UNITED STATES TARIFF COMMISSION

AMINOACETIC ACID (GLYCINE) FROM FRANCE

Determination of Injury
in Investigation No. AA1921-61
Under the Antidumping Act, 1921,
As Amended

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UNITED STATES TARIFF COMMISSION

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UNITED STATES TARIFF COMMISSION
Washington

February 17, 1970

/AA1921-61/

AMINOACETIC ACID FROM FRANCE

Determination of Injury

On November 17, 1969, the Tariff Commission was advised by the Assistant Secretary of the Treasury that Aminoacetic Acid (Glycine) from France is being, and is likely to be, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended. In accordance with the requirements of section 201(a) of the Antidumping Act (19 U.S.C. 160(a)), the Tariff Commission on November 18, 1969, instituted investigation No. AA1921-61 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.

A public hearing was held beginning on January 13, 1970. Notices of the investigation and hearing (subsequently postponed) were published in the Federal Register (34 F. R. 18775; 20076).

In arriving at a determination in this case, the Commission gave due consideration to all written submissions from interested parties, evidence adduced at the hearing, and all factual information obtained by

the Commission's staff from questionnaires, personal interviews, and other sources.

On the basis of the investigation, the majority of the Commission has determined that an industry in the United States is being injured by reason of the importation of aminoacetic acid sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended. 1/

STATEMENT OF REASONS FOR AFFIRMATIVE DETERMINATION

Views of Commissioners Clubb, Newsom and Moore

This case arises under the Antidumping Act of 1921, as amended, section 201(a) of which 2/ requires that whenever the Secretary of the

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1/ Commissioners Clubb, Newsom, and Moore determine that an industry is being injured by reason of imports of glycine from France and other countries. Chairman Sutton determines that an industry in the United States is being injured by reason of imports of glycine from France and deems it inappropriate for the Commission to make its determination extend beyond such imports. Commissioners Thunberg and Leonard determine in the negative.

2/ Section 201(a) of the Antidumping Act provides 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).

Treasury determines that a "class or kind of foreign merchandise" is being sold in the United States at less than fair value (hereinafter LTFV), he shall advise the Tariff Commission whereupon the Tariff Commission shall determine whether a domestic industry is being, or is likely to be, injured "by reason of the importation of such merchandise." Pursuant to this Act the Treasury Department has informed the Commission that Aminoacetic Acid (Glycine) 2/ is being imported from France at less than fair value. 3/

We have determined that (1) neither our investigation nor our findings are limited to the countries designated by the Treasury Department and (2) that the "class or kind of foreign merchandise" before the Commission is glycine imported at LTFV, not just that imported from France. After considering the effect of all imports of glycine at LTFV, we have determined that an industry in the United States is being injured by reason of such imports.

This case has its origin in the period 1966-67 when competition in the United States glycine market became increasingly severe as large

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2/ Glycine is a white, odorless, crystalline material with a sweetish taste which is used principally in pharmaceuticals. It is also used as a post-operative nutriment for intravenous feeding and as a low calorie sweetener.

3/ Letter from Assistant Secretary Rossides to Chairman Sutton dated November 12, 1969.

quantities of imported glycine entered the U. S. market at LTFV prices--prices which averaged as much as 25% to 30% less than the price of domestically produced glycine.

As a result of this price structure, domestic production fell by more than 40%, while imports increased by 140% between 1966 and 1967. By the end of 1967, imports, which had supplied less than 25% of U. S. consumption in 1964, had taken over 70% of the U. S. market. At that time imports were supplied by four countries in the following proportions: Japan, 39%; the Netherlands, 36%; France, 13%; and Germany, 12%.

On March 1, 1968, these proceedings were begun when Chattem Drug and Chemical Company, the sole U. S. producer of glycine, filed a dumping complaint with the Treasury Department, alleging that imports from all four countries were being sold at less than fair value. In April and May 1969 the Treasury Department terminated its proceedings against the exporters from West Germany [4/] and the Netherlands [5/] for reasons not

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4/ In April 1969 the Secretary of the Treasury determined that Glycine from West Germany was not being, and was not likely to be sold at less than fair value because

> The only known producer of Aminoacetic Acid (Glycine) for exportation to the United States has discontinued production of the product and has given assurances that no further shipments will be made to the United States. (34 F. R. 2210 (1969).)

The final negative determination for West Germany was filed April 11, 1969. (34 F. R. 6447 (1969).)

in issue here. This left only imports from Japan and France still involved, and despite the fact that it appears from the record that both were being sold at LTFV, the Treasury Department in November 1969 terminated its proceedings against the Japanese exporters and referred the case of the French imports alone to the Commission for an injury determination.

It is the Treasury Department's reason for the termination of its proceedings against LTFV imports from Japan which has caused the principal problem in this case. The Secretary found that both the French and the Japanese exporters' sales prices were less than their home market prices, and, accordingly, both were selling at less than fair value within the meaning of the Antidumping Act. Nevertheless, because the Japanese exporter agreed to discontinue the LTFV sales, the Treasury Department officially found that imports from

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5/ In May 1969 a negative determination by the Secretary was made with respect to shipments from the Netherlands (because glycine from that source was being sold at fair value). (34 F. R. 7334 (1969).) The final negative determination for the Netherlands was filed June 26, 1969. (34 F. R. 11427 (1969).)

Japan were not being sold at LTFV, [7] despite the fact that the evidence clearly shows that they were when the complaint was filed. Imports from France, on the other hand, were found to be at LTFV, and this matter was referred to the Commission for an injury determination. [8]

7/ A tentative determination for Japan was filed September 27, 1969, and read in pertinent part as follows:

> I hereby make a tentative determination that Aminoacetic Acid (Glycine) from Japan is not being, nor likely to be, sold at less than fair value within the meaning of section 201(a) of the Act (19 U.S.C. 160(a)).
>
> Statement of reasons on which this tentative determination is based. . . . .
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> . . . .
>
> Comparison between purchase price or exporter's sales price and home market price revealed that exporter's sales price and purchase price were lower than home market price.
>
> Upon being advised of the above, exporters of the glycine from Japan provided assurances that they would make no sales to the United States at less than fair value within the meaning of the Antidumping Act.

The final negative determination for Japan was filed November 28, 1969. It stated that

> The statement of reasons for the tentative determination was published in the above-mentioned notice and interested parties were afforded until November 7, 1969, to make written submissions or requests for an opportunity to present views in connection with the tentative determination.
>
> No written submissions or requests having been received, I hereby determine that for the reasons stated in the tentative

The problem with the dismissal of the Treasury Department proceedings against Japanese LTFV imports is that the Japanese exporters were the principal disruptive force in the U. S. market--the French LTFV imports merely played a contributory role. The Japanese exporters sold at much lower prices and in much larger quantities than the French, 9/ and undoubtedly were the major cause for the filing of the complaint. Yet if the Commission confines its investigation and determination to France, the country designated in the Treasury Department notice, it is possible that either no injury determination at all could be made (the conclusion reached by Commissioners Thunberg and Leonard), or that the dumping determination would be made against the French exporters who were not the principal offenders (the conclusion reached by Chairman Sutton).

7/ Continued:

> determination, Aminoacetic Acid (Glycine) from Japan is not being, nor likely to be, sold at less than fair value (section 201(a) of the Act; 19 U.S.C. 160(a)). (34 F. R. 19210 (1969).)

8/ 34 F. R. 18559 (1969).

9/ Data relating to sales and prices were submitted in confidence to the Commission. Rules prohibiting the disclosure of confidential information prevent a more precise statement of facts.

This presents a procedural issue which has not been involved in prior cases.

The Antidumping Act requires the Secretary of the Treasury to notify the Commission when he has determined that a "class or kind of foreign merchandise" is being imported at less than fair value. In the past the Secretary has always attached a country designation to his advice to the Commission, as he did in this case. For example, the Commission has been advised of LTFV sales of Window Glass from the U.S.S.R., Chromic Acid from Austria, and Concord Grapes from Canada. In each instance the Commission as a matter of convenience limited the scope of its investigation to the LTFV imports from the country named in the Treasury Department's notice.

We have never before had occasion to determine, however, whether we are legally bound by the country designation in the Treasury Department notice, because in no previous case has it been crucial to our determination. To put it another way, we have never determined whether a product from country X is a different "class or kind of foreign merchandise" for purposes of the Antidumping Act than the identical

product from country Y. 10/ Accordingly, despite Commission acquiescence in the country designations which have been attached to dumping cases in the past, we believe that this issue is still to be decided. We reject the argument that our affirmative determination in this case upsets ancient and established precedents.

After reviewing the available authorities, we have determined that the Commission is not bound by the country designation in the Treasury Department notice. We find no evidence in the legislative history of the Antidumping Act that Congress intended the term "class or kind of foreign merchandise" to carry a geographical connotation, nor does the common meaning of "class" or "kind" found in the dictionary support it. "Class" is defined as

> "a number of . . . things regarded as forming a group by reason of common attributes, characteristics, qualities, or traits." 11/

"Kind" is defined as

> "A class or group of individual objects . . . of the same nature or character or classified together because they have traits in common." 12/

10/ Implicitly, it might be said that we have determined that identical products are in the same "class or kind" of merchandise, since in cases where imports of the same product from several countries have been before us at the same time, we have tested the cumulative effect of all. Pig Iron from East Germany, Czechoslovakia, Romania and the U.S.S.R., Potash from Canada, France and West Germany. If the product from one country was a different "class or kind" of merchandise than the identical product from another country, the Act would require that we treat each separately.

Thus it is the qualities, attributes or traits inherent in the imported product itself which must determine its "class or kind" for purposes of the Antidumping Act. 13/

Realistically, it could not be otherwise. Congress enacted the Antidumping Act to protect domestic producers from unfairly priced imports of the "class or kind" produced by them. The geographic origin of the imported product is irrelevant to this issue. LTFV imports of glycine from one country have the same effect on the domestic producer as LTFV imports of glycine from any other country. Both are sold to potential customers of the domestic producer. Both have an effect on price competition in the domestic market. And both contribute to the injury to the domestic producer.

As the producer in this case observed, it is not possible to neatly separate the effects of French and Japanese LTFV sales, because a domestic producer subjected to unfairly priced imports from several sources is like

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11/ Random House Dictionary of the English Language (1966), pg. 272.

12/ Id., at 787.

13/ Judicial interpretation of similar statutory terms also establishes that a class must be determined by the inherent characteristics of the thing or persons being classified, and not by such extraneous considerations as geography or ownership. See, Switchmen's Union of N. America v. National M. Board, 135 F.2d 785, 793-94 (D. C. Cir., 1943), rev'd. on other grounds 320 U.S. 297; Inter County Rural E. Cooperative Corp. v. Reeves, 171 S.W. 2d 978 (Kty. 1943); Star-Kist Foods, Inc. v. United States, 150 F.Supp. 737 (Cust. Ct., 1956).

a man assaulted by three assailants in a dark alley--he doesn't know which one cut his arm and which one put the lump on his head, all he knows is that the three combined injured him.

If the Commission's investigation and finding is limited by the country designation in the Treasury Department notice, as two of the dissenting Commissioners believe it is, we would be required to treat LTFV imports of glycine from each country as a separate "class or kind of foreign merchandise," and we would be required to trace and separate the effects of LTFV imports from each country, making separate injury determinations for each one. If we were unable to trace the effects of each country's LTFV sales, we would presumably be required to make a finding of no injury, despite the fact that the evidence clearly shows the domestic producer has been severely injured by all LTFV imports combined.

We believe that such a rigid interpretation of our responsibilities runs counter to the plain words of the Act, as well as contrary to the obvious Congressional intent expressed therein. Accordingly, we hold that we are not bound by the country designations in the Treasury Department notice; that the matter before the Commission in this case is not "Glycine from France", but "Glycine"; and the issue is whether imports of glycine at less than fair value from all sources have injured the domestic glycine industry.

There can be no doubt that they have. During 1967, the last full year before imports were affected by this proceeding, imports sold at less than fair value in the United States market accounted for at least 35% of U. S. consumption, and perhaps more. These LTFV imports, especially those from Japan, sold at prices considerably below the domestic product, and had a substantial price depressing effect on the U. S. market. Under these circumstances there can be no doubt that the domestic industry has been injured by the LTFV imports.

It is argued that, however correct this interpretation of the Act might be for future cases, it cannot be utilized here because the Commission's Notice of Investigation referred only to LTFV imports of glycine from France, and to include LTFV imports from Japan in the investigation or findings would deny the Japanese exporter due process of law. In this connection our attention has been invited to Carl Zeiss, Inc. v. United States, 23 CCPA 7 (1935). We think it is sufficient to note that the Zeiss case arose under a statute (Sec. 336 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1336) which directs that the Commission shall "hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings." In contrast, the Antidumping

Act merely directs the Commission to conduct "such investigation as it deems necessary." Moreover, we note that there are no LTFV imports of glycine awaiting liquidation, and, accordingly, no dumping duties will be payable at this time either by the French or the Japanese exporters as a result of this determination.

In any event, failure to consider Japanese LTFV imports in this case would not only discriminate against the French exporter who would be barred from further dumping while his Japanese competitors would be under no such bar, but it would provide inadequate protection to the domestic producer as well. We think that such a result would be contrary to the requirements of the Antidumping Act.

Views of Chairman Sutton

In my opinion, an industry in the United States is being injured by reason of the importation of aminoacetic acid (glycine) from France, which is being sold in the United States at less than fair value (LTFV) within the meaning of the Antidumping Act, 1921, as amended.

The domestic industry

In making this determination under section 201(a) of the Antidumping Act, 1921, as amended, I have considered the injured industry to be those facilities in the United States that produce aminoacetic acid (glycine), hereinafter referred to as "glycine".

In early 1964 the United States had two major producers of glycine; imports from all countries supplied one fourth of U.S. consumption and were sold by importers at prices considerably below the price of the domestic product. In the latter part of that year the complainant in this case became the third U.S. producer of glycine using a highly efficient new method of production which appears to have enabled the firm to be more competitive with imports than the other two firms. One of the two original producers ceased production in 1965. The other producer ceased production in the latter part of 1966 when it turned to foreign sources for supplies of glycine to sell in the United States, a major source being LTFV imports from France.

Glycine imports

The complainant advised the Treasury Department that glycine was "being imported into the United States under such circumstances as to bring it within the purview of the Antidumping Act". The Treasury Department investigated the pricing practices of all known world producers.

The Netherlands.--Glycine from the Netherlands was found on the merits to be sold at or above fair value. 1/

West Germany.--Treasury's investigation of glycine from West Germany was discontinued with a determination of no sales at LTFV based on a cessation of production apparently wholly unrelated to the pendency of the dumping issue. The case was not decided on the merits. 2/

Japan.--Glycine from Japan was ascertained by Treasury to have been sold at LTFV prior to December 1968. However, upon receipt of assurances from the Japanese producers that they would cease shipping at prices below fair value to the United States, the Treasury made a "technical" determination of no sales at LTFV in 1969. 3/ Direct imports of glycine from Japan were all sold at fair value after November 1968.

Treasury records indicate that the margins of dumping (or amounts of price discrimination) in the case of imports from Japan prior to December 1968 were generally much greater than the margin which existed in the case of the French imports. Also, the Commission received unrefuted evidence that Japanese glycine has been, and is being, sold in Europe at prices well below the Japanese market value, that some of these European shipments have been resold and diverted to the United States at about twenty cents below the Japanese market value.

1/ 34 F.R. 7334; 11427.
2/ 34 F.R. 2210; 6447.
3/ 34 F.R. 15564; 19210.

France.--Glycine from France was determined to be, and likely to be, sold at less than fair value in the United States. 1/ The margin of dumping (or amount of price discrimination) in the early onset of competition was for practical purposes equivalent to the price differential between domestic glycine and French glycine. French imports constituted 25 percent of all imports or 13.2 percent of U.S. consumption of glycine in 1968.

Cumulative and sequential impact of LTFV imports

Because the Treasury published a negative determination regarding glycine imports from Japan, the producer of the LTFV imports from France, who ships glycine directly to the United States, has contended that it is not appropriate for the Commission to weigh the combined impact of the imports from both Japan and France in this case. He contends that we must consider only the impact of imports of French glycine; further, he contends that he has not undersold imports from Japan but has had to lower his prices to, or almost to, the price level of the Japanese product if he is to sell in the United States.

The contentions of the French producer must be rejected. These contentions are based upon technical matters regarding the respective jurisdictions of the Treasury and the Tariff Commission under the Act. In my opinion, these technical matters, as will be explained below, do not preclude the Commission's consideration of the cumulative and sequential impact on the domestic industry of all LTFV imports from both Japan and France.

1/ 33 F.R. 14079; 18559.

The Antidumping Act establishes two separate but interrelated jurisdictions--the first being in the Treasury, and the second being in the Tariff Commission. The statute vests in the Treasury sole authority to determine the existence or likelihood of LTFV sales and to define the class or kind of merchandise involving such sales, and vests in the Tariff Commission sole authority to determine whether an industry in the United States is being or is likely to be injured by such LTFV imports. The Treasury only can initiate action under the Act. The Tariff Commission derives its jurisdiction wholly from the formal determination of the Treasury. The Commission has no authority to review and revise the Secretary's action in any respect nor, in my judgment, does it have authority to make formal determinations of injury pursuant to which the Treasury, in making and publishing the requisite "finding" under section 201(a), would be obligated to provide for possible assessment of dumping duties outside the scope of Treasury's initial determination regarding LTFV sales. Accordingly, in my opinion, the Commission's formal action in this case must necessarily be limited to a determination of injury which can apply only to imports of glycine from France.

The foregoing conclusion, however, does not foreclose the possibility of giving consideration to the LTFV imports from Japan. The mutually exclusive jurisdictions vested in the Treasury and the Tariff Commission--while occasioning problems from time to time in regard to coordination of the respective functions of each agency--do not compel this result in this case. The Commission in previous

determinations under the Antidumping Act has been guided by the principle that all LTFV imports of a particular product from various sources sold in the United States at the same time or in sequence may be considered in the aggregate in the context of both their cumulative and sequential impact in the U.S. markets. 1/ It will be noted that each of these precedents involves LTFV sales which were the subject of formal affirmative determinations of the Treasury Department, whereas in the present case one of the Treasury's formal determinations was in the negative. The sole question, therefore, is whether the formal negative determination in this case as a matter of law vitiates the persuasiveness of the earlier Commission precedents.

In two of the earlier cases (pig iron and potash), no technical problem existed for the reason that Treasury's formal affirmative determinations with respect to LTFV imports from all sources were simultaneously before the Commission. In the other case (cement), however, it will be observed that the Customs Court has upheld the propriety of the Commission's looking into the sequential connection between LTFV imports in the case before it and LTFV imports in an earlier one involving cement from another source. Likewise, in my judgment, it is appropriate in this case for the Commission to look outside the formal Treasury determination before it in order to determine, if possible, the facts requisite to a proper disposition of the case.

1/ See majority opinions in investigation No. AA1921-22 (portland cement), affirmed in City Lumber Co. et al v. United States, R.D. 11557 (now on appeal before the Court of Customs and Patent Appeals); investigations No. AA1921-52, 53, 54 and 55 (pig iron); and investigations No. AA1921-58, 59 and 60 (potassium chloride).

As previously indicated, the Treasury's negative determination with respect to glycine imports from Japan was published in the Federal Register. This determination clearly shows on its face (1) that the action taken was not on the merits but was remedial in nature, (2) that Treasury revealed to the Japanese suppliers that the exporter's sales price and purchase price were lower than home market value (or, in other words, were at LTFV), and (3) that Treasury's action was premised upon having received from the Japanese exporter assurances that no future sales would be made in the United States at LTFV. The technical nature of Treasury's formal determination therefore is clearly demonstrated on its face. From this published Treasury determination the Commission can accept as a fact that Japanese shipments of glycine to the United States made prior to the giving of assurances were sold at LTFV. In addition, information supplied to the Commission from Treasury records not only corroborates this fact but also reveals the very substantial margins of dumping involved. I cannot conclude in the circumstances that such legal technicalities prevent the Commission from giving due consideration to all LTFV imports of glycine from both Japan and France.

Conditions of competition

The market for glycine in the United States has experienced a modest growth and has an apparent excellent growth potential because of the many uses being made of the product. It is apparent that supplies will have to increase if future needs are to be met. Despite this glowing description for a market, glycine is priced too low

for a healthy domestic industry [1] and a close examination of the conditions of competition needs to be made to ascertain the reasons why the domestic industry is suffering from low prices and whether such low prices are attributable to sales at LTFV.

To understand the full effect of LTFV sales on our domestic industry, it became apparent that we had to look not only at our domestic market place, but the world market, if we were to make a proper appraisal. Japanese glycine sold at LTFV not only came directly into the United States, but also via Denmark. French glycine came not only directly to the United States, but it has also been imported via West Germany, the Netherlands, Denmark, and England at prices below fair value as determined by Treasury.

Japanese producers, by reason of their selling for export at prices below their home market prices, have been the dominant price leaders in the world market as well as in the United States. Their prices in both markets are generally the lowest and must be met by other foreign producers if sales are to be consummated. This appears to hold true particularly with respect to the glycine producer in the Netherlands, as virtually none of the product is consumed in the Netherlands and the producer must depend entirely on sales in the world market where delivered cost in the market place is the principal governing factor in making a sale. For that reason the Netherland's

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1/ Two out of three producers have ceased production and it is evident that they felt their participation in the industry was not reasonably profitable.

glycine cannot be sold at a price for export to the United States or elsewhere that it might otherwise command were the Japanese to sell for export only at their home market price. I mention the Netherland's producer in this case because it is the major producer in Europe who has clearly not sold at LTFV and is currently the only known European producer outside of France. Thus, I find that glycine imports, though at fair value, nevertheless enter the United States at depressed or suppressed prices as a principal result of the Japanese practice of price discrimination, but also in part because of the price discriminating practices of the French producers.

Market penetration.--The largest U.S. imports in 1964-66 came from the Netherlands, the next largest from Japan, and then France. In 1967 the Japanese became the largest supplier. Imports of French glycine are coming in increasing quantities into the United States via Belgium, Denmark, England, and West Germany at prices considerably below fair value. During the period 1964 to 1967, inclusive, imports increased their penetration of the U.S. market from 25 to 70 percent. Indeed, Japanese sales in the United States increased 600 percent in the last year of that period. U.S. exports of glycine have been negligible.

Price suppression or depression.--As a direct or indirect effect of the LTFV sales by the Japanese and French producers, all imports at the unusually low prices have either suppressed or depressed the U.S. market price for glycine.

In 1964, the weighted average price of imported glycine from all sources was 14 cents a pound less than the weighted average price of domestic glycine. In 1965, when the complainant emerged as a third domestic producer on the market, the prices of glycine from virtually every source dropped. The weighted average price of one domestic producer dropped 2 cents per pound, another 4 cents per pound, and the new producer (the highly efficient plant) entered the market at a price several cents lower than either of its domestic competitors. Still, the average price of imports in 1965 was 13 cents per pound less than the average price of the domestic product. At this point of time, one of the early domestic producers ceased production. In 1966, the average price of imports dropped an additional 6 cents per pound and the domestic average price dropped 17 cents per pound, with a mere 2 cents-per-pound lower average price applicable to the imported product. At this price level, the second domestic producer ceased production and started importing the product to supply its customers. The average price of all glycine has continued to drop each year to date, the average prices for domestic glycine being higher each year than the average price of imported glycine (by 6 cents in 1967 and 4 cents in 1968 and 1969). Thus, importers of glycine have undersold domestic producers of glycine in every year for the last six years.

STATEMENT OF REASONS FOR NEGATIVE DETERMINATION

Views of Commissioner Thunberg

The Congress has divided the responsibility for administering the Antidumping Act between the Treasury Department and the Tariff Commission. Such a bifurcation of responsibility can be administered successfully--and all parties concerned treated equitably--only if the demarcation between the activities of the two agencies is unequivocally and unambiguously specified. By the language of the statute, "whenever the Secretary of the Treasury determines that a class or kind of foreign merchandise. . . .," the Secretary of the Treasury is assigned responsibility for classifying, categorizing, defining the commodity being sold at less than fair value (LTFV) for purposes of administering the act. Depending on the nature of the commodity and of the markets in which it is sold, the scope of the appropriate classification scheme may be more or less inclusive. But authority for so specifying the commodity being sold at less than fair value is unquestionably assigned to the Secretary of the Treasury and legal and administrative precedent supports his authority to delimit the definition of the commodity. In the present case the commodity has been so defined as "aminoacetic acid (glycine) from France."

In assigning to the Treasury Department responsibility for determining whether sales at less than fair value occur, the Congress implied that that agency must investigate the volume of sales at less than fair value and the margins by which the purchase prices of goods exported to the United States differ from 'fair value." In the case of a positive finding of LTFV sales, the statute implies that it is the responsibility of the Secretary of the Treasury to communicate to the Tariff Commission the specifics of its determination--the precise data of quantities sold at less than fair value, the margins at which these quantities were sold below fair value and the period of time over which these sales occurred. Whether or not LTFV imports cause injury to a domestic industry depends in preponderant part on how much is sold and at what margins below fair value. A small margin of dumping could, for example, be injurious if it has characterized a large volume of imports in a highly competitive market. Alternatively, a small volume of LTFV sales could cause injury if the margin of dumping were sufficiently great. In this case LTFV sales of 150,000 pounds of glycine, sold at an average dumping margin of about 18 percent, were determined by the Treasury Department to have taken place between March 1, 1968 and August 11, 1969.

An injury determination can be reached only after the specifics of quantity and value have been made available. The demarcation between Treasury responsibility and Tariff Commission responsibility for the successful operation of the law implies that Treasury functions are suspended with its determination and communication to the Tariff Commission of the facts concerning quantity and value of LTFV sales. On the basis of the specific facts provided by the Treasury, the Tariff Commission assumes responsibility for determining whether injury has been caused. In the present case the Tariff Commission announced on November 18, 1969, that it was initiating an investigation to determine whether sales at less than fair value of aminoacetic acid (glycine) from France are injuring or are likely to injure a domestic industry. By its announcement the Commission confined its investigation of injury to the effects of imports of glycine from France at less than fair value.

LTFV imports from France in 1968 amounted to about 7 percent of domestic consumption of glycine. The sole domestic producer of glycine, The Chattem Drug & Chemical Co., consumes about two-thirds of its own output which amounts to one-quarter to one-third of total U.S. consumption. The sales of glycine to other domestic consumers thus account for only one-third of Chattem's

production. No evidence was found that sales of LTFV imports from France caused Chattem to lower its selling prices or to lose sales. The margin of dumping in absolute terms was smaller than the difference between the price of the domestic glycine and the prices at which imports from Japan were sold in the domestic market. During 1967-69, moreover, average annual prices received by the sole importer of LTFV glycine from France for imported glycine sold in the U.S. market were generally higher than the average prices received for glycine by other importers and about equal to the average prices received by the domestic producer. Chattem's production and sales of glycine, which increased steadily in 1965-68, have expanded markedly in recent months to satisfy new demands. Since the company's unit production costs decline substantially as volume increases, the larger output should enable it to compete more effectively than formerly with imports. I have concluded, therefore, that LTFV imports from France are not causing and are not likely to cause injury to a domestic industry.

Views Of Commissioner Leonard

I find no industry in the United States is being or is likely to be injured or is prevented from being established by reason of the importation into the United States of Aminoacetic Acid (Glycine) from France which the Treasury determined is being, and is likely to be, sold at less than fair value (LTFV) within the meaning of the Antidumping Act, 1921, as amended.

Although total imports of glycine have increased substantially in recent years, imports at LTFV from France constituted but a small portion of total imports and at no time achieved a substantial penetration of the U.S. market. As Commissioner Thunberg reports, the Commission's investigation did not substantiate that sales of glycine from France at LTFV caused the domestic producer either to lose sales or to reduce his selling prices. In fact, the average prices received during 1967-69 by the only importer of the LTFV glycine from France were not only higher than those received by most other importers, but were somewhat higher than those received by the domestic producer.

While the record of the investigation fails to support a finding of injury or likelihood of injury to a domestic industry by reason of the importation of LTFV glycine from France alone, the basis of the findings of the majority in this investigation requires me to discuss imports of glycine from Japan. Such imports increased 600 percent in

only one year, from 65,000 pounds in 1966 to 492,000 pounds in 1967, as Japan became the principal supplying country. The evidence produced during the Commission's investigation indicates that the Japanese exporters sold at much lower prices than did other foreign suppliers. During 1966-68, a large part of the glycine imported from Japan was resold by the importers at prices 17 to 26 cents per pound below the weighted average price received by all importers. The low price of glycine from Japan, coupled with the large increase in such imports in 1967 and 1968, almost certainly was a principal factor in causing price reductions in the U.S. market for glycine.

Despite such evidence, much of which also appeared in Treasury files, the Treasury published in the Federal Register a determination that "Aminoacetic Acid (Glycine) from Japan is not being, nor likely to be, sold at less than fair value." 1/ Therefore, the Commission cannot determine that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States "of such merchandise," glycine from Japan.

With Treasury making such a negative determination on sales of glycine from Japan and, therefore, not sending such sales to the Commission for an injury determination, I cannot go beyond the statute and in some way be influenced by the Japanese glycine sales to find affirmatively in this investigation. Since I cannot consider the effect of the sales of

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1/ 34 Fed. Reg. 19210 (Dec. 4, 1969).

glycine from Japan, I must render a negative finding on the question of injury to a domestic industry from LTFV sales of glycine from France. On the other hand, a majority of the Commission finds affirmatively because it does consider the effect of the sales of Japanese glycine.

Commissioners Clubb, Newsom and Moore take account of the sales of Japanese glycine by determining that an industry in the United States is being injured by reason of imports of glycine from France and other countries. They disregard the country designation in the Treasury determination and contend that once Treasury makes an affirmative determination on a particular item of commerce, the Commission can consider all sources of that item in deciding whether injury is present.

This view of three-fourths of the majority may have been more appropriate if it had been taken when the Commission received the initial Treasury determination drawn along country lines. But that would have been in November, 1954, when the Treasury determined affirmatively on muriate of potash from the Soviet Zone of Germany. However, the Commission in that investigation[1/] and in every dumping investigation since has deliberately confined the scope of its notice and injury determination in accordance with the Treasury designation of source from which the commodity came. If Treasury's long-continued practice of designating the country or origin were outside the terms of the statute, the Congress, it is assumed, would have since corrected it in its

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1/ Muriate of Potash from Soviet Zone of Germany, U.S. Tariff Comm. Release, Feb. 25, 1955.

considerations of the Antidumping Act and amendments thereto.[1/] The issue has been present in every Treasury determination coming before the Commission. There never having been a challenge to the country designation until now, it is too much a part of the operational framework of the statute for the Commission at this late date to read out designation of source of the commodity in the present antidumping investigation.

Besides, if the Commission were to choose the instant investigation to begin to ignore the country designation, it should have done so upon the institution of the investigation and the issuance of the public notice. However, the public notice read:

> AMINOACETIC ACID FROM FRANCE
>
> Notice of Investigation and Hearing
>
> Having received advice from the Treasury Department on November 17, 1969 that Aminoacetic Acid (Glycine) from France is being, and is likely to be, sold in the United States at less than fair value, the United States Tariff Commission has instituted an investigation under section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), 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.

The Commission is bound by that public notice. Its finding cannot

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1/ Treasury has from the inception of its jurisdiction in 1921 used source limitations in describing the articles within the scope of its proceedings under the Act. No changes in this practice have been made or suggested by the Congress.
Customs Simplification Act of 1954, P.L. 83-768, 68 Stat. 1136, (1954);
Antidumping Act Amendment, P.L. 85-630, 72 Stat. 583, (1958);
Renegotiation Amendments of 1968, P.L. 90-634, 82 Stat. 1347 (1968).

go beyond the description of the merchandise in that notice. Where the Commission does not confine its investigation to the matters contained in its public notice, its findings and recommendations based upon such investigation are without authority of law and invalid.1/

Nor are the views of Chairman Sutton of any more comfort to me. In his view, an industry in the United States is being injured by reason of LTFV imports of glycine from France, but, to find thusly, he examines the impact of the Japanese glycine sales on the total market structure and the world price situation. He extends what is termed the cumulative and sequential impact doctrine of past Commission decisions to find that French LTFV sales, on top of Japanese LTFV sales, are injuring the domestic glycine industry.

I have supported the cumulative and sequential impact theory in the past.2/ Last year's potash opinion of Chairman Sutton and myself expands his views expressed in a 1968 investigation.3/

The doctrine referred to holds that Treasury determinations of LTFV sales of a product from all sources may be considered together in order to find injury resulting from the sales from any one source. Further, the Treasury determinations of sales at LTFV need not all be formally before the Commission at the same time. Earlier Treasury LTFV determinations can be examined by the Commission in investigating possible injury re-

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1/ Carl Zeiss, Inc. v. U.S. 76F.2d 412 (1935), (23 CCPA 7); Best Foods Inc. v. U.S. 218 F.Supp. 576, 587 (Concur. opinion) (Cust. Ct., 1963).

2/ Muriate of Potash from Canada, France and West Germany, AA1921-58, 59, 60 (November 1969) T.C. Pub. 303.

3/ Pig Iron from East Germany, Czechoslovakia, Romania and the USSR, AA1921-52, 53, 54, 55 (September 1968) T.C. Pub. 265.

sulting from sales of the same product from a different source determined to be LTFV by Treasury at a later date.[1/]

Treasury's practice of issuing its findings by procedurally or administratively separating the countries or producers which ship LTFV imports to the United States has no necessary investigative effect on the Commission's determination of injury.[2/] However, while the Commission need not consider each Treasury LTFV determination independently of any other for a particular product, the Commission cannot consider as sales at LTFV sales of a product from one source determined by the Treasury not to be LTFV along with Treasury determined LTFV sales of the same product from another source. To do so in a case such as this one preempts Treasury's jurisdiction and is not in my view a permissible application of the cumulative and sequential impact theory. It is this which distinguishes the instant proceeding from the cumulative and sequential impact line of investigations.

Here, LTFV sales of the commodity from one country, Japan, have not been transmitted by the Treasury to the Commission to be joined with LTFV sales of the commodity from another country, France, which have so been sent by the Treasury to the Commission.

1/ City Lumber Co. v. United States, R.D. 11557 (July 1968), appeal filed before CCPA.

2/ Muriate of Potash from Canada, France and West Germany, AA1921-58, 59, 60 (November 1969) T.C. Pub. 303 at 4-9; and Pig Iron from East Germany, Czechoslovakia, Roamnia, and the USSR, AA1921-52, 53, 54, 55 (September 1968) T.C. Pub. 265 at 4-10.

It may be true that in fact there were Japanese glycine sales in the United States at prices lower than the home market price. The files of the Treasury viewed by the Commission would so indicate. Even Treasury's September 27, 1969 "Notice of Tentative Negative Determination" includes such a statement.[1/] But it is also true that the final word from Treasury, the final determination from Treasury, is that "Aminoacetic Acid (Glycine) from Japan is not being, nor likely to be, sold at less than fair value." [2/]

It matters not the reason for the Treasury determination, a negative one in return for the Japanese assurances that there will be no more sales at LTFV. It can even be characterized as technical. All that matters is that Treasury's determination was negative. That being the case, this Commission can go no further. We cannot consider the Japanese sales as other than fair value sales in trying to assess their effect on the French sales and in turn the effect on the domestic industry. Regrettable as it may be, Treasury's determination of glycine from Japan not being, nor likely to be, sold at LTFV based on assurances from Japan not to sell at LTFV in the future precludes the Commission in this investigation from determining under the statute injury to an industry in the United States.

1/ 34 Fed. Reg. 15564 (Oct. 7, 1969).

2/ 34 Fed. Reg. 19210 (1969).