 236 provides that

a suit may be brought in "the district court of the District of Columbia." It is not clear which of these two venue standards would be applicable.

Although both the Clayton Act and S. 236 specify a four-year statute of limitations for private suits (15 U.S.C. §15b and proposed Section 801(e)(1)), the provisions for tolling of the four-year period differ. Under the Clayton Act, a private cause of action "based in whole or in part" on the same "matter" involved in a United States civil or criminal antitrust proceeding (excluding actions for damages) is tolled during the pendency of the government proceeding and for one year thereafter. 15 U.S.C. §16(b). Under Section 801(e)(2) of S. 236, the statute of limitations would be tolled during the pendency of any Title VII antidumping proceeding relating to "the importation in question" plus one year thereafter. It is not clear which tolling provisions would govern, particularly in situations where the activities of the defendant were alleged to constitute dumping as well as violations of the Clayton Act or Sherman Act. A plaintiff might claim that its antidumping action was tolled because of the pendency of a government antitrust action even though either no antidumping proceeding under Title VII had been brought or the Title VII proceeding had been finally determined several years previously.

Section 16 of the Clayton Act, 15 U.S.C §26, provides, in pertinent part, that a private party may obtain injunctive relief "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate. . . ." As discussed above, Section 801(f) of S. 236 provides that the District Court may enjoin the defendant's importation of the allegedly dumped articles if the defendant fails to comply with any discovery order. Section 801(a)(2)(a) of S. 236 provides that the District Court may grant "such equitable relief as may be appropriate." The injunction standards of S. 236 go well beyond the injunction standard of the Clayton Act and also fail to protect defendants against "an injunction improvidently granted." It is not clear which injunction standard would be applicable in a private dumping action.

2. Confusion with other statutory provisions

Two other aspects of S. 236 could create confusion in the courts' handling of private actions that allege violations both of the dumping law and of other statutes. Section 801(g)(2) of

S. 236 states that the court may examine confidential or privileged material in camera, but it omits any reference to the standards set forth in Rule 26(c) of the Federal Rules of Civil Procedure applicable generally to federal court litigation. Section 801(h) of S. 236 directs that private dumping suits be expedited but specifies no basis for determining priorities among other matters that are statutorily directed to be expedited, such as proceedings subject to the Speedy Trial Act, 18 U.S.C. §§3161 et seq., actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-5(f)(5) and 2000e-6(b), or merger enforcement proceedings under the Clayton Act, 15 U.S.C. §18a(f)(B).

VI. S. 236 may produce confusion in the operation of the countervailing duty and antidumping provisions of Title VII

The potential for confusion in the operation of the countervailing duty and antidumping laws of Title VII arises from Section 801(i)(2) of S. 236, which specifies that "foreign market value" and "constructed value" are to be increased by the amount of any foreign "subsidy."¹³ S. 236's provision for inclusion of foreign subsidies, as determined by the District Court, is without reference to any countervailing duty proceeding, or subsidy determination, by the Department. S. 236 would, therefore, create a serious potential for inconsistent determinations regarding the existence or amount of any subsidy by the Department and the Court of International Trade (which reviews the Department's decision), on the one hand, and by the District Court for the District of Columbia on the other hand.

13 Under both S. 236 and Title VII the dumping margin is the difference between the United States price and the foreign market value, with the foreign market value being either the price in the foreign country or the constructed value. Section 801(a)(1)(A) of S. 236; 19 U.S.C. §1673, as defined by 19 U.S.C. §§1677a and 1677b. Under Title VII the United States price is increased by the amount of the export subsidy. 19 U.S.C. §1677a(d)(1)(D). Suppose, for example, that the United States price is \$11, the foreign market value (excluding any subsidy) is \$20, and there is a \$3 export subsidy. Under Title VII, the dumping margin would be \$6 (\$20 - \$14) and the countervailing duty would be \$3. Under S. 236, the foreign market value would be increased by the amount of the subsidy to \$23, resulting in a dumping margin of \$9 (\$23 - \$14).

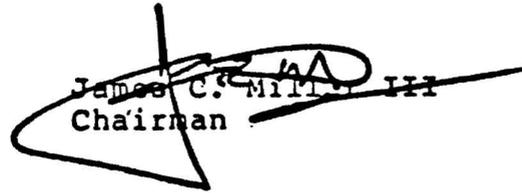
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This possible inconsistency is of particular concern given the complexity of subsidy determinations under the countervailing duty law.¹⁴

Conclusion

For the reasons stated above, the Commission concludes that enactment of S. 236 would have serious adverse consequences for United States consumers, for competition, for enforcement of the Clayton Act, and for administration of the antidumping and countervailing duty laws. The Commission, therefore, opposes S. 236.

By direction of the Commission.


James C. Miller III
Chairman

14 We also note that it is not clear how the prima facie status that S. 236 accords to a Title VII antidumping determination would apply to any subsidy alleged as part of the dumping margin under S. 236, particularly since S. 236 makes no reference to the existence or outcome of any Title VII countervailing duty proceeding involving the same product.