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Antidumping Laws As Barriers to Trade--The United States and the International Antidumping Code

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ANTIDUMPING LAWS AS BARRIERS TO TRADE—THE UNITED STATES AND THE INTERNATIONAL ANTIDUMPING CODE*

John J. Barceló III†

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In recent months the spectre of a serious international trade war has receded. The major financial nations have reached fundamental agreement on realigning the world's currency relationships;¹ the United States has removed the ten percent import surcharge² and the "Buy American" clause of the investment tax credit;³ a textile agreement has been completed between the United States and Japan;⁴ and Americans and Europeans are engaged in serious discussions over further trade liberalization.⁵ These developments have been accompanied by upheavals in traditional thinking about the structure of the pillar institutions of the international economy. The International Monetary Fund Agreement⁶ has become almost a relic overnight,⁷ and there is talk

¹ See N.Y. Times, Dec. 19, 1971, at 1, col. 8.

² Pres. Proc. No. 4098, 36 Fed. Reg. 24,201 (1971), *repealing* Pres. Proc. No. 4074, 36 Fed. Reg. 15,724 (1971) (imposing surcharge).

³ Revenue Act of 1971, § 103, Pub. L. No. 92-178 (Dec. 10, 1971).

⁴ See N.Y. Times, Oct. 16, 1971, at 1, col. 8.

⁵ See, e.g., *id.*, Feb. 12, 1972, at 1, col. 2; *id.*, Feb. 2, 1972, at 51, col. 5; *id.*, Dec. 22, 1971, at 51, col. 2; *id.*, Nov. 26, 1971, at 59, col. 1.

⁶ Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39 (1947). The agreement seeks to stabilize the world's currency relationships through a system of fixed exchange rates and a fund of exchange reserves from which loans are made to countries experiencing balance of payments difficulties. See generally H. AUFRICHT, *THE INTERNATIONAL MONETARY FUND* (1964); J. GOLD, *THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL LAW* (1965); H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 1101-43 (1968).

⁷ A fixed value for the dollar and its free convertibility into gold were implicit assumptions of the present system. The United States decision to suspend convertibility of the dollar into gold (see N.Y. Times, Aug. 16, 1971, at 1, col. 4), and its ultimate decision to devalue the dollar (see *id.*, Dec. 15, 1971, at 1, col. 8), violated these assumptions and undermined the dollar's role as a reserve currency. In truth, the monetary crisis which erupted after these radical American moves had been brewing for several years beginning at least with the devaluation of the pound sterling in the winter of 1967. See generally 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS*

of reformulating the General Agreement on Tariffs and Trade (GATT).⁸ Now that a trade war has been averted there is hopefully an opportunity to press forward towards more liberalized and expanded world trade in the context of either partially or thoroughly reformulated international economic institutions. This article is concerned with one aspect of the trade problem: antidumping laws.

"Dumping" refers to the practice of selling goods in an export market at prices below those prevailing in the home market. It is a form of international price discrimination. From the turn of the century to the 1950's the international trading community uniformly regarded dumping as a distortion of natural trade patterns. Consequently, the nations of the Western trading world and Japan have all enacted antidumping laws which assess a special duty against dumped goods. The duty is generally designed to raise the dumping price to the level of home market sales and is imposed in addition to regular tariffs. It is my thesis that antidumping laws are potentially far more distortive of trade patterns than the practice they were designed to deter.⁹

705-804 (1969). Changes in the present agreement that have been suggested for coping with the new parameters of international finance include: (1) new rules to facilitate necessary changes in the exchange rates of both surplus and deficit countries; (2) greater exchange rate flexibility through wider margins of permitted fluctuation around parity; and (3) substitution of special drawing rights (SDR's) for gold as the standard against which currencies are valued and as the regulator of international liquidity. See 23 INT'L FIN. NEWS SURVEY 388-90 (1971); see also INTERNATIONAL MONETARY FUND, SUMMARY PROCEEDINGS: ANNUAL MEETING (1971).

⁸ Oct. 30, 1947, 61 Stat. pt. 5, at A11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1950) [hereinafter cited as GATT].

The GATT is a multilateral agreement governing national action in trade policy matters. See generally K. DAM, *THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); H. STEINER & D. VAGTS, *supra* note 6, at 1046-89. For a discussion of the problems of GATT and suggestions for its reformulation emanating from the executive branch, see the summary recommendations of the President's Commission on International Trade and Investment Policy (COMMISSION ON INT'L TRADE & INV. POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD (1971)) and the special report of Peter G. Peterson, Assistant to the President for International Economic Affairs (see N.Y. Times, Dec. 30, 1971, at 1, col. 1; *id.* at 34, col. 1). See generally, Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299 (1971).

⁹ There is substantial literature on dumping and antidumping laws. The standard text is J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (reprint ed. 1966) [hereinafter cited as VINER]. This edition also contains Viner's *Memorandum on Dumping*, written for the World Economic Conference of the League of Nations (*id.* at 347), and his article *Dumping*, written for the *Encyclopedia of Social Sciences* (*id.* at 374).

Legal writers have seldom been willing to undertake the thorough economic analysis of the underlying evils of dumping necessary to understand why and to what extent the practice should be regulated. For notable exceptions see Anthony, *The American Response*

This article contains four major sections. Section I will examine the grounds traditionally advanced for opposing dumping in international trade, only one of which in my opinion is sound. If it becomes possible to restructure an international consensus on antidumping laws, I believe the new rules should reflect the standards for evaluating dumping suggested in this section. Section II traces in brief compass the history of complaints against dumping, the rise of national antidumping laws, and the protectionist potential of these laws. Section III discusses efforts to curb the protectionism of antidumping laws through international agreement.¹⁰ Section IV discusses implementation of the International Antidumping Code in the signatory countries, which include all the Western trading nations and Japan. Implementation of the Code in the United States is stressed in this section for two reasons: (1) the United States is the only signatory that has thus far not fully implemented the Code, as evidenced by the recent anti-Code injury decisions of the Tariff Commission,¹¹ and (2) American implementation

to Dumping from Capitalist and Socialist Economies—Substantive Premises and Restructured Procedures After the 1967 GATT Code, 54 CORNELL L. REV. 159 (1969); Note, *The Antidumping Act—Tariff or Antitrust Law?*, 74 YALE L.J. 707 (1965). For a discussion of the economics of dumping somewhat at variance with the analysis in Anthony, *supra*, see text accompanying notes 38-51 *infra*. The question of which are more trade distortive, dumping or antidumping laws, is discussed thoroughly in K. DAM, *supra* note 8, at 167-77.

The standard legal essay on the American Antidumping Act is Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44 (1958). For general discussion of the American Act, see Anthony, *supra*; Baier, *Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States*, 17 STAN. L. REV. 409 (1965); Conner & Buschlinger, *The United States Antidumping Act: A Timely Survey*, 7 VA. J. INT'L L. 117 (1966); Coudert, *The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189 (1965); Davis, *The Regulation and Control of Foreign Trade*, 66 COLUM. L. REV. 1428, 1438-44 (1966); Feller, *The Antidumping Act and the Future of East-West Trade*, 66 MICH. L. REV. 115 (1967); Hendrick, *Administration of the U.S. Antidumping Act—Procedures and Policies*, in SENATE FINANCE COMM., 90TH CONG., 2D SESS., COMPENDIUM OF PAPERS ON LEGISLATIVE OVERSIGHT REVIEW OF UNITED STATES TRADE POLICIES 156 (Comm. Print 1968) [hereinafter cited as COMPENDIUM]; Kohn, *The Antidumping Act: Its Administration and Place in American Trade Policy*, 60 MICH. L. REV. 407 (1962); Prosterman, *Withholding of Appraisement Under the United States Antidumping Act: Protectionism or Unfair Competition Law?*, 41 WASH. L. REV. 315 (1966).

¹⁰ The most notable attempt to curb protectionism is the International Antidumping Code, negotiated during the GATT-sponsored Kennedy Round at Geneva from 1964 to 1967. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *opened for signature*, June 30, 1967, [1967] 19 U.S.T. 4348, T.I.A.S. No. 6431 (effective July 1, 1968) [hereinafter cited as Code]. The Code has been reprinted in 32 Fed. Reg. 14,962 (1967) and in 6 INTERNATIONAL LEGAL MATERIALS 920 (1967).

¹¹ See text accompanying notes 250-317 *infra*.

is the key to the Code's success as an effective expression of an international consensus on antidumping laws. The United States Treasury, in determining price discrimination, has implemented the Code in accordance with the American antidumping statute.¹² It is my thesis that the Tariff Commission, in its injury determinations under the statute, should do likewise. I believe that Code principles constitute a permissible, indeed better, interpretation of the statute than the Commission's recent anti-Code decisions.

The Code, although it falls short of the ideal standards discussed in section I, is nevertheless an important step forward. Negotiated at the Kennedy Round in the summer of 1967,¹³ it is the first attempt at fashioning substantive and administrative standards to suppress the protectionist potential of a nontariff trade barrier. Lower duty levels have been successfully achieved over the years at periodic GATT-sponsored trade conferences¹⁴ through direct negotiations on tariff schedules. Nontariff barriers are more difficult to control. They generally involve legitimate internal regulatory schemes, such as domestic safety regulations, antipollution controls, or taxing policies, which have restrictive effects on trade.¹⁵ The mere proliferation of such regulatory schemes and the administrative burdens they involve can cause serious delays in customs clearance. Moreover, as tariff walls have crumbled nontariff barriers have become more visible and more attractive to domestic interests seeking protection.¹⁶ With the rising need for further nontariff controls, the Antidumping Code, if successful, could serve as a model for future negotiations.¹⁷

¹² Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 11, as amended, 19 U.S.C. §§ 160-71 (1970) [hereinafter cited as Antidumping Act].

¹³ See note 10 *supra*.

¹⁴ The last and most productive conference was the Kennedy Round. There were four others: at Annecy, France in 1949; at Torquay, England in 1951; and at Geneva, Switzerland in 1956 and 1962 (the "Dillon Round"). See Note, *The Trade Act of 1971: A Fundamental Change in United States Foreign Trade Policy*, 80 YALE L.J. 1418, 1428 n.53 (1971).

¹⁵ There is growing literature on nontariff trade distortions. See generally R. BALDWIN, *NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE* (1970); K. DAM, *supra* note 8, at 180 *passim*; Kelly, *Nontariff Barriers*, in *STUDIES IN TRADE LIBERALIZATION* 265-314 (B. Balassa ed. 1967); Wilson, *Nontariff Barriers to International Trade: A Survey of Current Problems*, 18 J. PUB. L. 403 (1969).

¹⁶ T. CURTIS & J. VASTINE, *THE KENNEDY ROUND AND THE FUTURE OF AMERICAN TRADE* 202 (1971); see also J. EVANS, *THE KENNEDY ROUND IN AMERICAN TRADE POLICY: THE TWILIGHT OF GATT?* 87-89 (1971).

¹⁷ Codes paralleling the Antidumping Code are most likely to be negotiated to deal with export subsidies and government procurement policies. SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS, *FUTURE UNITED STATES FOREIGN TRADE POLICY: REPORT TO THE*

In the final analysis the success of the Code will depend upon actual, as opposed to formal, consensus. If the United States Tariff Commission persists in its present protectionist, anti-Code posture, it will be clear that a realistic consensus has not yet developed in the anti-dumping area, not even at the compromise level represented by the Code. But there are reasons to hope for change. The Commission's membership is in constant flux, and membership more than anything seems to determine the cast of its decisions.¹⁸ Moreover, one can reasonably conclude that many of the dumping complaints recently acted upon

PRESIDENT 18, 20-38 (1969); see Hudec, *supra* note 8, at 1357 n.147. The GATT has completed a major study of other nontariff barriers for use in future negotiations. See GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 69 (15th Supp. 1968); *id.* at 12, 14 (16th Supp. 1969).

The debate over restructuring GATT has raised the question of whether it should continue to contain sets of legalistic rules and principles to govern national actors in trade matters. The alternative would be a looser structure to facilitate pragmatic commercial bargaining between nations, with stress upon actual trade flows. See Hudec, *supra* note 8, at 1302-09. Hudec draws upon two recently published general works on the GATT: K. DAM, *supra* note 8; J. JACKSON, *supra* note 8.

Dissatisfaction with the legalistic approach stems perhaps from the general realization that the present GATT rules overstate the existing degree of international consensus and commitment to nondiscriminatory, liberal trade principles. The suggested alternative of "nondirective consultative procedures" no doubt reflects the pragmatic view that GATT has functioned most effectively with such procedures in the past. The term comes from Hudec, *supra* note 8, at 1299-1300.

This article assumes the worth and virtue of the rule-making or codification approach, especially in the area of nontariff trade barriers, where uniform codified standards can be of paramount importance to private traders who must forecast the regulatory treatment they can expect to receive at national borders. Moreover, on the broader issue of rules versus bargaining procedures, I believe there must be a continued role in international commerce for the "rules of the game." The recent monetary crisis has underscored the increasing interdependence of the world's separate national economies. Attempts to export unemployment or to beggar neighboring nations through unilateral economic policies merely invite retaliation and a reduced pie for all. Rules and principles clarify the bounds within which national actors may pursue national objectives without fear of retaliation. The primary need is for a more accurately stated and indeed expanded international consensus in trade matters. See, e.g., R. COOPER, THE ECONOMICS OF INTERDEPENDENCE (1968).

In truth the present GATT rules have never been given unconditional binding force by the contracting parties. Under the Protocol of Provisional Application, 61 Stat. A2051 (1947), 55 U.N.T.S. 308 (1950), the contracting parties were not bound to any provisions in part II of GATT (arts. III-XXIII) which conflicted with national legislation existing prior to October 30, 1947. For a general discussion of the Protocol, see J. JACKSON, *supra* note 8, at 60-63. Moreover, the GATT provisions are often either riddled with exceptions or cast in such general terms as to have no seriously binding content. The Antidumping Code attempts in the dumping area to remedy some of these defects. It is a binding agreement, and it attempts to elaborate some of the more general concepts in the present GATT rules. See generally K. DAM, *supra* note 8; J. JACKSON, *supra* note 8.

¹⁸ See note 323 *infra*.

in the United States were triggered in part by the then existing disparity in exchange rates and by the American payments imbalance. Because of the recent crisis-inspired adjustments, the protectionist pressure in Congress and on the Commission can be expected to subside to some degree in the future.

I

DUMPING AND A FREE TRADE WORLD ECONOMY

A. *Standards for Evaluating Dumping*

To assess the alleged evils of dumping in international trade, I begin with a basic premise: the validity of free trade theory.¹⁹ My assumption is that world welfare will be promoted if barriers to trade are reduced and business concerns are encouraged to compete across national boundaries. There are recognized exceptions to liberal trade policy, justified mostly by short term considerations. For example, free trade may be restricted in a country to aid infant industries, to avoid sudden stress or dislocation in a given sector of a national economy, or to aid in solving balance of payments problems.²⁰ My inquiry is whether dumping falls into a similar exceptional category or whether it is fundamentally inconsistent with free trade objectives. Why should the United States, for example, levy a special duty on imported Japanese television sets which happen to command a higher price in Japan than in the United States²¹ and not on sets which are sold at a uniform price in both countries?

¹⁹ On the basic economics of free trade theory see generally P. SAMUELSON, *ECONOMICS* 621-705 (8th ed. 1970) [hereinafter cited as SAMUELSON]. For more advanced treatment of the subject, see G. HABERLER, *A SURVEY OF INTERNATIONAL TRADE THEORY* (1961) [hereinafter cited as HABERLER, SURVEY]; C. KINDLEBERGER, *INTERNATIONAL ECONOMICS* (4th ed. 1968); 2 J. MEADE, *TRADE AND WELFARE* (1955). For an excellent concise statement of the theory of free trade, exceptions to the theory, and the historical development of American trade policy, with ample cited authority, see Note, *supra* note 14.

For the economics of dumping in international trade, see generally VINER; see also G. HABERLER, *THE THEORY OF INTERNATIONAL TRADE* 296-324 (rev. Engl. transl. 1950) [hereinafter cited as HABERLER, THEORY]; C. KINDLEBERGER, *supra* at 146-68; 2 J. MEADE, *supra* at 244-53; A. PIGOU, *THE ECONOMICS OF WELFARE* 284-85, 288-89 (4th ed. 1932); J. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 179-208 (1933); L. YEAGER & D. TUERCK, *TRADE POLICY AND THE PRICE SYSTEM* 149-54 (1966); de Jong, *The Significance of Dumping in International Trade*, 2 J. WORLD TRADE L. 162, 167-72 (1968).

²⁰ For a discussion of the three common exceptions to free trade theory, see Note, *supra* note 14, at 1421-24.

²¹ See *Television Receiving Sets, Monochrome & Color, from Japan*, 36 Fed. Reg. 4597 (Treas. 1971) (imposing antidumping duty).

1. *Kinds of Dumping*

I shall consider three kinds of dumping, measuring each by the effect it has on competing producers in the country into which the dumped goods are shipped: (1) per se price discrimination; (2) injurious dumping; and (3) predatory dumping. The first category includes dumping which causes only minimal business injury to domestic competitors; the distinguishing characteristic is per se price discrimination. The second includes dumping practices which cause recognizable and perhaps significant business injury in the form of lost sales and lower profits, but of a type normally associated with ordinary price competition in the marketplace. The third includes dumping practices which by design or in effect cause such pervasive injury to domestic competition as to threaten monopolization.

It is part of my thesis that only the last, predatory dumping, is inconsistent with the objectives of free trade policy. This position is sometimes implied but not often clearly articulated in the legal literature on dumping.²² On the contrary, condemnation of all injurious dumping or even per se condemnation of international price discrimination has often been urged. I shall consider four arguments advanced to support these latter positions: (1) that dumping represents an unfair trade practice; (2) that the advantage the dumper appears to possess is "artificial" and reflects a hidden "subsidy" from monopoly profits in the home market; (3) that dumping which rests upon monopoly power in the home market is distortive of resource allocation; and (4) that because dumping prices are generally impermanent, the short-lived benefits which inexpensive dumped goods may bring to the consumer do not outweigh the injury to domestic producers. The unsoundness of these arguments stems mainly from their overemphasis on cost factors in pricing decisions—to the neglect of demand²³—and from their failure to appreciate the procompetitive aspects of non-predatory dumping.²⁴

2. *The Affinity Between Free Trade and Antitrust Policy*

The analysis of dumping which follows rests upon the seldom stressed affinity between free trade theory and antitrust policy. In the static terms of comparative advantage, liberal trade doctrine tells us

²² For two of the clearest statements of this position, see Adams & Dirlam, *Dumping, Antitrust Policy and Economic Power*, 1966 Bus. TOPICS 20; Note, *supra* note 9.

²³ See text accompanying notes 39-51 *infra*.

²⁴ See text accompanying notes 65-77 *infra*.

that total world income will increase if each country specializes in the production of those goods which, relative to its other production alternatives, it can produce with greatest efficiency. Each country then meets its other needs by trading its specialized products for those of other countries.²⁵ There is also a dynamic side to the free trade argument, however, which takes into account changes in efficiency over time.²⁶ Here liberal trade doctrine and antitrust policy overlap. The latter teaches that competitive rivalry in the marketplace is the most reliable means, consistent with a free market economy, of achieving three major dynamic objectives: efficiency in the allocation of productive resources through time, innovative vigor in the production process, and distribution of products to the consumer at lowest possible prices.²⁷ Free trade theory merely seeks to achieve these virtues on a global scale by encouraging competition to spill across national boundaries. Efficiency in the allocation of global resources is thus furthered and prices are lowered towards a global minimum.²⁸

B. *Avoidance of Anticompetitive Predation—The Possibly Valid Argument Against Dumping*

In theory the predatory dumper violates the fundamental desiderata of free trade and antitrust policies by carrying competition too far. The prototype case is that of the powerful foreign monopolist who uses his monopoly earnings at home to sustain cut-rate prices in the market under attack. After crippling rivals and driving them to extinction, he recoups losses through monopoly profits in the newly conquered market. If seriously followed as a business strategy, such practices would threaten the competitive process itself.

Antidumping laws designed to ban only this form of dumping are

²⁵ On the benefits of specialization and comparative advantage theory, see SAMUELSON 645-50; see also HABERLER, SURVEY 6-11.

²⁶ See HABERLER, SURVEY 55.

²⁷ See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958), where the Court states: "[T]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress . . ." See also ATTORNEY GENERAL'S NAT'L COMM. TO STUDY THE ANTI-TRUST LAWS, REPORT 337-38 (1955) [hereinafter cited as ATTORNEY GENERAL'S ANTI-TRUST REPORT]. For a general discussion of antitrust economics, see F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1970) [hereinafter cited as SCHERER].

²⁸ Free trade objectives are more limited than those of antitrust policy, however, because natural imperfections are greater in the international than the domestic market. Factors of production, for example labor, are less mobile internationally than domestically.

analogous to the American domestic anti-price discrimination measures found in section 2 of the Clayton Act,²⁹ as amended in 1936 by the Robinson-Patman Act.³⁰ The primary line provisions of these laws prohibit a domestic supplier from discriminating in price only if such discrimination threatens monopolization or lessens competition in the same product line.³¹ Competitive or nettlesome price discrimination is not banned per se.

While antipredation laws are consistent with basic antitrust policy, there are still reasons to be cautious about their application. Economists often stress that such laws—particularly anti-price discrimination laws—may in themselves pose serious and unavoidable danger to the competitive process. If one were to find suppliers who discriminate in price for proper competitive reasons guilty of lessening competition in cases where they inflict only ordinary business injury on rival business concerns, all interfirm price rivalry—the essence of business competition—would be inhibited.³² The mere existence of anti-price discrimination laws produces some chilling effect on price competition.

This effect appears particularly unnecessary when it is realized that the extent of predation in price discrimination practices is often greatly exaggerated.³³ A predatory strategy is not totally dependent upon price discrimination, nor is there any reason to believe that it is a more common strategy among monopolists. The predator need only have a deep pocket, which could have resulted from highly profitable but independent product lines, past accumulated profits, or the personal wealth of individual entrepreneurs. More importantly, predatory pricing will only be effective if it is possible to prevent reentry into the market after

²⁹ Ch. 323, § 2, 38 Stat. 730 (1914).

³⁰ 15 U.S.C. § 13(a) (1970).

³¹ The statute as it now reads makes price discrimination unlawful where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination

Clayton Act § 2, 15 U.S.C. § 13(a) (1970), formerly ch. 323, § 2, 38 Stat. 730 (1914). For general discussion of the domestic American price discrimination law, see C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (2d rev. ed. 1959); C. EDWARDS, THE PRICE DISCRIMINATION LAW (1959); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962).

³² See ATTORNEY GENERAL'S ANTITRUST REPORT 164-65; C. EDWARDS, *supra* note 31, at 530-31; SCHERER 499; BOWMAN, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967); Note, *Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury*, 68 COLUM. L. REV. 137, 140-41 (1968).

³³ See Bowman, *supra* note 32, at 83; McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. CHI. L. REV. 398 (1956).

the attempt is made to charge monopoly prices. There is never any guarantee that entry barriers will be sufficient. Bankruptcy or plant shutdown on the part of injured competitors would not eliminate physical production facilities; these might be reactivated if prices rise. The monopolist could of course set prices just below the point at which entry would be encouraged, but it would be difficult to predict this "stay-out" price in advance and to calculate whether in the long run a predatory strategy would be worth the cost.

On the international level the predatory strategy raises even greater difficulties and uncertainties. To succeed, a predatory dumper must achieve a worldwide monopoly.³⁴ It would not be enough to drive out domestic producers in the market under attack, since the slightest rise in prices up to or above the world price level would encourage immediate entry by rival producers in other countries.

Thus there is good reason to doubt the full validity and seriousness of even the predatory argument against dumping. I turn now to arguments which condemn dumping in more sweeping terms and which are more clearly fallacious. These arguments pose for international trade even more egregious forms of the competition-inhibiting dangers inherent in all anti-price discrimination laws.

C. *The Invalid Arguments Against Dumping*

1. *Dumping as an Unfair Trade Practice*

Domestic producers and public officials sometimes appear to argue that price discrimination in international trade should be condemned per se as an "unfair trade practice" or as "unfair competition."³⁵ These concepts have their origin in tort law where they have been used by plaintiffs to obtain relief against various deceptive and unscrupulous business practices such as plagiarism, theft of trade secrets, fake or deceptively imitative labeling, or disparagement of another enterprise or product.³⁶ Closely related concepts are recognized in copyright, patent, and trademark statutes. Allowance of such causes of action represents an exception to general antitrust policy designed to serve as a

³⁴ *But see* de Jong, *supra* note 19, at 171-72.

³⁵ *See, e.g.,* Long, *United States Law and the International Anti-dumping Code*, 3 INT'L LAW. 464, 467 (1969); American Mining Congress, *Declaration of Policy, 1967-68*, in COMPENDIUM 82. In a number of recent Tariff Commission decisions Commissioner Clubb has expressed similar views. *See* text accompanying notes 281-82 *infra*.

³⁶ *See* Green, *Protection of Trade Relations Under Tort Law*, 47 VA. L. REV. 559, 565-66 (1961).

special inducement to invention and to the careful development of marketing techniques embodied in a trade name.

No such policy justification underlies the argument for outlawing all instances of price discrimination. Applied to international trade, the argument would grant domestic firms a commercial property right in existing customers or price levels. A domestic producer could apparently secure relief against a discriminating foreign supplier whenever any form of business injury—loss of sales or lower profits—justified the administrative expense of redressing the injury.³⁷ Ordinary price competition would probably result in such injury, and the foreign supplier, if he is to compete effectively in international commerce, would frequently be forced to discriminate in price to some degree, because a competitive price must reflect the local conditions in each national market. The unfair competition argument, if a valid exception to liberal trade principles, would seem to be one which wholly swallows the doctrine.

2. *Dumping as an Artificial Advantage—The Subsidy Argument*

A second argument attacks low dumping prices because, it is asserted, they are not cost justified. Dumping prices are said to be “subsidized” by high monopoly profits in the home market and are thus seen to reflect an “artificial” rather than a “genuine” competitive advantage.³⁸

a. *The Fallacy of Cost-Plus Pricing—The Omission of Demand.* The suggestion here is that only cost-plus pricing is economically defensible.³⁹ In this view “genuine” pricing requires a ratable distribution of variable and fixed costs to each item of production sold in each market. Costs such as wages and the outlay for raw materials vary proportionately with the amount of output, whereas fixed costs such as those attributable to plant machinery and space rental are incurred irrespective of output. Standard economic theory teaches that variable costs must be covered in the short run and total costs—variable plus fixed—in the long run.⁴⁰ Thus a price in the export market above average variable costs but below average total costs would be seen by proponents of cost-plus pricing as not bearing its fair share of fixed costs and hence not genuinely cost justified in the long run. Higher prices in

³⁷ See text accompanying notes 281-82 *infra*.

³⁸ See Anthony, *supra* note 9, at 168-77.

³⁹ Cf. Note, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 241 (1967).

⁴⁰ See SAMUELSON 441-48.

the home market would be seen as bearing a disproportionately large share of the fixed costs and hence as "subsidizing" the export sales.⁴¹

This line of argument fails to give proper weight to the demand or revenue side of pricing decisions.⁴² It proceeds correctly from the assumption that profitable price discrimination can only occur when the dumper possesses some degree of market power⁴³ on home sales which enables him to charge a higher price at home than abroad.⁴⁴ But without discussing demand factors it cannot be said that the higher home market price in any proper sense subsidizes sales of lower priced export items. If demand is more elastic in the export market, an entrepreneur will in fact maximize his profits in both the long and short run by charging lower prices for export. Under profit-maximizing price discrimination he would thus be making the maximum possible contribution to variable and fixed costs from the sales in both markets.

b. *Optimal Pricing: Marginal Cost Equated with Marginal Revenue.* In pricing theory rational profit-maximizing behavior consists of producing and selling additional units as long as the addition to revenue (marginal revenue) attributable to the last unit sold exceeds the marginal cost of producing that unit.⁴⁵ Where marginal revenue just equals marginal cost, profits will be maximized.⁴⁶

⁴¹ See Anthony, *supra* note 9, at 174-75.

⁴² See C. KINDLEBERGER, *supra* note 19, at 151-52.

⁴³ "Market power" is used here to mean an individual firm's ability to affect price by altering output. As market power increases it phases at some point into monopoly power. See P. AREEDA, *ANTITRUST ANALYSIS* 127 (1967).

⁴⁴ See J. ROBINSON, *supra* note 19, at 179-202; SCHERER 253-57; D. WATSON, *PRICE THEORY AND ITS USES* 311-24 (1963).

⁴⁵ For a basic discussion of marginal cost, marginal revenue, and profit maximization, see SAMUELSON 459-77. For application of optimal pricing analysis to price discrimination, see de Jong, *supra* note 19, at 167-68; note 44 *supra*.

The concept of profit maximization should not be confused with balance sheet profits. The point of profit maximization is the optimum output point, given the decision to produce. Fixed costs, which do not vary with output, are ignored. The balance sheet will show a profit only if maximized revenues are sufficient to cover all costs, fixed and variable.

⁴⁶ Economists define marginal cost as the incremental cost of producing the last unit of output. It normally falls or remains constant at early production stages and begins to rise near capacity output. Marginal revenue is the net addition to revenue attributable to the last unit sold. Under imperfect competition a producer faces a downward sloping demand curve. Thus the sale of each additional unit of output both adds to and subtracts from total revenue. The sale itself brings new revenue, but since the greater quantity can only be sold at a lower price, the producer loses revenue on all previous units of output which must now also be sold at the new lower price. Marginal revenue therefore equals the price (revenue) of the last unit sold minus the revenue lost by selling prior units at the new price level. The marginal revenue curve lies below the demand curve and continues to fall with downward sloping demand. Thus a rational profit maximizer continues to produce and sell until the falling marginal revenue curve intersects the

A foreign trader seeking to maximize profits through optimum production and sales usually faces a single marginal cost curve, but two separate marginal revenue curves, one each for the home and foreign markets. His costs remain the same no matter where the output is sold because his production facilities are concentrated in the home market.⁴⁷ But consumers in two separate national markets are likely to respond differently to changes in price. This produces two separate marginal revenue curves. Under uniform pricing it would be impossible for marginal cost to equal marginal revenue in both markets. The dumper must charge a lower price in the more elastic market and a higher price in the less elastic market for marginal cost to equal marginal revenue in both markets, which is the condition for optimum output and sales (profit maximization).⁴⁸

Since it often happens that elasticity of demand for any given product is higher in the export than in the home market,⁴⁹ lower foreign prices can hardly be thought of as unusual or "artificial." Greater export market elasticity may result from high tariffs at home which reduce competition and hence lessen domestic elasticity. It may also result from reduced buyer attachment to foreign products in the export market because of the greater risks and longer lead times associated with a foreign source of supply, or because of greater competition in that market from local products.

c. *Limiting Condition: Price Below Marginal Cost.* In theory only where a low dumping price falls below marginal cost can one say

constant or rising marginal cost curve. One less unit of production would forego the profit that could be made from producing the next unit at a cost less than the addition to revenue resulting from its sale. One unit produced and sold beyond the optimum point would result in a loss because marginal cost would then exceed marginal revenue.

⁴⁷ If the cost of transportation to the export market were included as a cost of production, it would be necessary to qualify this statement. But for the purposes of anti-dumping laws price comparisons between domestic and export sales are usually made at an ex-factory point. See Hendrick, *The United States Antidumping Act*, 58 AM. J. INT'L L. 914, 919 (1964).

⁴⁸ These marginalist theories have in fact been borne out by empirical research. In a survey of 110 domestic manufacturing companies rated as "excellently managed" by the American Institute of Management it was discovered that most multiproduct firms did not base pricing on full cost-plus formulas. Prices were found to reflect factors central to marginalist thinking: expected competitive pressure from other companies and elasticity of demand among buyers. Earley, *Marginal Policies of "Excellently Managed" Companies*, 46 AM. ECON. REV. 44, 45, 56 (1956). Multiproduct pricing—for example, different prices for crude oil and residual fuel oil, both resulting from a single manufacturing process—is closely analogous to single-product pricing in different markets. In both cases the price charged must reflect differing conditions of demand. See C. KINDLEBERGER, *supra* note 19, at 151-52.

⁴⁹ Cf. C. KINDLEBERGER, *supra* note 19, at 153; J. ROBINSON, *supra* note 19, at 205-06.

with some plausibility that home market sales are subsidizing money-losing foreign sales.⁵⁰ Here marginal revenue, which is always equal to or less than price, must also lie below marginal cost. Hence greater revenue could be obtained by raising the export price and, with it, marginal revenue.

The startling upshot of this analysis is that even sales in the export market below average total cost need not be money-losing or non-profit-maximizing. Average revenue is the governing concept. It must equal or exceed average total cost for a business to be profitable in the balance sheet sense. Under price discrimination a different price is charged in two or more markets; hence, average revenue falls somewhere between the different prices charged. If average revenue happens to equal average total cost at the optimum output, the business will be profitable and its activity cost justified in the long run, although at the same time the lower dumping price in the export market will fall below average total cost. As long as marginal cost equals marginal revenue in this market profits will be maximized, and one cannot say that such low pricing in the export market is artificial or uneconomic. In fact, to charge a higher price in this market would itself be uneconomic, because it would reduce profits.⁵¹

3. *Dumping as Exploitation of Monopoly Power*

A third argument against dumping is that, even if seen as profit-maximizing behavior, dumping exploits the evils of monopoly power.⁵² Welfare economics teaches that monopoly power is socially undesirable because, among other reasons, it allows the monopolist to restrict his output in order to charge prices well above marginal cost and therefore to reap higher returns.⁵³ It is thus distortive of proper resource allocation because more of society's resources should be devoted to the production of the goods in question. The quantity should be increased and the price lowered. Can we say that because profit-maximizing dumping is based upon the existence of some degree of monopoly power at home, that such dumping is per se an evil practice or that it further distorts allocative efficiency in the global economy?

⁵⁰ Technically, price below marginal cost merely means that greater return could be earned by raising the price; it does not necessarily mean that books will not balance. See Ehrenhaft, *supra* note 9, at 48 n.21; note 45 *supra*; cf. J. ROBINSON, *supra* note 19, at 188-202; SAMUELSON 471-74; SCHERER 254-55.

⁵¹ It is entirely possible that a producer might be able to cover both variable and fixed costs—and thus remain in business in the long run—only by charging in an export market a low profit-maximizing dumping price which happened to fall below unit costs. See J. ROBINSON, *supra* note 19, at 203-04; A. PICOU, *supra* note 19, at 286-88.

⁵² See R. BALDWIN, *supra* note 15, at 142-43.

⁵³ See SCHERER 11-17.

In this form the question is misleading; we must assume that some degree of monopolization or imperfect competition will remain in the dumper's home market regardless of what is done about dumping in foreign markets. There are natural and unavoidable competitive imperfections in every market. Antidumping measures can have no effect on antitrust policy at the dumping source. Hence the correct question is whether dumping adds to or decreases the allocative distortions associated with imperfect competition. Are we better off under uniform monopoly pricing or under price discrimination?⁵⁴

From the perspective of global efficiency theoretical economists have found this a difficult and ambiguous question whose answer depends upon variables that are impossible to measure empirically. In simplified form, the issue is whether total output would increase or decrease under price discrimination, since allocative inefficiencies associated with imperfect competition are the result of the monopolist's excessive restriction of output to earn higher profits. Joan Robinson in her classic study of imperfect competition demonstrated that the question of output expansion or contraction under price discrimination turns on the elasticities and shapes of demand curves in the home and foreign markets.⁵⁵ Robinson argued a priori that output under discriminating monopoly was likely to expand, especially where low priced export sales are involved.⁵⁶ However, there has been no real empirical verification of these theoretical probabilities.⁵⁷

Even if nothing conclusive can be said on the question of global efficiency, the issue is not so clouded from the viewpoint of the country into which the dumped goods are shipped. In this market more goods will be supplied at a lower price if dumping is allowed. The lower price will also more closely approximate the dumper's marginal cost, the ideal welfare point at which consumer satisfaction from the last unit sold just matches the cost of producing that unit.⁵⁸ If consumers in the dumper's higher priced home market are in fact exploited, the fault lies with the existence of monopoly power in that market and not with dumping. Antidumping laws in other countries would not be responsive to the problem.

⁵⁴ For discussion of this question in the domestic context, see *id.* at 257-59.

⁵⁵ J. ROBINSON, *supra* note 19, at 188-95.

⁵⁶ *Id.* at 205-06.

⁵⁷ Moreover, Pigou has suggested there may be other more complicated maldistributive effects which cannot be analyzed in the simple terms of output expansion and contraction. A. FIGOU, *supra* note 19, at 284-85, 288-89; see J. ROBINSON, *supra* note 19, at 206.

⁵⁸ At prices higher than marginal cost welfare economists have pointed out that consumers who would have purchased at lower prices are sacrificed to the monopolist's desire for greater profits. See SCHERER 14-17.

4. *Dumping as Inflicting Injurious Adjustment Costs—The Impermanence Argument*

A fourth argument against nonpredatory dumping was espoused by Jacob Viner, perhaps the best known American economist to study dumping in scholarly fashion. Viner put heavy stress on the length of time one could expect dumping prices to endure. He classified dumping into three categories: (1) *sporadic dumping*—one or two shipments within a very short time span; (2) *intermittent or short run dumping*—lasting months or perhaps a year or longer; and (3) *continuous or long run dumping*—extending indefinitely into the future.⁵⁹

Viner saw nothing objectionable about long run dumping,⁶⁰ which could result from a permanently more elastic demand in the foreign market. As long as low prices could be expected to continue, consumers and intermediate producers could rely upon a permanent source of cheap goods. The domestic industry could not object to adjusting to this form of competition.

Sporadic dumping would not promise a permanent source of cheap goods, but Viner thought this practice simply too brief or haphazard to be seriously injurious.⁶¹ It might be traceable to the shipment on consignment of unsold goods which, because of market fluctuations en route, failed to bring the desired price at destination, or merely to a casual overstock which for various reasons had to be cleared at lower prices in the more elastic foreign market. Dumping motivated merely by excess stock is analogous to "clear the stock" sales of distressed goods by domestic retailers or bargain basements. Such sales provide a needed flexibility to the market system, whether on the international or domestic level, and allow smoother adjustments for miscalculations.⁶²

Viner considered only short run dumping objectionable. In this form dumping lasts long enough to be injurious to domestic competitors but not long enough to be a reliable source of goods for consumers and intermediate producers. Predatory dumping fits easily into this category, but Viner's reasoning also embraced simple injurious dumping. His conclusion seemed to rest on a rough and ready calculus which balanced

⁵⁹ VINER 23.

⁶⁰ There is no economic—as distinguished from military, or sentimental, or political, or sociological—argument which has yet been presented by upholders of tariff protection which makes an adequate reply to the free-trade case against the restriction of *permanently cheap* imports.

Id. at 145 (emphasis in original).

⁶¹ *Id.* at 30.

⁶² See C. KINDLEBERGER, *supra* note 19, at 157-58.

benefits to consumers against injury to producers. Short-lived consumer benefits in the form of lower prices could not offset serious injury to domestic producers in the form of reduced output and sales.⁶³

Viner's approach raises at least two troublesome issues: (1) if only intermittent or short run dumping is to be condemned, how can we know from the existence of price discrimination alone whether we are dealing with the sporadic, short run or long run variety? and (2) even if we are able to identify short run dumping practices, by what criterion can we say that the short run domestic producer injury outweighs the short run domestic consumer benefit?

a. *Price Discrimination as Weak Evidence of Impermanence.* Viner's confidence in the usual impermanence of dumping sales was apparently based more on observation than theory.⁶⁴ We may assert with confidence that money-losing sales will be temporary, but how are we to know from price discrimination alone if dumping is profit-maximizing in the long or short run? Only if prices are below marginal cost can we say conclusively that money-losing sales are involved. A test involving marginal cost estimates would, of course, be administratively unworkable. An average cost standard, which as we have seen is not in every case determinative of non-profit-maximizing behavior, might be thought to give a rough approximation of such cases. But from an administrative point of view average cost calculations would not gain much over marginal cost calculations. Moreover, for consistency, it would probably be necessary to oppose uniform pricing below average cost as well, since such sales might also be expected to be temporary.

b. *The Costs of Impermanence Versus the Importance of Competitive Rivalry.* The more serious flaw in the Viner argument, however, lies in its failure to stress the importance of vigorous competition in the marketplace. If dumping impermanence results from a firm's studied responses to cyclical demand conditions or from market testing and experimentation, is there cause to attack the transient nature of these practices or rather to exult at the evidence they bear of a healthy competitive process? From the competitive point of view, permanence rather than impermanence in business practices should be viewed with suspicion. In the predatory situation it is not the impermanence of the dumping price which is distressing, but the high monopoly price which is expected to follow.

The only plausible ground on which business injury from dumped

⁶³ See VINER 145-47; Anthony, *supra* note 9, at 165-68; Viner, *Memorandum on Dumping*, in VINER 356-57.

⁶⁴ See Viner, *Memorandum on Dumping*, in VINER 358-59.

imports may be seen to offset short run consumer benefits from low prices requires us to assume in advance that domestic producers are vigorously competitive and roughly as efficient as the foreign competition.⁶⁵ It could then be argued that elimination of adjustment costs caused by short run dumping would allow domestic firms to offer lower prices to the consumer in the long run. This of course begs the question. Even assuming that short run dumping practices may not reflect the long run efficiency advantages of the foreign producer, legislation designed to discourage dumping in all of its short run forms would defeat healthy influences on price competition in the domestic market. And if our assumption of vigorous competition among domestic producers is not realistic, there would be no incentive to offer lower prices to the consumer, no matter how much the producer's costs of adjustment are reduced by protecting against short run foreign competition.⁶⁶

c. *The Procompetitive Effects of Competitive and Cyclical Pricing.* Dumping of longer than sporadic duration but not lasting indefinitely can be attributed to several motives:⁶⁷ (1) a producer might charge low prices to facilitate entering a market as a new firm, to create demand for a new product, to retain customers in an established market in the face of lower prices from competitors, or to test market alternatives as an experimental ploy; (2) he might dump in the short run in order to continue to operate at full capacity in the face of a cyclical downturn in demand at home; or (3) he might be a predator. Only the predatory motive would have negative effects on the competitive process itself. The first two, introductory or experimental pricing and cyclical demand pricing, might be thought of as procompetitive and anticompetitive respectively.⁶⁸

Economists evaluate competitive vigor in the marketplace in terms of three important criteria: market structure, competitor conduct, and overall economic performance.⁶⁹ The last criterion merely measures the overall efficiency of the production and distribution system and the level of innovative vigor. The question of market structure concerns

⁶⁵ For a discussion of dumping which explicitly makes this assumption, see Anthony, *supra* note 9, at 165.

⁶⁶ Cf. SCHERER 200-06. Scherer discusses the analogous problem of cutthroat competition in the wholly domestic setting. See text accompanying notes 71-75 *infra*.

⁶⁷ See VINER 23-31; cf. SCHERER 256-57, 261-62; Bowman, *supra* note 32, at 77.

⁶⁸ For discussion of the procompetitive aspects of price discrimination, see SCHERER 261; Bowman, *supra* note 32, at 77-78.

⁶⁹ See generally SCHERER 3-6; see also J. BAIN, *INDUSTRIAL ORGANIZATION* (2d ed. 1968); R. CAVES, *AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE* (2d ed. 1967); Mueller, *The New Antitrust: A "Structural" Approach*, 1 *ANTITRUST L. & ECON. REV.* 87 (Winter 1967).

the number of business firms, their relative market shares, and the existence and severity of barriers to entry. A highly competitive market structure would require a large number of firms, each having a small percentage of the total market, and the absence of entry barriers. The conduct criterion concerns the manner in which firms make output and pricing decisions—whether independently, interdependently, or collusively—and the purpose or effect of those decisions, that is, whether they reflect interfirm rivalry, exclusion of newcomers, or predation. Competitive conduct would call for independent pricing and output decisions seeking to maximize profits in the face of sharp rivalry.

In these terms it can be seen that low introductory, meeting competition, and experimental prices have highly procompetitive effects on market structure and conduct. Low promotional or meeting competition prices either add another firm to the market or preserve a market position and thus ensure future rivalry. It is in fact the very short-lived nature of these pricing practices which contributes to their procompetitive effect. If a dumper continued to charge money-losing low prices long enough to acquire an alarmingly large share of the market, one might begin to fear predatory motives or effects. In terms of market conduct, reducing prices to meet or undercut the competition is the essence of rivalry, and experimental pricing displays the kind of independence in pricing decisions which marks proper competitive conduct.

With regard to cyclical demand dumping, the positive effects on the competitive process center more on conduct than market structure. Price shading through dumping in a foreign market in response to decreasing demand at home can have very healthy effects on competitive conduct by undermining any tendency toward oligopolistic price discipline in the import market.⁷⁰ This kind of price competition is especially salutary as an antidote to inflationary pressures currently prevalent in the American market which keep prices high despite recessionary conditions.

Price competition in the face of downturns in demand may be costly, especially if the market into which dumped goods are shipped also feels the effect of decreasing demand. This is analogous to the problem of cutthroat competition among a group of undisciplined oligopolists with high fixed overhead and low day-to-day operating costs.⁷¹ In the face of a recessionary decline in demand, the temptation for each is to cut prices to maintain the efficiency of capacity output and

⁷⁰ See SCHERER 261.

⁷¹ For general discussion of the problem of cutthroat competition, see *id.* at 198-206.

to make as large a contribution as possible to the cost of fixed overhead. Downward spiralling price competition may continue over a wide range down to the ultimate constraint of low marginal cost. Profits would be higher for all firms in an industry if they collusively agreed upon a higher price and reduced output for each.

Producers in such industries argue that abnormal competition in the trough of decreasing demand is foolishly wasteful. Depressed business conditions are expected to be only temporary and full production facilities will be needed in the long run to meet higher, more normal demand requirements. "Stop and go" operation of plants is said to lead to serious inefficiencies which could be eliminated by "fair trade" price maintenance laws. Such laws would prohibit a firm from undercutting standard or agreed upon prices during periods of decreasing demand.

But in the absence of competitive stimulus there is no reason to expect protected oligopolists to pass on cost savings to the consumer. F.M. Scherer has demonstrated that if oligopolists are allowed to stabilize prices to avoid cutthroat competition, prices are likely to remain fixed during periods of economic recession and to rise to higher levels during boom periods.⁷² Only government price regulation of the public utility variety could safeguard against this possibility if a pro-competitive policy is abandoned.⁷³

From the empirical evidence available, refusal to amend domestic antitrust policy to accommodate the cutthroat competition argument appears to have been wise. Studies of industries allegedly susceptible to the excesses of cutthroat competition, such as steel, sugar, tobacco, and bicycle and cement manufacturing, have shown that all have weathered periods of stiff competition without serious injury.⁷⁴ Except during the great depression of the early 1930's, conduct resembling ruinous competition appears to have been extremely rare.⁷⁵

Where objectionable competition originates abroad, as in the dumping case, there is of course always a greater willingness to indulge producer-biased thinking⁷⁶ and to sacrifice the consumer-oriented pro-competitive policies which lie behind liberal trade theory. Many of the same industries which have complained of cutthroat competition in the domestic market—steel, bicycles, and cement—have in fact won pro-

⁷² *Id.* at 202-06.

⁷³ See Anthony, *supra* note 9, at 176-77.

⁷⁴ See discussion and authorities cited in SCHERER 205.

⁷⁵ *Id.* at 206.

⁷⁶ See C. KINDLEBERGER, *supra* note 19, at 158.

tection against foreign dumping in the past.⁷⁷ It seems clear that these industries, all oligopolistic in structure, are especially sensitive to price competition. To give them protection against low dumping prices on the ground of impermanence alone would sacrifice many of the virtues of the competitive market system. This must be viewed as a contradiction of, rather than a legitimate exception to, free trade theory.

5. Summary

My discussion of the economics of dumping and free trade theory suggests that the "unfair competition" argument has validity only where anticompetitive or predatory dumping is involved. Opposition to dumping on the ground that it involves artificial non-cost-justified behavior is misleading, unless we know that dumping prices are below marginal cost. Otherwise we might be dealing with an entirely "cost-justified" case of profit-maximizing behavior, where marginal cost equals marginal revenue in all markets irrespective of the ratable distribution of long run fixed costs. Arguments that global efficiency will suffer if dumping is permitted fail to approach the question from the correct perspective. If we assume as a practical matter that market imperfections are unavoidable, the question then becomes which of the two available choices, discriminatory or uniform monopoly pricing, will lead to greater allocative efficiency. Because of the complicated, uncertain variables involved, no completely satisfactory answer can be given to this question. I can say with some confidence, however, that only consumers in the high priced market will suffer from the distortions associated with high monopoly prices. I also noted the difficulty of predicting impermanence from evidence of price discrimination alone. More important, opposition to dumping on the ground of its impermanence would seem to give excessive weight to producer interests and to ignore the importance of competitive pricing to the efficient functioning of the market system. A number of forms of short run dumping may cause business injury to domestic rivals, but this is the essence of free trade and the competitive system.

D. *The Influence of Arguments Against Dumping on the Tests of Dumping Injury*

The arguments I have discussed bear directly on the issue of what measures should be taken against foreign dumpers. The nub of the

⁷⁷ See, e.g., Steel Reinforcing Bars from Canada, 29 Fed. Reg. 3840 (Tariff Comm'n 1964); Portland Cement from the Dominican Republic, 28 Fed. Reg. 4047 (Tariff Comm'n 1963); Bicycles from Czechoslovakia, 25 Fed. Reg. 9782 (Tariff Comm'n 1960).

issue lies in the definition of injury to the competing industry in the country receiving the dumped goods. The valid predation argument against dumping would seem to call for an injury test designed to protect only the competitive process itself. The unsound arguments against dumping suggest tests which would protect individual competitors.

The distinction is essentially one between quantitative and qualitative tests of injury. The unsound arguments would trigger antidumping measures in response to varying degrees of ordinary business injury to domestic competitors. The criteria here would include loss of sales, price deterioration, loss of profits, unemployment, and idling of plant capacity. Injury of this kind in sufficiently great quantity and duration could eliminate even efficient competitors and thus have a negative impact on competitive rivalry. But where quantitative injury does not reach such a destructive threshold, how is one to know whether the injury inflicted is merely the sign of a healthy competitive process or of budding predation? Qualitatively different tests are needed to measure competition-lessening effects in the marketplace.

1. *The Valid Test—Injury to Competition*

Commentators in the Robinson-Patman field have offered a number of useful tests by which to evaluate economic action and to preserve an "injury to competition" standard.⁷⁸ These tests, which may be applied with only slight adaptation to the dumping context, stress predatory intent, market structure, competitive conduct, and cost information.⁷⁹ Unless the quantitative criteria signal injury of major proportions, such qualitative tests should be of critical importance if only predatory dumping is to be condemned.

First, emphasis should be placed on the actual or implied predatory intent of the dumper. Since revealing business letters and confession-prone directors are likely to be *rarae aves*, inference should probably play a large role. Here one would look to such factors as the degree by which the delivered price of dumped goods undercuts the domestic

⁷⁸ See Comment, *Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury*, 68 COLUM. L. REV. 137 (1968); Comment, *Territorial Price Discrimination: The Competitive Injury Requirement Reconsidered*, 36 GEO. WASH. L. REV. 164 (1967); Comment, *supra* note 39, at 241-42; Comment, *Competitive Injury Under the Robinson-Patman Act*, 74 HARV. L. REV. 1597 (1961); see also Bowman, *supra* note 32; Brooks, *Injury to Competition Under the Robinson-Patman Act*, 109 U. PA. L. REV. 777 (1961); Dam, *The Economics and Law of Price Discrimination: Herein of Three Regulatory Schemes*, 31 U. CHI. L. REV. 1 (1963); Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 U. WASH. L. REV. 1 (1966).

⁷⁹ See Comment, *supra* note 78, 68 COLUM. L. REV. at 141-49; Comment, *supra* note 39, at 241; Comment, *supra* note 78, 74 HARV. L. REV. at 1602-10.

price, the substantiality of market invasion, and the rapidity with which the invasion proceeds.

Second, structural factors in the domestic industry, such as entry barriers and the relative size and power of the respective competitors, should be considered. Thus injury should rarely be found if entry barriers—for example, tariffs or start-up capital requirements—are high or if the competitive struggle pits a small foreign dumper against a few large and powerful domestic rivals.

Third, the test should include consideration of conduct factors such as domestic pricing patterns before and after dumping sales take place. A history of price rigidity or oligopolistic price discipline in the market receiving the dumped goods should weigh against a finding of dumping injury.

Fourth, some attention should be paid to cost data supplied by the foreign dumper to determine whether pricing decisions are profit-maximizing. Here it must be remembered that only sales below marginal cost are conclusively non-profit-maximizing, and even those may be justified for promotional or experimental purposes.

2. *The Invalid Test—Injury to Competitors*

Arguments against nonpredatory dumping of course favor an “injury to competitors” approach. Indeed, under the unfair competition or artificial advantage arguments, any legally cognizable business injury would merit antidumping action. Loss of sales by a single domestic competitor as a result of price competition from dumped imports might meet such a *de minimis* standard even if the complaining firm were inefficient and marginal. Since under these arguments economic evil is seen to lie in the practice of price discrimination itself, an injury test avoids only frivolous or inconsequential claims.⁸⁰

Viner’s argument against dumping, although not restricted to the predatory situation, was at least predicated upon the existence of *substantial* injury to domestic producers.⁸¹ The substantiality requirement presumably served to counterbalance the loss of consumer benefits and the possibility in any given dumping case that unobjectionable long run dumping might be involved.

The Viner approach is reminiscent of the injury test under various versions of the escape clause included in the 1947 GATT agreement⁸²

⁸⁰ Most of the recent Tariff Commission determinations of injury seem to have been based on a *de minimis* theory of injury. See note 283 and accompanying text *infra*.

⁸¹ VINER 145-47; Viner, *Memorandum on Dumping*, in *id.* at 347-73.

⁸² Article XIX of the GATT provides in part:

If, as a result of unforeseen developments and of the effect of the obligations

and in the legislation authorizing United States participation in tariff negotiations under GATT auspices.⁸³ The general thrust of these provisions is to allow withdrawal of negotiated tariff concessions where a trade agreement results in such an influx of imports as to cause *serious* injury to a domestic industry producing the same or a competitive product.⁸⁴ There is no requirement that the imports be discriminatorily priced. The purpose is plainly protectionist and can arguably be justified as a short run exception to free trade principles that allows a given sector of a national economy to adjust to the vigor of foreign competition.

In sum, an ordinary business injury test, even one based on *substantial* injury, contains strong elements of protectionist bias. One might suggest that the bias is a political necessity. Indeed, it might be urged that the escape clause principle should be expanded to apply to any sudden influx of low priced imports—not merely those resulting from tariff concessions—especially if relief from foreign competition were allowed for only a limited period.⁸⁵ But unless the degree of business

incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten *serious injury* to domestic producers in that territory of like or directly competitive products, the contracting party shall be free . . . to suspend the obligation

.....

GATT art. XIX (1)(a), 61 Stat. A58 (1947) (emphasis added). In general, however, a party suspending an obligation under this section must be willing to negotiate other offsetting concessions or suffer retaliation from the parties affected. *Id.* art. XIX (2),(3), 61 Stat. A59 (1947).

⁸³ Under the version of the escape clause appearing in the Trade Expansion Act of 1962 (Pub. L. No. 87-794, 76 Stat. 872 [hereinafter cited as TEA]), which superseded prior trade agreement legislation, a negotiated tariff concession may be removed if the Tariff Commission determines that

as a result in major part of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, *serious* injury to the domestic industry producing an article which is like or directly competitive with the imported article.

19 U.S.C. § 1901(b)(1) (1970) (emphasis added).

⁸⁴ Injury for escape clause purposes has traditionally been measured by a range of factors indicating ordinary business injury—for example, decreases in domestic production, sales, wages, employment, profits, and inventories. See Trade Agreements Extension Act of 1951, ch. 141, § 7(b), 65 Stat. 74, *repealed*, TEA § 301, 19 U.S.C. § 1901(b)(2) (1970). The present provisions of the Trade Expansion Act of 1962 are similar but not so detailed.

⁸⁵ The changes in the escape clause provisions drafted into the proposed Trade Act of 1971, S. 4, H.R. 20, 92d Cong., 1st Sess. (1971), would have produced substantially this result. See Note, *supra* note 14, at 1433-36. Thus far these changes have not been enacted. See also Hudec, *supra* note 8, at 1354-55.

For general discussion of the escape clause, see Banner, "In Major Part"—The New Causation Problem in the Trade-Agreements Program, 44 TEXAS L. REV. 1331 (1966);

injury involved is so widespread and substantial as to threaten a de facto lessening of competition, there appears to be no reason to single out for the application of such a clearly protectionist standard only those imports which happen to be discriminatorily low priced. Unless we are dealing with predatory dumping there is no good reason to treat dumped imports less liberally than other imports.

II

EVOLUTION IN TRADE DISTORTION: FROM DUMPING TO ANTIDUMPING LAWS

The early concern of the international trading community was with dumping as a distortion of natural trade patterns. Public officials and businessmen often cited the danger of predation as their reason for opposing the practice, but the economic dynamics of price discrimination which we have explored were not well understood. Antidumping fervor was often indistinguishable from general opposition to import competition. To protect against the alleged and ill defined evils of dumping, the major trading nations enacted broadly worded antidumping legislation with serious potential for protectionist abuse. Only recently has the trading community come to realize the greater threat to world trade inherent in these laws.

A. *Early Claims Against Dumping*

Viner traced dumping to sixteenth century Elizabethan England where foreigners were charged with selling paper at a loss to prevent the rise of the new British paper industry.⁸⁶ During the mercantile period in general, however, nations were primarily concerned with "bounty dumping," the governmental practice of granting export and production subsidies on internationally traded goods.⁸⁷

Genuine concern with price discrimination by private firms arose only after the Industrial Revolution made large scale production possible.⁸⁸ Industrialization spurred the growth of giant industries—for

BRONZ, *The Tariff Commission as a Regulatory Agency*, 61 COLUM. L. REV. 463, 468-71 (1961); METZGER, *The Escape Clause and Adjustment Assistance: Proposals and Assessments*, 2 LAW & POLICY INT'L BUS. 352 (1970); SURREY, *Legal Problems To Be Encountered in the Operation of the Trade Expansion Act of 1962*, 41 N.C.L. REV. 389, 394-97; Note, *Adjustment Assistance: A New Proposal for Eligibility*, 55 CORNELL L. REV. 1049 (1970); Note, *supra* note 14, at 1433-36.

⁸⁶ Viner, *Dumping*, in VINER 374-75.

⁸⁷ See HABERLER, THEORY 317; VINER 36; Ehrenhaft, *supra* note 9, at 50-52.

⁸⁸ See VINER 36, 51. Viner chronicles dumping practices in and by the major trading

example, in chemicals and steel—which eventually developed into cartels in Europe and trusts in America. Industrialization also fostered greater protectionism. Hence, by the turn of the century the prerequisites for widespread dumping existed:⁸⁹ customs laws and transportation costs delineated separate national markets and concentrated economic power allowed cartels and trusts to control output and adjust prices to the conditions prevailing in these markets.

From 1890 to 1914 it was apparently a common practice for German cartels, protected at home behind high tariff walls, to charge lower prices for export than for home consumption.⁹⁰ At the same time frequent complaints were made against American dumping of steel products and heavy machinery in Europe and Canada, as well as in the British colonies.⁹¹ But such practices seem to have been actuated primarily by the desire to maintain the efficiency of full production and the profitability of high, stable prices at home.⁹² Prices in the world markets simply reflected world competition.

Allegations of predatory motive were not infrequent. For example, in 1919 the American alien property custodian, A. Mitchell Palmer, charged that German dumping of chemicals and military dyestuffs was intended to crush American competition and establish a worldwide monopoly.⁹³ Viner, however, pointed out the general lack of evidence to support such charges and the likelihood that war-fostered anti-German propaganda lay behind most of them.⁹⁴ Opposition to import competition of all kinds also played a role in such complaints.

B. *The Rise of National Antidumping Laws*

The international trading community first sought to control dumping through international agreements condemning the practice and by placing the duty of prevention on the dumper's home government.⁹⁵ Although the initial agreements in the late nineteenth century were often more concerned with government subsidies (bounty dumping),⁹⁶

nations from the post-industrial period forward. *Id.* at 51-93. See also Ehrenhaft, *supra* note 9, at 51.

⁸⁹ See HABERLER, THEORY 301-02.

⁹⁰ See VINER 51-66.

⁹¹ See *id.* at 88-90.

⁹² See *id.* at 59-61.

⁹³ HOUSE COMM. ON WAYS & MEANS, ANTIDUMPING LEGISLATION, H.R. REP. NO. 479, 66th Cong., 2d Sess. 2-3 (1919).

⁹⁴ See VINER 61-65.

⁹⁵ See S. DOC. NO. 112, 73d Cong., 2d Sess. 19 (1934); Ehrenhaft, *supra* note 9, at 51-52.

⁹⁶ See S. Doc. No. 112, 73d Cong., 2d Sess. 19 (1934).

resolutions of the League of Nations and the 1927 Geneva World Economic Conference clearly condemned predatory dumping and dumping which disrupted world markets.⁹⁷ These efforts largely failed, probably because home governments had no interest in curtailing their exports.

The serious phase of national action against dumping began in 1904 when Canada became the first nation to assess special duties against dumped imports.⁹⁸ Similar legislation was passed in New Zealand in 1905⁹⁹ and in the Union of South Africa in 1914.¹⁰⁰ But it was not until the post-World War I period that antidumping laws spread to the United States and Europe, spurred by protectionist sentiment and fears of ruinous German dumping.¹⁰¹ In 1916 the United States had appended to the Revenue Act of that year two sections¹⁰² which in effect extended the anti-price discrimination provisions of the 1914 Clayton Act to foreign commerce. But the 1916 provisions were unique; they called for criminal sanctions and treble damage relief. But they have never been applied. In 1921 antidumping statutes levying special duties on dumped imports were passed in the United States, Australia, and Great Britain.¹⁰³ By 1958 virtually all the major trading nations had antidumping provisions in one form or another, although they were most commonly enforced in the Anglo-American world.¹⁰⁴

C. *The Protectionist Character of Antidumping Legislation*

From the outset antidumping laws had overtones of protectionism. They were generally enacted as part of tariff legislation, they utilized a tariff-like remedy, and they were usually administered by customs officials.¹⁰⁵ In operation they involved protectionism of two different

⁹⁷ I WORLD ECONOMIC CONFERENCE, REPORT AND PROCEEDINGS, LEAGUE OF NATIONS, ECON. & FIN. II, No. 52, at 44 (1927); ECONOMIC CONSULTATIVE COMM., REPORT: ECONOMIC ORGANISATION, LEAGUE OF NATIONS, ECON. & FIN. II, No. 18, at 13 (1928). These resolutions are reprinted in S. Doc. No. 112, 73d Cong., 2d Sess. 19-20 (1934).

⁹⁸ An Act To Amend the Customs Tariff, 1897, 4 Edw. 7, c. 11, § 19 (Can. 1904); see VINER 192-204.

⁹⁹ The Agricultural Implement Manufacture, Importation, and Sale Act, 1905, 5 Edw. 7, No. 58 (N.Z. 1905); see VINER 204-06.

¹⁰⁰ Act of July 7, 1914, Concerning the Imposition of Customs Duties, [1914] S. Africa Statutes, No. 26, § 8; see VINER 209-12.

¹⁰¹ See VINER 216-17, 258-65; Ehrenhaft, *supra* note 9, at 51.

¹⁰² Revenue Act of 1916, ch. 463, §§ 800-01, 39 Stat. 798, 15 U.S.C. §§ 71-72 (1970).

¹⁰³ Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 11; Customs Tariff (Industries Preservation) Act, 1921, [1921] Commw. Acts, No. 28 (Austl.); Safeguarding of Industries Act, 1921, 11 & 12 Geo. 5, c. 47; see VINER 216-31, 258-65.

¹⁰⁴ See GATT, ANTI-DUMPING AND COUNTERVAILING DUTIES 5-6 (1958); see generally GATT, ANTI-DUMPING AND COUNTERVAILING DUTIES: REPORT OF EXPERTS (1961) [hereinafter cited as REPORT OF EXPERTS].

¹⁰⁵ See GATT, ANTI-DUMPING AND COUNTERVAILING DUTIES 12 (1958).

kinds, substantive and procedural. The broad operative concepts of this legislation could be expansively interpreted to subject a significant portion of a country's imported goods to special antidumping duties. And even if no duty were ultimately imposed, the administrative procedures involved were often sufficient in themselves to have a chilling effect on imports.

1. *Substantive Protectionism*

Antidumping laws generally require two affirmative determinations before special duties may be levied against offending imports. The goods must be found first to be discriminatorily low priced and second to cause or threaten to cause injury to the domestic market.

Antidumping statutes have not often condemned price discrimination directly; rather, they have usually been designed to combat sales below "normal value"¹⁰⁶ or below "fair value."¹⁰⁷ But in practice these terms have come to mean sales at a price below the price charged in the home market, the price in some third country market, or, in rare cases, the estimated cost of production in the home market.¹⁰⁸ At one point Swedish law compared the price of imported goods with a standard "reference price" set by the government, which fluctuated with the price of domestic Swedish goods.¹⁰⁹ Thus, in effect, any imports below the domestic Swedish price would be affected by the antidumping law. But few countries have followed such a blatantly protectionist approach. Rather, the major issue has become whether, and to what degree, to allow on export commerce price adjustments attributable to cost savings from such factors as bulk shipments, reduced promotional expenses, lower maintenance, and the like.¹¹⁰ Refusal to allow such adjustments, even under reasonable circumstances, would stamp many imports as priced below "fair value." But levy of antidumping duties would still depend ultimately on the injury finding.

A weak standard of injury would operate to bar all price discrimination in international trade. Foreign suppliers would be forced to lower their domestic price whenever they wished to offer a low, com-

¹⁰⁶ GATT, art. VI, 61 Stat. A23 (1947), as modified, 62 Stat 3682, T.I.A.S. No. 1890 (1948).

¹⁰⁷ Antidumping Act, § 201(a), 19 U.S.C. § 160(a) (1970).

¹⁰⁸ See, e.g., the American definition of "fair value" included in the Treasury Department's Antidumping Regulations, 19 C.F.R. §§ 153.2-153.5 (1971).

¹⁰⁹ See GATT Ruling, *Swedish Antidumping Duties*, in GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 81 (3d Supp. 1955) (complaint by Italy against Sweden).

¹¹⁰ See REPORT OF EXPERTS 7-10. For discussion of the United States practice as of 1968, see Hendrick, *Administration of the U.S. Antidumping Act—Procedures and Policies*, in COMPENDIUM 162-66; Hendrick, *supra* note 47, at 922-23.

petitive price in an export market. This could have the protectionist effect of barring trade by making it too costly.

Until recently, antidumping legislation could be found which contained no injury requirement at all or very broad language which could be interpreted to the same effect. The 1904 Canadian law, by assessing duties against all dumped goods if they were merely "of a class or kind made or produced in Canada,"¹¹¹ in effect had no injury standard. The 1921 United States statute, which is still in effect, is an example of the use of broad language. Special duties are to be assessed whenever "an industry in the United States is being or is likely to be injured . . . by reason of the importation of [discriminatorily low priced merchandise]."¹¹² There are three operative concepts in the American language: existence of an industry, injury to it, and a causal relation between dumped imports and the injury. The industry concept is often broken into two further notions, a product market and a geographic market area. Each of these concepts can be infused with a different meaning depending on the objective in mind, that is, depending on whether the objective is to bar price discrimination per se, injurious dumping, or predatory dumping.¹¹³

For example, under an anticompetitive definition concerned mostly with maintaining domestic competitive rivalry, the product market would include the market for those goods which are genuinely competitive with *or* substitutes for the dumped product in question.¹¹⁴ The geographic market would be drawn to include the actual area or areas within which firms dealing in the relevant product lines actually compete.¹¹⁵ In cement this might be limited to the Northeast area of the United States, while in steel products this might extend to the entire continental United States. Injury would mean injury to competition rather than injury to particular competitors. The requirement of a causal relation between dumping and lessened competition might involve identifying the individual foreign suppliers who could conceivably threaten competition, rather than linking injury to dumped goods from all sources.¹¹⁶

¹¹¹ An Act To Amend the Customs Tariff, 1897, 4 Edw. 7, c. 11, § 19 (Can. 1904). For discussion of the new Canadian law implementing the International Antidumping Code, see text accompanying notes 174-83 *infra*.

¹¹² Antidumping Act § 201(a), 19 U.S.C. § 160(a) (1970).

¹¹³ See notes 78-85 and accompanying text *supra*.

¹¹⁴ This is a simplified statement of only a part of the complex question of market definition in antitrust law. See generally P. AREEDA, *supra* note 43, at 127-58.

¹¹⁵ *Id.*

¹¹⁶ See text accompanying notes 308-10 *infra*.

But the statutory language will also support a more protectionist approach. Under a standard condemning price discrimination per se, a single firm producing green wrapping paper might constitute an "industry,"¹¹⁷ a small loss of green paper sales by this firm might constitute injury,¹¹⁸ and the most remote connection between dumping and such injury might constitute cause.¹¹⁹ Under an injurious dumping standard, higher quantitative thresholds would be required for each concept, but the overall test would approximate a predatory or anticompetitive standard only if such thresholds were very high.

In sum, antidumping statutes drafted in broad terms are inherently subject to protectionist application whenever national officials choose to find price discrimination freely and to employ de minimis tests of injury.

2. Procedural Protectionism

On the procedural side, antidumping legislation in most countries has been subject to abusive administration with regard to several issues, including:¹²⁰ (1) the substantiality required of a complaint before proceedings are initiated; (2) the overall length of the proceedings; (3) the availability and application of provisional measures; (4) the retroactivity of provisional remedies and final duties; and (5) the degree to which proceedings are fair and open, and give concerned parties proper advance notice and an opportunity to be heard. With respect to each of these issues, abusive procedures indirectly penalize goods which come under dumping suspicion—sometimes by the tactical design of domestic complainants—and thus impede the free flow of trade even where no positive dumping finding is ultimately made.

In the past, foreign exporters to the United States have often been critical of American procedures with respect to the first four of these issues.¹²¹ Since 1954 American antidumping proceedings have been administered by two separate agencies.¹²² The Treasury Department

¹¹⁷ For discussion of the Tariff Commission's recent tendency towards an excessively narrow market definition, see text accompanying notes 251-68 *infra*.

¹¹⁸ For discussion of the Commission's new de minimis test of injury, see text accompanying notes 281-93 *infra*.

¹¹⁹ For discussion of the Commission's new "contributing cause" doctrine, see text accompanying notes 311-17 *infra*.

¹²⁰ See REPORT OF EXPERTS 15-19; U.S. TARIFF COMM'N, OPERATION OF THE TRADE AGREEMENTS PROGRAM—19TH REPORT 229-31 (1967).

¹²¹ See U.S. TARIFF COMM'N, *supra* note 120; Rehm, *The Kennedy Round of Trade Negotiations*, 62 AM. J. INT'L L. 403, 429-30 (1968).

¹²² The Customs Simplification Act of 1954, ch. 1213, § 301, 68 Stat. 1138, 19 U.S.C. § 160 (1970), transferred the determination of dumping injury from the Treasury to the Tariff Commission.

first determines price discrimination and, if its decision is affirmative, the Tariff Commission then decides the injury question. This bifurcation in function facilitates the initiation of dumping investigations but increases the length of the total proceeding. Evidence of price discrimination alone might suffice to launch a Treasury investigation; at the same time, reserving the injury question for a later investigation by the Tariff Commission naturally lengthens the overall proceedings.

American procedures also require withholding of appraisement with respect to all goods merely suspected of being sold at discriminatorily low prices.¹²³ This means that as a provisional remedy customs officials suspend determination of the full amount of *ad valorem* and other duties payable. In some cases withholding may be applied retroactively to reach goods imported as much as four months prior to the initial dumping complaint.¹²⁴ Once appraisement is withheld an importer cannot know what his duty liability might ultimately be. Thus further importation of the goods involved is often either greatly diminished or curtailed altogether, unless the import price is raised.¹²⁵ The longer the period of time during which goods are subjected to a provisional remedy such as withholding, the greater the protectionist impact. In the United States, some cases have resulted in withholding of appraisement for as long as nine months to a year or longer.¹²⁶

Recent procedures in European countries have imposed many of these same or similar burdens and have also lacked many ordinary due process safeguards.¹²⁷ Final determinations have been reached without giving regular notice to the parties involved and without allowing them to present oral or written evidence.¹²⁸ Such procedures have a serious protectionist impact; they encourage foreign suppliers to raise prices

¹²³ 19 U.S.C. § 160(b) (1970).

¹²⁴ *Id.* The new 1968 antidumping regulations withhold appraisement only from the date of the decision to withhold, although discretion is retained to apply the remedy retroactively. 19 C.F.R. § 153.48(a) (1971); see text accompanying notes 239-41 *infra*.

¹²⁵ Pig Iron from Czechoslovakia, East Germany, Romania, & the U.S.S.R., 33 Fed. Reg. 15,904 (Treas. July 1968); Cast Iron Soil Pipe from Poland, 32 Fed. Reg. 12,925 (Tariff Comm'n 1967) (withholding apparently stopped importation); Coudert, *supra* note 9, at 197-98; Prosterman, *supra* note 9, at 318-19; but see Conner & Buschlinger, *supra* note 9, at 130; Hendrick, *supra* note 110, at 160 n.33.

¹²⁶ See Ehrenhaft, *supra* note 9, at 61; *Hearings on Tariff and Trade Proposals Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess., pt. 2, at 521-22 (1970). Long withholding periods are common. See, e.g., Window Glass from the U.S.S.R., 28 Fed. Reg. 7610 (Treas. July 1963) (withholding), 29 Fed. Reg. 13,581 (Tariff Comm'n Sept. 1964) (no injury); White Portland Cement from Japan, 28 Fed. Reg. 9996 (Treas. Sept. 1963) (withholding), 29 Fed. Reg. 9636 (Tariff Comm'n July 1964) (no injury).

¹²⁷ See Rehm, *supra* note 121, at 429.

¹²⁸ See U.S. TARIFF COMM'N, *supra* note 120, at 230; Kelly, *supra* note 15, at 300.

rather than risk entanglement with arbitrarily enforced antidumping laws.

III

CURBING THE PROTECTIONIST POTENTIAL OF ANTIDUMPING LAWS THROUGH INTERNATIONAL AGREEMENT

In the years immediately following World War II the Western trading nations joined in a cooperative effort to structure international agreements and institutions to encourage freer economic intercourse, and thus to blunt the tendency toward nationalistic, "beggar thy neighbor" economic policies.¹²⁹ In this cooperative spirit, the United States in 1945 suggested that the subject of dumping and antidumping laws be included in the discussions which eventually led to the adoption of the General Agreement on Tariffs and Trade in 1947.¹³⁰

A. GATT Article VI

GATT article VI, covering antidumping and countervailing duties, plagues both the dumping and antidumping houses, but the former mainly in hortatory terms: "The contracting parties recognize that dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party . . ." ¹³¹ The qualifying phrase clearly exempts price discrimination per se from opprobrium. Moreover, this article imposes no affirmative duty on any nation actually to prevent private firm dumping.

Indeed, article VI obligates the contracting parties not to levy antidumping duties unless certain standards for determining price discrimination and injury are met. First, import sales must be below the "margin of dumping," which is expressly defined to mean one of three values—the home market price, the highest third market price, or the cost of production in the country of origin.¹³² The contracting parties are also required to make "[d]ue allowance . . . for differences in conditions and terms of sale . . ." ¹³³ Second, there must be injury to or retardation of a domestic industry and the injury must be "material."¹³⁴

¹²⁹ Chayes, *Legal Institutions of the International Economy*, 1967 UTAH L. REV. 331.

¹³⁰ See J. JACKSON, *supra* note 8, at 403-04.

¹³¹ GATT art. VI(1), *as modified*, 62 Stat. 3682, T.I.A.S. No. 1890 (1948).

¹³² *Id.* The third market price or cost of production (defined so as to include a "reasonable addition for profit") may be used only if no domestic price exists.

¹³³ *Id.*

¹³⁴ *Id.* art. VI(6)(a), *as modified*, 62 Stat. 3683, T.I.A.S. No. 1890 (1948).

Although these terms are not defined further, they clearly exclude anti-dumping laws which combat price discrimination per se.

The major drawback to article VI, however, lies in its nonbinding character. Most of the national antidumping laws were enacted prior to 1947. Under the Protocol of Provisional Application for part II of GATT,¹³⁵ which includes article VI, the contracting parties are not strictly bound to provisions which conflict with preexisting national legislation. Moreover, even good faith adherents to article VI have interpreted its language in widely diverse fashion. Only the Swedish law used the exact article VI terminology, "material injury."¹³⁶ Canada had no injury requirement at all,¹³⁷ and some countries have easily found material injury by interpreting the "industry" concept to encompass only a regional subpart of a larger national production and distribution pattern.¹³⁸

B. *The International Antidumping Code*

At the opening of the Kennedy Round GATT negotiations in 1963 the contracting parties decided to include nontariff barriers on the agenda of negotiating topics.¹³⁹ Factors in addition to the ambiguity and nonbinding character of article VI encouraged focus on antidumping laws.¹⁴⁰ A number of European countries had become increasingly alarmed at the manner in which the American antidumping law was being administered. The United States in turn objected to the absence of an injury requirement in Canada and to the Star Chamber nature of European procedures. This latter issue had grown in importance after 1961 when a number of European countries, particularly the United Kingdom, began to process an increasing number of antidumping cases.¹⁴¹ The European Economic Community (EEC) also began to plan a uniform antidumping regulation for the Common Market countries.¹⁴² Thus there was opportunity at the Kennedy Round for harmonizing

¹³⁵ 61 Stat. A2051 (1947), 55 U.N.T.S. 308 (1950).

¹³⁶ Royal Ordinance No. 84 of March 29, 1957, *quoted in* GATT, ANTI-DUMPING AND COUNTERVAILING DUTIES 109 (1958), provided for the levying of duties "in accordance with the provisions of GATT." This ordinance expired in 1959. The present provision, Royal Ordinance No. 274 of May 23, 1969, *reprinted in* GATT, ANTI-DUMPING LEGISLATION, ANTI-DUMPING LAWS AND REGULATIONS OF PARTIES TO THE AGREEMENT ON THE IMPLEMENTATION OF ARTICLE VI OF GATT 81 (1970) [hereinafter cited as ANTI-DUMPING LEGISLATION], neither refers to GATT nor uses the term "material injury."

¹³⁷ See text accompanying note 111 *supra*.

¹³⁸ Cf. GATT, ANTI-DUMPING AND COUNTERVAILING DUTIES 10 (1961).

¹³⁹ Rehm, *supra* note 121, at 427.

¹⁴⁰ See *id.* at 427-31.

¹⁴¹ See Kelly, *supra* note 15, at 299-300.

¹⁴² See *id.* at 300.

antidumping laws while tightening the restrictions against their use for protectionist ends.

The International Antidumping Code,¹⁴³ negotiated technically as an agreement to elaborate the provisions of GATT article VI, made no attempt to condemn dumping itself. For the first time an international agreement on dumping concerned itself solely with curbing the protectionist application of antidumping laws.¹⁴⁴ The Code focused on the protectionist potential of both the substantive and procedural provisions of existing legislation.

1. *Suppression of Administrative and Procedural Trade Burdens*

The Code provisions on administrative and procedural burdens have three major objectives: (1) to reduce the harassment value of antidumping proceedings; (2) to reduce the penal nature of provisional and final remedies; and (3) to ensure procedural fairness.

To achieve the first objective the Code requires that government officials have evidence of *both* dumping (price discrimination) and injury before initiating formal investigative proceedings.¹⁴⁵ This prevents domestic complainants from harassing foreign competition with a steady barrage of dumping complaints based solely on evidence of price discrimination, or, as has less often occurred, based solely on evidence of injury. To shorten the overall proceedings, the Code encourages, but does not require, simultaneous investigation of both the price discrimination and injury questions.¹⁴⁶ Simultaneous consideration of these questions is mandated only after provisional measures are applied.¹⁴⁷

The Code pursues the second objective, reducing the penal nature of provisional and final remedies, by allowing provisional remedies to be assessed against goods under investigation only if there has been an affirmative "preliminary decision" of price discrimination and if there is some evidence of injury on hand.¹⁴⁸ Provisional remedies may be in the form of special provisional duties or withholding of appraisement,¹⁴⁹ but they may not normally be applied retroactively to goods entered for

¹⁴³ See note 10 *supra*.

¹⁴⁴ For a brief discussion of the Code provisions, see K. DAM, *supra* note 8, at 174-77; J. JACKSON, *supra* note 8, at 412-24; Rehm, *supra* note 121, at 431-34. For a more elaborate discussion of the Code, see Comment, *The Kennedy Round GATT Anti-Dumping Code*, 29 U. PITT. L. REV. 482, 490-514 (1968).

¹⁴⁵ Code art. 5(a).

¹⁴⁶ *Id.* art. 5(b).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* art. 10(a).

¹⁴⁹ *Id.* art. 10(b).

customs purposes prior to the decision to impose a provisional remedy.¹⁵⁰ In addition, they are expressly limited to a total duration of three months or, where the foreign supplier and local importer so request, to six months.¹⁵¹ The retroactivity of final duties as a general rule is also limited to the period for which provisional remedies have been applied.¹⁵²

Finally the Code ensures procedural openness by requiring national authorities to notify the foreign supplier and local importer of the initiation of antidumping proceedings.¹⁵³ They must be given an opportunity to present written evidence¹⁵⁴ and must be notified of the final determination, the reasons for the decision, and the criteria used.¹⁵⁵

2. *Suppression of Protectionist Interpretation of Substantive Concepts—The Definition of Injury*

On the substantive side the Code's treatment of the price discrimination determination merely elaborates on article VI without significant change.¹⁵⁶ In dealing with the impact of dumped goods in the importing country market, however, the Code introduces new definitional limits for the basic concepts of domestic industry, injury, and causation. It takes a disappointing "escape clause" approach rather than one designed to limit antidumping measures solely to clear cases of anticompetitive or predatory dumping. Nevertheless, through high quantitative standards the Code at least approximates an antitrust test.

a. *Domestic Industry.* The Code's industry definition is perhaps most deficient in its treatment of the product market concept, where the issue is often which domestic products to include for the purpose of measuring percentage market invasion by dumped imports. Here the Code borrows from its own terminology in the price discrimination area to include for injury purposes only the "like product" in the domestic market.¹⁵⁷ "Like product" is defined as a product "identical, [that is] alike in all respects to the [dumped] product under consideration."¹⁵⁸

¹⁵⁰ *Id.* art. 11.

¹⁵¹ *Id.* art. 10(d).

¹⁵² *Id.* art. 11. In a few narrow cases duties may be assessed on goods entered prior to this period. *Id.*

¹⁵³ *Id.* art. 6(f).

¹⁵⁴ *Id.* art. 6(a). An oral hearing may also be held "on justification." *Id.*

¹⁵⁵ *Id.* art. 6(h).

¹⁵⁶ This elaboration takes account of special cases, for example, where goods are transhipped through a nonprocessing country or where a foreign supplier does not sell to a local importer at arm's length. *See id.* art. 2.

¹⁵⁷ *Id.* art. 4(a).

¹⁵⁸ *Id.* art. 2(b).

Thus in determining price discrimination it seems appropriate to compare prices only on identical products, but for injury purposes this definition may result in exaggerating the dumping impact by narrowing the product market unnecessarily.

In the antitrust field theorists have generally rejected narrow, inflexible tests of the product market because of the need to take into account the substitutability of various related products.¹⁵⁹ The central question is the degree of market power which can be exercised in a given product line. If, for example, firm *R* produces red wrapping paper and firm *G* green wrapping paper, and consumers are color blind or otherwise indifferent to the distinction between red and green paper, it would not be possible to exercise market power in red or green wrapping paper separately. Higher prices for red paper would mean increased sales of green paper and vice versa. The danger of monopolization should in this case properly be measured in the wrapping paper market as a whole. A proper definition of the product market should therefore include all those domestic products which are substantially competitive with or close substitutes for the dumped goods.

In defining the geographic market area the Code is more consistent with basic antitrust notions. The general rule equates "domestic industry" with the "domestic producers as a whole of the like products."¹⁶⁰ Market segmentation is allowed, however, if because of transportation costs or traditional marketing patterns a few producers sell almost all their output in a limited geographic area and producers in other parts of the country do not sell to any substantial degree in the same area.¹⁶¹

The touchstone of these exceptions is the relative market isolation of the producers in the regional area. Clearly if producers in or near the competitive market area sell a substantial amount of their production outside the region, it would seem unreasonable to measure the extent of injury in terms of sales invasion or price depression in the regional area alone. A firm selling on a nationwide basis could remain quite healthy and yet lose an alarmingly large share of a narrow regional market. By the same token the existence of substantial regional sales of goods from distant suppliers also destroys the market isolation premise. Injury to local producers would not necessarily portend anticompetitive

¹⁵⁹ See generally P. AREEDA, *supra* note 43, at 127-58; ATTORNEY GENERAL'S ANTI-TRUST REPORT 44-45; F. ROWE, *supra* note 31, at 143-44; SCHERER 52-57; Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 350-51 (1967).

¹⁶⁰ Code art. 4(a).

¹⁶¹ *Id.* art. 4(a)(ii).

dangers so long as other domestic suppliers remained strong and viable. Only in truly isolated markets might injury to competition indeed occur.¹⁶²

b. *Material Injury*. Rather than adopt an injury to competition standard,¹⁶³ the Code retains the "material injury" language of article VI.¹⁶⁴ The term "material" is not defined, but the Code suggests that several factors should be examined, such as market share, profits, employment, and utilization of capacity in the domestic industry. Two further factors mentioned at least hint at an anticompetitive standard. The Code calls for consideration of restrictive trade practices, presumably in the import market, and the extent to which duty paid prices undercut the domestic level.¹⁶⁵ The former consideration suggests concern over oligopolistic price discipline in the market receiving dumped goods, and the latter a search for predatory intent on the part of the dumper.

c. *Principal Cause*. To avoid the imposition of antidumping duties when general recessionary conditions, nondumped imports, or other business factors are the real cause of domestic business losses, the Code provides that dumped imports must be the "principal cause" of domestic injury.¹⁶⁶ There is no elaboration as to precisely what this means, but the Code suggests that the effects of dumping be compared with all other adverse factors. Here the influence of "escape clause" reasoning appears strong. The escape clause in American trade agreements legislation, for example, has traditionally required a substantial cause test for injury alleged to have resulted from tariff concessions.¹⁶⁷ Indeed, on the question of linking increased imports with reduced tariffs, the causality language of the 1962 Trade Expansion Act has at times been interpreted to require the causal effect of tariff concessions to outweigh the aggregate of all other possible causes of increased imports.¹⁶⁸ The Code, which merely says "the authorities shall weigh"¹⁶⁹ dumping

¹⁶² See generally text accompanying notes 159-60 *supra*.

¹⁶³ See notes 78-79 and accompanying text *supra*.

¹⁶⁴ Code art. 3(a).

¹⁶⁵ *Id.* art. 3(b).

¹⁶⁶ *Id.* art. 3(a).

¹⁶⁷ See TEA § 301(b)(3), 19 U.S.C. § 1901(b)(3) (1970), defining "cause" as being the "major factor" in causing injury. The prior law, Trade Agreements Extension Act of 1951, ch. 141, § 7, 65 Stat. 74, as amended, Trade Agreements Extension Act of 1955, ch. 169, § 6(a), 69 Stat. 166, defined "cause" as having "contributed substantially towards causing" injury. See also notes 82-85 and accompanying text *supra*.

¹⁶⁸ See National Tile & Mfg. Co., TEA-F-6, Tariff Comm'n Pub. No. 145, at 14 (Dec. 21, 1964) (Culliton, Comm'r); Banner, *supra* note 85; Metzger, *supra* note 85, at 369 n.73 (views of former Tariff Comm'n Chairman); Note, *supra* note 14, at 1434 n.93, 1438.

¹⁶⁹ Code art. 3(a).

against all other factors, does not actually require a preponderance or aggregate theory result. This might be viewed as too rigid an approach. Nevertheless, its stress on a higher causality test is well placed, for this raises the standard for finding injury and sharpens the focus on activity which might actually threaten predation or lessen competition.

d. *International Review of National Interpretations.* The Geneva draftsmen were of course under no illusion that Code terminology would in itself guarantee nonprotectionist application of national laws. To guard against errant interpretations, the Code calls for a "Committee on Anti-Dumping Practices" to meet annually for consultations on the administration of antidumping laws in the signatory countries.¹⁷⁰ Whatever leverage the committee is able to exercise in molding a consistent body of international jurisprudence will rest ultimately on the reciprocity principle.¹⁷¹ A country which adopts a protectionist interpretation must expect a retaliatory interpretation by other signatory countries.

IV

IMPLEMENTATION OF THE INTERNATIONAL ANTIDUMPING CODE

A. *Implementation of the Code Abroad*

In addition to the United States, seventeen countries,¹⁷² including the major trading nations of the Western world and Japan, signed the Code at Geneva. With the exception of the United States, each of the

¹⁷⁰ *Id.* art. 17. The committee has been formed and continues to meet annually. See GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 12 (16th Supp. 1969).

¹⁷¹ See Scace, *New Anti-dumping Legislation—Some Problems of Interpretation*, 17 CAN. TAX J. 51, 55 (1969). The following observation was made by Mr. R.Y. Grey of the Canadian Department of Finance:

[A] clearly highly protectionist interpretation by the Canadian Anti-Dumping Tribunal would be an important argumentation in front of the United States Tariff Commission when Canadian exporters are accused of dumping in the United States . . . or in the United Kingdom, for example. And in a certain sense, jurisprudence will become internationalized because we are operating under the same Code.

Id., quoting FINANCE COMM., HOUSE OF COMMONS, 28th Parl., 1st Sess., No. 4, MINUTES 73 (Can. 1968).

¹⁷² The signatories are Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Italy, Japan, Luxemburg, The Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and Yugoslavia. See J. JACKSON, *supra* note 8, at 410 n.25. The EEC also signed as a separate party to the agreement. Jackson points out that because of the most favored nation principle of GATT art. I, parties to the Code are technically obligated to give Code treatment to all GATT members, even those who have not adhered to the Code. *Id.* at 410.

signatories appears to have implemented the Code provisions, in some cases through new legislation.¹⁷³

In Canada¹⁷⁴ and the United Kingdom¹⁷⁵ major statutory revisions were necessary since neither country had included an injury requirement prior to the Code. Although some of the Common Market countries incorporated the Code directly into their national law,¹⁷⁶ the most significant development for these countries was the enactment of a general antidumping regulation by the Council of the European Communities in April of 1968.¹⁷⁷ The new regulation followed the Code in virtually all respects and, with the expiration of the Rome Treaty's transitional period on December 31, 1969,¹⁷⁸ has now become binding in all Common Market countries.¹⁷⁹ New antidumping legislation enacted in Japan in March of 1968¹⁸⁰ is less elaborate than the Canadian,

173 See SENATE COMM. ON FINANCE, 91ST. CONG., 1ST. SESS., REPORT OF THE PRESIDENT ON ANTIDUMPING 105-06 (Comm. Print 1969); see also ANTI-DUMPING LEGISLATION.

174 An Act Respecting the Imposition of Anti-Dumping Duty, CAN. REV. STAT. c. A-15 (1970); see ANTI-DUMPING LEGISLATION 1; Scace, *supra* note 171. For a discussion of pre-Code Canadian antidumping law, see MacKenzie, *Anti-dumping Duties in Canada*, 4 CAN. Y.B. INT'L L. 131 (1966).

175 Customs Duties (Dumping and Subsidies) Act, 1969, c. 16; see ANTI-DUMPING LEGISLATION 83.

176 E.g., Law of Dec. 28, 1968, [1968] BGBl II 1183 (Germany).

177 Règlement (CEE) No. 459/68 du Conseil, JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES, April 17, 1968, at 1; see ANTI-DUMPING LEGISLATION 37; 2 A. CAMPBELL, COMMON MARKET LAW ¶¶ 3671-704 (1969). The regulation covers dumping from non-EEC countries into the community area. It is thus based on article III of the Rome Treaty concerning common commercial policy in external trade (Treaty Establishing the European Economic Community (Common Market), *opened for signature* March 25, 1957, [1957] BGBl II 753 (Germany), 298 U.N.T.S. 11 [hereinafter cited as EEC Treaty]), and should not be confused with the regulation of intra-EEC dumping. For discussion of the new EEC regulation, see Beseler, *EEC Protection Against Dumping and Market Subsidies from Third Countries*, 6 COMMON MARKET L. REV. 327 (1968); Ehle, *Basic Aspects of the Anti-Dumping Regulations of the Common Market*, 3 INT'L LAW. 490 (1969). For a discussion of European antidumping laws prior to the Code, see *Analyses of the Anti-dumping Laws of the Federal Republic of Germany, France, Italy, and the United Kingdom*, 10 ABA INT'L & COMP. L. BULL., Dec. 1965, at 14.

178 EEC Treaty art. 8.

179 See Beseler, *supra* note 177, at 330; Ehle, *supra* note 177, at 493. During the transitional period, article 26 of the antidumping regulation allowed the application of national antidumping laws in limited cases. See Beseler, *supra* note 177, at 351-52; Ehle, *supra* note 177, at 491-93. In one limited area there is disagreement as to whether national laws might still be applicable. Article 17(1) provides for Community-wide antidumping action "where Community interests call for Community action." EEC Treaty art. 17(1). Ehle reasons that if negative results are reached because of a lack of Community-wide interest, national antidumping action might still be possible. Ehle, *supra* note 177, at 493. Beseler takes the position that the EEC regulation has completely displaced national law. Beseler, *supra* note 177, at 343 n.97.

180 Customs Tariff Law art. 9, as amended, Law No. 5, March 1968, reprinted in ANTI-DUMPING LEGISLATION 73.

British, and EEC laws but follows their general pattern. All the significant Code standards appear to have been satisfied in the new statute and in the regulations established through a Cabinet Order of July, 1968.¹⁸¹

Experience under the new Code-inspired antidumping laws in these countries has thus far been sparse, largely because the new legislation has not often been invoked.¹⁸² The Code's impact in Canada, however, has already been significant. Under the pre-Code law antidumping duties had been assessed against small quantities of isoctanal imported into Canada from the United States. In the latest case involving the same chemical from the same source, the Canadian Antidumping Tribunal applied a statutory injury provision for the first time and dismissed the proceedings on a finding of no injury.¹⁸³ This sanguine picture of domestic reactions to the Code is marred only by the Code's reception in the United States.

B. *Implementation of the Code in the United States*

The United States fully adhered to the International Antidumping Code at Geneva under the President's executive agreement power. The Code thus became a binding American obligation on its effective date, July 1, 1968. Since that time the Treasury Department has adjusted its procedures to comply with the Code. By contrast the Tariff Commission's most recent decisions are totally incompatible with the Code's injury standards and proceed in a protectionist, anti-Code direction. In a narrow technical sense both agencies are acting legally because of the limited effect given to certain kinds of executive agreements in internal

¹⁸¹ Cabinet Order No. 233, July 1968, *reprinted in ANTI-DUMPING LEGISLATION* 75.

¹⁸² The GATT Antidumping Committee has reported the following statistics for certain Code signatories:

ANTIDUMPING CASES PENDING OR INITIATED
JULY 1, 1969 TO JUNE 30, 1970

Category of Cases	Signatory						
	U.S.	Canada	Denmark	EEC	Greece	Norway	U.K.
Cases Pending July 1, 1969	30	5	0	1	2	2	5
Cases Initiated Between July 1, 1969 and June 30, 1970	23	3	1	0	0	0	6

GATT, Second Report by the Committee on Anti-Dumping Practices, Doc. L/3521, April 6, 1971, at 2, 4. The relative frequency of antidumping cases is obviously much greater in the United States. There were no cases in the signatories not mentioned.

¹⁸³ See SENATE COMM. ON FINANCE, *supra* note 173, at 105.

American law. At the same time both agencies are free to implement the Code while remaining faithful to the antidumping act.

1. *Legal Status of the Code*

The weak position of the Code in internal American law results primarily from its character as an executive agreement, and in particular a non-self-executing, inherent power executive agreement. Executive agreements have binding force equal to treaties in creating international obligations,¹⁸⁴ but they are not given the same force in internal American law.

The first issue which arises under the question of internal effect concerns whether an international agreement is executory or self-executing.¹⁸⁵ The Antidumping Code is a non-self-executing agreement by its own terms, since it requires the signatory parties to bring their laws and regulations into conformity.¹⁸⁶ When it negotiates a non-self-executing agreement, the executive branch may have three alternative means of implementation. Congressional legislation, the most common means, would have established the superiority of the Code over the Act, but this alternative was unpromising as a means of implementing the Code because of strong protectionist sentiment in Congress.¹⁸⁷ The executive branch might instead have argued plausibly that the Code was based on the power delegated to the President in the Trade Expansion Act of 1962, which authorized American participation in the Kennedy Round. Implementation could then have been achieved through the President's special proclamation power authorized in that Act.¹⁸⁸ But the delegating language in the 1962 Act was weak; it merely authorized reduction of "existing duty or other import restriction."¹⁸⁹ Moreover, a number of congressmen argued strongly that there was no authority for the Code in the 1962 Act.¹⁹⁰ Thus the executive branch decided to base the Code

¹⁸⁴ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 142-44 (1965). See generally W. McCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, pts. 1 & 2, 54 YALE L.J. 181, 534 (1945).

¹⁸⁵ International agreements may be non-self-executing because of a constitutional requirement, because of the generality of the agreement's provisions, or because those provisions indicate that implementing legislation of some kind is contemplated. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 141-45 (1965).

¹⁸⁶ Code art. 14.

¹⁸⁷ See Rehm, *supra* note 121, at 430.

¹⁸⁸ TEA § 201(a)(2), 19 U.S.C. § 1821(a)(2) (1970).

¹⁸⁹ *Id.*

¹⁹⁰ See S. Con. Res. 38, 90th Cong., 1st Sess., 113 CONG. REC. 20,916 (1967), reprinted in *Hearings on the International Antidumping Code Before the Senate Comm. on Finance*, 90th Cong., 2d Sess. 9 (1968) [hereinafter cited as *Code Hearings*]; see also T. CURTIS &

on the President's inherent authority in foreign affairs.¹⁹¹ Implementation was presumably expected through the administrative decisions of the Treasury and Tariff Commission.

The second issue arising under the question of internal effect concerns the power of an international agreement to override inconsistent domestic statutes. Treaties and executive agreements entered pursuant to congressionally delegated authority follow the "later in date" rule of priority,¹⁹² but there is authority for denying that effect to an executive agreement based exclusively on the constitutional power of the President.¹⁹³ Thus the inherent power theory urged by the executive branch as the basis for the Code was counterproductive on the question of supremacy of the Code over the 1921 Act. Through title II of the Renegotiation Amendments Act of 1968,¹⁹⁴ Congress dispelled any doubts over the supremacy question. It instructed the Treasury and Tariff Commission to "resolve any conflict between the International Antidumping Code and the Antidumping Act, 1921, in favor of the Act as applied by the agency administering the Act."¹⁹⁵

2. *Freedom of the Treasury and Tariff Commission To Implement the Code*

Title II of the Renegotiation Amendments Act was a product in part of the larger executive-legislative struggle for power in foreign affairs of the late 1960's,¹⁹⁶ and in part of the protectionist sentiment in

J. VASTINE, *supra* note 16, at 208-10; S. REP. NO. 1385, pt. 2, 90th Cong., 2d Sess. (1968); S. REP. NO. 1341, 89th Cong., 2d Sess. 2-3 (1966), *reprinted in Code Hearings* 7-8; Long, *supra* note 35, at 469.

Legal commentators have also argued that the Code was not authorized by the Trade Expansion Act. See Anthony, *supra* note 9, at 179 n.57; Shannon & Marx, *The International Anti-Dumping Code and United States Antidumping Law—An Appraisal*, 7 COLUM. J. TRANSNAT'L L. 171, 175-81 (1968). Both arguments rest heavily on a statement in a Senate report accompanying the 1962 Act: "Other laws not intended to be affected include the Antidumping Act . . ." S. REP. NO. 2059, 87th Cong., 2d Sess. 19 (1962). However, there was no such statement in the corresponding House report (H.R. REP. NO. 1818, 87th Cong., 2d Sess. 45 (1962)) and the statutory language, "other import restrictions," is broad enough to encompass the Code.

¹⁹¹ SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS, MEMORANDUM, Aug. 17, 1966, *reprinted in* 112 CONG. REC. 20,412 (1966).

¹⁹² See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 141-43 (1965).

¹⁹³ See *id.* § 144; see also *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

¹⁹⁴ Renegotiation Amendments Act of 1968, Pub. L. No. 90-634, tit. II, 82 Stat. 1347, 19 U.S.C. § 160 note (1970).

¹⁹⁵ *Id.* § 201(a)(1), 82 Stat. 1347, 19 U.S.C. § 160 note (1970).

¹⁹⁶ The seriousness with which the separation of powers issue was viewed is reflected in the statements of Senator Hartke on the floor of the Senate:

These men [various senators and representatives supporting Senator Hartke's

Congress.¹⁹⁷ In fact, the bill as it emerged from the Senate would have completely prohibited the Treasury and Tariff Commission from implementing the Code provisions.¹⁹⁸ Liberal trade interests in the House forced a compromise by the conference committee, so that the final version of the 1968 Act carries a distinctly neutral cast.¹⁹⁹ The supremacy of the Act is assured, but the Treasury and Tariff Commission are not prohibited from carrying the Code into effect as long as basic consistency with the Act is maintained.

The real issue is one of interpretation, not of priority of legal norms. The Act is drafted in broad terms. I have shown, for example, that the Tariff Commission must decide "whether an industry in the United States is being or is likely to be injured . . . by reason of the importation of [dumped goods]."²⁰⁰ The Code on the other hand gives a detailed definition of an industry, requires injury to be material, and adds a principal cause standard. The Act's broad terms and the Code's narrow terms do not "conflict"; the issue is whether it is proper to give a Code interpretation to the Act.

Prior to the passage of the Renegotiation Amendments Act one could have argued that the Code had an indirect binding effect on the Treasury and Tariff Commission. They are after all administrative agencies, and the President had entered an international agreement obligating the United States to interpret and apply its law according to the guidelines set forth in the Code. The President's authority would have been clearer, perhaps, over the Treasury than over the Commission. The Commission could be viewed for some purposes—and espe-

position] recognize not only the specific economic problem [of international dumping practices] but also the transcendent problem. A problem that could have most serious effects on the nature and future course of the Republic. A problem that has seen full flower in the Tonkin Bay Resolution, the Canadian-American Auto Parts Agreement, the Defense Department's refusal to build two nuclear frigates as specifically directed The list goes on and on. But in the Anti-Dumping Code we have reached a new plateau.

113 CONG. REC. 20,915 (1967).

¹⁹⁷ See 114 CONG. REC. 26,131-33 (1968) (remarks of Senator Hartke). Although Senator Hartke disclaims protectionism as the purpose for title II, the less liberal treatment proposed by the Senate discloses protectionist sentiments. See also Rehm, *supra* note 121, at 430.

¹⁹⁸ See 114 CONG. REC. 29,888 (1968) (remarks of Senator Long discussing the Conference Report on the 1968 Act); Pintos & Murphy, *Congress Dumps the International Antidumping Code*, 18 CATH. U.L. REV. 180, 188 (1968).

¹⁹⁹ See CONF. REP. NO. 1951, 90th Cong., 2d Sess. (1968); 114 CONG. REC. 30,607 (1968) (remarks of Congressman Boggs discussing the Conference Report on the 1968 Act); T. CURTIS & J. VASTINE, *supra* note 16, at 212-23; see also note 195 and accompanying text *supra*.

²⁰⁰ Antidumping Act § 201(a), 19 U.S.C. § 160(a) (1970).

cially in the antidumping field where it makes final determinations—as an independent agency²⁰¹ responsible primarily to Congress.

Congress addressed this problem directly in the 1968 Renegotiation Amendments Act by providing: “Nothing contained in the International Antidumping Code . . . shall be construed to restrict the discretion of the . . . Tariff Commission in performing its duties and functions under the Antidumping Act . . .”²⁰² At one point the 1968 Act has the appearance of implementing legislation since it directs the two agencies to “take into account the provisions of the International Antidumping Code.”²⁰³ But it states they are to do so “only insofar as [the Code provisions] are consistent with the Antidumping Act, 1921, as applied by the agency administering the Act.”²⁰⁴ Thus the Treasury and Commission retain full discretion to interpret the 1921 Act in accordance with the Code or contrary to it. The Renegotiation Amendments Act leaves unanswered the fundamental question of how these agencies *should* interpret the Act.

There is of course no single, rigid approach to statutory interpretation. Weight must be given to the plain meaning of words, to legislative history, to the purpose of the statute, and to past interpretations. On each of these approaches, however, interpreting the Antidumping Act poses difficulties.

First, as to the meaning of words, I have shown that the language is broad and hence subject to differing interpretations, depending upon whether a protectionist or antitrust character is ascribed to it.

Second, as to legislative history, the background of the Antidumping Act is confused, with both protectionist and antitrust strands in the fabric.²⁰⁵ The Act was passed in a recessionary period²⁰⁶ as title II of the

²⁰¹ See Bronz, *supra* note 85; see also Metzger, *New Roles for the U.S. Tariff Commission*, 1 LAW & POLICY INT'L BUS. 1 (1969).

²⁰² Renegotiation Amendments Act of 1968, Pub. L. No. 90-634, § 201(a), 82 Stat. 1347, 19 U.S.C. § 160 note (1970).

²⁰³ *Id.* § 201(a)(2). Congressman Boggs asserted this view on the floor of the House: It is clear to me, as a conferee who participated in every discussion on this issue, that title II constitutes congressional recognition of the . . . Code. That is, instead of rejecting the code, it accepts it. It is noteworthy, for example, that subsection (a)(2) expressly directs both the Treasury Department and the Tariff Commission to take the code into account in administering the act. Moreover, subsection (b)(2) clearly envisages that the code will be applied by both administering agencies. This means, in effect, that the code is given a statutory status. 114 CONG. REC. 30,607 (1968).

²⁰⁴ Renegotiation Amendments Act of 1968, Pub. L. No. 90-634, § 201(a)(1), 82 Stat. 1347, 19 U.S.C. § 160 note (1970).

²⁰⁵ For discussion of the legislative history of the 1921 Antidumping Act, see Coudert, *supra* note 9, at 190-92; Ehrenhaft, *supra* note 9, at 44-49; Comment, *supra* note 9, at 714-15.

²⁰⁶ See 61 CONG. REC. 1020-21 (1921) (remarks of Senator McCumber).

1921 Emergency Tariff Act,²⁰⁷ which was designed to protect farmers from low priced imports. The antidumping title may even have been a sop to industrialists to prevent them from opposing higher agricultural tariffs.²⁰⁸ It imposed a tariff remedy against offending goods, rejecting the antitrust remedies against offending suppliers provided for under the Revenue Act of 1916.²⁰⁹ The Act has been administered by Customs officials and, since 1954, in part by the Tariff Commission.²¹⁰ Each of these features suggests a protectionist design.

On the other hand the Act plainly condemns only sales "below fair value," and the duty levied is fixed at the amount of discrimination in price. Alleged predatory pricing by European cartels, particularly the German chemical firms, was clearly presented to Congress as the danger against which the law was designed to protect.²¹¹ A tariff remedy was preferred because of the difficulty in obtaining personal jurisdiction over foreign suppliers and of proving intent to monopolize under the 1916 Act.²¹² The task of injury determination was transferred to the Tariff Commission in 1954 because of its expertise, staff, and facilities,²¹³ not because of a more protectionist interpretation of the statute.

Third, as to statutory purpose, the only reason supported by economic theory for giving dumped imports less liberal treatment than other imports is to protect against the threat of predation.²¹⁴ The domestic Robinson-Patman Act opposes only competition-lessening price discrimination, and there seems no reason to take a more severe view of price discrimination in international trade. Nevertheless, the Antidumping Act language calls for action against dumped goods which cause injury to "an industry in the United States."²¹⁵ This language is at least open to the interpretation that nonpredatory, injurious dumping is proscribed, however inconsistent this may be with liberal trade theory.

Fourth, as to the principle of stare decisis, past interpretations of

²⁰⁷ 42 Stat. 9, 11 (1921).

²⁰⁸ See 61 CONG. REC. 1098 (1921) (remarks of Senator Simmons); see also 61 CONG. REC. 1297 (1921) (remarks of Senator Stanley, in which he characterizes the antidumping law as a "universal price accelerator").

²⁰⁹ 39 Stat. 798, 15 U.S.C. § 72 (1970). See text accompanying note 102 *supra*.

²¹⁰ See note 122 and accompanying text *supra*.

²¹¹ See 61 CONG. REC. 262 (1921) (remarks of Representative Fordney); 61 CONG. REC. 1021-22 (1921) (remarks of Senator McCumber).

²¹² See U.S. TARIFF COMM'N, REPORT: DUMPING AND UNFAIR COMPETITION 18, 20-21 (1919).

²¹³ See S. REP. NO. 2326, 83d Cong., 2d Sess. 2 (1954); *Hearings on H.R. 9476 Before the House Comm. on Ways and Means*, 83d Cong., 2d Sess. 39-41 (1954) [hereinafter cited as *Hearings on H.R. 9476*].

²¹⁴ See notes 29-77 and accompanying text *supra*.

²¹⁵ Antidumping Act § 201(a), 19 U.S.C. § 160(a) (1970).

the Act by the Treasury and Tariff Commission—especially by the latter—have not been consistent. The Commission has in fact never felt the need strictly to follow *stare decisis*.²¹⁶ As we will discuss later, most of its past decisions bear an “escape clause” cast, but in general have wavered noticeably with the changing membership of the Commission.

Because the Code has now become an international guideline for antidumping measures, the Commission would do well to give it considerable weight. The important point here is that irrespective of the supremacy question, the 1968 Renegotiation Amendments Act does not prevent either the Treasury or the Tariff Commission from interpreting the Act in such a way as to maintain consistency with the Code. The fundamental question is whether the 1921 Act is to be given a protectionist or antitrust interpretation. An enlightened approach would insist on an antitrust interpretation of the Act. A more politically cautious approach might dictate an “escape clause” interpretation. Either would maintain consistency between the Code and the Act.

3. *Treasury Implementation of the Code in Price Discrimination Determinations*

From the outset the Treasury Department assumed that the Code was consistent with existing United States law. Thus it willingly sought to implement the Code provisions by promulgating new amendments to its antidumping regulations.²¹⁷ These became effective July 1, 1968, the same date on which the Antidumping Code went into effect. These amendments represented an effort to reduce the harassment value of antidumping proceedings and to remove the penal character of some aspects of withholding of appraisement and assessment of final duties. The Code provisions required no significant changes in preexisting American standards for determining price discrimination and for fair and open proceedings.

The new regulations have sought to curb the harassment value of investigations and the penal nature of remedies in three major ways: (1) by requiring evidence of injury and price discrimination before initiating an investigation; (2) by shortening the overall length of the proceedings, and especially of the period during which appraisement is withheld; and (3) by reducing or eliminating retroactivity of withholding of appraisement and assessment of final duties. Critics of the Code

²¹⁶ See Hendrick, *supra* note 47, at 924.

²¹⁷ 19 C.F.R. §§ 153.1-.64 (1971). For an excellent discussion of the new regulations, see Anthony, *supra* note 9, at 177-98.

have argued that with each of these changes the new regulations violate the Antidumping Act.²¹⁸ If one bears in mind the proper objective of antidumping laws, this criticism seems unfounded.

a. *Simultaneous Consideration of Injury and Price Discrimination.*

The Code requires that

evidence of both dumping [price discrimination] and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied²¹⁹

To comply with these provisions the 1968 regulations require an industry representative to submit with the original complaint "information indicating that an industry in the United States is being injured, or is likely to be injured."²²⁰

Superficially this appears to conflict with the American procedure established in 1954 when the task of injury determination was transferred from the Treasury to the Tariff Commission. Thus Code opponents argue that the Secretary of the Treasury has exceeded his authority by requiring information bearing on injury in the initial complaint. This seems an excessively narrow view. Even under pre-Code and post-1954 regulations the Treasury had required injury information in the original complaint.²²¹ Surely the Treasury must have the discretion to require such information, to avoid harassing importers with unfounded complaints and to avoid incurring the expense and wasted time involved in a futile determination of price discrimination. If need be, statutory authority might be found in the Treasury's complete discretion to initiate an investigation in the first place²²² or in its final authority to impose antidumping duties.²²³

A more important question is how substantial the injury information must be to meet the test of the 1968 regulations. A full scale Treasury investigation into injury would clearly invade the prerogative of the Commission. The Code, however, does not require an extensive investigation into the injury question at the initiation stage. It merely

²¹⁸ See S. REP. NO. 1385, 90th Cong., 2d Sess., pt. 2 (1968); Long, *supra* note 35, at 480; Shannon & Marx, *supra* note 190, at 185-90; Comment, *supra* note 144, at 498-512, 514-15; see also Anthony, *supra* note 9, at 186-93 (objecting to simultaneous withholding and less than fair value determinations).

²¹⁹ Code art. 5(b).

²²⁰ 19 C.F.R. § 153.27(e) (1971).

²²¹ See 19 C.F.R. § 14.6(b)(3) (1967) (requiring information as to total volume and value of competing domestic production), *repealed*, 19 C.F.R. § 153 (1971).

²²² Antidumping Act § 201(a), 19 U.S.C. § 160(a) (1970).

²²³ *Id.* § 202(a), 19 U.S.C. § 161(a) (1970).

requires that *evidence* of injury be considered "in the decision whether or not to initiate an investigation."²²⁴ A Treasury spokesman has asserted that the pre-Code standard, which aimed solely at avoiding frivolous and harassing investigations, has been retained.²²⁵ The large number of minimally injurious cases which the Treasury has thus far forwarded to the Commission suggests that this standard has at least not been toughened.²²⁶

b. *Limiting the Duration of Withholding of Appraisalment.* Another aspect of the simultaneity issue arises from other Code provisions. The last phrase of the Code language quoted above appears to require full scale simultaneity only after provisional measures are applied, which for the United States means after appraisalment is withheld. The Code limits the total duration of provisional measures to three months; however, on request of the local importer and foreign exporter this period may be extended to six months.²²⁷ If the six-month option is exercised, the Code removes the requirement of simultaneous investigations after provisional remedies are taken.²²⁸ These exceptional provisions add the necessary flexibility for maintaining consistency between the Code and the Act. The Treasury Regulations have taken advantage of them by providing separate three-month²²⁹ and six-month procedures.²³⁰

Under pre-Code procedures²³¹ the Treasury regularly withheld appraisalment after a preliminary, tentative finding of "less than fair value" (LTFV) sales. Formal proceedings continued, however, until a final determination was reached. The new three-month procedure of the 1968 regulations contemplates that the decision to withhold appraisalment and final determination of LTFV sales will be made "concurrently." The final LTFV determination triggers the Tariff Commission investigation which, under the Act, must be completed within three months. If the finding is positive, antidumping duties are imposed; if negative, the case is dismissed. In either case withholding will cease and the three-month limitation on its duration will have been met.

²²⁴ Code art. 5(b).

²²⁵ See *Code Hearings* 34-40 (remarks of Fred Smith, General Counsel, U.S. Treasury Dep't).

²²⁶ See text accompanying notes 233-93 *infra*.

²²⁷ Code art. 10(d).

²²⁸ *Id.* art. 5(b).

²²⁹ 19 C.F.R. § 153.34(a) (1971).

²³⁰ *Id.* § 153.34(b).

²³¹ See generally Hendrick, *Administration of the U.S. Antidumping Act—Procedures and Policies*, in COMPENDIUM 156.

Code critics have challenged²³² the concurrence of the decision to impose withholding with the final determination that LTFV sales are involved. The language of the Act seems to require withholding as soon as "the Secretary has reason to believe or suspect"²³³ price discrimination, and hence before he would ordinarily make a final determination of LTFV sales. But even on this reading of the Act, the 1968 regulations cannot be faulted for not withholding appraisalment soon enough. The language of the regulations closely follows that of the Act by calling for withholding "[i]f . . . there are reasonable grounds to believe or suspect that any merchandise is being, or is likely to be, sold at less than its foreign market value."²³⁴

Of course one might object that proceedings which are ripe for withholding are premature for a final LTFV determination. The foreign exporter and local importer are, however, the parties primarily injured by a premature positive finding of price discrimination, and the six-month option offers them an adequate remedy. For cases in which the ultimate outcome is seriously in doubt even after a withholding decision, the exporter and importer may request three additional months within which to contest the LTFV question.²³⁵ During this three-month period appraisalment will be withheld and there will be no consideration of the injury question by the Tariff Commission. If at the end of this first three-month period the Treasury makes a final positive determination of LTFV sales, the case then goes to the Tariff Commission for its three-month injury investigation, during which appraisalment continues to be withheld for a total of six months.

In sum, objections to the modicum of simultaneity and the shortened withholding periods under the 1968 regulations are not even technically well founded. Moreover, lengthened proceedings would only serve protectionist ends. Congress transferred the injury determination to the Tariff Commission because of its expertise in injury findings, not for the purpose of insulating the price discrimination and injury decisions or of lengthening the overall proceedings. Congress's imposition of the three-month limit on the Commission's decision shows its concern over lengthy proceedings. The Treasury Department's effort to shorten the proceedings is thus commendable and seemingly consistent with congressional intent.²³⁶

²³² See Anthony, *supra* note 9, at 188-90.

²³³ Antidumping Act § 201(b); 19 U.S.C. § 160(b) (1970).

²³⁴ 19 C.F.R. § 153.34(a) (1971).

²³⁵ *Id.* § 153.34(b).

²³⁶ It should be noted that the "Trade Act of 1971" introduced in the Senate (S. 4,

c. *Curbing Retroactivity*. Under the Antidumping Act, once a decision is reached to withhold appraisement, it may be applied to all unappraised goods entered for customs purposes during a period beginning 120 days before the question of dumping was first raised.²³⁷ As a practical matter this provision affected goods whose appraisement had been delayed for fortuitous reasons or reasons unrelated to dumping. Because of the obvious inequity of retroactive withholding, however, the pre-Code Treasury regulations provided for it in very few cases.²³⁸

The Code now prohibits all retroactive application of provisional measures,²³⁹ and the 1968 Treasury regulations have complied with this requirement. Thus appraisement will generally be withheld only on goods entered after the decision to withhold has been made.²⁴⁰ Since the 1921 Act merely authorizes but does not plainly require retroactive withholding there seems little ground to question the validity of the new procedure. Indeed, the 120-day provision was originally introduced by a 1954 amendment to the Act²⁴¹ to curtail what had been the Treasury Department's unlimited discretion prior to that time to apply withholding retroactively.

The Act does, however, require a degree of retroactivity in the assessment of final antidumping duties, and the Code has been drafted in a transparent attempt to comply with the American statute. The Code allows retroactive application of duties (1) upon goods entered after the withholding decision and (2) upon goods entered prior to that decision if the reason they have not been appraised is unrelated to dumping.²⁴² The Act calls for the assessment of antidumping duties against all dumped goods which have been entered for customs purposes but which remain unappraised at the time of final injury determination.²⁴³ Goods will fall into this category only if they have been subject to a withholding decision or if appraisement has not been made for some other unrelated reason—the two exceptions of the Code.

92d Cong., 1st Sess.) and House (H.R. 20, 92d Cong., 1st Sess.) in January 1971 sought to limit the determination time to four months. S. 4, H.R. 20, 92d Cong., 1st Sess., tit. III, ch. 1 (Amendments to the Antidumping and Countervailing Duty Laws).

²³⁷ 19 U.S.C. § 160(b) (1970).

²³⁸ See Conner & Buschlinger, *supra* note 9, at 129.

²³⁹ Code art. 11.

²⁴⁰ 19 C.F.R. § 153.48(a) (1971). The provisions of this section allow the Commissioner of Customs to specify a different effective date for withholding, but there is nothing to indicate that retroactivity is intended.

²⁴¹ Customs Simplification Act of 1954, ch. 1213, § 301, 68 Stat. 1138, 19 U.S.C. § 160(b) (1970).

²⁴² Code arts. 11(i), (ii).

²⁴³ 19 U.S.C. § 161(a) (1970).

d. *Treasury's Departure from Code Standards on Price Assurances.* Only in the area of price assurances has the Treasury apparently altered its general policy of implementing the Code. Under pre-Code practice and under the original version of the 1968 regulations, the Treasury Department broadly authorized the termination of dumping investigations if a foreign dumper gave what are called "price assurances"—a guarantee not to discriminate in price in the future or to cease shipments altogether.²⁴⁴ In a recent amendment to the 1968 regulations stricter requirements have been imposed. Proceedings will be terminated on the basis of price assurances only where the dumping margin is considered "minimal in relation to the total volume of sales."²⁴⁵ The Code encourages a more liberal approach to price assurances.²⁴⁶

Although it is difficult to characterize the thrust of the Treasury Department's change, there will clearly be some trade restricting effects. Anti-Code writers have objected to the number of past dismissals based on price assurances,²⁴⁷ although the only reason given for opposing dismissal has been the need to counter "hit and run dumping."²⁴⁸ This term seems misapplied. The threat that a predatory dumper could dump up to the point of withholding, cease the practice under price assurances, and then dump again at a later time seems slight. As long as price assurances are faithfully observed, as they apparently always have been, the remedy sought by antidumping legislation will have been achieved. Refusal to dismiss the proceedings would seem to suggest a desire to penalize the local importer or foreign exporter for goods sold at dumping prices and entered prior to the price revision.²⁴⁹ The new Treasury policy may thus encourage all exporters of significant size to resolve doubtful pricing questions in an upward direction. Mistaken assumptions as to what the Treasury Department will allow can no longer be

²⁴⁴ 19 C.F.R. § 14.7(b)(9) (1967) (pre-Code); 19 C.F.R. § 53.15 (1969) (post-Code), amended, 19 C.F.R. § 153.15 (1971). See Hendrick, *supra* note 231, at 166-67.

²⁴⁵ Discontinuance of Antidumping Regulations—Customs Regulations Amended, 35 Fed. Reg. 8275 (Treas. 1970). See *Hearings on Tariff and Trade Proposals Before House Comm. on Ways and Means*, 91st Cong., 2d Sess. 522 (1970) (remarks of Eugene Rossides).

²⁴⁶ Code art. 7. The new Treasury Department procedure is not strictly a violation of the Code since article 7 merely suggests, but does not require, that proceedings be dismissed on receipt of price assurances.

²⁴⁷ See Long, *supra* note 35, at 480-81; *Code Hearings* 81 (remarks of Senator Long, Chairman, Senate Finance Committee).

²⁴⁸ See Titanium Dioxide from Japan, 31 Fed. Reg. 3198 (Treas. 1966) (refusal to accept price revision).

²⁴⁹ See Hendrick, *supra* note 231, at 166; *Code Hearings* 81 (remarks of Senator Long).

Members of the GATT Antidumping Committee (see note 170 and accompanying text *supra*) have objected to the new Treasury procedure as "inconsistent with the spirit of the Code" and "punitive in intent." GATT, *supra* note 182, at 1.

corrected after the fact by price assurances, at least not if a substantial volume of imports is involved.

A liberal price assurances procedure is not in itself a wholly un-mixed blessing. It can have a serious protectionist effect by encouraging exporters to raise prices rather than risk an injury determination. The extent of this protectionist effect depends largely upon the character and reasonableness of the standards of injury applied.

4. *The Tariff Commission's Failure To Implement the Code in Injury Determinations*

In contrast to the Treasury Department, the Tariff Commission from the outset has taken a hostile view of the Code. In a report prepared for the Senate Finance Committee in June, 1967, a majority of the Commission concluded that the Code provisions on injury were inconsistent with the 1921 Antidumping Act.²⁵⁰ The real issue as I have pointed out, however, is one of interpretation of the elastic clauses of the Act, not consistency in a strict sense.

The fairest characterization of the Code is that it takes essentially an escape clause approach to dumping injury. The most distressing aspect of the Commission's recent injury decisions is not that they have rejected a strict antitrust approach to the dumping question, a result which is objectionable in its own right, but that they appear even to have departed from the domestic escape clause approach of pre-Code days, which would have allowed the United States to have joined the pragmatic international consensus represented by the Code.

Admittedly, such conclusions are not easy to draw because of the imprecision of Code concepts such as material injury or principal cause, and because of the erratic nature of the Commission's decisions. But an examination of the Commission's post-Code decisions clearly indicates a sharp movement away from its traditional standards in a more restrictionist, anti-Code direction. If continued, the Commission's new decisional trend will probably destroy the Code as an expression of international consensus.

In the following discussion I shall consider the Commission's

²⁵⁰ SENATE COMM. ON FINANCE, REPORT OF THE U.S. TARIFF COMMISSION ON S. CON. RES. 38, REGARDING THE INTERNATIONAL ANTIDUMPING CODE, 90th Cong., 2d Sess. 1-48 (Comm. Print 1967) [hereinafter cited as TARIFF COMM'N CODE REPORT]. In a minority report then Chairman Metzger and Commissioner Thunberg found no inconsistency on the face of the Code. They felt the issue would have to be resolved on a case-by-case basis. *Id.* at 49-60.

For the opinion of commentators that the Code and Act are inconsistent in the injury area, see Long, *supra* note 35; Pintos & Murphy, *supra* note 198, at 189-91; Shannon & Marx, *supra* note 190.

post-Code approach to the three operative concepts of an injury determination contained in both the Act and the Code: the definition of domestic industry, the amount of injury required, and the degree of causal nexus between dumped imports and injury. I shall also examine the Commission's lack of sensitivity to the procompetitive effects of dumping practices, although this is not directly related to the question of implementing the Code.

a. *Domestic Industry.* The Commission's recent treatment of the domestic industry concept reflects a problem which pre-dated the Code: the absence of a clear rationale for including or excluding closely related products in the product market definition. This has allowed the Commission to narrow the market definition almost at will so as to enlarge the apparent importance of dumped imports. Unfortunately, as noted,²⁵¹ the Code provides no remedy here. It defines the product market for injury purposes to include only domestic products "identical" to dumped imports,²⁵² and thus encourages a narrow approach. The Commission's recent decisions are thus not strictly in violation of the Code.

A proper antitrust view of the product market question would group within a single industry all those domestic products which are close substitutes for one another and for the dumped goods in question: in other words, those for which the cross elasticity of demand is high. One might also wish to take account of production processes to assess the ease of changeover in production from one product to another. The central notion is the ability of competitors to prevent a predator from exercising excessive market power in a given product line.

Only if the objective is to protect individual competitors will accounting categories or physical characteristics alone suffice to identify the product market. Narrow definition of the product market can be a highly convenient protectionist weapon. If, for example, there is no domestic product identical to imported orange wrapping paper, one might measure its impact on the nearest "identical" product, red wrapping paper, setting aside green, blue, and yellow paper. Such narrowing can protect a single domestic firm producing red wrapping paper or the red paper line of a large number of otherwise healthy and prosperous multiproduct paper firms.

In its escape clause decisions of the late 1950's the Tariff Commission often favored a narrow approach to the product market ques-

²⁵¹ See notes 157-59 and accompanying text *supra*.

²⁵² Code arts. 2(b), 3, 4(a).

tion.²⁵³ This approach was generally carried over into the antidumping field,²⁵⁴ although none of the early cases seems quite so restrictive as recent Commission decisions.²⁵⁵ Two recent decisions, *Pig Iron from East Germany, Czechoslovakia, Romania & the U.S.S.R.*²⁵⁶ and *Television Receiving Sets from Japan*,²⁵⁷ are particularly illustrative of a narrow approach.

In the *Pig Iron* case the imports in question consisted almost exclusively of basic grade and foundry grade pig iron. There appears to be little competition between the two grades since the former is used in steel making, the latter in the production of cast iron products, and since the two are not interchangeable for these purposes. The imports were all of the cold ingot variety in both grades, whereas a very large proportion of domestic production of basic and foundry grade pig iron remains in a molten state for captive use by integrated steel firms and iron foundries.

Because of steadily falling prices of scrap metal in recent years, it has been increasingly substituted for foundry grade pig iron in the iron casting process. Indeed scrap metal appeared to be the predominant cause of the difficulties experienced in the merchant pig iron market. In any event, it was clear that the cross elasticity of demand between foundry grade pig iron and scrap metal, which are almost perfect substitutes in the iron casting process, was very high. Thus on a market power theory it would have been reasonable to have included in the definition of the product market foundry grade pig iron (molten and cold) and scrap metal. Imports of the basic grade might have been categorized as a separate product line consisting of cold and molten basic grade pig iron needed for producing steel.

The Commission chose, however, to narrow the product market to cold basic and cold foundry grade pig iron.²⁵⁸ This definition included

²⁵³ See Bronz, *supra* note 85, at 472-75.

²⁵⁴ See Baier, *supra* note 9, at 427-28; Bronz, *supra* note 85, at 473-74; Hendrick, *supra* note 231, at 175.

²⁵⁵ For very narrow approaches to the product market among pre-Code decisions, however, see *Tissue Paper from Norway*, 23 Fed. Reg. 8892 (Tariff Comm'n 1958) (directly comparable items); *Plastic Baby Carriers from Japan*, 29 Fed. Reg. 13,990 (Tariff Comm'n 1964) (carriages with specific accessories).

²⁵⁶ 33 Fed. Reg. 14,664 (Tariff Comm'n 1968).

²⁵⁷ 36 Fed. Reg. 4576 (Tariff Comm'n 1971).

²⁵⁸ The dissenting commissioners in the *Pig Iron* case, then Chairman Metzger and Commissioner Thunberg, seemed unwilling to exclude molten or "captive" pig iron from the market definition. The question was not squarely presented, however, since both commissioners found no injury even on the excessively narrow market definition chosen by the majority. Tariff Comm'n Pub. No. 265, at 27 (Metzger, Chairman, dissenting); *id.* at 43 (Thunberg, Comm'r, dissenting). Chairman Metzger's dissent contains the only

both grades of imported pig iron but excluded scrap metal and the large domestic production of molten pig iron. The Commission was thus able to exaggerate the degree of market penetration to a maximum of 12.4 percent. There appears to be no basis for fearing that market power could have been exercised in cold basic and cold foundry grade pig iron. Higher domestic prices for these products would simply mean greater domestic production and sales of molten pig iron and scrap metal.

In *Television Sets from Japan* the Commission initially used broad strokes to include in the definition of industry the twenty or so domestic firms which produce both monochrome and color television sets in a wide range of screen sizes. Thereafter, however, it measured market invasion only by the market for the middle screen sizes. Apparently American producers completely dominate the production of large screen sets, while Japanese producers offer stiff competition in the middle screen sizes. It may be that the cross elasticity of demand between middle and large size sets, both monochrome and color, is sufficiently low to permit the exercise of significant market power in middle screen sizes alone, but the Commission failed to address this point. In fact there was no mention at all of reduced profits in middle screen sizes or of inability of domestic firms to shift easily into greater production of middle sized sets.

The Commission has also adopted a narrow definition of the geographic market. Although in its pre-Code decisions the Tariff Commission often measured injury in narrow regional areas,²⁵⁹ it generally did so on principles fully consistent with the present Code guidelines.²⁶⁰ The Code allows market segmentation where either high transport costs or traditional marketing patterns genuinely isolate producers in distinct geographic areas.²⁶¹ Producers included in the market must sell a high percentage of their output in the area in question, and other national producers must not regularly make penetration sales in this area.

In the *Portland Cement* cases²⁶² of the early 1960's the high

reference to the Antidumping Code to be found in a formal Tariff Commission opinion. Metzger found the Code inapplicable because the nations involved, except for Czechoslovakia, were nonsignatories and nonmembers of GATT. *Id.* at 27 n.1. Although Czechoslovakia had adhered to the Code, Metzger relied upon an earlier GATT waiver granted the United States with respect to its GATT obligations to Czechoslovakia. *Id.*

²⁵⁹ See Note, *supra* note 9, at 721 n.70.

²⁶⁰ For a discussion of pre-Code geographic segmentation cases, see Coudert, *supra* note 9, at 190, 213-16.

²⁶¹ Code art. 4(a)(i), (ii).

²⁶² *Portland Cement from Dominican Republic*, 28 Fed. Reg. 4047 (Tariff Comm'n 1963); *Portland Cement from Dominican Republic*, 27 Fed. Reg. 3872 (Tariff Comm'n

transportation cost of bulky, low value cement had led to the concentration of cement plants in specific market areas. The Commission thus measured injury in these isolated areas. In contrast, lower transportation costs and a history of market interpenetration resulted in a broader definition of the geographic market in the 1963 *Steel Wire Rod* cases.²⁶³

In the Commission's post-Code decisions geographic market definition has not played a large role. But as the recent *Steel Bars & Shapes from Australia*²⁶⁴ decision indicates, geographic segmentation is always available, especially in industries with high transport costs, to magnify the appearance of injury. In *Bars & Shapes* imports were entered at West, Gulf, and East Coast ports. Despite strong evidence of a nationwide price structure for these products,²⁶⁵ the Commission measured injury to the narrow Northwest market, which included the states of Oregon and Washington, in which three domestic firms made sales. One of the three was a national firm with national sales, and only one of the two regional firms was a complainant. At their peak level in 1968, LTFV imports amounted to only 5.5 percent of the consumption in Washington and Oregon. On a national basis the figure was 0.5 percent.

The majority based its segmentation decision on the existence of high transport costs and cited two controversial 1964 decisions involving steel bars and shapes from Canada.²⁶⁶ Vigorous dissents in those cases had challenged the existence of a recognizable market area for steel bars and shapes in the Northwest because there was evidence of widespread interpenetration in that market from other parts of the country.²⁶⁷ The majority in *Bars & Shapes from Australia* made no effort to support a theory of market isolation, and rested instead on the breathtakingly simplistic notion that "injury to a part of the national industry is an injury to the whole industry."²⁶⁸ Because of what appears to have been minimal business interference with perhaps only one firm, and at the

1962); Portland Cement from Portugal, 26 Fed. Reg. 10,010 (Tariff Comm'n 1961); Portland Cement from Belgium, 26 Fed. Reg. 5102 (Tariff Comm'n 1961); Portland Cement from Sweden, 26 Fed. Reg. 3002 (Tariff Comm'n 1961).

²⁶³ Hot-Rolled Carbon Steel Wire Rods from France, 28 Fed. Reg. 7368 (Tariff Comm'n 1963); Hot-Rolled Carbon Steel Wire Rods from West Germany, 28 Fed. Reg. 6606 (Tariff Comm'n 1963); Hot-Rolled Carbon Steel Wire Rods from Belgium, 28 Fed. Reg. 6475 (Tariff Comm'n 1963).

²⁶⁴ 35 Fed. Reg. 4161 (Tariff Comm'n 1970).

²⁶⁵ *Id.* at 4163 (Thunberg & Newsom, Comm'rs, dissenting).

²⁶⁶ Carbon Steel Bars & Shapes from Canada, 29 Fed. Reg. 12,599 (Tariff Comm'n 1964); Steel Reinforcing Bars from Canada, 29 Fed. Reg. 3840 (Tariff Comm'n 1964).

²⁶⁷ See Coudert, *supra* note 9, at 215-16. Coudert agrees with the dissenters that application of the segmentation doctrine in these cases was inconsistent with a liberal trade policy.

²⁶⁸ 35 Fed. Reg. at 4162.

most two, in the Washington-Oregon area, antidumping duties were levied at all ports of entry in the country.

b. *Material Injury*. Whereas the Code requires injury to a domestic industry or threat thereof to be *material*, the American statute merely provides that the Tariff Commission "shall determine . . . whether an industry in the United States is being or is likely to be injured."²⁶⁹ Despite the apparent difference in these provisions, there are strong precedents supporting an interpretation of the American act to require material or even anticompetitive injury. In recent decisions, however, the Commission has applied a much more attenuated injury standard.

The contracting parties of GATT specified a material injury standard in article VI of the 1947 agreement. Although article VI was not strictly binding on the United States, the Treasury Department, which then determined injury, nevertheless adopted the GATT language as the proper interpretation of the American statute.²⁷⁰ At the time of the inclusion of a "serious injury" test in the escape clause of the 1951 Trade Agreements Extension Act,²⁷¹ a legislative attempt was made to amend the language of the dumping statute to require material injury. Congress rejected this effort, but it did so, according to the House Ways and Means Committee,

to avoid the possibility that the addition of the word "materially" might be interpreted to require proof of a greater degree of injury than is required under existing law for imposition of antidumping duties. The committee decision is not intended to require imposition of antidumping duties upon a showing of frivolous, inconsequential, or immaterial injury.²⁷²

Since the Treasury had consistently testified that it interpreted the "existing law" as requiring a "material injury" standard, congressional inaction cannot be read as rejecting this interpretation. In later congressional hearings on the question of transferring the injury determination to the Tariff Commission, the Commission's general counsel explained that the "materiality" interpretation of the Treasury would continue to be applied unless Congress gave specific statutory instructions to the contrary.²⁷³

In its 1955 *Cast Iron Soil Pipe from the United Kingdom* deci-

²⁶⁹ Antidumping Act § 201(a), 19 U.S.C. § 160(a) (1970).

²⁷⁰ See *Hearings on H.R. 9476*, at 35 (statement of Paul Kaplowitz, General Counsel, Tariff Comm'n).

²⁷¹ § 7(a), 65 Stat. 74.

²⁷² H.R. REP. No. 1089, 82d Cong., 1st Sess. 7 (1951).

²⁷³ See *Hearings on H.R. 9476*, at 35.

sion²⁷⁴ the Commission seemed to contradict the general counsel's position. The Commission applied an industry segmentation theory for the first time in this case, and measured injury only in the West Coast market area. Market intrusion even there amounted to only three percent. The West Coast complainant was apparently a marginal producer, whereas the domestic industry as a whole had experienced increases in production, sales, capacity, and prices.

Eight years after the *Soil Pipe* decision, which was scathingly criticized in legal writings and a congressional report,²⁷⁵ the Commission returned to a material injury standard. Indeed in a number of cases it embraced a full anticompetitive test of injury. In its 1963 investigation of *Titanium Dioxide from France*,²⁷⁶ the Commission recalled its general counsel's earlier policy statement before the House Ways and Means Committee and asserted that only "material injury" would justify an affirmative finding. GATT article VI was mentioned in a footnote,²⁷⁷ and the Commission based its construction on an unabashed antitrust reading of the antidumping statute:

It is evident that Congress did not consider sales "at less than fair value" as being *malum per se*; such sales are condemned in the act only when they have an anticompetitive effect; and it is only then that such sales may be equated with the concept of "unfair competition."²⁷⁸

The middle 1960's witnessed other Commission decisions, however, which appeared to take a more quantitative, escape clause approach to the statute. A series of quantitative factors were frequently cited, such as market invasion, depressed prices, falling profits, unused capacity, and unemployment.²⁷⁹ The first two, loss of customers and depressed prices, received predominant consideration.²⁸⁰ However, since these factors were generally required to be present in combination and since a reasonable level of substantiality of all the factors was generally neces-

²⁷⁴ AA 1921-5, Tariff Comm'n Pub. No. 5 (Oct. 27, 1955).

²⁷⁵ See *Hearings on H.R. 6006, 6007 and 5120 Before House Comm. on Ways and Means*, 85th Cong., 1st Sess. 92-98 (1957); Kohn, *supra* note 9, at 418.

²⁷⁶ 28 Fed. Reg. 10,467 (Tariff Comm'n 1963).

²⁷⁷ *Id.* at n.2.

²⁷⁸ *Id.* at 10,467; *accord*, *Titanium Dioxide from West Germany*, 31 Fed. Reg. 5852 (Tariff Comm'n 1966) (no injury); *White Portland Cement from Japan*, 29 Fed. Reg. 9636 (Tariff Comm'n 1964) (no injury); *Chromic Acid from Australia*, 29 Fed. Reg. 2919 (Tariff Comm'n 1964) (injury); *Vital Wheat Gluten from Canada*, 29 Fed. Reg. 1701 (Tariff Comm'n 1964) (no injury).

²⁷⁹ See Baier, *supra* note 9, at 417-26.

²⁸⁰ See TARIFF COMM'N CODE REPORT 15; Comment, *supra* note 9, at 710.

sary, the quantitative and anticompetitive tests were not sharply divergent.

Under the influence of changed and reduced membership the Commission veered sharply away from these standards in its 1967 *Soil Pipe from Poland* decision.²⁸¹ The *Polish Soil Pipe* case, a split 2-2 decision, is reminiscent of the earlier *Soil Pipe from the United Kingdom* decision in its narrow definition of market area and the insignificance of dumped sales even in this smaller market: Polish soil pipe sales never rose above four percent in the Northeast market area. But the rationale of the decision is its most disturbing aspect. The majority opinion emasculated the material injury concept by interpreting any greater than de minimis injury to satisfy the injury test. Commissioner Clubb went even further in a separate opinion and argued that the injury requirement had only been inserted in the 1921 Act to avoid imposing on each customs appraiser the burdensome task of inquiring into price discrimination on every importation.²⁸² Since Clubb would assess dumping duties whenever there is sufficient injury to justify the time and expense of an investigation, he in effect espouses the strongly protectionist view that price discrimination per se is an unfair trade practice.

The new de minimis test, at times supported by Clubb's questionable interpretation of the legislative history of the Antidumping Act, has been applied in major injury decisions since the *Polish Soil Pipe* case.²⁸³ A number of the affirmative post-Code decisions involve small

²⁸¹ 32 Fed. Reg. 12,925 (Tariff Comm'n 1967). When the *Polish Soil Pipe* case was decided there were only four members on what is ordinarily a six-man Commission.

²⁸² 32 Fed. Reg. at 12,927. There is indeed some support for Clubb's view in the legislative history. See S. REP. NO. 16, 67th Cong., 1st Sess. 10 (1921); *Hearings on H.R. 2435 Before the Senate Comm. on Finance*, 67th Cong., 1st Sess. 36-42 (1931). In my view, however, the legislative history of the 1921 Antidumping Act is too confused for such conclusive assertions. See notes 206-14 and accompanying text *supra*. Indeed, there are specific elements in the history which contradict Clubb's theory. The injury requirement was clearly viewed by some Senators as a standard for determining predatory dumping, not as a device to protect overburdened customs appraisers. See 61 CONG. REC. 1101 (1921) (remarks of Senators Simmons and Watson). Moreover, concern with overburdening customs appraisers, if it existed at all on the part of other Senators, could hardly have been very strong in view of the withholding of appraisement provision added to the final form of the antidumping statute as it emerged from the conference committee. That provision directed each local appraiser to make the very price discrimination determination on each imported product which, in Clubb's view, the injury provision was inserted to avoid. Antidumping Act § 201(b), amended, Customs Simplification Act of 1954, ch. 1213, § 301, 68 Stat. 1139, 19 U.S.C. § 160(b) (1970) (transferring the withholding investigation from the local appraiser to the Secretary of the Treasury). See 61 CONG. REC. 1563 (1921) (conference committee report).

²⁸³ Ferrite Cores from Japan, 36 Fed. Reg. 1934 (Tariff Comm'n 1971); Glass from

to miniscule market invasion, depending on how the product market is defined, and domestic profit and capacity utilization figures proceeding in a contradictory steady or upward direction.²⁸⁴ Although in pre-Code periods a positive determination was generally based on both substantial market invasion and depressed prices,²⁸⁵ a number of injury findings have recently been made on the basis of a declining price structure alone.²⁸⁶ The threshold of required market invasion, which was determined in an exhaustive pre-Code study to be a none too high minimum of seven percent,²⁸⁷ was pushed to below two percent in the recent *Glass from Japan* determination,²⁸⁸ and even lower in *Ferrite Cores from Japan*.²⁸⁹

*Whole Dried Eggs from Holland*²⁹⁰ is an instructive case. Imports of Dutch whole dried eggs used in the baking and noodle industries first began in 1966, and at that time represented one percent of the American market. Sales rose to three percent in 1967 and 1968, while total United States consumption increased substantially. When total consumption fell in 1969, imported Dutch eggs accounted for seven percent of the market. The Commission's opinion does not indicate that all of the imports were sold at "less than fair value," and does not disclose any further evidence of injury beyond the seven percent figure for market intrusion. The majority²⁹¹ stated that it was satisfied

Japan, 36 Fed. Reg. 7330 (Tariff Comm'n 1971); Pig Iron from Canada, Finland & West Germany, 36 Fed. Reg. 11,835 (Tariff Comm'n 1971); Steel Bars, Reinforcing Bars & Shapes from Australia, 35 Fed. Reg. 4161 (Tariff Comm'n 1970); Whole Dried Eggs from Holland, 35 Fed. Reg. 12,500 (Tariff Comm'n 1970); Potassium Chloride from Canada, France & West Germany, 34 Fed. Reg. 19,003 (Tariff Comm'n 1969); Pig Iron from East Germany, Czechoslovakia, Romania & the U.S.S.R., 33 Fed. Reg. 14,664 (Tariff Comm'n 1968); Titanium Sponge from the U.S.S.R., 33 Fed. Reg. 10,769 (Tariff Comm'n 1968) (Commission began investigation before the effective date of the Code—July 1, 1968).

It should be noted that Commissioner Clubb left the Tariff Commission at the expiration of his term in the summer of 1971. In the injury decisions rendered since then the Commission has not mentioned Clubb's theory of *de minimis* injury; nevertheless, the substance of the decisions indicates a continued adherence to an attenuated test of injury. See, e.g., *Tempered Glass from Japan*, 36 Fed. Reg. 14,682 (Aug. 1971); *Clear Sheet Glass from Taiwan*, 36 Fed. Reg. 13,869 (July 1971).

²⁸⁴ See, e.g., *Pig Iron from East Germany, Czechoslovakia, Romania & the U.S.S.R.*, 33 Fed. Reg. 14,664 (Tariff Comm'n 1968) (capacity utilization at its peak during largest amount of dumping sales and profits showed little variation).

²⁸⁵ Note 279 *supra*.

²⁸⁶ See, e.g., *Ferrite Cores from Japan*, 36 Fed. Reg. 1934 (Tariff Comm'n 1971); *Glass from Japan*, 36 Fed. Reg. 7330 (Tariff Comm'n 1971).

²⁸⁷ Baier, *supra* note 9, at 422.

²⁸⁸ 36 Fed. Reg. at 7331.

²⁸⁹ 36 Fed. Reg. at 1935.

²⁹⁰ 35 Fed. Reg. 12,500 (Tariff Comm'n 1970).

²⁹¹ Like *Polish Soil Pipe, Dried Eggs* involved a split decision with two commissioners comprising a majority.

with "a showing of anything more than a trivial or inconsequential effect on the domestic industry."²⁹²

Even under such a startling test, however, the injury conclusion in this case is difficult to comprehend. The price trend of domestic and imported dried eggs during 1968 and 1969, when imports were at a peak, was sharply *upward*. There was no reported evidence of lower profits, unemployment, or reduced capacity among domestic competitors. The evidence indicated that the Dutch eggs had not been in any way injurious to the domestic price of whole dried eggs and some evidence indicated that the complaining firm had been unable to fill all of its orders for whole dried eggs in the past. The Dutch eggs were apparently of a lower quality, and hence because of a lower demand for them, were sold at prices slightly below the American product. Even this lower price was apparently *above* the prevailing world price for dried eggs of similar kind and quality.²⁹³

c. *Causality*. The high causality standard of the Code is potentially its most far-reaching aspect. There are no exact parallels in pre-Code American antidumping decisions to the Code requirement that "dumped imports . . . [must be] demonstrably the principal cause of material injury."²⁹⁴ The Antidumping Act merely instructs the Commission to determine "whether an industry in the United States is being or is likely to be injured . . . *by reason of* the importation of such merchandise."²⁹⁵

The closest parallel to the principal cause standard is found in the Commission's pre-Code escape clause decisions. Prior to the 1962 Trade Expansion Act the escape clause had required a showing that increased imports resulting from trade concessions "have contributed substantially towards causing or threatening serious injury."²⁹⁶ That standard was difficult but not impossible to satisfy.²⁹⁷ It had been interpreted by the Tariff Commission to mean that increased imports must contribute to the requisite injury more than any other single factor.²⁹⁸ For the apparent purpose of reducing the availability of escape clause relief, the Trade

²⁹² 35 Fed. Reg. at 12,501.

²⁹³ In addition, the higher price in The Netherlands can probably be attributed to the high support prices established under the common agricultural policy of the EEC.

²⁹⁴ Code art. 3(a).

²⁹⁵ Antidumping Act § 201(a), 19 U.S.C. § 160(a) (1970) (emphasis added).

²⁹⁶ Trade Agreements Extension Act of 1955, ch. 169, § 6(a), 69 Stat. 166, *amending* ch. 141, § 7(b), 65 Stat. 74 (1951 Extension Act). This provision has been repealed by TEA §§ 301(b)(1), (3), 76 Stat. 884, 19 U.S.C. §§ 1901(b)(1), (3) (1970).

²⁹⁷ See Banner, *supra* note 85; Davis, *supra* note 9, at 1432.

²⁹⁸ See Banner, *supra* note 85, at 1336-37.

Expansion Act introduced a dual causality test: increased imports must be caused "in major part" by trade agreement concessions, and they must be "the major factor" in causing injury to the relevant domestic industry.²⁹⁹ In a line of decisions under the 1962 Act the Tariff Commission at times interpreted the new "major part" language to mean that trade concessions must be a greater cause of increased imports than the aggregate of all other possible causes.³⁰⁰ It would not be difficult to read this interpretation into the "principal cause" language of the Antidumping Code, which urges that dumping should be weighed against "all other factors taken together which may be adversely affecting the industry."³⁰¹

Until recently no petitioner for escape clause or adjustment assistance relief³⁰² had been able to meet the new causality test of the 1962 Trade Expansion Act.³⁰³ It could thus be objected that the standard is too high and therefore inappropriate for the antidumping law.³⁰⁴ On the other hand, the conscious policy of the 1962 Act was to avoid resort to industrywide tariff protection where less than a full national industry has suffered injury. For this reason the adjustment assistance program was introduced to provide individualized assistance to particular firms and groups of workers.³⁰⁵ The Antidumping Act affords a strong parallel to this situation because it also inappropriately utilizes nationwide tariff sanctions where, because of the tendency toward regionalized markets, injury is actually less than nationwide.

²⁹⁹ TEA §§ 301(b)(1), (3), 19 U.S.C. §§ 1901(b)(1), (3) (1970).

³⁰⁰ See, e.g., National Tile & Mfg. Co., TEA-F-5, Tariff Comm'n Pub. No. 145, at 13 (Dec. 21, 1964); Softwood Lumber, TEA-I-4, Tariff Comm'n Pub. No. 79 (Feb. 14, 1963).

This development under the escape clause provisions of the Trade Expansion Act is discussed in Metzger, *supra* note 85, at 369 n.73 (former Tariff Comm'n Chairman); Note, *supra* note 14, at 1434-35; see also Banner, *supra* note 85.

³⁰¹ Code art. 3(a).

³⁰² See TEA §§ 313-18, 19 U.S.C. §§ 1913-18 (1970).

³⁰³ See Banner, *supra* note 85. The Tariff Commission made no affirmative decisions from 1962 to 1969. See Note, *supra* note 14, at 1432. Recently, however, the Commission appeared to abandon the preponderance test in several affirmative findings. Pianos & Parts, Tariff Comm'n Pub. No. 309 (Dec. 23, 1969); Buttweid Pipe & Tubing, Tariff Comm'n Pub. No. 297 (Nov. 3, 1969); Transmission Towers, Tariff Comm'n Pub. No. 298 (Nov. 3, 1969). See Note, *Adjustment Assistance Under the Trade Expansion Act: A Critique of Recent Tariff Commission Decisions*, 6 TEXAS INT'L L.F. 67 (1970).

Although the preponderance test may have been abandoned, it seems clear that a negative finding in either tariff adjustment or adjustment assistance cases may still be based on a failure to meet the major part test. See Men's & Boy's Shirts, Tariff Comm'n Pub. No. 439 (Nov. 26, 1971) (adjustment assistance); Nonrubber Footwear, Tariff Comm'n Pub. No. 359 (Jan. 15, 1971) (tariff adjustment); Note *supra* note 14, at 1432 n.81.

³⁰⁴ See 113 CONG. REC. 27,089 (1967) (remarks of Senator Hartke).

³⁰⁵ See S. METZGER, TRADE AGREEMENTS AND THE KENNEDY ROUND (1964); Banner, *supra* note 85, at 1356; Note, *supra* note 14, at 1431-32.

Moreover, on an antitrust theory of dumping action an even firmer causal nexus should be required to support an injury finding than under the plainly protectionist escape clause.

The language of the Code, however, may yield to a more modest interpretation. "Principal cause" need not necessarily mean "major part" or "major factor."³⁰⁶ Rather it could be construed to be the rough equivalent of the former "contributed substantially towards causing" language of the escape clause. Under this standard the injurious effect of dumping would merely have to outweigh that of any other single factor.³⁰⁷

In its latest post-Code decisions, however, the Commission has rejected both an anticompetitive and an escape clause approach to the causality question. It has adopted instead a highly attenuated "contributing cause" theory, which virtually eliminates the causality issue.

The new causality test was foreshadowed by the Commission's adoption of the cumulation doctrine in *Pig Iron from East Germany, Czechoslovakia, Romania & the U.S.S.R.*³⁰⁸ Here for the first time the Commission measured injury by cumulating the injurious effect of dumped pig iron from each of the East European countries involved and from the Soviet Union. In the 1963 *Steel Wire Rod* cases,³⁰⁹ where imports originated in Belgium, Luxemburg, France, and West Germany, the Commission had adopted an opposite approach and had measured the impact of dumped goods from each country separately.

³⁰⁶ See 113 CONG. REC. 27,091 (1967) (remarks of Senator Javits).

³⁰⁷ In an attempt to ease the standard of causality in adjustment assistance cases, Senator Hartke introduced S. 1333, 89th Cong., 1st Sess. (1965). That bill would have changed the "major factor" language to "predominant factor." In explaining the intended meaning of the new language, Senator Hartke said:

Increased imports would be the predominant factor in those cases where the Tariff Commission finds that they are a more important factor than any other single cause. It will not be necessary that they be more important than all the other factors combined.

111 CONG. REC. 3742 (1965). The "principle cause" terminology of the Code could easily be likened to this interpretation of "predominant factor." See also 29 C.F.R. § 1801.2(j) (1971), defining "primary factor" in adjustment assistance cases under the Canadian-American Automotive Agreement to mean "a factor which is greater in importance than any other single factor . . . but which does not have to be greater than any combination of other factors."

³⁰⁸ 33 Fed. Reg. 14,664 (Tariff Comm'n 1968).

³⁰⁹ Hot-Rolled Carbon Steel Wire Rods from France, 28 Fed. Reg. 7368 (Tariff Comm'n 1963); Hot-Rolled Carbon Steel Wire Rods from West Germany, 28 Fed. Reg. 6606 (Tariff Comm'n 1963); Hot-Rolled Carbon Steel Wire Rods from Luxemburg, 28 Fed. Reg. 6476 (Tariff Comm'n 1963); Hot-Rolled Carbon Steel Wire Rods from Belgium, 28 Fed. Reg. 6475 (Tariff Comm'n 1963).

The majority in *Pig Iron* argued these earlier cases could be read as having found no injury even if aggregate effects were considered. 33 Fed. Reg. at 14,665.

On an anticompetitive theory of dumping injury, the cumulation doctrine is troublesome because it does not rest on collusive or interdependent behavior. As long as the different national dumpers are competitive with one another, there should be no reason to complain of unfair anticompetitive practices. Only if there were evidence of collusion might it be feared that the dumpers could gain control of the market as a group.³¹⁰

The *Pig Iron* cumulation doctrine clearly laid the foundation for a causation theory requiring mere contribution to injury on the part of dumped imports. If injury caused by nationally separate, noncollusively dumped goods could be cumulated, what was to prevent aggregating dumping injury with harmful business effects caused by nondumped imports or even domestic business conditions?

The first statement of the new contributing cause standard appears in the 1971 *Ferrite Cores from Japan* decision.³¹¹ The majority of three Commissioners rejected the importer's argument, derived apparently from the causality language of the Code, that injury should not be found if attributable "primarily, if not solely, to factors other than sales at LTFV."³¹² Instead the majority asserted that "if injury is attributable in part to the LTFV sales of the ferrite cores and such injury is more than de minimis, we must make an affirmative determination. The relative importance of such injury to injuries caused by other factors is irrelevant."³¹³

The dissent pointed out that the decline in demand for ferrite cores because of other causes was the major reason, perhaps the sole reason, for falling prices in the industry. After the cessation of ferrite core imports in 1967, domestic prices for cores continued to decline. Market invasion by all ferrite core imports, only part of which were sold at "less than fair value," generally hovered around the one percent level, with a slight and temporary bulge to four percent in 1967.³¹⁴

In *Pig Iron from Canada, Finland & West Germany*,³¹⁵ the Com-

³¹⁰ The decision is nevertheless arguably supported by the language of the Anti-dumping Act, since the Act calls for the prevention of injury to "an industry in the United States." 19 U.S.C. § 160(a) (1970). Thus if unrelated foreign competitors fully replaced American producers without lessening the general level of domestic competitive rivalry, it might be argued that an "American industry" would still have been injured. But it is difficult to explain why dumped goods should not be allowed to eliminate an American industry, while uniformly low priced imports would face no such bar.

³¹¹ 36 Fed. Reg. 1934 (Tariff Comm'n 1971).

³¹² *Id.*

³¹³ *Id.* (emphasis added).

³¹⁴ *Id.* at 1936.

³¹⁵ 36 Fed. Reg. 11,835 (Tariff Comm'n 1971).

mission completed the circle by combining a cumulation test with the new contributing cause standard. Even after aggregating the separate pig iron imports from Canada, Finland, and West Germany, percentage market invasion was apparently too minimal to be mentioned. The Commission merely asserted that "the effect of the LTFV imports was to displace *some* of the domestically produced cold pig iron."³¹⁶ The majority admitted that depressed prices of domestic pig iron could be attributed to technological changes in the steel industry, to low prices for scrap metal, and to low prices of imported pig iron in general. None of these considerations, however, was an obstacle to an injury finding under the diluted standard enunciated: "*it is not necessary to show that imports were the sole cause nor even the major cause of injury as long as the facts show that LTFV imports were more than a de minimis factor in contributing to the injury.*"³¹⁷ A causality test of this kind, especially when combined with the de minimis injury theory, will surely bar all price discrimination in international trade.

d. *Insensitivity to Procompetitive Factors.* On a separate ground not involving a strict violation of Code standards one can also object to some of the Commission's recent decisions, namely because they display a thorough insensitivity to the procompetitive aspects of dumping sales. In *Potassium Chloride from Canada, France & West Germany*,³¹⁸ for example, the Commission refused to consider what seemed to be a clear case of meeting American competition by French and West German potash producers. In an attempt to retain their traditionally small part of the East Coast potash market, French and German producers cut their prices to follow the generally plummeting price structure in the American market caused by general oversupply. These same conditions were not present in Europe, where prices remained higher. Under the Commission's interpretation the French and West Germans were forced either to cut their European prices to avoid price discrimination, or to withdraw from the American market and thus lessen competitive rivalry on the East Coast.

This decision's insensitivity to the value of price competition is underscored by its treatment of the multinational corporation issue. Eighty-five to ninety percent of the potash imports in question came from Canada and were produced by four American firms with plants in the United States and Canada. Only three of the ten American potash producers did not have some link with the Canadian market. Although

³¹⁶ *Id.* (emphasis added).

³¹⁷ *Id.* at 11,835-36 (emphasis added).

³¹⁸ 34 Fed. Reg. 19,003 (Tariff Comm'n 1969).

the price in the Canadian market was higher, Canadian sales of potash were apparently insignificant. The lower American prices were the result of stiff competition among the American producers in the face of general oversupply. In a concurring opinion Commissioners Clubb and Moore argued that the Antidumping Act was designed to protect American labor as well as producers; hence it was legitimate to consider fictional injury to the parent by imports from the subsidiary.³¹⁹ This view seems to ascribe to the Act the purpose of discouraging American firms from locating abroad—a characteristic of a protectionist tariff. With an eye to competitive effects one might legitimately have asked whether American firms were using monopoly profits abroad as a lever with which to dominate the American market. But as a general rule, increased investment by American firms abroad increases competition in the foreign market and thus reduces foreign market power. In this case, of course, the differentially low prices charged by the Canadian plants merely reflected the competitive conditions in the United States. The American firms apparently located production units in Canada because of ore deposits there.

In *Bars & Shapes from Australia*³²⁰ injury was found despite the Commission's apparent understanding that only sporadic dumping sales were involved. The Australian producer disposed of surplus production in various world markets, wherever he could obtain the most favorable price. Anticompetitive motives and effects were not considered.

Moreover, in an increasing number of cases the Commission has begun to measure injury on the basis of price depression alone.³²¹ Without inquiry as to the trend of corporate profits, utilization of capacity, the number and size of competitors involved, or the existence of possible oligopolistic price discipline in the American market, injury findings have been based solely on falling domestic prices as if this were an incontrovertible evil under all circumstances.

CONCLUSION

I have argued that antidumping laws should be interpreted to prohibit only anticompetitive dumping in international trade. I based this position heavily on an economic analysis of dumping, free trade theory,

³¹⁹ *Id.* at 19,007-08.

³²⁰ 35 Fed. Reg. 4163 (Tariff Comm'n 1970).

³²¹ See, e.g., Ferrite Cores from Japan, 36 Fed. Reg. 1934 (Tariff Comm'n 1971); Glass from Japan, 36 Fed. Reg. 7330 (Tariff Comm'n 1971).

and antitrust policy. Although the legislative history of the Antidumping Act of 1921 is confused and indecisive, there is at least as much authority for as there is against this view. There is also supportive precedent in the somewhat erratic decisions of the Tariff Commission, which have wavered between an antitrust and an escape clause view of the Act. The most recent decisions of the Tariff Commission represent a departure from these general standards, in open conflict with the International Antidumping Code.

The Code takes a compromise stance between an antitrust and an escape clause approach to the dumping question, one rather more heavily weighted towards the latter than the former. It constitutes a clear attempt to curb the protectionist potential inherent in the administrative and substantive provisions of antidumping legislation. With the exception of the United States it has been accepted and implemented in good faith by the major Western trading nations and Japan.

I have argued that the Renegotiation Amendments Act of 1968 would not prevent interpreting the United States antidumping statute in accordance with the Code guidelines. Indeed, the Treasury Regulations of 1968 provide illustrative proof of this proposition. If it is accepted that the Act has a strong antitrust policy core, or at a minimum that it should be interpreted as roughly consistent with escape clause principles, the present Tariff Commission position is not only inconsistent with the Code, but with the Act as well.

Any careful consideration of antidumping laws inevitably raises doubts about the need for such legislation at all, especially in a developed country like the United States, with its bulging armory of antitrust laws. It seems fair to say that dumping has not proved to be the threat anticipated at the turn of the century or during the interwar years. The Robinson-Patman and Sherman Acts in particular give ample protection against predatory practices, even in incipient stages, and there seems little reason from a free trade perspective to demand greater protection or different standards where international as opposed to domestic price discrimination is at issue. Both of these antitrust laws may be enforced against local importers or nonresident foreigners.³²²

For the present, however, the international trading community has accepted the enforcement of antidumping laws within the confines of

³²² See, e.g., *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951) (Sherman Act). No cases have been brought against foreigners under the Robinson-Patman Act, but the statutory language appears applicable. See F. ROWE, *supra* note 31, at 81-83. On the questions of process and personal jurisdiction, see *id.* at 81 n.153; Comment, *supra* note 9, at 723-24.

the International Antidumping Code. Continued adherence by the Tariff Commission to its present anti-Code posture³²³ threatens to enervate the force of the Code and encourage retaliatory application of the antidumping laws of other countries. This would spell the defeat of a major, forward looking effort to control a non-tariff barrier to trade through international agreement.

³²³ In the summer of 1971 two new members, Catherine Bedell and Joseph Parker, joined the Commission as Chairman and Vice-Chairman respectively. If Chairman Bedell and Vice-Chairman Parker both adopt a pro-Code view, or if one does, and Commissioner Sutton, whose term expires in the summer of 1972, is replaced by a pro-Code appointee, the Commission's decisions may become less antagonistic towards the Code's injury standards. The most recent Commission decisions in which both new Commissioners have participated are, however, unpromising. *See* Sheet Glass from France, Italy & West Germany, 36 Fed. Reg. 21, 432 (1971) (3-3 decision: Chairman Bedell found injury, Vice-Chairman Parker did not; the Antidumping Act calls for an injury finding on tie votes (19 U.S.C. § 160(a) (1970)); Ice Cream Sandwich Wafers from Canada, 37 Fed. Reg. 2817 (Tariff Comm'n 1972) (4-2 injury decision: Chairman Bedell and Vice-Chairman Parker found injury); Diamond Tips from the United Kingdom, 37 Fed. Reg. 3932 (Tariff Comm'n 1972) (unanimous injury decision).