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_Baker & McKenzi, London_

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WHY SHOULD NATIONS UTILIZE ANTIDUMPING MEASURES?

Ross Denton*

I. INTRODUCTION

A number of eminent scholars have for a number of years carefully argued that the national antidumping and subsidy rules are illogical.1 These criticisms generally take two forms.

The first position notes that dumping itself is not harmful to the economy of the importing nation. This view relies predominantly on consumer gains outweighing producer losses. This argument, however, does not address the situation in the exporting country or the effect on world welfare as a whole. Similar arguments apply to subsidies.2

The second position argues that the imposition of duties to deal with dumping actually injures the importing nation by placing a tax on imports (and taxes on imports inevitably become taxes on exports).3 Some view this as simple protectionism, transferring wealth from consumers in the importing country to the possibly inefficient domestic industry of the importing country.

It is, of course, possible to argue both of the above positions, and those who do are the fiercest critics of antidumping law. However, some accept that antidumping rules are a necessary evil, on balance

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2. See, e.g., Sykes, supra note 1.

being better than any practical alternative;\(^4\) others argue for their abolition.\(^5\)

It should also be noted that various authors attack the national implementation of the international principles on the basis that they are protectionist.\(^6\) These authors often do not question the basis of the international rules, but merely the implementation at the national level.

The purpose of this paper is to present arguments that may provide support for the continuation of the international antidumping regime, and in certain measure, for the continuation of national antidumping rules. It steers an often difficult course between advocating tighter controls on the use of antidumping actions as protectionist measures, and their use to prevent potentially harmful dumping. However, this paper does not attempt to define how to produce a rational antidumping-type system, but merely provides some standards for assessing whether that system is sensible.

This paper will attempt to analyze two distinct issues. First, it will assert that the GATT principles on antidumping are in a state of tension, serving two opposing purposes. The first purpose is to liberalize trade movements, in some measure attempting to rid the world of harmful distortions. Such a function would concentrate primarily on the private act of price discrimination. This purpose is, however, contentious. The second and more familiar purpose of the GATT principles is to provide procedural and substantive safeguards against the abuse of national antidumping rules. This purpose looks to the public act of protectionism through the use of antidumping actions. This is clearly a concern of the GATT antidumping regime and provided most of the impetus towards the creation of the two Antidumping Codes. While I eventually conclude, that the control of national antidumping regimes is currently the most important aspect of the international principles (and has been since the 1960s), I believe that it is

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4. Vermulst, for example, states:

Economists and lawyers increasingly argue that the antidumping laws should be revised to bring them more into accordance with principles of economic and antitrust theory. This criticism, however, assumes that antidumping laws should be economically fair. Although this assumption is valid from a "welfare economics" point of view, it tends to forget that the current antidumping laws might be the least of possible evils from a political point of view.


important to re-state and examine the liberalizing function, even if such function has been in large part discredited.

The second purpose of this paper is to attempt to see whether there are any reasons for the continuation of the national antidumping laws.

The link between the two issues is that without some liberalizing purpose of the international rules, individual nations would have a great temptation to forego antidumping regimes, thereby possibly sending a message to foreign producers that certain behavior is acceptable.

The current operative excesses of national regimes are cause for concern. For example, the antidumping rules of the European Economic Community ("EC") are under pressure because of the perception that they are being used in a protectionist manner. Such behavior is made all the more troublesome by the inability of exporters to gain meaningful judicial review of dumping measures. Clearly all is not well. But do these problems urge the abolition of antidumping rules?

This paper argues that it is essentially "undemocratic" to allow low- to mid-level administrators in national executives to make "trade policy," making decisions that affect potentially billions of dollars of trade. While any system of administration is dependent upon the discretion of officials, national legislatures clearly do not intend that such discretion be used as a means to manage large areas of trading relations between nations. While national officials should be able to decide whether a particular expense is to be deducted or not, there is a qualitative difference between allowing this and allowing the instigation of a


9. While only of tangential relevance, such an argument can be used to reject the currently fashionable principle of "managed trade." See, e.g., Advisory Committee for Trade Policy and Negotiations, Analysis of the U.S.-Japan Trade Problem (Washington, D.C.: USGPO, 1989); Kissinger & Vance, Bipartisan Objectives for American Foreign Policy, 66 FOREIGN AFF. 899, 913 (1988); H. Shutt, THE MYTH OF FREE TRADE 159-85 (1985); R. Waldmann, MANAGED TRADE (1986); C. Prestowitz, TRADING PLACES 322 (1988); Note, Managing Dumping In a Global Economy, 21 GEO. WASH. J. INT'L L. & ECON. 503 (1988). Clear adherence to principles is a far more administratively efficient manner of proceeding than treating each and every problem on an ad hoc basis.
trigger price mechanism for steel or a company and product specific cost-based standard for imports of semiconductors. Of course, gaps in the principles need to be filled, and interpretations of principles will always need to be made. This type of discretion can be contrasted with unfettered discretion to engage in negotiations to settle problems, whatever the cost. If nations are to protect their national interests from "unfair" trade, such a decision should be taken in the "full glare" of public debate and should be based upon a full examination of the costs involved in protection. Therefore, a major conclusion of this paper is that national antidumping actions need to examine the effect of imports on competition, and not only on competitors. Such an obligation could be undertaken either unilaterally by nations or as a result of international agreement.

The antidumping regime exists at two distinct levels: national and international. The reasons for the enactment of the national rules are not the same as the reasons for the establishment of the international principles. Those who argue that the national rules as instruments of national trade policy are outdated and ought to be abolished should be made to address the question of whether the international principles have also lost their validity. If nations decide not to apply antidumping rules because of domestic objections, such a unilateral decision does not necessarily call into question the role of the international principles.

II. THE FUNCTION OF THE INTERNATIONAL ANTIDUMPING PRINCIPLES

In this section, I will attempt to distinguish between the GATT principles relating to antidumping and the national antidumping rules, which represent the partial concretization of those principles. The two groups are not, however, coterminous; not all facets of the principles

10. For a cogent explanation of this principle, see O. Long, Public Scrutiny of Protection (1987). In defending this thesis, Hugh Corbet has noted:

[B]ureaucrats in industrialised countries being left by ministers to play God for too long in the field of international trade and competition; handing out a little bit of regulation here, doing a little bit of negotiation there, cartelising one industry after another, until they have helped not only to screw up the GATT system but also, and more importantly, to screw up the economies in whose interests they might actually have believed they were working.


11. One aspect of the existence of the international rules controlling national excesses (see infra sec. II.C), is premised on the existence of national rules. If the national rules were removed, the rationale for the international principles would to a large extent also be removed.

12. However, a decision on behalf of the U.S. or the EC to stop using antidumping rules would, of course, have some effect on the continued effectiveness of the international rules.
are found in national rules, nor do all the rules reflect underlying international principles.

The international antidumping system was not set up until 1947. Up to that date, only national rules addressed antidumping issues. After the war, however, the Allied powers wanted to create an international economic regime, and the U.S. put forward a proposal on an antidumping regime modeled after its own national law.

At this point, it is appropriate to look at the national antidumping rules for two reasons. First, given the paucity of material at the international level, it is important to understand how national actors viewed the function of their antidumping rules. Given the historical context of the formation of GATT, special emphasis will have to be given to the United States rules. Second, the motivations towards the national antidumping rules and the motivations involved in the formation of the international principles are manifoldly different. The concerns shown at the national level are not totally reflected in the international concerns. This divergence illustrates the general thesis of this paper that the international principles and national rules do not address the same issues, and that arguments for the removal of national rules do not necessarily impinge on the validity of the international principles.

A. A Short History of the Function of National Antidumping Rules

In 1904, Canada passed the first law relating to what we would today call dumping. The statute provided no indication as to the purpose of the antidumping provision. However, it did refer to a deviation from "fair market price." This reference might suggest that the statute was not simply protectionist. Partial accounts of this antidumping law indicate that it was passed to protect the infant Canadian steel industry from short-term predatory dumping from the

13. The first antidumping law passed in Canada in 1904 predates any economic understanding of the gains and losses from dumping. Arguably, the legal restriction has never had an economic foundation, which suggests that the rationale for antidumping law may have to be found outside any economic argument. To suggest that the antidumping law is economically unsound is, of course, an important policy consideration and not one lightly ignored. However, such consideration does not on its own justify the repeal of the law. Many statutes are economically inappropriate, but their rationale lies elsewhere.

14. Section 19 of the Customs Tariff Act of 1904 states:

Whenever it appears to the satisfaction of the Minister of Customs, or of any officer of customs authorized to collect customs duties, that the export price or the actual selling price to the importer in Canada of any imported dutiable article, of a class or kind made or produced in Canada, is less than the fair market value thereof . . . such article shall, in addition to the duty otherwise established, be subject to a special duty of customs equal to the difference between such fair market value and such selling price . . . .

Can. Stat. 4 Edw. VII, ch. 11, Sec. 19. This additional duty, however, was not to exceed one half of the ordinary duty.
cartelized U.S. steel companies. Edward Porritt quotes a Mr. Fielding in the Canadian House of Commons:

These trusts and combines . . . are not worrying about the good of the people of Canada. They send the goods here with the hope and expectation that they will crush the native Canadian industries. And with the Canadian industry crushed out what would happen? The end of cheapness would come, and the beginning of dearness would be at hand. Ninety per cent of the complaints made to us by our manufacturers are not that the tariff is too low, but that this dumping and slaughtering exists. The dumping condition . . . is not a permanent condition. It is a temporary condition; and therefore it needs only a temporary remedy that can be applied whenever the necessity for it arises.

Part of the problem of discriminatory pricing can be found in the high tariffs prevalent at the turn of the century. Exporters would dump in the export market partly to surmount import tariffs. The avoidance of tariffs by dumping, however, seems not to have been an issue in the enactment of the Canadian law.

The rules of antidumping law in the U.S. have a complex history. The first provision to deal with international price manipulation was section 73 of the Tariff Act of 1894. This section made unlawful:

every combination, conspiracy, trust, agreement, or contract . . . when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter.

The Underwood Tariff Act of 1913, however, constituted the first serious attempt to enact an antidumping-type statute in the United States. This provision was deleted by the Senate Finance Committee.

Notwithstanding this setback, President Wilson, although opposed to tariff increases, wanted to alleviate protectionist pressures against

15. It would seem from Porritt that the existence of free trade conditions in Great Britain effectively precluded British firms from dumping in the Canadian market. E. PORRITT, SIXTY YEARS OF PROTECTION IN CANADA 1846-1907, at 408 (1908).

16. Id. at 407.


predatory dumping. This concern led to the enactment of sections 800-01 of the Revenue Act of 1916. The Act criminalized international price discrimination with the intent to injure, destroy, or prevent the establishment of an industry in the United States. This statute has been little used because of the high threshold of intent required.

The push towards administrative control of dumping began in 1919 and partly grew out of dissatisfaction with the way the 1916 Act had been utilized. After some complicated Congressional actions and the return of the protectionist Republicans to control of Congress and the Executive in 1920, the provision eventually became part of the Emergency Tariff Act of 1921. Section 201 of the Emergency Tariff Act of 1921 states:

That whenever the Secretary of the Treasury, after such investigation as he deems necessary, finds that an industry in the United States is being or likely to be injured, or is prevented from being established, by reason of the importation into the United States of a class or kind of foreign merchandise, and that merchandise of such class or kind is being sold at less than its fair value, then he shall make such finding public to the extent that he deems necessary.

Section 202 imposed “a special dumping duty in an amount equal to such difference” if the purchase price or exporter’s sales price was less than the foreign market value. Although this wording has been expanded and refined on numerous occasions, its thrust remains essentially the same.

It is difficult to glean a consistent rationale for the enactment of an administrative antidumping law in the U.S. context. It would not be unreasonable to suggest that many Congressmen voted for a provision whose implications they did not fully understand. Some Congressmen seemed to be confused about what was intended by the various bills’ provisions; some confused dumping with simple fraudulent undervaluation of import prices, while others stated that it dealt with sales


20. It has been strongly suggested that the 1916 Act was enacted to extend the provisions against unfair competition found in the Clayton Act to import trade. See Letter from Assistant Attorney General Samuel J. Graham to the New York Times, July 4, 1916, at 10, col. 6, where he said, “Just as we have said to our own people by the Clayton Act that they should not indulge in unfair competition, so we propose to say the same to the foreigner.”


below the cost of production.\textsuperscript{25}

Congressmen believed that the practice of dumping had assumed massive proportions. The 1921 bill introducing the administrative antidumping action was motivated by the perception that massive dumping was occurring due to the return to the U.S. of goods stockpiled in Europe during World War I.\textsuperscript{26} When witnesses were examined by the Senate Finance Committee, however, they produced no evidence of any current dumping. This finding produced much controversy in the congressional debates, since the bill was seemingly enacted to handle a problem which had not yet, and might never, arise.\textsuperscript{27}

While the circumstances surrounding the actual existence of dumping are clear, the reasons for passing the Act are not. In some instances, the rationale of the legislation appears to be merely that of raising revenue.\textsuperscript{28} In other cases, the rationale appears to have been avoidance or prevention of predation.\textsuperscript{29} The antidumping provision,

\begin{footnotesize}
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\item[(25.)] Senator McCumber's idea of what the 1921 bill aimed for seemed to diverge from the wording of the provisions. He stated, "[U]sing the term 'dumping' as we understand it—that is, as referring to products sold in this country for a less price than the producing cost in the country of production." 61 CONG. REC. 1099 (1921).
\item[(26.)] See 61 CONG. REC. 1099 (1921).
\item[(27.)] See, e.g., 61 CONG. REC. 1021 (1921) (exchange between Sens. McCumber and King); 61 CONG. REC. 1098-1100 (1921); 61 CONG. REC. 1103-04 (1921) (statement of Sen. Simmons). Such an issue led one Senator to conclude, "My understanding is that the Ways and Means Committee incorporated the antidumping clause, not because of dumping that was going on at the time of the passage of this act through the House...[but m]erely as an insurance policy, a guaranty against future dumping, something that might happen." 61 CONG. REC. 1100 (1921) (statement of Sen. Watson).
\item[(28.)] According to Rep. Lenroot, the stated purpose of the bill containing the 1913 antidumping clause was "only" the purpose of raising revenue and has "no element of protection." 50 CONG. REC. 1365 (1921); cf. statement of Sen. Penrose on the 1921 provision: "Whether rates are raised or not, the antidumping provision is not intended to produce much revenue." 61 CONG. REC. 1068 (1921).
\item[(29.)] For example, in the House debates on the 1921 bill, Mr. Fordney noted:
Several countries of the world in the presence of the experience now being undergone by this country have enacted such legislation. It protects our industries and labor against a new common species of commercial warfare of dumping goods on our market at less than cost or home value, if necessary, until our markets are destroyed, whereupon the dumping ceases and prices are raised at above former levels to recoup dumping losses. By this process, while temporarily cheaper prices are had, our industries are being destroyed, after which we more than repay in higher prices.
61 CONG. REC. 262 (1921).
In the Senate, Senator McCumber reiterated this purpose when he said, "[T]he purpose of the bill is to prevent an attempt by any foreign producer to dump his goods into the United States for less than cost for the purpose of destroying an industry in the United States." 61 CONG. REC. 1022 (1921). He continued:
[i]t is the purpose to allow the manufacturers in the United States to continue in business, even though it costs them much more to manufacture than it does those in a foreign country and to provide for the employment of American labor and American capital, because anyone who has followed the ups and downs of any business in the United States in which there is competition knows that when an industry in the United States is destroyed by underselling by a foreign competitor all prices immediately go up to an exorbitant degree and far beyond what was originally the American price.
Id.
\end{enumerate}
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Senator Penrose noted, "is a preventative. The mere fact that the provision exists on the statute books tends to prevent dumping.\textsuperscript{30}\)

At other times the rationale seems to suggest straightforward protection of U.S. industry. It is possible that there was something other than straightforward protectionism involved in enacting dumping rules since, prior to the GATT, nations could do whatever they liked in terms of commercial policy. If they wanted to protect their domestic industry, they simply could have levied a tariff or imposed a quota. At this time, however, Congress was in charge of setting tariff rates and thus any alteration in duties would have demanded congressional attention. Congress would have to have been involved in all cases alleging dumping or subsidization. This involvement would have been slow, cumbersome and inefficient use of congressional time. As Congress jealously guarded its rights to impose tariffs, in setting up an administrative antidumping system, it made the imposition of additional duties for antidumping reliant upon certain conditions, which, if found to be fulfilled, provided an almost automatic imposition of duties.

While it is possible that the U.S. Congressmen did not understand what they were doing, and therefore confused price discrimination with the prevention of predation or sales below cost, it is also possible that they understood that the problems of administering a system based on cost were insurmountable. In order to determine whether such sales were being made, an administering authority would not only need great economic and accounting expertise, but also the cooperation of the alleged dumper, who may or may not have a presence within the enforcing jurisdiction. It is also possible that the alleged dumper, even if it had a presence in the U.S., would have been unwilling to hand over confidential business data to foreign government officials. By way of contrast, the \textit{price} of a good is so-called "hard data." It is much easier to find list prices of a good on two distinct markets than to try to discover the actual cost of a product. This situation may have led the Congressmen to favor a system which utilized "hard data" and which was able to be administered by relatively unskilled officials. This problem of administration has been a recurrent theme throughout the history of antidumping law.\textsuperscript{31}

Congress was also aware of the possibility of "mirror" action. In the rather uncertain postwar period, simply raising the tariff in order

\textsuperscript{30} 61 CONG. REC. 1068 (1921).

\textsuperscript{31} While not elevating a principle of "administrability" to a determinative factor, it seems that if there is a gap between what \textit{ought} to be done and what \textit{can} be done, practical considerations usually prevail.
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Antidumping measures to protect might have invited retaliation. Nations thus began to emphasize the element of "unfairness," which shifted the emphasis away from the conduct of the importing country to the conduct of the exporting country. If an act was normatively unfair, then acting against such practice would simply be restoring the status quo, and hence clearly not protectionist.

Many of the motivations of the national legislatures, therefore, were not relevant to the formulation of international principles. Indeed, some motivations, such as simple protection of domestic industries, were antithetical to the aims of the international system.

Until 1947, the national rules were based on price discrimination and most were particularly concerned with predation from cartels. In 1947, with the signing of the GATT, however, the principles underlying the rules were becoming increasingly obscure.

B. A Short History of the Purpose of the GATT Antidumping System

The first U.S. suggestion for the international economic regime was a State Department report entitled "Proposals for Expansion of World Trade and Employment," published in November 1945. This report paid little or no attention to the issue of dumping, only remarking that "Members should undertake: . . . 3. To subscribe to a general definition of the circumstances under which antidumping and countervailing duties may properly be applied to products imported from other members." The next step was another U.S. report, "Suggested Charter for an International Trade Organization of the United Nations," published in September 1946. Article 11 of this Charter was related to antidumping actions and apparently aimed to constrain such national measures. However, it should not be overlooked that the U.S. proposals

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33. Id. at 11-12.
35. Article 11 read inter alia: 1. No antidumping duty shall be imposed on any product of any Member country imported into any other Member country in excess of an amount equal to the margin of dumping under which such product is being imported. For the purposes of this Article, the margin of dumping shall be understood to mean the amount by which the price of a product exported from one country to another is less than (a) the comparable price charged for the like or similar product to buyers in the domestic market of the exporting country, or, (b) in the absence of such domestic price, the highest comparable price at which the like or similar product is sold for export to any third country, or, (c) in the absence of (a) or (b), the cost of production of the product in the country of origin; with
also included a section on the control of restrictive business practices. In explaining why the U.S. felt such practices needed to be controlled, a senior official noted that cartels had been used to prevent the development of new industries, often through deliberate dumping. The comprehensive nature of the U.S. “system” suggests that the U.S. realized that dumping could be detrimental to world welfare. Had the U.S. only been concerned about its own welfare, it would have only acted at its border, rather than propose an international regulatory system. The observation that dumping can prevent the development of new industries also helps explain why the U.S. proposals allowed the use of antidumping actions, rather than simply prohibiting them. This observation is particularly relevant since the documents cited above suggest that the main U.S. preoccupation with antidumping law was its regulation and not its facilitation.

As eventually agreed upon by the Preparatory Committee, article VI of the GATT contains the current formulation of the price discrimination rule. Entitled “Antidumping and Countervailing Duties,” it stated:

The contracting parties recognize that dumping, by which products are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.

The concept of normal value, or home market price, was defined as follows: A product is sold below its normal value if the price of the product when exported to another country is:

(a) less than the price on the home market for a similar product sold under similar conditions;
(b) in the absence of such a home market price;

due allowance in each case for the differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability. . . .

5. Each Member undertakes that as a general rule it will not impose any antidumping duty or countervailing duty on the importation of any product of other Member countries unless it determines that the dumping or subsidization, as the case may be, under which such product is imported, is such as to injure or threaten to injure a domestic industry, or is such as to prevent the establishment of a domestic industry.

Id. at 5-6. 36. As to how this control was to be achieved, see infra text accompanying note 46.


38. As will be noted below in the text accompanying notes 69-71, the discussion of antidumping rules in the Preparatory Committees does not unambiguously suggest that the contracting parties agreed that the purpose of antidumping rules was to restrain national antidumping actions. At one end of the spectrum of debate, the U.K. delegation opposed inclusion of the possibility of imposing antidumping duties; at the other end, other nations wished to make antidumping actions mandatory and include a condemnation of dumping per se in the Agreement.
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(i) less than the price on a third market for a similar product sold under similar conditions;
(ii) less than the cost of production in the country of origin plus a reasonable amount for selling costs and profit.

A number of initial observations about the GATT system of antidumping regulation need to be made. First, the GATT contains no condemnation of dumping. Some commentators mistakenly argue that dumping is internationally condemned, or even "illegal." Article VI, however, only condemns injurious dumping. Even if dumping causes injury, it is not prohibited, but merely "condemned." Dumping can only be reacted against by nations if injury is proven and directly caused by the dumping. The absence of any condemnation of dumping per se means that nations are not obliged to prohibit nor even discourage dumping by their nationals. Even though the GATT contains no condemnation of dumping, nor obligation of nations to act against dumping on third markets by their nationals, it should be noted that, in 1954, New Zealand proposed that article VI be amended to include the phrase "[a]ccordingly contracting parties shall refrain from action which would cause or encourage dumping of this kind." The proposal was not accepted because the contracting parties felt that they could not control the commercial activity of companies.

39. Several nations tried unsuccessfully to have such a condemnation included in the wording.

40. Dumping, according to Malcolm Baldridge, "is anti-free trade and is illegal under U.S. laws as well as under the General Agreement on Tariffs and Trade. In short, sanctions against illegal dumping and for opening markets are pro-, not anti-free trade." Baldridge, There Won't Be a Trade War, Wash. Post, Apr. 10, 1987, at A27, col. 2; see also C. PRESTOWITZ, supra note 9, at 38, where he states, "The only problem was that dumping is illegal under both U.S. trade law and under the international rules of GATT." See also The Unfair Foreign Competition Act of 1985: Hearings on S. 1655 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 72 (1985) (statement of Sen. Howell Heflin that "'[d]umping' is clearly unlawful . . . ."); cf. J. JACKSON, WORLD TRADE AND THE LAW OF GATT, 412 nn.9 & 10 and accompanying text (1969).

41. Viner recognized the difficulty of requiring exporting nations to prohibit dumping by their nationals. He noted in 1926:

There is little, if any, basis for faith in the feasibility of international control of the dumping problem by means of agreement on the part of the particular countries to prevent dumping by their exporters . . . . It is utopian to expect that many Governments could be persuaded voluntarily to adopt a policy which would involve either [such] consequences for its exporting industries.

J. VINER, MEMORANDUM ON DUMPING para. 23 (1926). This issue was also raised in the GATT Panel report on the Canadian FIRA legislation, where the panel pointed out, "[i]n particular, the General Agreement does not impose on contracting parties the obligation to prevent enterprises from dumping." GATT, Canada-Administration of the Foreign Investment Review Act: Report of the Panel Adopted on 7 Feb. 1984, L/5504, BISD, 30 Supp. 140, 164 (1984). Arguably the ability of a contracting party to prohibit dumping might infringe upon article XI (to the extent it controls exports) since such ability would be outside the scope of article VI.


cern, however, was partially reflected in a report adopted in 1955, which stated that "contracting parties should, within the framework of their legislation, refrain from encouraging dumping, as defined in that paragraph, by private enterprises."\(^4^4\) The precise obligation contained within this statement, however, remains unclear.

Second, and more significantly for our purposes, contracting parties were not obliged to enforce any antidumping law.\(^4^5\) However, one should be wary of concluding that the GATT did not intend to impose obligations on contracting parties in terms of their internal relations with private citizens. Even though the GATT principles are clearly addressed only to the contracting parties, the aborted International Trade Organization ("ITO") would have undertaken, albeit indirectly, to regulate restrictive business practices of individuals. Chapter V of the "Suggested Charter" would have obliged members to "take appropriate individual and collective measures to prevent business practices among commercial enterprises which restrict competition, restrict access to markets or foster monopolistic control in international trade."\(^4^6\) Under the original regulatory scheme, therefore, even though nations would not have been obliged to take antidumping actions, they would have been obliged to deal with anticompetitive private actions which, \textit{inter alia}, might have fostered the ability to dump. This latter obligation would have buttressed the governmental obligation to limit conditions that positively facilitated dumping by private individuals or firms. The ITO was not approved, however, and the GATT system therefore only regulates the practice of nations and does not place any restrictions on non-governmental actors.

The broad public/private distinction currently characterizing GATT obligations probably results in the impression that the GATT antidumping principles were formulated only to control national antidumping laws. Certainly later in the life of the GATT, the control of national antidumping laws became a major preoccupation, and the actions of certain contracting parties, particularly the U.S. and the EC, were a primary cause of the negotiation of the two antidumping Codes.

However, the New Zealand delegate noted that the proposal was intended not to make nations act positively against their nationals but only to refrain from facilitating the possibility of dumping.

\(^4^4\) GATT, BISD, 3 Supp. 223 (1955).

\(^4^5\) See GATT, infra note 77, at 83 (Panel noting, "Article VI does not oblige an importing country to levy an anti-dumping duty whenever there is a case of dumping . . .").

\(^4^6\) \textit{Suggested Charter for an International Trade Organization}, supra note 34, art. 34, para. 1.
C. The "antiprotectionist" function

Concerns over the possible protectionist use of national antidumping laws have existed ever since the inception of the GATT. The U.S. clearly held such concerns, as evidenced by its proposals for an international trade regime.

In 1961, a GATT Group of Experts noted:

The Group agreed that it was essential that countries should avoid immoderate use of anti-dumping and countervailing duties, since this would reduce the value of efforts that had been made since the war to remove barriers to trade. These duties were to be regarded as exceptional and temporary measures to deal with specific cases of injurious dumping or subsidization.47

The two Antidumping Codes were clearly negotiated in order to limit the abuse of national antidumping laws. Although both Codes had numerous concerns, their main purpose was to “standardize” the GATT principles and to adopt uniform procedures and interpretations of key concepts. This attempt at standardization was undertaken in order to eliminate both divergences from the principles of article VI and the existence of national differences which in application could amount to restrictions on trade.

Both the 1967 and 1979 Codes state in their Preambles “that antidumping practices should not constitute an unjustifiable impediment to international trade . . . .”48 The main impetus49 for the 1967 Code was the general perception that the U.S. law operated in such a way as to “chill” international trade.50 The U.S. had a cumbersome and complex antidumping regime51 which was regularly the object of criticism, both domestically52 and internationally.53 However, the U.S. was also

49. The other major concern was that as tariff barriers were negotiated away, governments would use non-tariff barriers as a way of offsetting the tariff concessions made under the Kennedy Round formula. U.S. Tariff Commission, Pub. No. 252, Operation of the Trade Agreements Program, 18th Report 37 (1966).
50. According to commonly quoted statistics, the U.S. Treasury Department acted on 321 antidumping complaints between 1955 and 1964. See infra note 52. Of these cases, only nine resulted in duties being imposed. Sixty-eight were terminated due to a voluntary increase in the exporters’ prices; no sales at less than fair value “LTFV” were found in 208; and in thirty six, the Tariff Commission found no injury.
52. See, e.g., 111 Cong. Rec. 12,075-77 (1965).
critical of foreign antidumping regimes, which it viewed as non-transparent and discretionary. At the beginning of the Kennedy Round, it was agreed that some attention should be given to non-tariff barriers. With this in mind, the major parties negotiated the Code, which substantially expanded upon Article VI and clarified the obligations of the contracting parties. The negotiators hoped that the Code would eliminate "unjustifiable" barriers to international trade arising out of the administration of antidumping statutes.

The circumstances surrounding the negotiation of the 1979 Code are similar, but much more complex. First, some inter-governmental wrangling in the U.S. had clouded the issue whether the U.S. was fully in accordance with its obligations under the 1967 Code. The President had argued that the Code could be accepted without the express approval of the Congress. Congress disagreed and enacted legislation which obliged the implementing authorities to depart from the obligations under the Code in certain limited circumstances. While the U.S. negotiators argued that the U.S. in fact applied the provisions of the 1967 Code, other contracting parties disagreed and argued that the "standardizing" function of the international Code was not being applied by the United States.

Second, after the OPEC-induced recession in the mid- to late-1970s, the EC increasingly relied upon its antidumping measures as a way of fending off competition. Unlike the U.S., however, the EC realized that it was bound by the 1967 Code.

Third, a Subsidies Code was negotiated as part of the Tokyo Round negotiations. Since the injury principles found in the new Subsidies Code were very similar to those found in the 1967 Code, negotiators believed that the provisions of any Antidumping Code should substantially mirror those found in the Subsidies Code. Such parallel interpretations would also tend to limit "action-shopping."

Finally, in order to allay the fears of the developing countries that their progress might be harmed by the antidumping actions of devel-

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oped countries, the negotiators felt that a new code should acknowledge the special position of the developing countries. To a certain extent the new Code gave effect to all these concerns.

D. The “Liberalizing” Function

Despite the seemingly overwhelming evidence that the GATT principles exist only to control the excesses of national antidumping regimes, there is an alternative interpretation of the international principles. If this interpretation (explained below) is indeed correct, then it would appear that the GATT antidumping principles are more ambiguous than commonly assumed, reining in the use of antidumping legislation to preclude its use as a non-tariff barrier, but at the same time looking to control the phenomenon of dumping.

Commentators such as Bhagwati and Petersmann argue that antidumping and countervailing duty rules are a necessary part of the international trade order. Both argue that a fundamental principle of the GATT system was the protection of undistorted competition. Bhagwati explains why this must be the case:

The trade regime that one constructs must . . . rule out artificial comparative advantage arising from interventions such as subsidies and protection. It must equally frown upon dumping, insofar as it is a technique used to secure an otherwise untenable foothold in world markets.

The reason for the assumption that the international system may differ from the national system may not be immediately apparent. The concept of gains from free trade is usually explained in terms of a single country. The theory of comparative advantage may be used to show how if Country A unilaterally derestricts its trade and relies on international specialization, it will gain more than in the situation where it protects its domestic economy. However, can an international


64. Others have noted the trade-liberalizing function of the GATT antidumping rules. See E. Vermulst, Antidumping Law and Practice in the United States and the European Communities 14 (1987), which states: “Paradoxically, antidumping laws serve an extremely useful function in the maintenance of a liberal free trade system, as exemplified by GATT.”

65. J. Bhagwati, supra note 63, at 34.
trading system be constructed out of the principle of unilateral derestriction? The nation engaging in unilateral free trade is attempting to "maximize" its own welfare. When one tries to expand the principle of liberalization into an international order, however, one is driven to suggest that there have to be principles by which the system is policed in order to preserve its overall integrity; the system cannot operate if parts of the system do not adhere to the same principles. In constructing an international system, the focus has shifted from national welfare to world welfare. The national, unilateral idea of free trade ignores the actions of others; the international system cannot. While a nation may ignore the acts of others because it gains (at the expense, for example, of nations that subsidize their exports, or, in the absence of predation, companies that sell below some notion of cost), the international system increases world welfare by ensuring that all actors pursue liberalized trading behavior because world welfare is the total of all the national figures. If one is indeed trying to ensure the efficient allocation of resources in an international context such as the GATT system, one has to argue that liberalization and freedom from distortion are required in all parts of the system. This corresponds to the original conception of the ITO, which constrained both public and private barriers to international trade.

The argument that, under certain circumstances, the international system needs to constrain dumping might lead to the conclusion that the international system should enforce the principles in the form of international rules. However, the GATT system technically does not have the power to administer rules, since GATT is not an international organization with autonomous powers but rather a body comprised of its contracting parties. It might be argued, however, that the GATT does not need to enforce rules because it can rely on the interests of producers or nations to bring actions. Arguments suggesting that the national rules are illogical seek to undermine the use of the national antidumping laws, and if successful might severely weaken the international principles.

Even if individual nations reject the use of antidumping laws for nationalistic reasons, Bhagwati and Petersmann might suggest that a GATT-type system cannot afford to encourage rejection of national rules, which it relies upon to avoid potentially harmful distortions. Without national rules, the GATT principles become an empty letter. If Bhagwati and Petersmann are correct, arguments as to abolition of

66. Some nations have a vested interest in the integrity of the system, but all see their own national political interests at stake. However, evidence suggests that antidumping actions are only pursued regularly by four jurisdictions: the U.S., the EC, Canada, and Australia.
national antidumping rules *per se* would have to address the 'system-preserving' function of the GATT principles. Although the national antidumping actions are currently increasing both in number and in amount of trade affected, only the "Big Four" jurisdictions—Australia, Canada, the EC, and the U.S.—frequently use their own rules. If the "Big Four" unilaterally decided to repeal their antidumping laws (an extremely unlikely scenario!) or not to enforce them, there would be no means to prevent dumping. The behavior that the international rules were intended to discourage might increase after all.

How might the use of national antidumping rules help preserve the GATT system? Many lawyers, undoubtedly influenced by Chicago School economic theory, question the rationality of *national* antidumping policies on the basis of their effect on *national* welfare.

Why do nations use antidumping rules when they end up worse off than if they did nothing at all? A powerful nation such as the U.S., or the EC, with a vested interest in the integrity of the system, might argue that removing all national antidumping rules, given their deterrence function, would endanger the international allocation of resources.\footnote{67} National antidumping rules may, in fact, act as a deterrent.\footnote{68} Even though the imposition of duties in particular cases probably hurts the levying country just as much as the alleged dumper, these duties might serve as a deterrent to other dumpers.\footnote{69}

We should, however, draw attention to the possible abuse of the argument that a nation uses its antidumping law as a way of deterring other nations' subjects from acting in an "irrational" manner. In particular, where such "selfless policing" of the international arena protects a domestic industry in the importing country, one might ask whether deterrence of inefficient dumping is the real, or even primary, motivation.\footnote{69}

A more subtle explanation of why nations might act against dump-

\footnote{67. In order to assess whether a nation gains from antidumping actions, one must take into account the amount of dumping that is deterred. This calculus of deterrence is likely to be impossible to quantify.}

\footnote{68. However, the current complexity and arbitrariness of the national antidumping rules lead to the conclusion that firms do not know when they are dumping. If so, then it is unlikely that the rules can deter. See, e.g., *Hearings on S.1655*, infra note 81, at 35-36 (statement of Gilbert Kaplan): A foreign producer may not even know whether he is dumping. He doesn't know offhand what benchmark we are going to look at when we start a dumping case. He doesn't know what effect currency fluctuations might have between the time he signs a contract and actually sells and the time the investigation starts. He doesn't know what such or similar merchandise we are going to be basing our comparisons on. We often don't find precisely the same merchandise in foreign markets, and we have to make adjustments based on different kinds of merchandise. This is the sort of thing a foreign exporter cannot predict.}

\footnote{69. A similar reasoning applies to the imposition of countervailing duties to offset foreign subsidies.
ing, arguably to their own detriment, might be that they are trying to persuade the exporting nation to remove the barrier that facilitates the domestic monopoly power in that country. Again, one should be skeptical of such reasoning. Deardorff has noted:

On the face of it, however, this is hardly what those who seek protection under the antidumping statutes have in mind. They almost surely are looking for a higher price with which to compete, and would be dismayed if the only effect of their actions were to open up foreign markets to greater competition. Nonetheless, as a matter of global policy, this might be defended as moving the world closer to a global optimum. I regard this as a questionable justification for national policies, however, given especially that firms can acquire domestic monopoly power through so many other means than trade barriers.\(^70\)

If nations really do wish to liberalize the economies of their trading partners, is unilateral use of antidumping duties the most appropriate way to communicate and effectuate such a wish? Would it not be more appropriate to use the multilateral forum of GATT, in particular the dispute-settlement procedures, to bring down such barriers?

Evidence as to the “liberalizing” function of the international principles is sparse. If the only reason for having an antidumping system at the GATT level was to control national antidumping law, then the most effective way of doing this might be to prohibit national rules, in the same way that article XI essentially prohibits quotas. It is difficult to prove the existence of a consensus on the functions of the international principles because virtually no discussion took place on the necessity for such principles.

Some evidence does exist, however, for the “liberalizing” function of the international principles. The U.S., as the major actor in the negotiations, seemed committed both to national antidumping rules and international principles proscribing dumping. Nevertheless, it carefully limited the use of national rules to prevent protectionism.\(^71\) This was achieved by subjecting the national rules to an injury test, which

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\(^70\) See Deardorff, supra note 1.

\(^71\) This statement, however, has to be qualified in part. The incorporation of the antidumping rules in the GATT was not seen as essential by the U.S. In essence, the U.S. only demanded provisions in the GATT which would protect the benefit of its tariff concession. The U.S. delegate Mr. Brown is on record as noting that the U.S. did not regard antidumping rules as essential to protect U.S. tariff concessions in the GATT. Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: Tenth Meeting of the Tariff Agreement Committee, GATT E/PC/T/TAC/PV/10, at 45 (1946). However, Mr. Brown had earlier implied that such an observation was only related to the protection of U.S. tariff concessions. Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: Sixth Meeting of the Tariff Agreement Committee, GATT E/PC/T/TAC/PV/6, at 7-13 (1946). Whether antidumping or other principles were necessary to a liberalizing trading regime was not under discussion in that forum.
allowed reaction only if the dumping caused injury to domestic producers.

However, the U.S. position was not the only one. At one end of the spectrum, the U.K. reserved its position that all national antidumping and countervailing duty actions should be prohibited.\textsuperscript{72} At the other end, certain nations wanted to make the international principles even more effective against dumping. Some wished to include an express condemnation of dumping,\textsuperscript{73} and others wished to exclude the injury test.\textsuperscript{74} However, one should be cautious before concluding that these nations wished to condemn non-injurious dumping because they believed that dumping was injurious to world welfare. These nations may, in fact, have demanded such a condemnation in order to be able to protect local industries.

The compromise, which substantially reflected the U.S. position, allowed for a condemnation of injurious dumping. This was a substantial defeat for the nations wishing to have an unconditional condemnation of dumping, and probably resulted from U.S. concerns over its possible abuses by protectionist states.

For our purposes, however, the fundamental point still remains: If the U.S. only wanted to stop national abuses of antidumping, why did it not push for the prohibition of national antidumping rules?

Several possibilities exist. First, a major problem with the liberalization of world trade involves the relationship of the international principles with the concrete results of the implementation of such principles. The beneficial effects of liberalization are spread very thinly among the world consumers who pay less for their goods. The "bad" effects of liberalization are concentrated among inefficient producers of the product. However, these producers are likely to be more focused, more powerful, and more politically influential than consumers. The problem that advocates of liberalization have is how to convince the voter that the positive effects of the process outweigh the negative outcomes. This is often an impossible task. An enlightened executive

\textsuperscript{72} See GATT E/PC/T/C. II/W. 27 (1946).

\textsuperscript{73} See, e.g., the views of Cuba and Lebanon, Revised Annotated Agenda for Chapter IV, GATT E/CONF. 2/C. 3/10, at 2-3 (1947), where they suggested, \textit{inter alia}, that the practice of "dumping" be condemned, in whatever form it may manifest itself, and that all Members shall do the utmost within their powers to prevent and penalize such practices, pursuant to a fair international commercial policy. Consequently, it is also agreed that all members shall counteract any and all forms of dumping with appropriate measures and also shall penalize such practices with the view to the protection of their domestic interests . . . .

China, Argentina, and Mexico proposed similar condemnations.

\textsuperscript{74} It should also be noted that article 11.5, \textit{supra} note 35, also stated that "as a general rule" duties should only be imposed in the presence of injury. The departures from this rule, however, remained unarticulated.
might try to appear to give domestic interest groups what they want while minimizing the damage to international trade. It is possible that antidumping rules operate in this way, too. Thus, U.S. trade negotiators might have been aware of the repercussions that the removal of the antidumping laws would have on domestic politics. To the general public, dumping (clearly a pejorative term) is an evil. It carries the stigma of unfairly putting people out of jobs. Congress would have been very wary of any system which did not control the phenomenon of dumping. While the absence of an antidumping system might have some basis in economic theory, persuading voters that they are better off without protection from dumping would be a difficult task.

Second, Bhagwati and Petersmann suggest that the U.S., notwithstanding its own self-interest, saw that international principles designed to control the private act of dumping had some utility in terms of world welfare. The U.S. was clearly intent on providing a near-exhaustive system for the liberalization of world trade. The U.S. proposals were very carefully crafted. It should not be forgotten that part of the structure of trade liberalization restrained the use of private restrictive practices which could replace or prop up public barriers. Even though the U.S. saw that public barriers were significant, it realized that private behavior, such as dumping or predatory monopolization, could in fact impede liberalization of world trade as much as any governmental act. The U.S. could afford such a principled and clear-headed attitude when the rest of the world’s economies were crippled by war. The rebuilding of the Japanese and European economies, however, made it inevitable that the main thrust of national antidumping policy would turn away from world trade liberalization and toward preservation of domestic industries.

1. Antidumping and the GATT obligations

In support of the liberalizing function of the GATT rules, it might be noted that the GATT system offers special “concessions” to nations using antidumping law. First, article I does not apply to antidumping measures. This argument was raised in one of the few dispute-settlement proceedings relating to dumping. The Panel stated at paragraph 8:

If the low-cost producer is actually resorting to dumping practices, he forgoes the protection embodied in the most-favoured-nation-clause. On

75. The economic analysis might simply have been buried under the more powerful gut reaction that dumping is “unfair.” A major thread of Western political philosophy provides arguments for government protection of property and business. This deep belief in property has provided a partial explanation for protectionism. See, in particular, J. Locke, Two Treatises of Government (1690).
the other hand, Article VI does not oblige an importing country to levy an antidumping duty whenever there is a case of dumping, or to treat in the same manner all suppliers who resort to such practices.\textsuperscript{76}

In addition, the GATT Secretariat has pointed out:

Although Article VI does not refer to Article I of the GATT, namely the most-favoured-nation obligation, it is clear from the wording that a discriminatory application of antidumping duties is in conformity with GATT. As in all other instances where GATT provides an exception to the obligation to grant most-favored-nation treatment, the application of such an exception is limited in the interest of maintaining the greatest possible freedom of trade.\textsuperscript{77}

Second, the imposition of duties under article VI are not subject to the bindings of article II.\textsuperscript{78} Third, some argue further that the antidumping provisions are not subject to any of the GATT principles to the extent that the conduct conforms to the wording of article VI. For example, national antidumping laws do not have to have a domestic counterpart punishing price discrimination,\textsuperscript{79} since conduct in accordance with article VI is outside the scope of article III. This argument has limited scope, however, and if a nation tried to introduce criminal sanctions\textsuperscript{80} rather than duties for dumping, as required by article VI, then such behavior would be subject to the provisions of article III, since it has stepped outside the conditions of article VI.

a. The “fair”/“unfair” dichotomy

In support of the argument that the GATT system implicitly attempts to control dumping, the difference between article VI and article XIX might be noted. This differentiation may suggest a “fair”/“unfair” dichotomy.\textsuperscript{81} The differences between article VI and article XIX might suggest that each article pursues radically different objec-

\textsuperscript{76} GATT, Swedish Anti-Dumping Duties, BISD, 3 Supp. 81, 83 (1955).

\textsuperscript{77} See GATT L/712, at 5 (1957).


\textsuperscript{79} Cf. Davey, supra note 1; see also text accompanying note 76.

\textsuperscript{80} Currently there is an “antidumping” statute which does have a criminal sanction — the Antidumping Act of 1916 — but this was passed prior to the GATT and thus is “grandfathered” to the extent that it remains unchanged. However, the Act is largely a “dead letter” given the almost prohibitive intent test. Attempts have been made to change the antidumping rules so as to “criminalize” or privately punish such behavior. See S. 1655, 99th Cong., 1st Sess. (1985); Unfair Competition Act of 1985: Hearings on S. 1655 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985); Remedies Against the Dumping of Imports: Hearings on S. 1655 Before the Subcomm. on International Trade of the Senate Comm. on Finance, 99th Cong., 2d Sess. (1986).

\textsuperscript{81} Hemmendinger, Shifting Sands: An Examination of the Philosophical Basis for U.S. Trade Laws, in INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE, ch. 2 (J. Jackson, R. Cunningham, & C. Fortheim eds. 1985); Lowenfeld, supra note 1; Nicolaides, How Fair Is Fair Trade?, 21 J. WORLD TRADE L. 147 (1987).
tives. Article VI with its special concessions addresses the issue of unfair and potentially damaging trade, whereas article XIX deals with the problem of short-term adjustment to fair trade. If this is the case, then it seems unlikely, as some commentators suggest, that antidumping laws can be replaced by a comprehensive international safeguards system.

Any "fair"/"unfair" distinction is essentially political; quantitative disciplines such as economics have very little to say on the subject. However, simply because economics has no input on what is a normative issue, this distinction should not be ignored. It has a powerful political appeal,82 and certain acts seem objectively unfair. Unfairness is a spectrum; nations with a liberal trading regime have a narrower perception of unfairness than protectionist nations. It is also possible that the "fair"/"unfair" distinction revolves around the wish of nations to deflect issues away from the behavior of their nationals and towards the behavior of nationals from other states.83 Unfairness moves the debate from the importing country to the exporting country. While clearly no formal "fair"/"unfair" dichotomy exists in GATT, certain relevant distinctions do exist.

(1). Condemnation of injurious behavior

Article VI states that dumping and subsidization where injurious are to be condemned.84 No parallel condemnation is found in article XIX.85

(2). Article VI, XIX and MFN

There is a difference in the application of the MFN rule between articles VI and XIX. Safeguard actions are arguably subject to article I in order to discourage their use and to make protection from fair

82. See supra note 4.
83. See Reich, The Economics of Illusion and the Illusion of Economics, 66 FOREIGN AFF. 516, 521 (1987):
[T]he responsibility for America's economic problems has been safely externalized. It is true, of course, that some nations subsidize their exports to us and hobble our exports to them. But absent international agreement on what sort of subsidies and non-tariff protections are unfair, America's responses merely reflect what the United States unilaterally deems to be unfair. The dominant metaphors create the impression of unsportsmanlike, if not indecent, behavior — "tilting the playing field," "dumping"— when in reality the playing field has always been as hilly as the Ozarks, and dumped goods are often known to American consumers by the less perjorative term "bargains."
84. This would suggest that there is something unfair in the act of dumping, since injury to import-competing producers is not able to be used as a rationale for long-term protection, according to article XIX.
85. The substantial differences between articles VI and XIX may explain why the use of antidumping actions relative to safeguard actions is on the increase.
imports as politically difficult and short as possible. National antidumping actions are a clear and explicit exception from article I, since nations acting against dumping should be allowed to act against the "offender" and to keep trade otherwise as free as possible.

(3). The period of relief

Given the condemnation of injurious dumping, relief under article VI continues as long as the practice continues. Relief under article XIX, however, is supposed to be short to medium-term. Under article XIX, the safeguard measures are supposed to be only temporary because the trade is "fair," and the import competition should result from structural changes. This is exactly what ought to happen under the principle of comparative advantage and is, therefore, encouraged with the palliative or "safety valve" of short-term relief for the importing country. Injurious dumping, however, is unfair (because it is a "proven" distortion) and requires a permanent measure because dumping will distort as long as it continues.

2. Critique of the liberalization function of the principles

There are, however, a number of problems with the thesis propounded by Bhagwati. First, if the system were trying to eliminate distortions, why would the regulation of dumping be at most permissive and not obligatory? One reason may be that while most of the GATT principles are framed in terms of negative obligations ("that nations shall not . . ." or "shall refrain from"), an obligation to prevent dumping would have to be phrased in terms of a mandatory obligation (to actually do something).

A better explanation of the permissive nature of antidumping actions is the idea that under certain circumstances, obligatory antidumping actions play into the hands of the protectionist. GATT rules do not dictate what nations must do in terms of economic policy, but they do establish a hierarchy of options. GATT rules aim at encouraging the most liberal options and, to some extent, prohibiting the most harmful options. Nations still have great freedom in their trade relations, but are made aware that certain policy options are likely to be costly since they open the acting nation up to compensatory claims. An obligatory antidumping action would not only violate the right of nations to determine their own level of protection, but would also raise the question of whether an obligation to stop dumping could ever be enforced. It should be noted that under the post-1947 GATT system, it is unlikely that nations could dictate certain behavior either to their
exporters or to importers.\textsuperscript{86}

An even more compelling explanation is that the permissive nature of antidumping actions represents a compromise between nations that wanted no antidumping principles and those that wanted an explicit condemnation of dumping. The GATT system has very few intellectually pure principles and most of the time represents a compromise between opposing factions. Allowing nations to react against dumping would satisfy those that wished to condemn dumping, whereas conditioning such a reaction upon certain findings — in particular, injury— would please those nations that wished to see no control of dumping. Simply making dumping actions obligatory would not have represented a compromise at all.

A second criticism of the Bhagwati thesis asks why an injury requirement is necessary if the system were trying to eliminate distortions and why the existence of a domestic producer would be relevant to the issue of whether a distortion should be controlled. If the system was established to avoid distortions, then the existence of injury to a competing producer ought to be irrelevant.

As noted above, it is possible that the existence of the injury test was a compromise between those that wished to see dumping condemned and those who wished to see all antidumping actions prohibited. Although the U.S. wished to see dumping controlled, it refused to see antidumping actions become nontariff barriers. Under the principle of “administrability,” the problem of how to administer a concept as imprecise as a “distortion of the free market”\textsuperscript{87} might be resolved by saying that distortion is only actionable if injurious. This reduces actions to the subset in which harm is proven.\textsuperscript{88} It is also a way of

\textsuperscript{86} Some have suggested that the loss to exporting countries caused by dumping is minimal since “exporting countries have generally not thought it worthwhile to control dumping.” The GATT rules are permissive as to the right of importing countries to act against dumping but do not on their face allow antidumping-type actions to be taken by exporting nations. Any attempt to do so would almost certainly be taken to be an infringement of article XI. This issue was raised in the recent GATT Panel Report on semiconductors, but the Panel did not decide whether measures intended to stop exporters from dumping in third markets infringed article VI. However, they did find that where such measures infringed article XI, then they were to be prohibited. While the point arguably is still open, it seems likely that as article VI is an exception from a number of fundamental provisions of GATT, it should be construed narrowly. Since article VI only talks of action by importing nations, it should not be expanded to include actions by exporting nations.

\textsuperscript{87} It is not possible to say in all situations that dumping harms the world, even though almost by definition it will distort the system of resource allocation. In certain specific cases, the allocation of resources is improved by the ability to dump in the same way that some subsidies may actually ameliorate the effects of certain distortions within an economy.

\textsuperscript{88} It should be noted that the notion of harm to importing countries’ domestic industry does not necessarily tell us whether dumping has harmed the world, or even the importing nation overall. However, the ability to administer the rule in a clear, multilaterally acceptable manner might rule out allowing interventions which correct rather than distort the allocation of re-
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preventing the use of national laws as protectionist devices. Nations are only able to react to the extent that the antidumping rules do not themselves become distortions in the efficient allocation of resources.

By way of a conclusion, it is at least feasible that the international antidumping law has two distinct facets: first, the more widely accepted one of controlling the national abuse of national antidumping laws, and second, the more controversial one of controlling distortions in international resource allocation.

E. The "Interface" Function

It is also possible that the international antidumping principles serve a different purpose, one which was not explicitly recognized at the outset of the GATT and had remained unarticulated in the preparatory works.

Nations do not operate their economies along identical lines. Even though most nations in the GATT system adhere to the principle of free markets, implementation of that principle differs radically from the formally free market nations to the developing states. Structural differences are largely responsible for many of the trade problems facing the international system, and may consciously or unconsciously foster the private firms' "ability" to dump. Nations such as the U.S. feel aggrieved that countries like Japan and South Korea seem to constantly run trade surpluses with them. When Japan and Korea were small, underdeveloped industrial nations, their radically different commercial system presented no problem to U.S. industry, which could accept these different structures because they had little effect on its trade. However, as Japan and the other Asian Tigers grew strong, they began to eat into the U.S. markets. Attention became focused on their commercial structures. U.S. industries began commenting on, among other things, the closeness of the State and industry, the long hours worked by workers, the low pay, the poor conditions, and the aggressiveness with which the Asians chased sales. The number of antidumping actions against such countries began to increase. It has, therefore, been argued that such national rules are working as a mediative or "interface" mechanism which, while allowing disparate national sources. Nations are able to react against behavior which distorts the putative allocation of resources. Not all dumping distorts this allocation; not all dumping represents such an allocation.

economies to interact, reduces the tensions brought about by differences in trading environments. This function would not attempt to cleanse the international system of distortions, but only to subdue protectionist pressures by reducing the "unfairness" of foreign commercial structures. In this light, the international sanctioning of national rules is a "buffer" which ameliorates the effect of structural differences when they get to the stage of intruding on the domestic welfare of the importing nation. This rationale partially sidesteps the fairness/unfairness debate by concentrating simply on dealing with the problem. The "interface" argument does not suggest that the antidumping methodology (price discrimination between home and export market) is the most appropriate way of dealing with (nor does it, in fact, deal with) the problem of structural differences. However, it does to an extent reduce the friction between differing systems. The interface argument also suggests that maybe national antidumping laws operate as a de facto safeguard measure because the ability to effectively reduce trade friction and placate concentrated producer groups is at least as important a political function as the maximization of national welfare.

There is some evidence that this is in fact what is happening in national antidumping systems. Richard Wright has argued:

One aspect of [the recent EC antidumping cases against Japanese firms] which deserves attention is the fact that the exporters' arguments against the Council really amount to a plea for the Communities to ignore the effects of the Japanese distribution system, which has enabled Japanese companies to sell at high profits domestically and use these to "subsidize" loss-making low cost sales in the EC and elsewhere. Since the maintenance of this price discrimination is predicated upon the existence of barriers, it would be wrong to ignore the effects of these in calculating dumping margins.

A key argument in the controversy in the EC has been whether all costs of related selling companies in Japan were "direct" and hence able to be offset against the home market price. This argument is tantamount to accepting that such costs are directly and functionally related to each sale. The reality, as any businessman who has attempted to trade in Japan knows, is that these highly significant costs are in no way directly linked to sales but instead represent for the large part general selling costs in the market. These are very high because of the costly distribution system in Japan. It is this very system which acts as a positive disincentive to exporters to Japan. To offset the costs of this system,

90. Including the phenomena of dumping and potentially harmful antidumping actions.
91. The effective reduction of trade friction arguably requires a system that is easily administered. This possibly accounts for a number of the more controversial aspects of the current system, such as averaging in the calculation of the dumping margin. However, ease of application of rules should not be the only criterion for judging the effectiveness of a law.
therefore, in a dumping case, would be equivalent to denying the role it plays in the maintenance of price discrimination.\textsuperscript{92}

This argument suggests that the European Community at least is slightly amending its antidumping regime to take account of the specific structural factors that provide Japanese firms with a competitive advantage over domestic firms in the EC market.

While the interface mechanism might help explain the proliferation of U.S. and EC antidumping actions against Japanese or non-market economy firms, it does not help to explain antidumping actions between economies so superficially similar (as, for example, the U.S. and EC). For this reason, the "interface" theory is only a partial explanation of the recent upsurge in antidumping activity.

Nor does the interface function provide an independent justification for national antidumping systems. For example, Deardorff concludes that the U.S. social security system, which allows U.S. employers to escape the full cost of layoffs, is not a justification for national antidumping policies. In all cases the most appropriate policy response is to attack the cause of the problem (for example, by taxing layoffs) and not to deal with its symptoms (for example, by placing an import tax on imports competing with domestically produced goods).\textsuperscript{93}

\section*{III. \textbf{DOES DUMPING PRESENT A REAL PROBLEM?}}

In Section II, I endeavored to show that the GATT rules do not simply exist as a way of regulating national antidumping actions. However, even if we conclude that there is a liberalizing function to the international principles, and that the national rules in fact support this function, we should then inquire whether antidumping rules (either national or international), with their focus on price discrimination, are in fact the best way of achieving this liberalizing function.

\subsection*{A. Preliminary Issues}

First, we should note that the benefits and losses to the importing and exporting nations as a result of dumping are unclear. An economist, if he or she knew the "slope of the curves," could tell us whether the world as a whole, individual nations, or even individual sectors lost or gained by dumping. However, such an analysis depends on the cir-

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{92}] See Wright, \textit{Validity of Antidumping Remedies - Some Thoughts}, in \textit{Anti-Dumping Law and Practice: A Comparative Study}, ch. 7, § 18 (J. Jackson & E. Vermulst eds. 1989).
  \item[\textsuperscript{93}] Deardorff, \textit{supra note 1}, at 32.
\end{itemize}
\end{footnotesize}
cumstances of the case. In only a few limited cases can dumping produce an unambiguous benefit or loss to the world. In a few cases, therefore, international price discrimination might harm the importing country. Under such circumstances, the presence of a regime aiming either at deterring such behavior or offsetting its effect might be of some use. However, those favoring abolition of the antidumping laws are not simply arguing that the gains and losses from dumping are unclear. They point out the absurdity of the imposition of a duty that injures consumers in the importing country as a reaction to something which may not harm.

Second, the reasons why firms dump and why nations might wish to react are not necessarily connected. This might help explain why nations persist in bringing antidumping actions even though the alleged dumper is acting in an economically rational manner. For example, the fact that firms dump to reduce inventory or to expand total output may be irrelevant from the point of view of the importing country. Its primary concern may be the injury to domestic producers, and in particular, the preservation of domestic jobs. How or why injury is caused may be of little interest. Nations might not be interested in allocating resources efficiently, either domestically or internationally, and may in fact be giving effect to non-economic criteria in carrying out antidumping actions.

After mentioning these preliminary points, some discussion of the enduring issues is inevitable.

B. Price Discrimination

There is an oft-cited belief that price discrimination is in some way "unfair." Notwithstanding the avoidance of predation, this idea of unfairness was the major reason for the enactment of the U.S. law in 1921. To an economist, there is no necessary relation between unfairness and price discrimination. Indeed, the issue of "fairness" is not susceptible to economic analysis but rather is more a value judgment to be made by legislators or policy-makers. What is meant by "unfair" is unclear. An example of the arbitrariness of the concept may help clarify.

94. This is most clearly brought out in J. Robinson, The Economics of Imperfect Competition, ch. 16, 204-05 (2d ed. 1969).

95. Economists use a notion of price discrimination different from that commonly used. To an economist, price discrimination means making two (or more) related sales at prices that are not in the same proportion to the marginal cost of each sale.

96. Nor, as will be noted below, is there any necessary link between price discrimination and predation.
Through the vagaries of current national antidumping law, a person A may be determined to be selling in the United States at $18 and in his own market at $20. Another person B may also be determined to be selling in the United States at $18 and in his own market at $18. The U.S. producers arguably feel no more competition in their home market from A than B. Why is exporter A acting unfairly and B not? Why is it important simply to discover that a difference in price exists? Why, in principle, should it matter that the price difference is between the home and export markets? The answers are practically bound up with the question of cross-subsidization between markets and will be discussed below.

An economic analysis recognizes two sorts of price discrimination: so called “persistent” discrimination and “sporadic” discrimination. Arguments have been made that the former is far more pernicious than the latter, and that, in fact, “sporadic” discrimination is necessary in order to allow the price mechanism to function correctly. For example, Richard Posner states:

[...] the effectiveness of a price discrimination would have a serious — perhaps disastrous — impact on the ability of industries to adapt efficiently to changing circumstances, and in particular on the natural tendency of cartels to collapse through cheating that typically begins with discriminatory reductions.

So not all price discrimination is per se bad. Notwithstanding Posner's argument that price discrimination is necessary to the market process, certain conditions might also allow the ability to discriminate in price to be advantageous to everyone involved. For example, the ability to charge two different prices may allow the producer to reach a quantity at which production becomes possible; without such discrimination, production would not occur. It is thus difficult to say that simple

97. Even if one were to argue that A could in theory “cross-subsidize” and B could not, one would have to take into account the relative sales in each market. If A sold 95% of his production in the U.S., for example, it would take an enormous margin of profit in the domestic market to be able to fund sales in the U.S.

98. Formally, the antidumping rules do not apply to a situation where price discrimination occurs between a market other than the home market of the alleged dumper and the importing market. In practice, however, national rules do allow the choice of third markets as “surrogates” for the home market price.


100. This observation has to be qualified by saying that the ability to produce may be of less importance than the prohibition on price discrimination. This might be a consideration where an alternative source of production is already on line. It could be a justification for the U.S. attitude that patent-holders may discriminate in price if, without such discrimination, production would not take place. In this situation, the existence of the intellectual property right makes it seem likely that no alternative source of production is possible.
price discrimination *without more* should invoke a protective reaction against the discriminating state.

Lawyers argue that price discrimination potentially causes injury in at least two related ways. The first way would be to injure direct competitors of the price discriminator. If producer A is able to sell widgets at different prices to purchasers, this may injure other producers of widgets, while not necessarily injuring the purchasers of widgets. Under this scenario, the ability to effectively discriminate allows competitors in certain markets to be undercut and put out of business. The second method of injury occurs where the purchasers of widgets are injured because of the price discrimination. This injury occurs where the recipient of the higher price was unable to compete with the purchaser at the lower price. For example if purchaser A buys widgets at $5 and turns them into wodgets, he has a cost advantage in the production of wodgets over B, who purchases the input widgets at $10.

There are thus two primary concerns with price discrimination: elimination of competition at the producer level, and elimination of the competition at the purchaser level. Antidumping principles deal with the first problem (in antitrust jargon “primary line discrimination”), but only imperfectly address the second type of harm.

An argument against a reaction to dumping would be that in reacting against objectively non-injurious behavior, nations benefit their producers to the detriment of their consumers, possibly producing an overall national loss. This result is seen as “irrational.” Again, this argument has little to do with the motive of the alleged dumper, dealing instead simply with the relative efficiency of reacting. Currently, antidumping law places a premium on domestic producer surplus, and overall national welfare is largely ignored.

However, the idea of overall national welfare is emphasized in the context of national price discrimination. National laws that look at price discrimination tend to be ambiguous. The U.S. has a law on the statute books essentially proscribing price discrimination, but it is

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101. If one were worried about the ability to discriminate between markets, why should the antidumping laws only be concerned with the home market and the export market? Why not examine the possibility of discrimination between two foreign markets? Possibly at the time the laws were devised, the problem was seen to be cartels. Home markets were clearly protected. Secondly, under only limited circumstances could a firm or group of firms have a monopoly in a foreign market but not the home market.

102. The damage to competitors may in the medium- to long-term harm purchasers by making *all* purchasers pay more for the products because of the absence of effective competition. This should not be confused with the question of damage between competitors at the purchasers' level.

103. In antidumping jargon, this would be called “upstream dumping.”

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seldom enforced and its continued existence has been criticized.\footnote{See e.g., R. Posner, supra note 100; see also U.S. Dep't of Justice, Report on the Robinson-Patman Act 19 (1977).} If legal reaction against price discrimination is not clearly warranted in all cases in the national trade context, is there any reason to suggest that the situation would change with respect to international trade?

One major difference might be the existence of many incongruities at the international level caused by divergent national policies. The domestic market operates in a manner more akin to perfect competition than the international market and will stubbornly resist any efforts to monopolize it. The international market has governmental barriers, differences in accounting, sales techniques, and cultural preferences, all of which tend to make the existence of some level of monopoly power more likely than at the domestic level.

A second difference might be that at the domestic level, all advantages from price discrimination are captured within the national context. If a California firm discriminates against Ohio consumers, the profit still stays within the U.S., will trickle down to stockholders\footnote{The stockholders could be either American or foreign. Both, however, will pay tax on dividends.} or employees,\footnote{These are likely to be American.} and will also possibly be taxed at the federal level. The same behavior by a European or Japanese business will produce similar effects, but the positive effects (increased employment, bigger profits, higher taxation) will be felt in the European or Japanese economy, whereas the Ohio consumer (and therefore indirectly the U.S.) may still be suffering. Thus, if price discrimination were practiced internationally, the net\footnote{Even if dumping benefited the consumers in the importing country, the loss to the import-competing industry might outweigh such a gain.} beneficial effects of the discrimination might be captured totally inside the exporting country. As noted by senior U.S. trade official Bruce Smart, this result of international price discrimination might lead to differing policies between purely domestic and international behavior.\footnote{Smart, Trade Is Everything But Unfair, Wall St. J., June 22, 1987, at 27, col. 1.} After observing that selling below cost is common in the U.S. domestic context — and is legal, he pointed out that “selling to Americans, by American firms competing with one another, does not threaten to transfer wealth and unemployment across national boundaries.”\footnote{The point seems to refer to sales below cost but is equally applicable to price discrimination.}
C. Predation

Predation has been the most sustained rationale for reacting against dumping. As early as 1914, the U.S. Congress recognized that price discrimination could be extremely harmful if purposefully destructive of competitors:

[I]t has been a most common practice of great and powerful combinations engaged in commerce . . . to lower prices of their commodities . . . in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors . . . Such a system . . . is so manifestly unfair and unjust, not only to competitors who are directly injured thereby but [also] to the general public . . . .111

Predation has also been one of the most controversial bases for antidumping law. Some commentators argue that, like in the domestic antitrust area, international predation has never and will never work.112 Others argue that if international predation does occur, the current antitrust system—both in the exporting113 and importing114 country—is sufficient to deal with the problem.

A major problem with predation is that no accepted definition exists for what constitutes such behavior. Certainly selling below cost on whatever basis one wishes to choose is not per se predatory. On the other hand, a firm need not sell below cost in order to be predatory.

Predation is not possible for a number of reasons:
(a) predators have to take losses on all current sales in the hope of uncertain profits in the future. Consequently, predators have no clear way of calculating success because rational predators have to balance uncertain future gains against certain present losses;
(b) predators must have and be able to maintain monopoly power;115

111. H.R. REP. No. 627, 63d Cong., 2d Sess. 8 (1914).
112. Some authoritative quotations can be found in Kammerschen, Predatory Pricing. Vertical Integration and Market Foreclosure, INDUS. ORGANIZATION REV. 144, n. 12 (1974).
113. Davey, supra note 1, observes:
The dominance of trusts and cartels has generally declined as the major economic powers have adopted and enforced antitrust laws . . . . It is noteworthy, however, that what may have been a major motivation for dumping in the early 1900's — the preservation of domestic cartels — is not commonly alleged today, presumably because of the widespread existence of anti-cartel or antitrust laws, a relatively recent phenomenon. While this observation is largely true, it is conspicuously not the case for Japan, where the government encourages cooperation on the domestic market through various means, not necessarily only through exemptions from antitrust law.
114. While U.S. antitrust law may be formally appropriate for dealing with predatory conduct of the type currently dealt with under the antidumping law, certain problems of jurisdiction and enforcement do exist. There is also the question of whether the standard of proof of predatory intent is too high under the antitrust law. The reason why so few cases have been brought may be due to the problems of proof rather than simply the infrequency of predatory conduct, as some have suggested.
115. This power can result from (a) governmental barriers or (b) private acts. Objections to
such power is facilitated by the possibility of price discrimination (and hence, the link into antidumping law). However, both monopoly power and the ability to price-discriminate are said to be destroyed by the existence of competitors or the possibility of arbitrage.\textsuperscript{116}

However, simply achieving a monopoly position is insufficient if it cannot be exploited. Therefore, (c) as a way of achieving or continuing the monopoly, the predator must have the ability to exclude re-entry, which in most cases is impossible. As soon as the predator raises the price, the old competitors or new ones would (re-)enter.

Consequently, it is usually asserted that very little empirical evidence of predation exists. Those skeptics of the existence of predation further observe that where evidence of such behavior does exist, it is usually by a group of predators, since individual predators are unlikely to be sufficiently dominant to be able to exclude actual or potential competitors from the market.\textsuperscript{117} However, these predatory combines are unlikely to endure because they are prone to cheating.\textsuperscript{118} The U.S. national antidumping law have been raised on the basis that it is the governmental acts that are causing the harm, and private traders should not be punished. The real focus of attention should be on the removal of governmental restrictions in fora such as GATT or through bilateral agreements. However, what is an importing country to do if dumping is facilitated by private barriers to trade? To the extent that these barriers are predatory, a case may be made for using antidumping actions to deter or offset the predation.

116. Arbitrage makes the continuation of some sort of monopoly unlikely with respect to dumping. To the extent that the difference in prices between markets exceeds the transport costs, then any rational competitor will send the goods to the high price market in order to destroy the local monopoly. However, often formal and informal barriers operate to stop arbitrage. James Fallows notes the "47th Street Photo paradox":

Japanese-made products are always cheaper in New York than in Tokyo. If Japan's markets were really open to new contenders and to price competition, 47th Street Photo itself could make a fortune by shipping Japanese cameras and audio systems back to Tokyo and selling them there.  
Fallows, Containing Japan, ATLANTIC MONTHLY, May, 1989, at 40, 43.

Notwithstanding some form of barrier to trade, however, if transport costs are a low percentage of the total cost, as with electronic goods or semiconductors, then arbitrage is very likely. However, one should be skeptical of arbitrage in products that are not standardized or able to be traded as a commodity. Complex goods such as consumer electronics need an extensive sales and marketing structure. One cannot simply find a single purchaser for thousands of VCRs. Each customer will want to view the good, test it, and expect after-sales service. Unless the arbitrageur can take a free ride on local merchants' efforts, the need for such local services will substantially reduce the likelihood of effective arbitrage, if not eliminate it. Such an example, however, is not dependent upon geographically discrete markets. It is just as likely to happen within the same state in the U.S. since competitors may be unable to provide a market for the goods.

117. National antidumping law and practice tends to suggest that predation by single firms is not a concern of the rules since actions are brought against all firms from the exporting nation and most of the time against several nations. However, actions against a single firm are in principle possible.

118. This was a major conclusion of the Supreme Court in Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 590 (1985), which stated:

Such a [predatory] conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to
Supreme Court in *Zenith v. Matsushita* seemed to agree that predatory conspiracies are unlikely. Not only was the likelihood of successful coordination of the Japanese cartel remote, but also no evidence suggested that the Japanese manufacturers had been able to exclude other producers from the U.S. market. Their presumed aim of predation of the U.S. market was "yet far distant." The inability to exclude other producers from the market seems to be the decisive issue. Predation has not occurred in televisions because of import competition from other Far Eastern countries. In this case, therefore, the ability to stop entry was missing. One should not assume that the ability to exclude competition and raise prices is always missing.

If these arguments against predation were unambiguously sustainable, then there would be reason to exclude predatory conduct as a rationale for antidumping laws. Is there any reason to doubt the above arguments?

A standard argument for reacting against predatory dumping (i.e. predation in *international* trade) runs as follows: A firm will raise prices in its protected domestic market and dump in the foreign market in order to "cross-subsidize" until it has driven out all possible competitors. It will then raise the price in that foreign market and gouge the foreign consumers. The objections to the likelihood of such behavior would seem to lie both in the element of monopoly enjoyed by the predator and the ability to exclude competition. There has to be some reason why the predator can charge a higher price in his domestic market. This could be due to governmental restraints, the operation of a cartel, or simply the familiarity with the domestic product over an imported one. There also has to be some reason why re-entry or entry into the market is not feasible.

Differences between conditions in *national* markets and *international* markets might make predation easier in the international context. For example, in the domestic context, effective market segmentation is more often not possible and effective arbitrage is possible than in the international market. Thus the domestic predator may be taking a loss on all current sales in the hope that he or she can raise the price at a later date when competition has been eliminated. However, it is possible in the international context that the predator does not, in fact, suffer current losses. Assuming the existence of some form

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endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partner suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds.

119. As will be noted below, there is no reason to think that simple price discrimination is predatory.
of market power, or more specifically the ability to cross-subsidize between markets, the predator can support losses in the export market through profits in the home market. However, these assumptions can be reversed. In some circumstances, market segmentation and the absence of arbitrage might be more likely in the domestic context than the international context.

There are other reasons why the differences between the international and domestic markets might be rejected. First, the much larger international market is probably more difficult to predate than the domestic market. Second, the above scenario completely ignores multi-product firms. The argument of "certain present losses vs. future uncertain gains" partly relies on single-product firms. A firm producing only widgets might think twice before trying to destroy a firm that also only produced widgets. But the possibility of success of predation is greatly enhanced where the predator is a large conglomerate which could cross-subsidize across product markets, and the target is a single product firm or group of firms. However, there is no reason to believe that multi-product firms only exist in the international, and not the national, context. Therefore, the multi-product firm argument is also not a basis for a distinction between the international and national contexts. Having said that, it is no coincidence that this model partially relates to the differences in industry structure between the U.S. and Japanese semiconductor industries. Most (but not all) of the casualties of the Japanese advance into the U.S. television market were also single product firms.

D. Imperfect Competition and the Possibility of International Predation

Nearly all markets are, to some extent, imperfect. Information and products do not flow freely, and many industries involve the "learning by doing" rationale. This might suggest that barriers to entry do, in fact, exist. But the phrase "barriers to entry" is somewhat misunderstood. In common parlance, it means a high cost borne by anyone wishing to enter production of a product. The large start-up costs of a semiconductor fabrication plant are usually taken to be barriers to entry. However, economists understand the term differently and suggest that a barrier to entry is a hurdle faced by new entrants to a market that was not faced by an existing producer. A classic example is a patent. The patent-holder can produce the good, but no one else can without a licence. Barriers to entry are of three broad kinds: (a) natural barriers, such as a Minimum Efficient Scale, where for certain reasons the market will only bear a limited number of firms because of the
interaction between economies of scale and size of market; (b) barriers created by firms such as advertising fees; and (c) governmental barriers, such as patents.

A particular variant of the first kind might be termed an Absolute Cost Advantage. A product might involve the use of a dynamic creation process, which is normally characterized as “learning by doing.” A firm that actually produces a product learns how to do it more efficiently and more cheaply than a firm entering or re-entering the market because of a declining marginal cost curve.

If a firm were able to reap large “learning by doing” advantages and to produce on such a scale as to have significantly lower overall costs than a rival, it could exclude that rival. While most of the research on this type of behavior has focused on the closure of the domestic market of the exporting nation, predatory dumping might have a similar result.

What might happen is that a firm produces a product, say commercial aircraft, in which the economies of scale and the “learning-by-doing” effects are large. It prices below its current cost with a view to reducing its costs through economies of scale and/or “learning-by-doing.” Once it has achieved the scale and/or “learning-by-doing” economies, it will be pricing at or somewhere above cost. An economist might argue that such a situation is not harmful. The consumer in the importing country has received low (arguably dumped) prices in the initial period and will receive the benefit of lower costs later on.

However, what if the firm reduces its price an “extra bit” so as to keep any rival competitors out? It then has the market to itself as a result of the high start-up costs of any potential rival. If the producer then prices at below the price it would have charged had it had a rival, but above the level at which it could price, the resulting situation might harm consumers. While this might be theoretically true, it is extremely difficult to produce evidence of a situation where predation at the international level has succeeded.

A potential problem might also exist where a current producer is able to take losses on this product by “cross-subsidizing” from other profitable lines. Japanese conglomerates seem to be able to sell certain lines at below cost (however defined) over the medium to long-term. Such behavior surprises some economists since the Japanese seem to

be acting "irrationally."\textsuperscript{121} Below cost pricing may be due to a protected home market,\textsuperscript{122} but it may also be due to the ability of conglomerates to pour money from profitable products into other products that seek a sales opening. In the case of semiconductors, this problem is acute for the U.S. merchant industry,\textsuperscript{123} which produces very few types of semiconductors. They have to compete against Japanese conglomerates that produce a vast array of consumer and industrial electronics.\textsuperscript{124}

Second, the ability to successfully predate may be enhanced where governments intervene. While the inability to recover loss or to calculate the prospects of success may theoretically be true, those prospects are greatly enhanced by the possibility of government involvement, as in the encouraging or mandating of an export cartel. It has been alleged that the Japanese government might be able to persuade the Japanese semiconductor producers to fight foreign competition rather than each other. In this manner, they could destroy the foreign competition. Again, the temptation would be to cheat on the government-induced cartel, each firm believing that it can gain an edge. The willingness to cheat would eventually compete away some or all of the advantage gained by the cartel. However, this projects Western-type behavior onto firms from other nations. It may transpire that cooperation is possible between Japanese firms at least on the home market, to the extent that they deem such behavior to be in their best interests. That foreign firms view strategy in a different manner from U.S. firms is not out of the question.

The problem with any form of government help in predation is that such intervention clouds the distinction between antidumping law, countervailing duty law, and targeting law. Government financial assistance clearly increases the likelihood of successful predation. But

\begin{quote}

122. But a protected home market would not allow \textit{all} sales to be below some notion of cost.

123. The U.S. merchant industry is not the only producer of semiconductors, however. Both IBM and AT&T produce a huge volume of semiconductors, amounting to a very significant share of world production. However, this fact is usually overlooked.

124. See, for example, the statement of Robert Galvin, chairman of Motorola:

\begin{quote}
The Japanese even now are repeating the same strategy—illegal in this country—to target 256K RAM memories to drive out U.S. producers. Having succeeded in dynamic semiconductor memory, they are now going back to target other device areas... This country must come to grips with the root of the problem—the Japanese cartels, and concerted targeting action of single U.S. products, using prices ridiculously under normal learning curves.
\end{quote}
\end{quote}

\textit{Galvin, Japanese Cartels, Products Targeting Chief Grievances, ELECTRONIC NEWS, Oct. 11, 1982, at 10.}
how about under a subsidy-type analysis? The attempts of a large aircraft manufacturer to predate the international market might not be troublesome if it receives no public assistance. Its ability to outlast its competitors, potential or otherwise, depends on the depth of its own pockets. However, if the same firm then receives government assistance, its staying power becomes linked to government coffers. Similarly, if the government of a predatory firm employs subtle targeting measures, such as exemption from antitrust laws, then the likelihood of predation increases because of the secure home-market base. However in each of these circumstances, the reasons underlying the law probably point to different policy considerations and reactions. Certainly nations are less willing to accept the “benefit” of targeted subsidies than they should be about private individuals attempting to predate through dumping. However, it is not altogether clear as yet what level of threat private predatory dumping does pose to national welfare.

Another potential concern is the nebulous concept of “deterrence.” If a producer has gained a reputation for toughness in one product, then competitors might be unwilling to compete with that firm in another product.125 *A fortiori* this will be the case where the government of the “predating” firms backs up those firms in any proceedings in the importing country.126

While new insights on international competition may be cause for concern, insufficient research has been done on whether predatory dumping or even predation in general is really a problem at the international level. Until further information has been made available, it seems safe to conclude that as yet international predation is only a theoretical concern.

E. Predation and antidumping legislation

The current international antidumping system does not squarely address the issue of predation, although the issue may have been a motive in the system’s promulgation. Both the international principles

125. See, e.g., *The U.S. Chipmakers’ Shaky Comeback*, FORTUNE, June 20, 1988, at 60: Despite the good news, most U.S. chipmakers aren’t comfortable enough to go charging back into the DRAM market. Says Jerry Sanders of AMD, which abandoned the business in 1986: “If you’ve been bitten once by a wild mad dog, there is a certain caution at your next meeting.”

126. A classic example of this behavior would be the statement offered by the Japanese government in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Japanese government issued a statement that part of the conduct complained of by the U.S. plaintiffs was “compelled” by the government and that the defendants would have been subject to certain sanctions had they disregarded this instruction. Although the issue of sovereign compulsion was raised at the district court level, it was not considered in the Supreme Court case.
and the national laws are concerned not with cost, but discrimination with respect to price.

As commonly defined, predation has to be based on some notion of sales below cost (however cost is defined). However, one should not infer too much from nor reverse this common argument. Also, as it is often defined, predation must involve sales below some notion of cost. But this is only a necessary and not a sufficient requirement. Sales below cost may be evidence of predation, but there are also many other reasons why firms might sell below cost and not be predatory. An example of below-cost, non-predatory behavior would be where a firm is introducing a new product on a market and engages in below-cost promotional sales in order to gain brand or product recognition. The most crucial example is where a firm is meeting the below cost price of its competitors engaging in a price war.

The antidumping rules discussed above focus on price discrimination and do not prima facie rely on a "below-cost" analysis.\textsuperscript{1} Even though antidumping law seems to deal with price discrimination, national antidumping laws have for a number of years had provisions dealing with sales below the cost (however defined) of production.

1. The "sales below cost" basis of antidumping law

Under certain national systems, sales below cost on the home market are disregarded because they are "not in the ordinary course of trade." This system has two aspects. First, if sales on the home market are made at less than the cost of producing the product and such sales have been made over a substantial period, then such "below-cost" sales may be disregarded from the normal value calculation. The remaining above-cost sales then form the basis of the normal value.\textsuperscript{2} The exclusion of these low domestic prices increases the normal value and thus makes the establishment of a dumping margin easier.

Secondly, if the remaining sales are not deemed to be an adequate basis for calculating the normal value, then the constructed value will be used. Under this test, all costs of production (fixed and variable), as

\textsuperscript{1} The "sales below cost" basis of antidumping law

\textsuperscript{2} The exclusion of these low domestic prices increases the normal value and thus makes the establishment of a dumping margin easier.

\textsuperscript{127} However, administrative agencies have suggested in some cases that a below-cost-of-production rationale is contained within the national dumping provisions. For example, the U.S. Tariff Commission has noted:

[Price discounting as a result of imports has] effectively caused a substantially large block of the sales of domestic glass to be made at prices below industry costs. Such a condition is anticompetitive and, if allowed to continue, would be monopolistic in result. The Antidumping Act is designed to help prevent such conditions.


\textsuperscript{128} Constructed value is one of the bases for the calculation of normal value in the absence of sufficient sales being made in the ordinary course of trade.
well as general selling expenses and profits, are imputed to the product.\textsuperscript{129}

The "sales below cost" rationale is a cost-based test being used as an occasional adjunct to a traditional price discrimination test. While the constructed value of the merchandise is compared to the actual selling price in the importing country in order to establish a dumping margin, the construction of cost (adjusted upwards for general expenses and profit) works like a cost-based system. If the export price is lower than the constructed cost (plus general expenses and profit), then the exporter is selling on the export market at below cost.

The problem comes when the constructed cost is turned into a selling price since, at least in the U.S., minimum amounts for general expenses (10%) and profit (8%) are added to this cost.\textsuperscript{130} To the extent that these figures do not represent normal commercial practice in the industry in question, then the U.S. system potentially harms both exporters to the U.S. and U.S. downstream users and consumers. The effect on the first group should be self-evident. The effect on U.S. downstream users and consumers is that if antidumping duties are imposed and the demand for the imported goods is relatively inelastic, the addition of 10% to cost, and then 8% more, burdens them to the extent that lower general expenses or profits are normal.

If the current below-cost sales tests are themselves protectionist, one might ask why the tests focus on sales below cost on the home market. If sales below cost occur on the home market of the alleged dumper, he or she is unlikely to be successfully predatory (and is probably not engaging in classic price discrimination).\textsuperscript{131} In reply, the sales-below-costs rules seem to operate to increase normal value in situations where it is not high enough to show dumping. What other reason could there be for the irrebuttable fixed minimum of 10% general expenses, or 8% profit? Secondly, one might note that the use of "fully allocated costs" is not economically rational.\textsuperscript{132} Economists and most businessmen know that in a period of depressed sales, it is sensible to sell below average cost, as long the price is above marginal cost.\textsuperscript{133} While administrators and academics might argue that the use

\textsuperscript{129} Under U.S. law, the general selling expenses shall not, under any circumstances, be less than ten percent of the cost of production, and profit shall not be less than eight percent of the total of production costs and general selling expenses. 19 U.S.C. § 1677b(e)(1)(B)(i)(ii) (1980).

\textsuperscript{130} There appears to be no opportunity for the exporter to prove lower figures.

\textsuperscript{131} Concern with predatory dumping revolves around low prices in the export market and high prices in the home market.

\textsuperscript{132} See, e.g., Deardorff, \textit{supra} note 1, at 30-31.

\textsuperscript{133} However, even sales below marginal cost are not always economically irrational. For
of a marginal cost test is almost impossible, this does not justify the use of a fully allocated cost test.

Therefore, one might view the "below cost of production" rule as a mongrel device to facilitate a finding of dumping, and therefore provide protection to domestic industry. It certainly has not introduced a new and more economically rational basis for the execution of antidumping investigations.

Antidumping law is not concerned with the level of prices, but merely the existence of a difference in price between national markets. Two examples may help to clarify. First, a person may be selling at $20 in the U.S. and at $35 in his home market. His costs are $15 in both markets (assuming negligible transport costs, as, for example, with semiconductors). The ruling U.S. price may be $50 and the lowest cost U.S. producer could profitably sell at $45. There is dumping, and the U.S. producer is injured in the sense that he or she is being undersold. But is the behavior unfair? The dumper has covered costs in both markets. Second, a person sells at $20 in both markets, but his costs are $18 in his home market and $22 in the export market (assuming significant transport costs, as, for example, with raw cotton). The U.S. price is $25 and the lowest U.S. producer can produce for $22. The U.S. producer is being undersold by virtue of the ability of the exporter to cross-subsidize, but there is no dumping.134

We should be under no illusion as to how the antidumping rules currently work. Even though the national rules could not formally address a situation in which price discrimination did not occur, the administrative discretion built into every national system allows the rules to be used to combat many types of behavior beyond simple price discrimination including, arguably, predation. It is this "perversion" of the international principles that is cause for most of the current criticism.

IV. HOW MIGHT THE USE OF ANTIDUMPING LAW BE CONSTRAINED?

The GATT system possibly permits the use of antidumping actions as a way of discouraging distortions of competition, and it concentrates on price discrimination. This is not unambiguously bad since, under certain circumstances, price discrimination may exploit a monopoly (with perfect price discrimination being the best way of exploit-

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134. This example is not necessarily predatory since there may be other reasons why such discrimination is practiced.
a monopoly). Unfortunately, the current system cannot differentiate between good and bad cases of price discrimination. The national rules are under attack since they impose costs on the consumer without taking into account whether the dumping is in fact injuring the importing nation, let alone the world as a whole.

Taking the GATT antidumping principles to include the "system preserving" function noted above in section II.D, how might national antidumping actions be constrained in such a way as to limit their protectionist effect? How might a nation address the possibility that predation is a problem?

A. A Digression: Controlling Predation

If predation is a problem, then using antidumping laws to deal with it is not a "first best" option. Deardorff suggests that the best method of solving the problem would be to tax the predator once the predator tried to exploit its monopoly:

[I]f an importing country were to threaten credibly to tax imports only once they become monopolized, and hence to tax away the monopoly profits that are the supposed lure for predatory behavior, that behavior would presumably stop. Taxing the cheap imports in the initial period would stop it too, of course, but given the many alternative reasons that exist for dumping, it would be unfortunate for the importing country to deprive itself of cheap imports just because of its fear of predation, when means exist for dealing with it later when the predatory intent has already been established.135

This solution is better than the use of antidumping law from the point of view of the consumers, since they are allowed to have cheap imports until price-gouging begins.

However, from the point of view of the producers, and more importantly their voting employees, it seems extremely unlikely that these groups would approve of a system which allowed them to be put out of business for the benefit of the consumer. Where the industry under predation is of some strategic importance, it would seem unlikely that any nation would accept its loss for the sake of access to low price supplies.

B. Controlling Antidumping Law

If one accepts that the international GATT antidumping principles have a partial "systems preserving" function, then one has to be careful in arguing that national antidumping rules should be abolished. If the removal of national antidumping law makes the likelihood of

135. Deardorff, supra note 1, at 36.
dumping greater, the national rules should be kept in place and used, but their use should be limited to situations in which the overall interests of the importing nation are furthered. However, a nation should not act against dumping when it is simply in its interest to do so. The traditional tests of dumping and material injury still must be fulfilled, but a public interest analysis should be grafted into the system.

The most appropriate way of controlling the abuse of antidumping law is to maintain the current national antidumping laws with their price discrimination focus and to provide a stronger public interest analysis\textsuperscript{136} which would focus, in particular, on the reasons for the imposition of duties. This approach takes a prohibition on international price discrimination and the current antidumping rules as part of the political landscape,\textsuperscript{137} but attempts to reduce the circumstances in which the rules themselves have a protectionist effect by highlighting the situations in which the importing nation emerges worse off. If a nation is forced to make a rational choice between its overall national welfare and the interest of certain domestic pressure groups, then that nation will only act where it is as a whole threatened by the imports. This might be construed as "industrial policy by the back door." I am quite willing to accept such a label if those currently advocating the

\textsuperscript{136} I claim no originality with respect to this concern. For example, former Chairwoman of the ITC Paula Stern has noted:

We should begin by fully examining the costs and benefits of all our options before, not after, we act. For instance, in December [1985] the ITC found that the President's steel restraint program — if it works as planned — will cost U.S. exporters of steel-containing products over $15 billion. Unfortunately, this calculation of export disadvantage was requested and aired only well after the import restraint program was underway.


Similarly, in a debate on the 1988 Omnibus Trade and Competitiveness Act, Senator Peter Wilson tabled an amendment requiring the ITC to produce an annual report on the "negative economic impact of trade import restraint programs." 134 \textit{Cong. Rec.} S. 10,726 (1988). He stated:

My amendment would require the ITC to report on the harm to consumers resulting from protectionism. If the import restraint program on apparel makes Mrs. Jones pay more for her kids [sic] back-to-school clothes, then we should fess-up and tell her that her own Government is taking money out of her pocketbook, and we should fess-up and tell Mrs. Jones how much more this wonderful Government protectionism is costing her.

My amendment would also require the ITC to do an assessment of job losses on [sic] caused by our protectionism. If Jim Smith, a steelworker in my State of California, is laid off because his own Government has cut off his employer's access to raw steel, then we should fess-up and tell him that his own Government has put him out of work.

Mr. President, my amendment would require a little honesty with the American consumer. My amendment would require a little honesty with American workers.

\textit{Id.}

\textsuperscript{137} I have not discussed the underlying reasons why unilateral removal of national antidumping laws is unlikely. However, one major reason why nations might decline to remove unilaterally their national laws is that in doing so, they give away a substantial bargaining chip in respect to other nations' protectionist laws. If, for example, the EC gave up its antidumping law, it would then have one less thing to offer the U.S. as a concession for the U.S. giving up its antidumping law.
use of antidumping rules accept that the current "blunderbuss" use of antidumping duties is "ad hoc and often irrational industrial policy by the back door." I have no problem with allowing a nation to decide which industries are sufficiently important to it that it will not accept such industries' demise; my concern is that such decisions are not taken in the cold light of day, with all the relevant facts and all the relevant interests examined. Arguably, the system of international resource allocation is better served under a structure which pays attention to all the costs and benefits of imports, rather than under the situation where only the interest of pressure groups are favored.

This "public interest" system avoids the issue of whether reacting against the economically rational decision of firms is itself rational. As noted above, nations probably do not care why firms dump, but care, for example, very much about the effects that such actions have on the level of employment in domestic industry, or the long-term effect on the industrial base. By making the imposition of antidumping duties dependent on a closer examination of national interests at stake, the "public interest" system sidesteps the issue of whether dumping is or is not objectively harmful.

Without a change at the international level, which seems unlikely, price discrimination is likely to remain a dominant focus of national unfair trade laws. Under such circumstances, the most appropriate solution is to reduce the overall harm from such national acts, which can take two forms. One form is cases in which price discrimination is shown (whether fairly or not). No net loss to the importing nation is shown, however, since there is no overall injury as a result of the dumping. The second form is cases where price discrimination is shown irrespective of the loss caused by the dumping. Reacting against the dumping produces a net loss to national welfare.

The underlying rationale in eliminating such negative consequences would be to encourage nations to act against dumping only when they suffered a net loss. This simple criteria could include many subtle issues and would allow nations to bring together a number of potentially conflicting interests, such as consumer welfare and national economic security. A system under which a nation explicitly decides whether it needs a microwave or VCR industry is preferable to one in which producer or consumer interests prevail. While we should be dissatisfied with any system in which trade policy becomes implicit industrial policy, we should not blindly reject a system under which all interests have been examined and a coherent policy adopted. The administration of international "unfair" trading rules should not have to depend only upon polar opposites: protectionist national rules with
their producer bias or a complete absence of such rules. There is no reason why antidumping rules should not consider the effect on competition as well as on competitors.

As a way of implementing a "public interest" system nations should attempt to undertake an additional series of investigations before imposing antidumping duties. Such analyses might examine inter alia:

(a) the effect of dependency on foreign supplies, both in terms of the affected industry and downstream users and overall national security (including military security);
(b) the effect of the dumping on the consumer of the product, particular attention being given to the trade-off between lower prices and long-term availability of alternative supplies including inter alia:
  — the availability of alternative suppliers;
  — the possibility of arbitrage, the existence of barriers to entry and re-entry in the particular industry, and any other industry-specific characteristics of the international market which might point to or eliminate the possibility of predation;
(c) evidence of cross-subsidization by foreign firms, paying particular regard to cross-subsidization across product, rather than simply geographical, markets;
(d) evidence of prolonged sales at a loss, taking into account the relevant product cycle, the relationship between fixed and variable costs and the potential for cross-subsidization above in (c);
(e) the participation of the alleged predator in a government-sponsored elevation plan, including, for example, special financing or fiscal programs, government-sponsored private procurement programs, exemption from antitrust or other restrictive regimes;
(f) any evidence of intention to eliminate current competition or to exclude future competition;  
(g) the present and likely level of research, development and investment funding in the domestic industry (in order to see

138. For example, the so-called "Hitachi memorandum." See United States-Japan Trade: Semiconductors: Hearings Before the Subcomm. on Trade, Productivity, and Economic Growth of the Joint Economic Comm., 99th Cong., 1st. Sess. 1-19 (1985) (statements of Chairman Wilson, the "Hitachi Memorandum," Wilson's letter to Tsuneo Tanaka, and Tanaka's reply to Wilson); see also Congress Poised to Take Protectionist Action this Fall against Tokyo, Congressmen Warn, [July-Dec.] 2 Int'l Trade Rep. (BNA) 1030 (1985).
whether the domestic industry is in natural or enforced decline;
(h) whether the attribution of "unfairness," determined through the level of the dumping margin, significantly exceeds the amount of injury caused to the domestic producers by the dumped imports;
(i) whether the imposition of antidumping duties (up to the level of the dumping margin) would restore the domestic industry to profitability.

While these additional considerations might seem strange, I must stress that they would only be extra considerations as to whether to impose duties. This system could not be used to protect an industry which was not facing material injury as a result of dumping. So while military and economic security issues might not traditionally be seen as part of an antidumping action, they might be issues in determining, whether, in the presence of dumping and material injury, duties should be imposed.

Such a detailed analysis should be made by an independent authority composed inter alia of both producers' and consumers' groups. The procedure should be as transparent as concerns for proprietary business information would allow, and the results should be fully published, with emphasis placed on the final "bottom-line" analysis: are we better off by protecting against or accepting the cheap goods? Once the recommendation of the independent body is made, either a decision should be made directly by the Executive as to how to implement it, or more preferably, the Legislature should vote on the implementation of such recommendation, with such a vote being made public. The involvement of the Legislature at the implementation stage depoliticizes the investigation, but makes the members of the Legislature accountable to the electorate for any decision to implement the recommendation resulting from the investigation.

A minor problem with this approach is that nations might be able to use antidumping actions where the nation gained from imposing such duties. Fortunately, such circumstances are likely to be very limited. Since the conditions of an antidumping action need to be fulfilled before moving to the public interest question, the above situation is no worse than the current system.

A major problem with this approach is that unless it is accompanied by comprehensive adoption of similar procedures in other trade actions, it runs the risk of being circumvented. At the moment, the perceived wisdom is that antidumping (and countervailing duty) actions are the most popular form of protection because they are auto-
matic, easy to win, and the remedies are fairly effective. That is why actions such as section 201, with its Presidential discretion, have fallen into disuse. If antidumping actions were made harder to win for the plaintiffs, then they would turn their attention to the most promising alternative. Unless that avenue were also closed, there would be little to gain from tightening up on the antidumping rules.

Another major problem with such an approach is that it does not consider the effect of not imposing antidumping duties on the international allocation of resources. If a nation discovered that it was never better off by reacting against dumping, whether predatory or otherwise, might the international regime collapse?

Deterrence should not be an excuse for protectionism. If nations were instructed to use trade actions as a deterrent to unfair behavior, it would seem likely that all sorts of unintended protectionist consequences might ensue. Unless a principle of deterrence is explicitly agreed upon in the international arena, the best test of "deterrence" may simply be national self-interest. Is it worthwhile deterring the arguably unfair actions of foreigners unless those actions cause any net harm to you?

Nations should be aware of their role in "policing" the international economy, but this role should not be misused. As noted above, in many cases, often those involving small exporters, the alleged dumper might not know what he is doing. These unintentional cases should not worry us, and they certainly are not susceptible to any form of deterrence. If intentional predation may be a problem, then we ought to be concerned about it, and deterrence might play an important role.

V. CONCLUSION

Given the premises of the GATT system, the system needs some measures which attempt to control distortive measures, either at the public or private level. In discussing the abolition of the national antidumping laws, the effectiveness of the international system must be a significant consideration since there appears to be an intimate link between the international and national rules.

From the national viewpoint, both price discrimination and international predation might be problems, particularly in industries in which "learning by doing" presents an effective barrier to entry and a difference in structure exists between national industries. Current antidumping law does not clearly cover this issue. It does, however,
cover areas which should not be reacted against since such reactive measures may injure the net national welfare of the reacting nation. Looking to national self-interest might subvert the deterrent/"policing" function of the rules. However, simply abolishing national antidumping law would send a message to exporters that it is acceptable to dump and possibly destroy the domestic industry of the importing nation.

I agree entirely that the antidumping rules as currently operated are protectionist. In a great proportion of the cases that currently proceed to duties, the producer is shielded from fair competition and the consumer is hurt. In my opinion, however, that suggests a tightening of the way in which the procedure currently operates and not a complete rejection of the international principles.