UNITED STATES TARIFF COMMISSION

POTASSIUM CHLORIDE (MURIATE OF POTASH) FROM CANADA, FRANCE, AND WEST GERMANY

Determination of Injury
in Investigation Nos. AA1921-58, 59, and 60
Under the Antidumping Act, 1921,
As Amended

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UNITED STATES TARIFF COMMISSION

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Washington

November 21, 1969

[AA1921-58/60]

POTASSIUM CHLORIDE FROM CANADA, FRANCE AND WEST GERMANY

Determinations of Injury and Likelihood of Injury

On August 22, 1969, the Tariff Commission received advice from the Treasury Department that potassium chloride, otherwise known as muriate of potash, from Canada, France, and West Germany is being, and is likely to be, sold in the United States at less than fair value within the meaning of the Anti-dumping Act, 1921, as amended. 1/ Accordingly, on that same date the Commission instituted Investigations No. AA1921-58 (with respect to imports from Canada), No. AA1921-59 (France), and No. AA1921-60 (West Germany) under section 201(a) of that Act 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 merchandise into the United States.

Notice of the institution of the investigations and of a joint hearing to be held in connection therewith was published in the Federal Register of June 28, 1968 (34 F.R. 13712). The hearing was held October 5-13, 1969.

1/ Treasury published a separate determination of sales at less than fair value for each country in the Federal Registers of August 23 and 26, 1969 (34 F.R. 13615, 13670).

In arriving at its determinations the Commission gave due consideration to all written submissions from interested parties, all testimony adduced at the hearing, and all information obtained by the Commission's staff.

On the basis of the joint investigations, the Commission has determined that an industry in the United States is being injured, and is likely to be injured on a continuing basis, by reason of the importation of potassium chloride, otherwise known as muriate of potash, from Canada, France, and West Germany, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended. 1/

STATEMENT OF REASONS

Views of Chairman Sutton and Commissioner Leonard

In our opinion, an industry in the United States is being, and is likely to be, injured by reason of the importation of potassium chloride from Canada, West Germany, and France, which is being sold at less than fair value (LTFV) within the meaning of the Antidumping Act, 1921, as amended.

In making this determination under section 201(a) of the Antidumping Act, 1921, as amended, we have considered the injured industry to be those facilities of domestic producers employed in the mining and refining of potassium chloride,

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1/ Commissioners Thunberg and Newsom dissent.

and have taken into account the combined impact on such industry of LTFV imports from all three countries collectively, rather than from each country individually.

The domestic industry

The term "an industry in the United States" in the Antidumping Act cannot, as claimed, be interpreted to mean "an industry in North America" in this or any other case. The statutory phrase contemplates protection of U.S. industries. In protecting domestic industry, the Congress was concerned not only for the welfare of the owners of producing plants, but also for the welfare of the employees in such plants and the communities of which they are a part. These interests are inextricably tied together. A multi-national producer of a product has no immunity to the operations of the Antidumping Act in connection with LTFV sales of its foreign product in the United States when the interests comprising the domestic industry viewed as a whole are being or are likely to be injured.

This situation is the one which prevails in the instant case. As previously indicated, we view the relevant industry to be those facilities of domestic producers employed in the mining and refining of potassium chloride. This industry embraces the total economic interests of the facilities of which it is comprised, including the workers. In our view, the Antidumping Act is designed

not only to protect the owners of the U.S. industry, but also is concerned with the derevative benefits that necessarily flow from the U.S. facilities to their employees and the communities in which they live.

The complaint on behalf of the domestic industry, so described, has been properly made in this case. A private citizen in Carlsbad, New Mexico, made the complaint with the Treasury Department. Support for his allegations has been given by domestic producers operating solely in the United States, civic-minded U.S. citizens, and public officials where domestic plants and workers are located.

Competitive impact of LTFV sales on domestic industry

The Commission has established clear precedent, over the 15-year period in which it has had jurisdiction to make "injury" determinations, that it will assess the effects of LTFV imports on a domestic industry by weighing the extent to which such imports have penetrated U.S. markets, taken away customers, and depressed market prices. Although other factors may enter into consideration, these are the basic factors most often considered in past cases.

In the case involving LTFV imports of pig iron from East Germany, Czechoslovakia, Romania, and the U.S.S.R. (Investigation

Nos. AA1921-52, 53, 54, and 55), views were stated (on pages 4-10 of the Tariff Commission print) as to why injurious LTFV imports from various countries must be considered collectively in weighing the extent of injury caused by a class or kind of merchandise. Following such principle, it is appropriate to make this determination that LTFV imports from all three countries named by the Assistant Secretary of the Treasury are causing injury to a domestic industry.

In addition, the Commission has held that an affirmative determination will ensue if the degree of injury is greater than de minimis, that is, more than trifling injury.

With respect to LTFV sales from Canada, an analysis of average delivered prices of approximately 80 percent of all potassium chloride sales in the United States during the peak sales periods (February) in 1967, 1968, and 1969 shows that the importers of Canadian potassium chloride undersold the domestic producers of potassium chloride at the ratio of 9 sales to 2, or in about 82 percent of the cases. Moreover, such practices of underselling would generally not have occurred had the sales of imports been made at fair-value prices since the margin of dumping 1/ at any given time generally exceeded the margin of

1/ The term "margin of dumping" connotes the difference between the Canadian market price (f.o.b. plant) and the price for which the imported product was sold (f.o.b. plant) to an arm's length buyer, or its equivalent.

underselling [1] several times. Such underselling has caused a series of incremental price reductions in the U.S. market within the past 2-1/2 years.

With respect to LTFV sales from West Germany and France, the facts are somewhat more difficult to weigh because more variables are present than in the case of imports from Canada. However, analysis of data regarding the prices obtained for domestic, West German, and French potassium chloride sold in recent years in the East Coast port markets which have traditionally been served by imports of potassium chloride from West Germany and France shows that their LTFV imports have been sold in most cases at prices below the price of the domestic product. This fact becomes clear after sales prices in these markets have been adjusted to delivered prices, [2] and after taking due account

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1/ The term "margin of underselling" connotes the difference between the price of Canadian potassium chloride and the price of domestic potassium chloride, delivered to the U.S. customer.

2/ It has been the practice of the Commission and the customs courts to compare delivered prices of the domestic vs foreign products in the United States in weighing the effect of LTFV imports on domestic industries and in determining the applicability of the Antidumping Act to such imports. See Commission determination on Titanium Dioxide from France (Investigation No. AA1921-31) where the Commission weighed the qualities of the domestic and foreign products when comparing their U.S. sales prices. See also the U.S. Customs Court case which involved a protest against the assessment of a dumping duty on certain imported Canadian flour which was sold in the United States at delivered prices generally higher than the price of domestic flour. The court stated that "Testimony was to the effect that the grade of the Canadian and American flour was practically the same." In commenting further on the situation, it said:

> The sales of Canadian-made flour sold in the United States were at higher prices than the American-made flour and thereby entirely destroy the effect of the dumping order of the Secretary of the Treasury or that of the appraiser.

United States v. C. J. Towers & Sons, T.D. 45495 (1932); appeal dismissed C. J. Towers & Sons v. United States, 20 C.C.P.A. 364, T.D. 46131.

of the differentials in market values between the domestic and the West German and French potassium chloride because of differences in quality, promptness in deliveries, and storage charges incurred in the use of the imported product. Even after liberal adjustments were made, the margins of underselling were often substantial and caused general incremental decreases in the prices of potassium chloride in each of the last three years in the market areas in which such imports were sold. Thus, although the LTFV imports from West Germany and France are small in contrast to those from Canada, it is appropriate to consider the cumulative impact of LTFV sales of imports from all three countries. 1/

The salient facts in this case can be summarized as follows:

	1966	1967	1968
Imports of Canadian KCl 1/ 2/-----	1,234	1,507	1,677
U.S. production of KCl 1/---------	3,036	3,072	2,492
U.S. consumption of KCl 1/--------	3,791	3,948	3,792
U.S. sales of domestic KCl 1/-----	2,342	2,182	1,906
Percentage of U.S. market taken by Canadian imports----------	33%	38%	46%
Percentage of utilization of U.S. industry capacity----------	78%	79%	69%

(Footnotes to appear on next page at end of table.)

1/ Had the imports from West Germany and France not been resold in the United States at prices below the price for comparable domestic potassium chloride, they would have not been included within the affirmative determination, but would have been treated as "technical sales at less than fair value". The fact that sales of imports of potassium chloride have traditionally established what might be termed a normal price for the product in East Coast port markets does not justify the importers' acts of lowering their prices, with the aid of LTFV purchases from abroad, for the purpose of holding

	1966	1967	1968
Average unit value of potassium chloride in United States (based on K_2O equivalent)------	37.1¢ 3/	27.5¢ 3/	23.0¢ 3/
Annual profit (P) or loss (L) of domestic industry in millions of dollars----------	$9.16 (P)	$1.60 (L)	$9.23 (L)

1/ 1,000 short tons K_2O equivalent.

2/ The first years shipment in 1962 totaled 337,000 tons and average annual shipments thereafter increased at almost the rate of 300,000 tons per year.

3/ Over the last 35 years the unit value rose gradually from 24 cents in 1934 to a high of 41.3 cents in 1965. The price dropped precipitously in the years 1966-1968, falling to 23 cents per unit in 1968, and it is continuing to fall to lower levels; some prices now being quoted at as low as 16 cents per unit. This price is considerably below the average cost of production of both the U.S. and Canadian industries.

It will be seen from the foregoing summarization that imports from Canada in a few short years have resulted in their portion of U.S. consumption increasing from 0 to about 50 percent. In addition, there have been consequent losses of sales by domestic producers, major shifts of U.S. customers from U.S. producers to Canadian producers, substantial unemployment of workers in the U.S. industry with consequent harm to their community, a substantial decline in prices, and an alarming shift from a viable profitable domestic industry to one now losing more than it used to make.

1/ Cont.--on to a traditional market when domestic producers step up their efforts to sell in such market.

For a discussion of the meaning of "technical sales at less than fair value" see cases involving imports of rayon staple fiber from Belgium, Cuba, and West Germany (Investigation Nos. AA1921-18, 20, and 21); and technical vanillin from Canada (Investigation No. AA1921-26).

The claim is made that these adverse conditions have resulted almost wholly from oversupply rather than from LTFV imports. The fallaciousness of this contention can be readily seen when it is realized that imports have been sold at significantly lower prices than the domestic product and that the margin of underselling is virtually always derived wholly from the margin of dumping which generally is several times as great. We must conclude, therefore, that the impact of LTFV imports is substantial and is causing injury to the domestic industry far in excess of the de minimis threshhold previously alluded to.

With respect to the claim advanced at the hearing that the proposed potash conservation regulations to be promulgated by the Government of Saskatchewan to be effective January 1, 1970, will alleviate the injurious impact of Canadian potash on the U.S. industry, it is observed that this matter relates solely to the issue of whether there is a likelihood of continued injury from LTFV imports from Canada. Although such regulations have now been issued, it is far too early to make any reasonable appraisal of their impact on the issue in question. Moreover, the evidence obtained gives no warrant for concluding that injury will not continue as a result of LTFV imports, particularly in light of the mushrooming growth of the Canadian industry.

Contentions not relevant to determination

A number of contentions were raised during the investigation which are not considered relevant to this determination. It was argued that a negative determination should ensue for such reasons as--there was no intent to injure the domestic industry, the assessment of a special dumping duty would in no way repair the economic situation and would merely be in the nature of a penalty, the present tense of the Antidumping Act contemplates weighing the impact of only current and future imports at LTFV, the evidence introduced at the hearing standing alone does not definitely link injury to LTFV imports, and because an affirmative determination would be an unfriendly act against Canada and will be detrimental to the interests of U.S. farmers. A further contention was made that certain Canadian producers should be excluded from this determination because the Treasury officials did not seek pricing information from them in connection with its investigation.

The language of the Antidumping Act, its legislative history, established administrative practice, and judicial precedent do not appear to recognize the relevancy of such contentions. Indeed, they are to the contrary.

Intent to injure has been considered relevant only in determining whether there is likelihood of injury and then only in those cases where the predatory intent is coupled with a capacity to carry out such an intent.

Judicial precedent clearly holds that special dumping duties are not penal and are not penalties, are import tariffs in every respect being merely equalizing duties to offset dumping margins, are intended to be imposed retroactively as well as prospectively, 1/ and are to be applied irrespective of whether they are remedial in the case at hand. 2/ They are designed to deter would-be dumpers.

The Commission's established practice of basing its determination on all facts developed from field work by its employees, Commission records, the public hearings, and all other reliable sources is premised on the statutory directive that it make a determination "after such investigation as it deems necessary". It is not limited by law to the evidence submitted in a record proceeding.

The assessment of dumping duties are frequently on goods from friendly nations and in every case could result in higher

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1/ See Cline Stewart Co. v. United States, Abstract Decision 18998 (Cust. Ct.) (1932); C. J. Towers & Sons v. United States, 21 CCPA 417, T.D. 46943 (1932) (affirmed on appeals as to unrelated matter); Kleberg & Co. v. United States, 21 CCPA 110, T.D. 46446 (1933); Kreutz & Co. v. Harry M. Durning (N.Y. Collector of Customs), T.D. 47045 (U.S. Circuit Court of Appeals for the Second Circuit) (1934); Kreutz & Co. v. United States, 25 CCPA 180, T.D. 49273 (1937).

2/ See Lewis & Conger v. United States, 13 CCA 22, T.D. 40862 (1925) in which the appellate court held that an additional duty was to be imposed on goods imported without proper marking as to the country of origin, even though the marking was added under customs supervision before the release of the goods into consumption where the ultimate consumer (the retail purchaser) was to be informed of their origin. The same court in some of the above cited cases has likened all additional duties, such as dumping duties, failure-to-properly-mark duties, and countervailing duties,

costs to the domestic consumer of such products. The equities in enforcing fair trade practices are generally recognized and accepted by Canada as reflected in its laws and its adherence to the provisions relating to dumping in the General Agreement on Tariffs and Trade. Moreover, we must assume that the Congress did not intend that the Act should be so applied that domestic consumers might reap the tainted benefit of prices established by unfair methods of competition.

The Commission cannot exclude any Canadian producer from this determination because the firm was not consulted in connection with the Secretary's determination of sales at LTFV because an appellate court has held that "it matters not that the /dumping/ finding was made ex parte" by the Secretary (Kreutz & Co. v. Harry M. Durning, T.D. 47045).

2/ Cont.--to be duties in every sense of the word and not penalties. In the instant case the court held the duty applied even though it would not rectify the conditions of the statute (that the goods must be properly marked before importation) and although one major purpose of the act was met (the ultimate purchaser was informed of the origin of the goods) without regard to the assessment of the duty. By analogy, the assessment of the dumping duty need not rectify the injury in this case. Writ of Certiori denied by U.S. Supreme Court, 269 U.S. 564.

Statement of Commissioner Clubb in
which Commissioner Moore Concurs

This matter comes before the Commission under Section 201(a) of the Antidumping Act of 1921, as amended, which requires the imposition of special dumping duties if (1) imported articles are being or are likely to be sold at less than fair value, and (2) such sales are injuring or are likely to injure an industry in the United States. 1/ Pursuant to the Act the Secretary of the Treasury has determined that potassium chloride from Canada, France and West Germany is being sold in the United States at less than fair value (hereinafter LTFV), and that determination is binding on the Commission. 2/

1/ The Antidumping Act reads in pertinent part as follows:

> Whenever the Secretary of the Treasury . . . 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, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured . . . by reason of the importation of such merchandise into the United States. . . . 19 U.S.C. § 160(a) (1964).

2/ Letter from Assistant Secretary of the Treasury Rossides dated August 20, 1969, which states in part that,

> In accordance with section 201(a) of the Antidumping Act, 1921, as amended, you are hereby advised that potassium chloride, otherwise known as muriate of potash, from Canada, France, and West Germany is being, and is likely to be, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended.

Accordingly, the only issue here is whether a domestic industry is being, or is likely to be, injured by the LTFV sales. If so, special dumping duties will be applied by the Treasury Department.3/

For reasons set out below we have determined that the potassium chloride industry of the United States is being injured within the meaning of the Antidumping Act.

The current difficulties of the United States potassium chloride industry have their roots in the developments in the fertilizer field since World War II. Prior to 1930 the United States imported virtually all of its potassium chloride requirements from deposits in Europe, located principally in France and Germany. In 1931 production was begun in Carlsbad, New Mexico, and this production slowly grew in significance until 1941 when it was greatly increased because the supplies from Europe were cut off as a result of World War II. 4/ During the war the

3/ The Antidumping Act provides that if both LTFV sales and injury are found then a special dumping duty shall be collected equal to the difference between the foreign market value and the importer's purchase price. 19 U.S.C. § 160(a) and 161(a) (1964).

4/ In 1911, the U. S. Congress appropriated funds for Government agencies to search for domestic sources of potash. Public No. 478 of the 61st Cong., Act of Mar. 4, 1911, Ch. 238, 36 Stat. 1256. During the period from 1926 through 1931, oilwell drilling in Carlsbad, N. M., disclosed the existence of bedded salt deposits and resulted in potash exploration by private interests.

In the United States, the greater part of the known domestic reserves is on public lands held under lease from the Federal Government. To prevent over-development of the potash industry in this country, after three companies

Carlsbad production supplied the relatively limited needs of the United States and a number of its allies.

After World War II a global search for new sources of potassium chloride was generated by the fear that the food needs of a rapidly growing world population would require greater potash reserves than were then known. In the next 20 years annual U. S. production was tripled--from about one million tons in 1946 to over three million tons in 1966. 5/ Also during this period U. S. companies began exploring large deposits in Canada, and in 1962 potassium chloride from a Canadian facility began to be imported in quantity in the United States. Two more Canadian plants came on stream shortly thereafter, and by 1966 Canada was supplying 85 per cent of U. S. imports and about 30 per cent of U. S. consumption of potassium chloride.

4/ Continued:

had become established, the Government in 1936 suspended action on applications for potash prospecting permits and leases on Government lands, except in "particularly meritorious cases." U. S. Department of the Interior, Departmental Order 914, Apr. 5, 1935. The issuance of prospecting permits was resumed in 1943; 8 Fed. Reg. 8556-57 (1943); U. S. Department of the Interior, Departmental Order 1829, June 9, 1943, and exploration was resumed by many companies on the public domain.

5/ All tonnages are expressed in terms of K_2O equivalent.

After Canadian imports began in 1962 the U. S. market was in a state of almost constant and increasing oversupply. 6/ Severe competition developed among all suppliers, both foreign and domestic, and since potassium chloride is essentially a fungible commodity, this competition was based almost entirely on price. As a result, the price of potassium chloride in the United States dropped steadily from $22.26 per ton in February 1966 to $18.96 in 1967, to $13.98 in 1968, and to $11.70 in February 1969. 7/ Present prices appear to be in the neighborhood of $10 per ton.

6/ U. S. production, consumption and imports of potash (more than 85% of which is believed to be potassium chloride) for selected years are set out below:

(Thousand short tons K_2O equivalent)

Year	Production	Consumption	Imports
1930	61	390	339*
1935	193	420	268*
1940	380	439	118*
1945	874	809	6*
1950	1,288	1,412	201
1955	2,080	2,066	178
1960	2,638	2,337	226
1965	3,140	3,391	1,108
1966	3,320	4,033	1,491
1967	3,299	4,139	1,708
1968	2,699	4,027	2,179

Source: Bureau of Mines
(*Estimated by Tariff Commission Staff.)

Prior to 1962 imports of potassium chloride came largely from France and Germany. The dramatic increase in imports thereafter reflects the increasing imports from Canada.

7/ Prices are unweighted averages on February 1 of each year for standard grade potassium chloride, f.o.b. mine, Carlsbad, N. M.

It was during this drastic price decline that the foreign producers ran afoul of the United States Antidumping Act, which is designed to prevent a foreign producer from selling in the United States at a lower price than he charges in his home market. Prices in the less competitive Canadian and European markets were not reduced as much as they were in the United States. As a result Canadian potassium chloride was soon selling in the United States at prices which the Treasury Department has found to be as much as 25 per cent below the price in Canada. French and German producers, who had supplied certain old-line customers on the East Coast without substantial competition prior to 1966, found that they, too, had to make price concessions in order to hold their small part of the U. S. market. By attempting to follow the plummeting price in the United States, while maintaining higher prices in their home market, these European suppliers were soon selling in the United States at prices as low as one-half that in their home markets.

The Antidumping law was enacted to prevent foreign competitors from engaging in such price discrimination if it injures a domestic industry. 8/

8/ Cast Iron Soil Pipe from Poland, U.S.T.C. Inv. No. AA1921-50 (1967); Titanium Sponge from the U.S.S.R., U.S.T.C. Inv. No. AA1921-51 (1968); and Pig Iron from East Germany, Czechoslovakia, Romania, and the U.S.S.R., U.S.T.C. Inv. Nos. AA1921-52, 53, 54, and 55 (1968).

The Antidumping Act does not prohibit foreign suppliers from selling at as low a price as they wish in the United States--provided they sell at the same or a lower price at home. They may make the most of every natural and technological advantage, enter into the most vigorous kind of price war, and even drive U. S. firms out of business, without violating the Antidumping Act--provided they sell at the same or a lower price at home. What they may not do when competing with domestic industry in the U. S. market--and what they have done here--is to sell at higher prices in their home markets than they charge for the same goods sold in the United States.

If such practices are permitted, foreign firms could use the profits from their secure home markets to drive domestic competitors out of business despite the fact that the domestic competitor may be more efficient. Accordingly, the Antidumping Act was enacted to insure--one way or another--that prices charged by foreign producers in the United States will be at least as high as those in their home markets. This result will be achieved either voluntarily by the pricing policies of the foreign competitors, or involuntarily by the taxing policies of the United States. 9/

9/ The House Ways and Means Committee recommended the enactment of the Antidumping provision with the following comment:

> The principle underlying the proposed additional duty to be added in prevention of dumping, particularly, where the tariff

The importers contend, however, that the Antidumping Act should not be applied in this case for the following reasons:

(1) The Act is not applicable because the production of potassium chloride in both Canada and the United States is controlled by several multinational corporations operating in both countries. Therefore, it is argued that

(a) there is only a North American potassium chloride industry, not an "industry in the United States" as required by the Antidumping Act; and

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9/ Continued:

> valuations are upon foreign market values, is to add such an amount of duty as will equalize sales at less than the foreign home market value or foreign export value or cost of production with profit added, whichever may be the highest, thereby making it unprofitable to dump goods on the markets of the United States at lower prices. If the seller of the goods is compelled to add as duty the difference between the sales price and what he would receive by selling in the otherwise highest obtainable market, all reward or inducement to dumping is removed.
>
> Other countries in the presence of the experience now being undergone by this country have enacted similar legislation. It protects our industries and labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value if necessary until our industries are destroyed, whereupon the dumping ceases and prices are raised at above former levels to recoup dumping losses. By this process while temporarily cheaper prices are had our industries are destroyed after which we more than repay in the exaction of higher prices. H. R. Rep. No. 1, 67th Cong., 1st Sess., 23-24 (1921).

(b) even if there is a U. S. potassium chloride industry, the companies which make it up have contributed to their own injury by their operations in Canada, and therefore are ineligible for relief.

(2) The LTFV imports from each foreign company, or at least each country, should be weighed separately to determine whether they have caused injury to the domestic industry, rather than weighing the cumulative effect of all LTFV imports together.

(3) Even if all LTFV imports are weighed together, they have not produced sufficient injury to bring the Antidumping Act into operation.

These contentions are discussed below.

The Multinational Corporation Problem

The status of the multinational corporation under the Antidumping Act has never been clarified, but is raised in bold relief here. Ten companies account for all of the potassium chloride production in the United States,[10/]

10/ Dow Chemical Co., Duval Corp. (a subsidiary of Pennzoil United, Inc.), International Minerals and Chemical Corp., Kaiser Chemical Co., Kerr-McGee Corp., National Potash Co. (wholly owned subsidiary of Freeport Sulphur Co.), Potash Company of America (a division of Ideal Basic Industries, Inc.), Southwest Potash Corp. (wholly owned subsidiary of American Metal Climax, Inc.), Texas Gulf Sulphur Co., and U. S. Potash and Chemical Co. (a wholly owned subsidiary of Continental American Royalty Co.).

and all but three of these have some connection with the Canadian industry. Four produce potassium chloride in both the United States and Canada and now account for more than 80 per cent of Canada's production. Recently 85-90 per cent of U. S. imports have come from Canada, almost all from these four companies. Three more U. S. producers own undeveloped leases on potassium chloride deposits in Canada, and certain of these in effect import Canadian potassium chloride by engaging in logistic exchanges ("swaps") with Canadian companies. 11/

It is argued that such close associations exist between the potassium chloride producers in the United States and those in Canada that the Antidumping Act cannot be applied for two reasons. First, it is argued that the production in Canada and the United States is so integrated that there is only a "North American potassium chloride industry" which is not separable

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11/ A logistic exchange of "swap" occurs when a seller makes a sale to a customer and arranges to have a competing supplier make the delivery, promising to return the favor at a future date. Such arrangements are usually made because the seller is out of the grade of potassium chloride his customer requires, or because other supplier's plant is closer to the customer. Such "swaps" have been growing in importance and now account for up to 20% of the shipments of some companies.

When a "lender" in Canada makes a shipment to a customer of a domestic company (the "borrower") in the United States, the importation has, in effect, been made for the account of the domestic company. It is argued that the domestic producer (the "borrower"), at least, cannot claim injury from these imports.

into national units, and therefore there is no "industry in the United States" which can be injured within the meaning of the Antidumping Act of 1921. 12/ Such an interpretation, if adopted, would immunize an unknown, but probably large amount, of U. S. imports against antidumping restrictions, since a considerable portion of U.S. imports are undoubtedly made by such multinational corporations. Indeed, in many industries it could no doubt be argued that producers in all countries are so related that only an inseparable worldwide industry exists. Second, it is contended that because many of the domestic producers are in one way or another linked to imports from Canada, the injury, if any, is self-inflicted, and therefore the industry cannot claim the protection of the Antidumping Act. 13/

Both the "no U. S. industry" and the "self-inflicted injury" arguments must be rejected because they are based on a too narrow construction of the statutory term "industry in the United States"--the term which Congress used to designate those interests it intended to protect under the Antidumping Act.

12/ Brief of International Minerals & Chemical Corp. (IMC), pg. 49-50.

13/ One respondent implies that a "clean hands" type rule should be invoked to prevent a party from complaining of self-inflicted injury. Another asserts that imports generated by the domestic industry can be likened to contributory negligence which, it is argued, should bar relief under the Antidumping Act.

Such protected interests [14/] include not just the interests of the stockholders of the multinational corporations involved, but the interests of the workers in the U. S. plants as well. [15/]

Where, as here, a corporation elects to produce the same product both inside and outside the United States, the Antidumping Act continues to protect the U. S. portion of the corporation and its employees from the unfair competitive practices of foreign producers--including the foreign branches of the same company--to the same extent as it did before the foreign branch was established. Realistically, it could not be otherwise if the labor portion of the "industry in the United States" is to be protected.

14/ In an earlier case it was stated that the "industry" included "all economic interests in the United States which might be destroyed by unabated dumping of the product involved." Titanium Sponge from the U.S.S.R., U. S. T. C. Inv. No. AA1921-51, at 16 (1968) (concurring statement).

15/ That the interests of the workers were to be protected under the Antidumping Act is made clear by the House Ways and Means Committee Report on the 1921 Act which states that the proposed act "protects our industries and labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value." H. R. Rep. No. 1, 67th Cong., 1st Sess. 23 (1921). (Emphasis added.)

Workers are also treated as part of the U. S. industry to be protected under more recent foreign trade legislation. Section 301(a)(1) of the Trade Expansion Act of 1962 permits a "certified or recognized union, or other representative of an industry" to file an escape clause petition. Further, if injury to the "industry" is established the President may grant adjustment assistance to the workers involved. 19 U.S.C. §§ 1901(a) and 1902(a)(3) (1964).

This suggests that at least in this type of foreign trade legislation Congress intended that the interests of workers as well as owners were to be comprehended within the term "industry."

The workers in Carlsbad are just as unemployed when the unfairly priced imports originate in a foreign plant owned by their employer as when they originate from any other source.

In past antidumping cases we have not dealt with situations where such a large part of both the foreign and domestic production was controlled by a few U. S. corporations, and so we have not had occasion to make clear how the multinational corporation is to be treated under the Antidumping Act. Our decision in this case now makes it clear. Imports from foreign branches of domestic firms are to be treated like any other imports. If they are offered at fair prices they do not violate the Antidumping Act, but if they are injuriously offered at less than fair value, U. S. ownership of the foreign producer will not give them immunity.

Cumulative Injury

The LTFV imports of potassium chloride brought to our attention come from three countries, and from certain companies within those countries. Because of this, some respondents argue that the effect of LTFV imports from each country or from each company should be weighed separately to determine whether they alone have caused injury to the domestic industry. If not, it is argued that the proceedings with respect to that country or company should be dismissed. If the Commission adopted this view, and

divided unfair imports along either country or company lines the chance that sufficient injury to trigger the Antidumping Act will be found in any case is greatly reduced.

Respondent notes that in the recent Pig Iron case the Commission rejected this approach, and weighed instead the cumulative effect of LTFV imports from all sources in making a single injury determination. 16/ Respondent argues that the Pig Iron case is distinguishable, however, because in that case all of the imports came from Communist Bloc countries "whose economic decisions were totally unresponsive to the forces of the home market." 17/

16/ In that case it was stated that

> Counsel for the U.S.S.R. exporter argues, however, that the effect of the LTFV sales from each country should be considered separately. Presumably, under this theory if the unfairly priced imports from each country did not by themselves cause injury to a domestic industry, dumping duties should not be applied despite the fact that the combined effect of the unfairly priced imports clearly do cause injury. It is sufficient to note with respect to this contention that the statute was written to protect domestic industries against an unfair trade practice which Congress feared might injure them. An industry can be injured as much by a few LTFV imports from each of many countries as it can be by many unfair imports from each of a few. The question in each case, therefore, is whether a domestic industry is being or is likely to be injured by LTFV sales. If so, such sales from all sources must cease, if they are contributing to the injury. Pig Iron from East Germany, Czechoslovakia, Romania, and the U.S.S.R., U. S. T. C. Inv. No. AA1921-52, 53, 54, and 55 at 24 (September 1968) (concurring statement).

17/ IMC Brief, pg. 54.

Respondent misconstrues the thrust of our determination in Pig Iron. There the effect of the LTFV imports from four sources were weighed together, not because they were all from Communist Bloc countries, but rather because an industry can be as much injured by small amounts of LTFV imports from many different sources as it can by the same total amount from one source. Accordingly, for purposes of making the injury determination, the source of the imports is not important. It is their combined effect on the domestic industry which controls.

Injury

In the past the Commission has applied the de minimis rule to the injury requirement of the Antidumping Act. 18/ Frivolous, inconsequential, or immaterial injury does not require the application of dumping duties. Thus, where there is no direct competition between the LTFV imports and the domestic product, or where price is not a significant consideration in such competition, a no injury determination may be in order. 19/ But where the competition is direct, and evidence of more than de minimis injury, such as lost sales, price depression or market instability is present, dumping duties must be applied.

18/ Cast Iron Soil Pipe from Poland, U.S.T.C. Inv. No. AA1921-50 (1967); Titanium Sponge from the U.S.S.R., U.S.T.C. Inv. No. AA1921-51 (1968); and Pig Iron from East Germany, Czechoslovakia, Romania, and the U.S.S.R., U.S.T.C. Inv. No. AA1921-52, 53, 54, and 55 (1968).

19/ Plastic Mattress Handles from Canada, U.S.T.C. Inv. No. AA1921-57 (1969).

Respondents here contend that the difficulties of the domestic industry are the result of numerous other factors, and that the effect upon the industry of the LTFV imports is so small that it falls within the de minimis rule. We cannot agree. The evidence obtained by the Commission shows that price is the most important, and perhaps the only, basis upon which potassium chloride was purchased, and that very small differences in price determine which supplier will be chosen. Accordingly, while it is clear that the domestic industry can trace some portion of its difficulties to other sources, it is also clear that the LTFV imports have contributed to the injury and likelihood of further injury to the U. S. potassium chloride industry. Such a situation, we believe, requires the application of dumping duties.

STATEMENT OF REASONS FOR NEGATIVE DETERMINATION BY COMMISSIONERS THUNBERG AND NEWSOM

On the basis of the facts revealed in the investigation and the hearing, we determine that the potassium chloride industry of the United States is not being, nor is it likely to be, injured by reason of the importation of muriate of potash at less than fair value, within the meaning of the Antidumping Act of 1921, as amended. Domestic producers of potassium chloride are experiencing serious economic problems; between 1966 and mid-1969 output declined 14 percent in quantity while sales dropped by 30 percent in value; prices meanwhile dropped by about 50 percent. These current difficulties, however, are not ascribable to sales of the imported material at less than fair value. Rather, the industry worldwide is suffering from the unjustified overly-optimistic expansion of potash producing facilities of the mid-1960's which increased productive capacity considerably beyond the near-term requirements of consumption.

The Treasury Department advised the Tariff Commission that potash from Canada, France, and Germany was being sold, and was likely to be sold, at less than fair value (LTFV), within the meaning of the Antidumping Act of 1921, as amended. The

facts established that price declines in the United States greatly exceeded dumping margins during the period for which dumping margins were determined by the Treasury Department. (During 1967, for example, dumping margins averaged 8 percent while the prices of Carlsbad producers declined 25 percent.) Imports from France and Germany provide an exception to this statement, for the margin of dumping determined for these imports was enormous. Evidence available to the Commission strongly suggests that these LTFV sales were a response to unprecedented competition from U.S. and Canadian sources which was sufficiently intense to win away many longstanding customers. The dumped European imports, themselves, however, were far too small in volume and much too localized in their sales to have anything more than a negligible impact on the domestic industry. For the remainder--LTFV imports from Canada--dumping margins in 1967 and 1968 were small (both absolutely and in comparison with domestic price declines) and sporadic. In fact these years were marked by such instability of delivered purchase prices that dumping margins frequently had to be recomputed several times each day.[1/] Such

1/ Such unstable market conditions make the margin of error, which always exists to some degree in the determination of fair value, larger than usual; given a small margin of dumping, the larger the margin of error implicit (or explicit) in the fair value computation, the greater must the volume of dumped imports be, other things being equal, to support an injury finding.

unsettled market conditions make the concept of "fair value" very difficult to apply--both on the part of producers seeking to avoid an equalizing dumping duty and on the part of enforcers seeking to determine whether a law has been violated.

It was fortuitous that this market turbulence occurred at the time that U.S. potash producers were shifting the locus of their operations from domestic sources nearing economic depletion to recently discovered high-quality Canadian sources. In fact, the tonnage decline in sales by domestic producers in 1966-68 was a reflection of the shifting of operations of four major U.S. producers to Canadian facilities; U.S. firms not producing in Canada either maintained or increased their sales during this period. Indeed the two domestic firms determined by the Treasury Department to have sold their Canadian product at less than fair value accounted during the period of the investigation for nearly one-half of total sales in the United States. Of their sales in the United States nearly three-quarters came from their Canadian operations. Thus, if the firms selling at LTFV were injuring the industry thereby, laws of chance would dictate that they must be injuring themselves, since they accounted for nearly half of the industry. Such an anomalous application of the statute would seem to be beyond Congressional intent.

We further determine that sales of potassium chloride at less than fair value are not likely to injure the domestic industry and are not preventing it from being established. Because the volume of potash consumption in Canada is insignificant in comparison with that of the U.S. market, producers in Canada will find their self-interest served by a pricing policy which maintains their price in Canada at a level equal to or below the U.S. price. It is therefore unlikely that the future will see any sales at less than fair value. Because the industry is suffering from over-expansion during the 1960's, prices and profits are low. It is therefore unlikely that new firms will in fact enter the industry (although one new firm, U.S. Potash & Chemical Co. did enter in 1968 by purchasing at a very low capital investment the property formerly owned and operated by U.S. Borax Company). The failure of new firms to enter, however, is in no way to be ascribed to LTFV sales or their likelihood, but rather to the depressed state of the industry.