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United States Compliance with the 1967 GATT Antidumping Code

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The 1967 GATT Antidumping Code (hereinafter the Code) may be viewed as an attempt to state an international consensus about the correct policy and practice of national antidumping laws. It is important to be clear about the nature of that consensus. National antidumping laws are not an expression of accepted economic theory about international trade. Rather, they tend to rest on more pedestrian value judgments about things such as "fair competition." These underlying value judgments are not necessarily the same from one country to another, and in some countries antidumping laws are not even considered particularly useful or necessary. In short, antidumping laws have neither a common base of accepted economic theory nor a common foundation in other values. This situation means that efforts to negotiate an international consensus on the subject necessarily involve a good deal of patchwork compromise lacking a consistent underlying policy. Rather than finding common ground, the negotiators must often settle for the middle ground—a bit of one side and a bit of the other. The Code itself is such a document.

To illustrate the range of various national perspectives toward antidumping laws, consider the following three positions. First, and somewhat paradoxically, the most rational economic welfare calculation with regard to dumping is probably that made by central planners in a state-controlled economy such as Poland. For these planners foreign trade represents an opportunity to maximize the yield of national resources by importing when the cost of imports is less than the cost of local production (costs being measured here in terms of the opportunity cost of the resources used to obtain the goods in question). Planners in pursuit of this goal have no reason to single out dumped imports for special treatment. To be sure, planners will be ready to restrain imports, i.e., not buy, when they feel that the economic and social costs of displacing local production are too high. In addition, they will pay attention to whether cheap imports are

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likely to be stable enough to justify whatever degree of local disinvestment is involved. In neither case, however, will the planner care whether the imports are dumped. From the planner's point of view, "the cheaper the better"; he will be quite happy, in fact, to find long-term, marginal cost dumping. The central planner, in short, has no reason to have an antidumping law, or its equivalent.

Given his disinterest in protecting his own economy against dumping, in international negotiations the central planner is most likely to ask for the narrowest possible scope of antidumping laws; the only antidumping laws he cares about are foreign antidumping laws affecting his own exports. The central planner is more than willing to accept any and all restraints on his own antidumping law in return, if he even has one. Concessions made to the central planner's point of view represent concessions to plain and simple negativism.

Second, consider the position generally regarded as the other extreme—the position represented by the United States antidumping law. Viewed from the rational perspective of a central planner, the antidumping laws of the United States make no more sense in maximizing United States economic welfare than they would for the Polish economy. The motivation for the United States antidumping law is not economic welfare, strictly speaking. Rather the United States law reflects the view that dumping is an unfair trade practice.

The United States concept of unfairness in this context grows out of the structure, and the ideology, of the United States private enterprise economy. Since investment resources are privately owned, it is the private enterprise that bears the loss of investment when its domestic production is displaced by foreign competition. It is the individual workers who bear the major cost of employment displacement. The ideology that justifies these private losses holds that those who prevail in a competitive marketplace are the more efficient producers, and therefore deserve the business they have taken because of superior efficiency. This normative role assigned to superior efficiency requires that there be a parallel normative condemnation of those other forms of business practice which permit competitors to gain market superiority without superior efficiency, i.e., the producer who is able to reduce his prices because he receives a cash subsidy from his government. Such competitive practices, unrelated to efficiency, must be classified as unfair competition. Producers and workers can be asked to bear the losses of fair competition only if they are protected from unfair competition.

United States law treats dumping as an unfair competitive practice. The key assumption is that a dumping price represents a price below average cost—in layman's terms, it is assumed that the exporter could not stay in business if all his production were sold at
that price.7 In the layman’s view, such prices do not represent the true efficiency of the export producer, and sales earned by selling at those prices are thus unfairly obtained.

United States trade law places limits on fair foreign competition as well as the unfair variety, but the distinction remains important. Imports which are deemed fair (or are at least not shown to be unfair) may be limited only under escape clause remedies, which require proof of rather serious economic harm; moreover, these remedies are designed to evaporate over time, in effect warning the domestic producer that he must either improve his performance or else get out of the business in favor of the more efficient foreign producer. By contrast, United States foreign trade law creates an entirely separate set of remedies for unfair trade which require a significantly lower threshold of economic harm and which remain in effect as long as the unfair practice exists.8 Antidumping laws fall into this second classification. In short, United States trade law not only uses the pejorative epithet “unfair,” but it takes this normative message quite seriously.

A United States negotiator representing an antidumping policy based on these value judgments will normally want authority to deal effectively with this particularly unworthy type of competition. There is bound to be little common ground between this perspective and the negative views of those who see no need for antidumping laws at all.

Between the extremes of the Polish and the United States positions is a rather large middle ground represented by economies stretching from Japan to the European Community. Like the United States, these are essentially private enterprise economies. Unlike the United States, they appear to place less emphasis on the winner-take-all, gamelike ideology of the United States marketplace. Instead, one tends to find that both government and business in these economies have a greater tendency to respond to competitive challenges by “arrangements” that will satisfy all, or most, of the relevant participants—in pejorative terms, cartels. Under this type of business ideology, dumping is hardly favored, but nonetheless it does not receive quite the same moral condemnation. The trouble with dumping is simply that aggressive price-cutting upsets order. The proper response is simply to restore order—to search for a solution in which the dumping exporter agrees to bring his prices back into line. The solution is more likely to be determined by the prevailing order than by any precise definitions of dumping.

This viewpoint presents yet a third attitude toward antidumping laws. The ordering tradition involves a substantial amount of informal, consultative contact between government and the relevant domestic and foreign producers. Depending on the legal traditions of
the country involved, the foreign exporter (and his domestic importer) may feel considerable compulsion to accept the practical solutions suggested in such consultations, particularly when the alternative of litigating a defense to an antidumping complaint is expensive, uncertain, or simply not done. In a setting where such "administrative guidance" is practiced, the precise substantive rules of the antidumping law will not be overly important. The existence of an antidumping law may be a useful calling card on price-cutting exporters, but what happens after that will be settled informally.

It is difficult to generalize about the precise negotiating position dictated by this third view. To the extent the particular country can achieve its objectives informally, its negotiators should be willing to accept rather stringent limitations on their own antidumping law in order to limit the antidumping laws of other governments which affect their own exporters. To this extent, this third position will be like that of the Polish position, essentially negative.

The hypothetical Polish position is interesting primarily as a reference point. The major contending forces in the drafting of the 1967 Code were the latter two positions described—the moralistic position reflected by United States law, and the more exporter-oriented position defined by the Japan-to-European Community spectrum. Two summary points should be made about this latter clash of views. First, despite the apparently similar economic structures of the participants, there is potentially a very large gap between the underlying premises about antidumping law. Both the text of the Code, its subsequent administration, and even its possible renegotiation in the future, are very likely to show the effects of this lack of a common starting point. This position may often represent what is in fact a more protectionist trade policy. Although undoubtedly some voices for the soft-line represent genuine liberal trade policy, especially among the traditionally free-trading small nations of Western Europe, some of the larger voices for the soft-line have pressed that view for exactly the contrary reason—that is, because they have such thorough-going systems of trade regimentation that dumping rules are partially or wholly irrelevant to their own level of trade protection.9

As a consequence, it is wrong to draw too many conclusions from a study of adherence to the Antidumping Code. For example, one may predict that Poland will never violate the Code. This will not mean that Poland has a free market. Along the same lines, although the European Community and others have adopted internal antidumping laws which are an essentially verbatim copy of the Code,10 the internal administration of those laws should be examined before jumping to the conclusion that meaningful compliance has in fact occurred.
STANDARDS OF COMPLIANCE

The United States' defense to charges that it has not complied with the Antidumping Code involves a distinction between two levels of compliance: formal law, the stated legal criteria which a government claims to apply; and operating law, the actual facts on which affirmative decisions are made, measured against the formal criteria of the Code. The United States contends that, while there may be differences or inconsistencies at the level of formal law, its operating law has conformed to the requirements of the Code. The United States argues that compliance at this level is sufficient—that to prove a violation, one must point to specific cases which, on their facts, do not satisfy the Code standards.  

One can argue that the United States position sets impossible criteria, or at least unduly difficult criteria, for measuring compliance. Almost any set of economic facts can be arranged into a colorable defense—one which will allow a United States spokesman to answer a complaint without embarrassment. In international confrontations between governments, such factual defenses will usually suffice to blunt the first round of complaints. The only way to penetrate this line of defense is by a careful, neutral examination of the facts—in effect, third-party adjudication. Unfortunately, the international machinery established to monitor the Code has never developed a tradition of such adjudication. Consequently, the operating law standard makes it possible for the United States to block any formal international judgment of United States practice.

There is, of course, the court of independent scholarly criticism, but critics do not find an easy road to judgment either. Written decisions by United States officials are often terse and difficult to follow, and the complete facts are very often unavailable due to confidentiality requirements or inadequate publication. Administrators thus have the enviable position of owning more information than their critics, a situation which always makes critics somewhat hesitant.

Difficult as it makes things, the United States claim to be judged by operating law compliance was in some sense part of the original bargain behind the Code. When the United States acceded to the Code in 1967, it announced that it intended to achieve compliance without changing existing legislation, a decision based on the judgment that proposals for new antidumping legislation might open the door to protectionist amendments that would make the antidumping law more rather than less restrictive. It was believed that the existing United States antidumping law would permit officials to achieve operating law compliance by means of administrative interpretation of the rather broad language of the existing United States statute.
Although the United States obtained no formal recognition of this intention, all the participants knew these intentions fully, for United States law and practice were without doubt the chief target of the Code negotiations.

The credibility of United States efforts to prove compliance under the operating law standard has been impaired by a series of legal reverses which followed adoption of the Code. Soon after the Code was adopted, a 3 to 2 majority of the Tariff Commission (now the International Trade Commission) issued a report pronouncing many of the Code's injury standards inconsistent with Tariff Commission interpretations of the injury standard of the United States antidumping law. The Congress followed with legislation that ordered the Commission and the Administration to adhere to United States law in cases of conflict with the Code. The later revision of the antidumping law in the Trade Act of 1974 (hereinafter the 1974 Act) conspicuously failed to call for adherence to the Code. A few amendments did permit closer compliance with Code requirements, but Congress never mentioned the Code itself and went out of its way to affirm certain other practices which appear to be inconsistent with compliance. The Congress also made clear that it expected vigorous prosecution of antidumping complaints, and subsequent oversight by congressional committees has made it clear that the Congress means to keep a careful watch on the manner in which United States officials exercise their interpretative and discretionary powers under the United States law.

The operating law standard of compliance has proved to be both awkward as a matter of principle and difficult to make credible in practice. The very domestic policy attitudes which make it necessary to resort to such a standard have worked to undermine the credibility needed to accept the essentially unverifiable judgments that must be made under it. It is thus difficult to contemplate any long-term solution to the compliance issue that does not include formal compliance as well. Although one must be quick to add that formal compliance will be no guarantee of operating law compliance (the United States position has no doubt rendered a service in directing attention to this issue), a credible claim of compliance must begin with a domestic law that conforms to the principles of the Code.

This article examines the present gap which exists between the Code and United States law. The main section which follows attempts to set out the major disparities in formal law. It attempts at the same time to assess the nature of operating law compliance to the extent
possible. A brief concluding section examines the outlook for greater future congruence between United States law and the Code.\textsuperscript{17}

\textbf{CODE RULES AND UNITED STATES LAW}

The Antidumping Code is not a paragon of precision or clarity. Its language may be read to raise many points of possible conflict with United States law. The following survey attempts to identify the main points of possible conflict—those that have been made issues by other governments, and those which probably would be made issues in a further negotiation.

\textit{Initiation of Investigations}

The Code places considerable emphasis on the criteria for opening a formal investigation and attempts to stop cases which are sure losers at the outset. This is a concern of considerable importance, for the mere fact of a formal investigation will often create enough commercial concern about potential liability to act as a powerful deterrent to trade.\textsuperscript{18} Rules which merely assure a proper outcome at the end of an investigation will do little to cure these trade-restricting effects.

Code Article 5:1 states that complaints "\textit{shall normally} be initiated upon a request on behalf of the industry affected [emphasis added]." A footnote states that the term "industry" is to be defined as the producers of the major proportion of national output of the like product, excluding producers who import the allegedly dumped goods.\textsuperscript{19} Read together, the sections appear to say that, in normal circumstances, the government should not entertain complaints from weak-sister firms alone if the largest share of the industry does not want to be bothered. Likewise, if the word "producers" is read strictly, labor's complaints should not be heard if management does not join them.

United States law contains no similar requirement of industry initiation. Not only may the Treasury Department open an investigation \textit{sua sponte}, but virtually anyone may request that such an investigation be initiated. As a practical matter, however, both a heavy workload and the diplomatic sensitivity of antidumping complaints tend to deter Treasury-initiated complaints when there is not strong industry interest in complaining. In addition, nonrepresentative complaints may be excluded at the outset if they fail to show any injury.\textsuperscript{20} Consequently, it is reasonable to expect that there will be substantial compliance at the operating law level. The main legal issue will be
whether the few serious cases filed by nonrepresentative parties can be rationalized under the "special circumstances" exception of Article 5, or whether the concept of "industry" can be bent enough to fit the actual complainants.  

A complaint charging dumping of automobiles, filed by the United Auto Workers and a Congressman, but not management, is a case in point. Several governments argued vigorously that acceptance of the complaint was a violation of the Code Article 5. Although the Code does list employment as one factor to be considered in determining injury, the complaining governments did not agree that labor interests could represent the industry. The United States also offered what could be viewed as a "special circumstances" justification. Pointing out that the automobile producers had extensive international operations, including large imports to the United States, the United States argued that because the foreign interests of the domestic manufacturers might be adversely affected, directly or indirectly, by their participation in the complaint, they were not capable of representing the domestic industry interests involved. Other governments disagreed. Their contrary interpretation read the Code to say that multinational corporations should be allowed to judge their own injury from the multinational perspective in which they operate, and that the interests of the producers should prevail where they conflicted with worker interests.

The charge of legal violation appears difficult to sustain. The industry-complaint rule is qualified by the term "normally," a term sprinkled through the Code at various points in what appears to be an effort to qualify obligations that the United States could not promise to obey fully. There is also the undefined exception for special circumstances, under which a prima facie legal defense should be available for any factor out of the ordinary.

The dispute over this issue provides a good illustration of the basic policy differences affecting the present Code, and of how they have been compromised in that text. The United States requirement that preliminary investigations must be initiated whenever the responsible official receives information of actionable dumping, and that Customs officials must report such information if it should come to their attention, reflects a view of dumping as a kind of public wrong—a wrong that public officials have a duty to prosecute whether anyone complains or not. This is, of course, a logical extension of the unfairness motif. The Code's provision that the complaint be initiated by the majority of producers, by comparison, looks like a conception of private wrong. This second view of antidumping law is compatible with the more arrangement-oriented view discussed earlier. This clash between the public and private conceptions of dumping can be found in many of the apparent divergences between
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United States law and the Code. The present Code's answer bears noting. The Code states one viewpoint as a rule, and then qualifies the statement so that it is no longer actually binding. Policy differences have been compromised, but not reconciled.

A second Code requirement for the initiation of formal investigations is that private and government-initiated complaints must be supported by "evidence . . . of injury." This presumes that a preliminary determination will be made about evidence of injury before a formal proceeding is opened. The following subsections of Article 5 go on to state that, assuming this first hurdle is cleared with satisfactory evidence, the injury issue should be investigated more or less simultaneously with the question of dumping, and that the investigation must be terminated promptly whenever officials become satisfied that the evidence of injury is inadequate.

In 1967, United States law was very difficult to manipulate into conformity with this requirement, and for years the United States claim of compliance rested on a terribly convoluted Treasury Department procedure which probably satisfied neither the Code nor United States law. The 1974 Act amended the United States antidumping laws to bring United States practice closer to the spirit of Article 5 in this regard. The 1974 Act confirmed the Treasury practice of requiring injury data in the complaint and expressly authorized Treasury to screen such data during a thirty-day period after the complaint. The Act then provided that, where Treasury finds "substantial doubt" of injury, the case may be referred to the ITC for a quick thirty-day investigation and determination as to whether there is "no reasonable indication" of requisite injury. If the ITC makes such a finding, the case is dropped. If not, the case is returned to Treasury for a six-month investigation of the dumping issue, with no further consideration of the injury issue until Treasury has made a final determination of dumping. Thereafter, the ITC makes a three-month investigation of the injury issue, during which time Treasury retains the power to consider possible errors in its dumping determination and to modify or reverse its dumping finding before the ITC issues findings.

The new "thirty-day wonder" proceeding before the ITC appears to satisfy all the procedural requirements for review prior to opening an investigation. Governments have charged, however, that the statutory standard for termination at this point ("no reasonable indication of injury") is too stringent. The main objection is that the United States statute, as interpreted by the ITC, places the burden on the party seeking dismissal. Article 5 of the Code, requiring that the complaint be "supported by evidence . . . of injury," arguably places the burden on the complainant. Perhaps more to the point, the spirit of Article 5 seems to call for something more than an inability to
show there is no reasonable indication of injury as a justification for the damage to trade of a six-month investigation.

This dispute over the exact meaning of the preinvestigation standard would probably not be very significant if the formal investigation which followed could dispose of weak injury cases immediately. The dispute is important, however, because, under the United States procedure, a weak injury case which survives the thirty-day wonder inquiry must await a six-month investigation of the dumping issue before the issue of injury can be considered again. Curiously, Article 5 permits this disjointed sequence. Article 5(b) states that dumping and injury "should" be considered simultaneously throughout the investigation, but it only requires that simultaneous consideration "shall" be given after provisional remedies can be invoked. The United States meets this requirement by not invoking provisional remedies (withholding of appraisement) until after the six-month dumping investigation. Consequently, only after the six-month investigation must the two issues be considered simultaneously. Although the dumping issue is generally all but settled by then, Treasury's reservation of power to reconsider the dumping finding during the ITC investigation constitutes technical compliance with the by now meaningless simultaneous consideration requirement.

The proponents of Article 5 probably wanted something more simultaneous than this. Quite clearly, however, they did not get their way. The United States could not promise abandonment of its totally separate injury proceeding; at best, it could promise only to delay provisional remedies until the injury determination could be launched. Faced with this unsatisfying bargain, the proponents might have been expected to recognize the critical importance of the initial preinvestigation standard in Article 5(a), and to have included something a little more forceful than "supported by evidence of." Alas, here again the United States negotiators were not able to promise more, for in 1967 the Treasury Department had only a tenuous claim of authority to make any review of the injury issue at all. The current effort to make something more out of the "supported-by-evidence" standard, by appealing to the purpose of Article 5, has the ring of renegotiation to it.

Given the debatable status of formal law compliance, one might ask how well the United States procedure complies with the spirit of Article 5 as operating law. How well, in fact, does the United States procedure screen out cases in which the injury issue should have ended the case quickly? A few numbers may give a flavor of how the procedure has operated.

As of November, 1978, there had been twenty-two complaints referred to the ITC under this thirty-day procedure; six (27 percent) had been terminated for inadequate evidence of injury. Of the sixteen cases allowed to go forward, only three had progressed to the
stage of a final injury determination. Two produced a unanimous finding of no injury; the third resulted in a 3 to 2 finding of likelihood of injury.

A certain amount of nonsense has been spoken about the cases sent forward for investigation. Critics in GATT have argued that Treasury's decision to refer a case to the ITC (based on a finding of substantial doubt) is tantamount to an official admission that the case should have been dismissed. By that logic, any effort to raise the injury issue ends up conceding that it is valid. The United States, on the other hand, appears to see some virtue in the fact that not one, but two, United States agencies look into the injury question at this time. Since it takes only one agency's decision to send the case forward it is difficult to follow the argument that more is better.

Another possible test of the adequacy of the thirty-day wonder procedure is to ask what proportion of cases are thrown out in the final injury investigation. Arguably, a high proportion of failures at this final stage would indicate that the initial screen is letting too many bad cases through. Some would argue that a high proportion of affirmative findings would demonstrate protectionist sentiments on the Commission, but then it is impossible to please everyone. Of the twenty-four ITC decisions in cases subject to the 1974 Act, there have been eleven affirmative findings (46 percent). The 46 percent ratio of affirmative findings is actually lower than the 53 percent ratio from 1967–75, the post-Code period when there was no thirty-day procedure, though the difference is not statistically significant. The ratio is higher than the ratio for the years prior to 1967, where the ratio was only 22 percent. The erratic movement of the ratio suggests either (1) that the new screening procedure has had no measurable effect, or (2) that too many other economic and political factors are involved to make the ratio a meaningful index. The latter is more likely.

**Definition of Dumping**

The provisions of Code Article 2 elaborating the price-discrimination concept of dumping are rather brief, and for the most part they add nothing but common sense expansion to the few sentences in GATT Article VI on this subject. Most of the issues that governments complain about in this area are not really covered by Article 2.

Perhaps the most fertile area for debate has been the question of identifying differences between the terms-and-conditions of home market sales and export sales that can be used to justify a lower price for export. Both Article VI of GATT and Article 2 of the Code require that "due allowance shall be made for the differences . . . affecting price comparability." Issues naturally vary with the precise
business situation in each case. Critics of United States practice commonly object to proof requirements for what are claimed to be intuitively obvious cost differences. A related theme of criticism is the alleged United States failure to recognize commercial practice as a justification for accepting certain factors as legitimate bases of price differentials.45 In the usual setting, a lawyer argues “commercial practice” when there is no cost justification.

At bottom, most of these proof-and-practices issues boil down to the government’s desire or ability to give the benefit of the doubt to exporters whose prices initially indicate dumping. In a small way, perhaps, this is yet another reflection of the gaps created by differing conceptions of the wrong at issue. The greater the perceived wrong at issue, the greater the political pressure on officials to prove calculations which excuse the prima facie case.

A second issue that has generated considerable debate recently is the concept of constructed value, a cost-plus-profit-plus-overhead calculation that is authorized when home market prices are unavailable or unreliable.46 The Code states that, “as a general rule,” the allowance for profit should not exceed the rate of profit “normally realized on sales of products of the same general category in the domestic market of the country of origin.”47 The United States legislation requires that the profit margin be no less than 8 percent.48 The 1967 Executive branch analysis of the Code explained that a profit allowance of 8 percent (which normally means 4 percent after taxes) would meet the Code test in most cases, and that the few cases where 8 percent is higher than the relevant industry’s recent profits would fit within the exception implied by “as a general rule.”49 This argument has met growing objection in the recent era of business stagnation, on the ground that 8 percent is simply not “normal.”

A third current issue, potentially the most important, involves an innovation of the 1974 Trade Act, providing that otherwise acceptable home market prices cannot be used for price comparison if they represent sustained sales at a loss.50 In other words, even though the export price is the same as the regular domestic price, dumping may be found if the uniform price does not cover costs of production. The new rule creates particular problems for capital-intensive industries such as steelmaking which may be forced to sell at a loss during extended periods of slack demand.

The text of the Code does not clearly prohibit this new rule. The pertinent provision authorizes the rejection of a home market price when “because of the particular market situation, such [home market] sales do not permit a proper comparison.”51 The reference to “proper comparison” simply begs the question.

The cost-of-production exception is probably consistent with the basic normative objection to dumping on the part of businesspersons
and politicians, at least in the United States. The premise is that dumping prices are not prices at which the exporter could stay in business if he had to sell all his output at that price. The new cost-of-production rule merely elevates the premise to the status of a rule.

The difficulties with making the premise explicit are several. The exporter's cooperation with such cost-of-production investigations can be very expensive, perhaps enough to make harassment profitable. The accounting decisions needed to determine cost could open the process to considerably more arbitrariness than is now the case. Worst of all, logical extension of the theory could expose the fact that we do not really know what we mean by cost. What do we do when a production facility operating at a loss is sold to someone else at an appropriately lower price? Or, what do we do when we find that the producer is covering its costs, but that the free market price of inputs is below their cost? The difficulties presented by the issue would appear to be beyond the capacity of government procedures.

Material Injury

Articles 3 and 4 of the Code deal with the definition of the injury standard. The key concept of material injury, which forms the basis for liability, is not defined. Important statements are made about causation and about the definition of the relevant industry.

Material

There are two general positions on the meaning of "material." The first is that the term "material" means any economic harm more than trivial, inconsequential, de minimis economic harm. The second is that "material injury" means a higher threshold, something not quite as hurtful as the "serious injury" required for ordinary escape clause relief, but yet still serious in the ordinary sense of that word. There seems to be increasing agreement among the government signatories of the Code that the text of the Code fails to define that higher threshold, and that without such a definition, the Code fails to create a cognizable legal commitment to that higher standard. While particular cases continue to be debated, charges of formal noncompliance cannot be pressed very far.

However, there does appear to be a consensus, among the majority of signatories at least, that the spirit of GATT Article VI and the Code requires the higher threshold. At the level of formal law, the United States does not satisfy this demand. The United States statute refers merely to "injury."52 In years past the ITC (previously the Tariff Commission) took the position that the term "injury" in the United States Antidumping Act meant the same thing as "material injury" under GATT Article VI, implying that something more than a de
minimis threshold was involved. Nonetheless, more recent opinions have indicated that, whether or not the word "material" is added, the standard is the de minimis threshold. In what might be called a gratuitous but highly authoritative legislative dictum, the Senate Finance Committee affirmed the latter view in its Report on the 1974 Act:

Obviously, the law will not recognize trifling, immaterial, insignificant or inconsequential injury. Immaterial injury connotes spiritual injury, which may exist inside of persons not industries. Injury must be a harm which is more than frivolous, inconsequential, insignificant or immaterial.

Whether the battle of words and thresholds has any meaning in terms of results in specific cases has yet to be shown. What is needed is some definition of the higher threshold that can be applied and an application of that threshold to the facts of ITC injury findings. At the present time, there is no satisfactory way to test the assertion that, as a matter of operating law, the affirmative decisions of the ITC meet this higher standard.

The possibility that GATT governments might one day negotiate an operative definition of material injury calls for an additional observation. The standard of injury is the one place, above all others, where one can expect differences of basic policy to surface. If dumping is really something bad and unfair, it will follow that it should be attacked wherever the economic harm is large enough to warrant the cost of doing so. The formal expressions that constitute United States domestic law seem to begin from this value premise. Formal adoption of some higher threshold would appear to be unattainable without some way of changing or avoiding this basic policy attitude.

Causation

There is a rather direct conflict between the Code rules on causation and the parallel concepts in United States law—at least at the formal level. The Code's concept of injury appears to rest on a measurement of what might be called "overall injury"—the current economic position of the industry (profits, capacity utilization, employment, etc.) measured against some standard of economic good health, be it either past performance or some general standard of successful operation, or both. If the current state of the industry is below this standard of good health, this difference is the injury being suffered, and if the difference is great enough, it is material injury. The Code requires governments to identify the causes of that overall injury, which may range from dumping to slack demand, interproduct competition, and the like. The Code then states that, in order to
impose antidumping remedies, governments must find that dumping is the "principal cause" of material injury. The Code does not state flatly that principal means a cause larger than all the other causes combined, but that is the thrust of its various subsidiary provisions.

The United States statute provides simply that the ITC must find that an industry has been "injured by reason of [the dumped imports]." In its Report on the 1974 Act cited above, the Senate Finance Committee expressed the view that injury due to other causes was immaterial to the injury test under United States law. Neither the Finance Committee's commentary nor subsequent ITC decisions claiming to adhere to it are completely clear on the causation test that follows from this view. Part of the time it appears that the test requires isolating the economic harm caused by the dumping and finding injury where that particular quantum of harm is more than immaterial. The more common view suggests that the ITC should look at the overall injury, measure the causative influence of dumping on that overall injury, and determine whether dumping has enough causal significance to be called a cause of this larger condition. Neither of these conceptions approaches the Code's "principal cause" test.

In this connection, it is interesting to note that the Code's conceptual approach actually does have a counterpart in other United States trade law. The United States escape clause legislation has always viewed injury as an overall concept, and has required that imports be either a "major cause" (the 1962 law) or a "substantial cause" (the 1974 law) of that overall injury before import relief can be granted. The causal requirement in the United States escape clause law is pretty clearly a normative statement—that domestic industry is not deserving of relief from import competition if most of its troubles are due to factors other than import competition, i.e., its own competitive inadequacy or general business conditions. The Code approach, in effect, asks that the same normative judgment be made about relief from competition from dumped imports. The different causation test in United States antidumping law simply rejects that normative claim. The obvious distinction is that the import competition dealt with under the escape clause is presumably fair competition, whereas dumping is not.

Industry

A third major issue under the injury concept is the definition of the industry that is entitled to complain if injured. The Code begins with the proposition that "industry" must normally encompass the entire national production of the relevant product. The United States law begins from the same premise. There are some differences of language relating to the definition of the relevant products, but the practical consequence of these differences appears minimal.
The most talked about issue in this area is the concept of regional industry. Under Code Article 4(a) (ii), the normal rule that requires consideration of the entire national production of a product may be set aside where producers in certain regional markets are isolated from other markets, both in terms of their own sales and sales from the producers in other markets. The producers in such an isolated regional market may be considered an industry for purposes of weighing injury.

Under the United States antidumping laws, both the former Tariff Commission and the present ITC have occasionally employed a regional industry concept. When Congress reviewed the Code shortly after ratification, a 3 to 2 majority of the Tariff Commission reported that the Code rules on regional industries were more restrictive than those followed by the Tariff Commission, and that four out of five recent findings of injury to a regional industry under United States law might have been decided differently under the Code rule. The main difference, according to the Commission majority, was that the Code rule required virtual isolation of the market, whereas the Commission had employed less rigorous tests of market separateness.66

A few leading pre-Code decisions were clearly inconsistent with the Code test. Commission decisions since adoption of the Code have done nothing to suggest a fundamental change of heart. The few post-Code cases are badly muddled by a doctrine which, after looking at injury in a particular region alone, purports to find injury to the total national industry, on the theory that "injury to a part [not necessarily a regional industry—just a "part"] is injury to the whole."67 Few would defend these cases as complying with any Code standard; the best defense would be that the part-whole doctrine is dead.

The Commission has managed to avoid the issue in recent years, not having based any affirmative decisions on the regional industry concept.68 However, this issue could become the source of a major compliance controversy, because, unlike most of the provisions which challenge United States practice, the Code criteria defining regional industries are quite precise. The possibility of clear violations by the United States is substantial.

Remedies

United States law clearly violates one Code rule on remedies. Code Article 11(i) provides that where dumping duties are based on a finding of likelihood of injury (no injury yet, but likely if relief is not granted), the duties may be imposed only upon goods entered after such decision. By contrast, where present injury is found, the Code permits application of dumping duties to all imports that have entered while provisional remedies were in effect—usually about three
months prior to the final findings. United States law does not make this distinction. In a recent case involving likelihood of injury, Treasury sought to follow the Code rule, but this was found to be in violation of United States law, and the Secretary was ordered to impose dumping duties on such entries.69

United States law comes very close to violating a second remedy-limiting rule; Code Article 8(e) provides that, in a case where the only injury is to a regional industry, dumping duties may be levied only on imports destined for that region. United States negotiators feared that the Constitutional requirement of uniform customs treatment would prohibit such selective application, a fear that was partially confirmed by recent court decision involving a 1963 (pre-Code) dumping finding.70 To reconcile the Code with United States practice, the United States negotiators secured the addition of a bizarre exception to Article 3(e) which allows application of nationwide duties in such cases if the exporter refuses to give an assurance that it will “cease dumping in the area concerned.” United States negotiators believed that compliance could be achieved by demanding such a price assurance in all regional industry cases.71

Another area of considerable concern at present is the timing of rescission of antidumping remedies. What happens after a finding occurs, and how long must it go on? The Code adopts a predictably antipunitive stance, requiring that remedies be dismantled as soon as they are no longer “necessary” to counteract injurious dumping.72 In contrast, Treasury regulations provide that, ordinarily, a finding of sales at less than fair value (dumping) will be revoked only after a two-year history of no dumping.73 Although no dumping duty is imposed on nondumped imports during this period, all entries must be investigated.

Several countries have complained that the presumptive two-year minimum is punitive, and thus violates the Code rule.74 The legal issue would appear to be whether Treasury's rule of thumb is an acceptable means of proving that future dumping is unlikely so that the duties are no longer necessary to forestall it. Also at issue is whether a punitive purpose (to deter others who might be tempted to take a more or less free bite) is a legitimate gloss on a rule limiting duties to those which are necessary to counteract dumping which is causing injury.

**THE OUTLOOK**

Through 1978, it appeared unlikely that the United States could achieve conformity with the Antidumping Code by renegotiating the Code itself. From the point of view of most other governments,
formal adherence to the present text of the Code was the only choice open to the United States. The United States has signed the Code. Most of the other governments had brought their laws into conformity (many by adopting the Code text itself). The United States had precious little standing to ask for reconsideration after everyone else had complied.

That judgment now appears to have been premature. A surrogate renegotiation has in fact been taking place in the Multilateral Trade Negotiations (hereinafter MTN), also known as the Tokyo Round. The MTN is a large trade negotiation being conducted under the management of GATT. One of the subjects of negotiation has been another code for the subject of countervailing duties. Countervailing duties are in many ways a twin to antidumping duties, a compensatory duty designed to counteract government subsidies. Both countervailing duties and antidumping duties are treated in GATT Article VI, both being subjected to essentially the same rules. The MTN code for countervailing duties has proved to be a virtual twin to the Antidumping Code, covering most of the same subjects in virtually the same language.

This time, however, there has been one important difference. United States negotiators have come to the MTN negotiations with the intention of submitting all such codes to congressional ratification. Consequently, the United States has insisted on provisions that Congress would in fact accept, particularly on issues such as causation and injury. At the same time, the United States has been willing to consider asking for authority to adopt some of the Code's distinctive procedures. Although negotiations are not complete at this writing, it appears that the final product will be a somewhat softened version of the Antidumping Code rules, one that the United States can enact into formal law.

If all this happens, it is more than likely that the next step will be a renegotiation of the Antidumping Code itself, together with such conforming changes in United States legislation as are necessary.

NOTES

BISD), 15 Supp. 24 (1968). The Code itself has been subscribed to by only twenty-four parties. See BISD, 23 Supp. 13 (1977) (Eighth Report of the Committee on Antidumping Practices). Citations to the Code will be given hereinafter as: "Antidumping Code, Article ______." 

2. Even Professor Viner's celebrated treatise argues that antidumping laws make economic sense only in certain limited areas. J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1922). For a much harsher economic critique of the antidumping laws see Barceló, The Antidumping Law: Repeal It or Revise It, ante.

3. In the course of this article, reference is made to many positions taken by the United States and other adherents to the Code. Two points should be made about these positions. (1) The position taken at one or two meetings is not necessarily a permanent datum; no effort has been made to discover whether governments today would take the same view on each and every issue mentioned. (2) The public documents cited with regard to such position statements will verify their existence, but they cannot report the positions fully.

4. In other words, the central planner would also have to be concerned about predatory dumping and sporadic dumping.

5. Notwithstanding, both Hungary and Poland have become signatories of the Code. Hungary has enacted the Code as an internal antidumping law, BISD, 23 Supp. 13, 15 (1977). Poland has merely accepted the Code obligations, but as yet has no antidumping law of its own.

6. The reasons for passing an antidumping law in a state-controlled economy are much like the reasons for instituting a tariff. So long as the economy in question is committed to central planning so that all trade is in fact determined by purchasing decisions, the law itself will be meaningless. By passing the law, however, the country in question can then make a show of accepting and obeying all international obligations pertaining thereto. While no one is really fooled, or even meant to be fooled, the scenario does provide a formalistic foundation for a claim of good international citizenship. There are usually just enough signs of possible movement toward a more market-oriented economy—declared intentions on the one side, and wishful thinking on the other—to blunt the edge of cynicism that might occur in these circumstances.


8. Title III of the 1974 Act is titled "Relief from Unfair Trade Practices," and deals, inter alia, with matters such as dumping, export subsidies, and various traditionally unfair competitive practices such as patent infringement. The remedy provisions are found at 19 U.S.C. § 160 (dumping); 19 U.S.C. § 1303 (export subsidies); 19 U.S.C. § 1337 (other unfair trade practices).

9. It is rather difficult to see how
antidumping measures could have had much impact in the quota-ridden Japanese market of the 1960s. It remains to be seen whether, despite the proceedings now under way, the Japanese government will in fact resort to the public confrontation of antidumping proceedings to deal with suspiciously low-priced imports. See Saxonhouse, Antidumping Law in Japan, post.


12. The Antidumping Code itself contains no dispute resolution procedure; Article 17 provides for nonadjudicatory consultations.


17. Due to space limitations, portions of the original paper that dealt with more technical subjects such as price assurances and other settlement practices have been omitted.

18. GAO study, supra note 16, at 1: "The discussions did indicate, however, that the initiation of a dumping investigation by Treasury creates enough uncertainty in the market place to prompt adjustments either in the price of imports or the quantity imported."

19. Antidumping Code, Article 4(a).

20. Treasury officials may refuse to conduct even a preliminary investigation unless facts relating to injury are alleged. See 19 C.F.R. §§ 153.29(a), 153.27(a)(4) (1977).

21. Antidumping Code, Article 5(a): "If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have evidence both on dumping and on injury resulting therefrom."

22. The complaint proceeding was announced in 40 Fed. Reg. 33,755 (1975). The case was
referred to the International Trade Commission for a preliminary investigation of injury; the Commission held that the case should not be dismissed. New, On-the-Highway, Four-Wheeled, Passenger Automobiles from Belgium, Canada, France, Italy, Japan, Sweden, the United Kingdom and West Germany, AA1921-­Inq.-­2, USITC Publ. 739 (1975). The case was settled and dismissed without further proceedings.


24. See, e.g., text at notes 46–49, infra. The Executive branch analysis of the Code relies on "normally" in this instance as well. See Senate Code Hearings, supra note 13, at 294.

25. One current case of government-initiated complaints that will probably be justified under special circumstances, if ever challenged, is the "fast-track" procedure used under the so-called Trigger-Price Mechanism (hereinafter TPM) for steel, 42 Fed. Reg. 65,214 (1977). The special circumstance would presumably be the recent history of steel dumping cases, the crushing volume of which forced the adoption of the TPM.

26. It might be objected that the industry-initiation rule is merely a way to assure the most reliable proof of some injury. However, the injury issue is taken care of elsewhere. After stating the rule of industry initiation, Article 5(a) requires that the complaint be "supported by evidence both of dumping and of injury resulting therefrom for this industry."

27. Antidumping Code, Article 5(a).

28. The problem was that the Antidumping Act vested determination of the injury issue in the Tariff Commission, after Treasury had completed its determination of dumping. Treasury sought to provide a very minimal injury screening by requiring that complaints contain facts alleging injury under what is claimed to be an inherent power to dismiss frivolous complaints that would waste the taxpayers' money. For a careful, somewhat tongue-in-cheek description of Treasury's contortions, see Anthony, The American Response to Dumping from Capitalist and Socialist Economies—Substantive Premises and Restructured Procedures after the 1967 GATT Code, 54 Cornell L. Rev. 159, 188–93 (1969).


32. The primary target of the complaints was the ITC's negative finding in the auto case.

33. In the first few cases under the special procedure a majority of the Commissioners wrote careful opinions stressing that the new act required, before a dismissal, that the Commission affirmatively find that there was "no reasonable indication" of injury—rather than merely finding that injury is not shown, not likely, or some other failure-of-proof type conclusion. See New, On-the-­Highway, Four-Wheeled Passenger Automobiles, supra
34. Treasury's power to revise its determinations after a case is sent to the ITC is claimed in 19 C.F.R. § 153.42 (1977).

35. The six cases were: Multimetal Lithographic Plates from Mexico, AA1921-Inq.-4, USITC Publ. 775 (1976); Methyl Alcohol from Brazil, AA1921-Inq.-7, USITC Publ. 837 (1977); Uncoated Free Sheet Offset Paper from Canada, AA1921-Inq.-10, USITC Publ. 869 (1978); Photographic Color Paper from Japan and West Germany, AA1921-Inq.-11 and AA1921-Inq.-12, USITC Publ. 885 (1978); Standard Household Incandescent Lamps from Hungary, AA1921-Inq.-18, USITC Publ. 912 (1978).


41. The group of cases subject to the new screening procedures begins with Electric Golf Carts from Poland, AA1921-147, USITC Publ. 740 (1975), and ends with Certain Nylon Yarn and Grouped Nylon Filaments from France, AA1921-185, USITC Publ. 922 (1978).

42. The sample is an extension of Fisher's calculations, supra note 40, and does not quite coincide with the effective date of the Code. The sample begins with Cast Iron Soil Pipe from Poland, AA1921-50, USITC Publ. 214 (1967), and ends with Lock-In Amplifiers and Parts Thereof from the United Kingdom, AA1921-146, USITC Publ. 736 (1975). There were forty affirmative findings in the seventy-six decisions involved.

43. See Fisher, supra note 40, at 104–5.

44. General economic conditions are probably the most significant influence on the ratios.


46. The concept of constructed value itself is recognized in GATT Article VI:1(b)(ii), and repeated in Antidumping Code, Article 2(d).

47. Antidumping Code, Article 2(d).


51. Antidumping Code, Article 2(d).


54. The case generally credited
with announcing this narrower test is *Cast Iron Soil Pipe*, supra note 42. On the effects of this doctrine, see Fisher, supra note 40, at 104–6.


56. See Antidumping Code Articles 3(a)–(c).

57. The text of Article 3(a) does require authorities to weigh "on the one hand, the effect of dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry." This looks like a "larger-than-all-others-combined" test. For a commentary on the Code test and parallel United States decisions, see Barceló, *Antidumping Laws as Barriers to Trade—the United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 553–57 (1972).


59. *S. Rep. No. 1298*, 93d Cong., 2d Sess. 180 (1976): Moreover, the law does not contemplate that injury from LTFV imports be weighed against other factors which may be contributing to injury to an industry. The words "by reason of" express a causation link, but do not mean that dumped imports must be a (or the) principal cause, a (or the) major cause, or a (or the) substantial cause of injury caused by all factors contributing to overall injury to an industry. In short, the Committee does not view injury caused by unfair competition, such as dumping, to require as strong a causation link to imports as would be required for determining the existence of injury under fair trade conditions.

60. The quotation in the previous footnote seems to straddle these two views. In Commission opinions, one occasionally sees a reference to "the injury" caused by dumped imports, *e.g.*, *Portland Hydraulic Cement from Mexico*, AA1921–161, USITC Publ. 795 (1976), at 3 n.1, but the more common way of expressing the analysis is to talk about the need for some partial contribution to overall injury, *e.g.*, *Birch Three-Ply Door Skins from Japan*, AA1921–150, USITC Publ. 754 (1976), at 10 ("... one must be able to identify the injury as resulting at least in part from the LTFV sales.").


62. The "fair-unfair" distinction affects the entire structure of escape-clause and antidumping remedies. See also note 59, supra.

63. Antidumping Code, Article 4(a).

64. The term "industry" is not defined, but the ITC has long interpreted the term as referring to national production, *ab initio*. See, *e.g.*, the Tariff Commission's report on the compatibility of the Antidumping Code and United States law, *Senate Code Hearings*, supra.
note 13, at 337–42. For a detailed discussion of the ITC's efforts to define "industry," see Krauland, The Standard of Injury in the Resolution of Antidumping Disputes, supra, text accompanying notes 2–24.

65. In Code Articles 3(d) and 4(a), an effort is made to define the industry in terms of the narrowest possible product description. This is a puzzling requirement, in that it makes any given volume of imports appear to be a proportionally larger share of the domestic market than would be true if broader product definitions were used. Although the United States practice looks in theory to any industry that might be injured, it is unlikely that the difference would ever result in an affirmative finding that could not be justified under the narrower Code test.

66. Senate Code Hearings, supra note 13, at 337–42. Perhaps the sharpest contrast would be found in Chromic Acid from Australia, AA1921–32, USTC Publ. 121 (1964), in which none of the United States producers is located in the sector identified as a regional market. One may wonder whether the analysis used in this case—a sort of businessman's idea of different markets based on some degree of price isolation—would be followed today. More recent discussions of the concept appear sensitive to the need for at least some degree of isolation of sales and production. See Portland Hydraulic Cement from Canada, AA1921–184, USITC Publ. 918 (1978).


68. In two recent "thirty-day wonder" proceedings under section 160(c), the Commission did rely on the possibility of a regional industry analysis as one of the reasons why the finding of injury could not be excluded on the basis of available injury data. Perchloroethylene from Belgium, France and Italy, AA1921–Inq.–14, –15, –16, USITC Publ. 904 (1978); Sugar from Belgium, France and West Germany, AA1921–Inq.–20, –21, –22, USITC Publ. 916 (1978).

In the 1978 decision in Portland Hydraulic Cement from Canada, supra note 66, one Commissioner voted to find injury on a regional basis, but the other three Commissioners who voted found no injury.

The Senate Finance Committee report to the 1974 Act treated the issue by way of another dictum, but in this instance it rather conspicuously avoided directing the Commission to apply the concept in all cases. "(T)he Committee believes that each case may be unique and does not wish to impose inflexible rules as to whether injury to regional producers always constitutes
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70. U.S. Const. art. I, § 8, cl. 1 states that “all Duties, Imposts and excises shall be uniform throughout the United States.” The dumping duties in question rested on a 1963 finding that dumped imports had injured a regional industry, located in New York City. Duties were applied on a nationwide basis, including Puerto Rico, as required by 19 U.S.C. § 172 (1976). The statutory command was upheld, with dictum in the Customs Court stating that nationwide application was constitutionally required. Imbert Imports, Inc. v. U.S., 331 F. Supp. 1400 (Cust. Ct. 1971), aff’d, 475 F.2d 1189 (C.C.P.A. 1973).


72. Antidumping Code, Article 9(a).
