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The Antidumping Laws and Principles under the GATT: Protecting Protection, the “Dunkel Drafts” and After the Uruguay Round

Heejang Yoo

University of Georgia School of Law

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THE ANTIDUMPING LAWS AND PRINCIPLES UNDER THE GATT:
PROTECTING PROTECTION, THE "DUNKEL DRAFTS" AND
AFTER THE URUGUAY ROUND

by

HEEJANG YOO

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by

HEEJANG YOO

Major Professor

Date 5/11/93

Chairman, Reading Committee

Date May 17, 1993

Approved:

Gordham L. Patel

Graduate Dean

Date May 18, 1993
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I. INTRODUCTION

Dumping and antidumping responses have become major concerns of the world trading system. The current operative excesses of national regimes are cause for concern. For example, the antidumping rules of the European Economic Community ("EC")\(^1\) 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.\(^2\) Clearly all is not well. In the view of the many, the dynamics of the national trade politics have led inexorably to creeping "procedural protectionism"\(^3\) in antidumping laws, as administering authorities and legislatures develop rules and practices that increasingly tilt decision-making processes in favor of

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domestic interests. These trends are commonly seen in each of the traditional users of the antidumping laws (Australia, Canada, the European Community and the United States), and there are several signs that this form of non-tariff protection is beginning to spread rapidly among developing countries.  

On the other hand, in the growing literature on antidumping policies, there appears to be a presumption that the problem with antidumping policies is mostly caused by the national implementation of international rules. 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 Those who argue that the national rules as instruments of national trade policy are outdated and ought to be abolished should be made to address the question of whether the international principles have also lost their validity.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 an unilateral decision does not necessarily

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4 See generally, Patrick Messerlin, Experiences of Developing Countries with Antidumping Laws (1988).


call into question the role of the international principles. Where the differences in national economies and cultures give rise to different pricing practices, and those practices result in injury to the producers in one country, some mechanism is needed to serve as a "buffer" or an "interface" device,⁷ that will allow different economies to interact without undue disruption to their economy.

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. 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.

However, the traditional antidumping laws have lost their ability to deal effectively with new problems associated with dumping in an increasingly global economy. For example, multinational companies source components and assemble goods in many different countries simultaneously, and they may be able to "circumvent" traditional antidumping protection by shifting source locations or setting up local "screw driver" assembly plants. Without some modification to adapt antidumping laws to economic circumstances of this sort, antidumping measures will increasingly lose their capacity to play an effective interface role in the international trade.

Periods, during which negotiation takes place to formulate reductions in trade barriers under the auspices of the GATT agreement, as well as to amend the articles of the agreement, are called rounds. The word "rounds" connotes that the process of liberalizing trade resembles a fight. The most recent negotiating period conference was the "Uruguay Round" held at the GATT headquarters in Geneva, and originally scheduled to last from the end of 1986 to the end of 1990.

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8 See Willy de Clercq, Fair Practice, Not Protectionism, Financial Times (London), Nov. 21, 1988.
Part II of this paper will review the principles of the GATT\(^9\) and current trends in national implementation. Part III will identify the extent to which antidumping issues have been discussed during the Uruguay Round and to analyze so-called "Dunkel Drafts"\(^{10}\). The purpose of this part is to discuss the issues and to highlight some of the changes by describing the contents of the change and, where appropriate, cross-referencing the change to an existing provision.

With more desirable changes, a better legal framework could be created whereby both existing as well as prospective antidumping laws would be expected to conform to. The suggestions will also be discussed at the end of the part III of this paper.

That the control of national antidumping regimes is currently the most important aspect of the international principles (and has been since the 1960s).\(^{11}\) The national antidumping actions need to examine the effect of imports on


\(^{11}\) See Ross Denton, supra note 6, at 224.
competition, and not only on competitors. Such an obligation could be undertaken either unilaterally by nations or as a result of international agreement.

Part IV concludes that it is important to return to the original principle\textsuperscript{12} of the trade liberalization, even if such a principle under the GATT has been in large part discredited.

\textsuperscript{12} See J. Jackson, Dumping: Substantial Reform of GATT Antidumping Code seem to be Difficult to Achieve in Uruguay Round, 7 ITR 397 (1990).
II. ANTIDUMPING LAWS AND THE CURRENT TRENDS IN IMPLEMENTATION

A. International Antidumping Laws

The General Agreement on Tariffs and Trade\textsuperscript{13} (GATT or General Agreement) is recognized as 'the most important agreement regulating trade among nations'.\textsuperscript{14} It is intended to facilitate the development of world resources; raise standards of living; increase real income; and expand the production and exchange of goods.\textsuperscript{15} To achieve these objectives, GATT is directed at "the substantial reduction of tariffs and other barriers to trade and to the

\textsuperscript{13} See supra note 9.


\textsuperscript{15} See GATT, supra note 9, preamble.
elimination of discriminatory treatment in international commerce".\textsuperscript{16} GATT has been surprisingly successful. Despite a tumultuous beginning and endemic structural frailties, GATT "has arguably done more over the past 40 years to promote the cause of peace and prosperity than any other international body".\textsuperscript{17}

One of the barriers to free trade that GATT seeks to eliminate is the "dumping" of merchandise by one country into another country's market. Stated generally, dumping is the sale of products in a foreign market at a price less than "the normal value of the products" in the home market.\textsuperscript{18} This prohibition is predicated on the assumption that dumping is not based on superior efficiency but is an attempt to injure or destroy competition.\textsuperscript{19} GATT permits a country to respond to dumping that causes or threatens

\begin{itemize}
  \item \textsuperscript{16} Id.; see also J. Jackson \& W. Davey, supra note 7, at 8.
  \item \textsuperscript{17} See The Times (London), Feb. 8, 1991, at 21 (International Chamber of Commerce stating that GATT "has powered the greatest expansion of global living standards in the history of humankind").
  \item \textsuperscript{18} GATT, supra note 9, art. VI, para. 1(a); J. Jackson, World Trading System, supra note 14, at 221. Where no comparable home market price exists, GATT allows the use of production costs in the country of origin or market prices in comparable countries to determine whether dumping has occurred. See GATT, supra note 9, art. VI, para. 1(b).
  \item \textsuperscript{19} For a detailed discussion of why a foreign company would want to dump, see text accompanying notes 65-69 infra.
\end{itemize}
material injury to domestic industries by levying a duty on
the product "not greater in amount than the margin of
dumping in respect of such product".20

The General Agreement on Tariffs and Trade was
completed and signed as an international trade agreement on
October 30, 1947.21 Originally, GATT was intended to be
subordinate to the yet unfinished International Trade
Organization (ITO)22 and was not to come into effect until
the ITO was established formally.23 For numerous reasons,
however, many negotiators argued that GATT should be brought
into force as soon as possible.24 To placate their

20 GATT, supra note 9, art. VI, para. 2.

21 GATT, supra note 9; see also K. Dam, The GATT: Law and
International Economic Organization 335 (1970) (GATT not
organization but merely multilateral agreement); J. Jackson,
World Trade, supra note 14, at 35-57.

22 J. Jackson, World Trading System, supra note 14, at
32-34. The ITO charter was to be completed in 1948.
In addition to imposing a "code of conduct" on
government restraints on international trade, the ITO was
intended to collect statistics, produce uniform definitions
and classifications, issue guidelines for customs valuations,
and resolve trade disputes.
; see also A. Lowenfeld, supra note 14, at 16.

23 See J. Jackson, World Trading System, supra note 14,
at 32-34; see also J. Jackson, World Trade, supra note 14, at
62 (governments have authority to agree to lower tariffs but
cannot, without parliamentary approval, agree to nontariff
barriers of GATT); J. Jackson & W. Davey, supra note 7, at 295
(discussing requirement of parliamentary approval).

24 The principal reason was the concern for getting the
tariff reduction portions of the General Agreement in
operation quickly. See Second Session of the Preparatory Comm.
of the United Nations Conference on Trade and Employment (1st
concerns, GATT was to be applied provisionally until a definitive application could be achieved. As a provisional measure, GATT was to have limited force and would not affect a contracting party's prior legislation that was inconsistent with the General Agreement. It was assumed that when the ITO charter finally was submitted, GATT would be submitted for "definitive" application as well.

However, this plan did not materialize as envisioned. The ITO charter never was approved, largely because of opposition in the United States Congress, thrusting the dual roles of multinational trade agreement and


See J. Jackson, World Trading System, supra note 14, at 35.

This agreement provided that contracting parties would undertake to "apply provisionally on and after 1 January 1948: (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation."

See Rogoff & Gauditz, The Provisional Application of International Agreements, 39 Me. L. Rev. 29, 67 (1987); see K. Dam, supra note 21, at 342 (The Protocol is "one of the principal weaknesses of the General Agreement as a codification of a rule of law in economic affairs").


See A. Lowenfeld, supra note 14, at 20-21; see J. Jackson, World Trade, supra note 14, at 50.
international organization upon GATT. GATT has lumbered along in this dual capacity without adequate legal structures or a basic constitution for over forty years.

1. The Principles of GATT

First of all, trade liberalization is the fundamental point in terms of modern international economic relations. "Liberal trade" is committed to minimizing the amount of government interference in trade crossing national borders. GATT explicitly endorses this principle in its preamble, stating that the General Agreement is directed toward the "substantial reduction of tariffs and other barriers to trade". As such, GATT generally is opposed to

29 See J. Jackson, World Trading System, supra note 14, at 33, 38 (although intended as multilateral treaty, GATT is international organization); see also J. Jackson, World Trade, supra note 14, at 119-22 (discussing whether GATT is international organization).

30 See J. Jackson, World Trade, supra note 14, at 51 (upon failure of ITO, GATT found itself without adequate legal and constitutional base); J. Jackson, World Trading System, supra note 14, at 38 (GATT lacks basic "constitution" designed to regulate its organizational activities and procedures).

31 See J. Jackson, World Trading System, supra note 14, at 8.

32 Id.

33 GATT, supra note 9, preamble; see also A. Lowenfeld, supra note 14, at 23 (GATT committed to keeping government restraints of trade to minimum).
both tariff\textsuperscript{34} and nontariff barriers.\textsuperscript{35} Although the preferred approach is simply to prohibit nontariff barriers,\textsuperscript{36} regulation of the barrier is a viable alternative where prohibition is not feasible due to the complicated or controversial nature of the barrier (as is true with antidumping laws).\textsuperscript{37} Furthermore, the only changes in trade permissible under GATT are those reducing the obstacles to free trade.\textsuperscript{38}

Another fundamental principle of GATT is nondiscriminatory trading.\textsuperscript{39} Specifically, all contracting parties are obligated to treat all other contracting parties equally\textsuperscript{40} and to accord products of foreign origin no less

\begin{footnotesize}
\textsuperscript{34} See K. Dam, supra note 21, at 17.

\textsuperscript{35} See id. at 19. Nontariff barriers are impediments to the free flow of goods or services in international trade other than tariffs, such as dumping, government subsidies, and quotas. see L. Glick, Multilateral Trade Negotiations: World Trade After the Tokyo Round 7 n.6 (1984).

\textsuperscript{36} See K. Dam, supra note 21, at 19.

\textsuperscript{37} See id. at 19-20.

\textsuperscript{38} See A. Lowenfeld, supra note 14, at 23 ("Government restraints on the movement of goods should be kept to a minimum, and if changed, should be reduced, not increased").

\textsuperscript{39} See GATT, supra note 9, preamble (GATT directed at "elimination of discriminatory treatment in international commerce"); A. Lowenfeld, supra note 14, at 23 (same).

\textsuperscript{40} This principle is known as "most-favored-nation" treatment. see GATT, supra note 9, art. I.
\end{footnotesize}
favorable treatment than products of domestic origin. A primary motivation behind this principle is to prevent domestic taxes and regulatory policies from being used as protectionist measures.

Finally, GATT is founded on the principle that conditions of trade should be discussed and agreed on within a multilateral framework. As mentioned in the introduction, Part I, GATT provides for multilateral tariffs and trade negotiations, or "rounds", that are "reciprocal and mutually advantageous" to all contracting parties and are aimed at the substantial reduction of trade barriers.

See GATT, supra note 9, art. III ("The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use"). This principle is known as "national treatment."


See A. Lowenfeld, supra note 14, at 23.

These principles are subject to various qualifications and corollaries. Nevertheless, one cannot assess the validity of action by a contracting party that may affect international trade adversely or impinge upon the rights and obligations of another contracting party except by reference to the fundamental principles of liberalization, nondiscrimination, and multilateral negotiation.

2. GATT and the Antidumping Laws

a. The Policies Underlying Antidumping Laws

Antidumping laws are a type of "market corrective", providing a remedy when a foreign industry engages in certain unfair acts to the detriment of a domestic industry. These acts are viewed as deviations from the "natural" rules of efficient and competitive markets. Antidumping laws, therefore, correct "exceptional events" by imposing a duty raising the low price of imports to what it

\[ \text{\footnotesize See A. Lowenfeld, supra note 14, at 24-27 (discussing exceptions, grandfather clauses, and special cases).} \]

\[ \text{\footnotesize See Daniel K. Tarullo, Beyond Normalcy of International Trade, 100 Harv. L. Rev. 547, 549 (1987).} \]

\[ \text{\footnotesize See id.} \]
should have been if the foreign producer had operated under the "normal" conditions of competitive markets.⁴⁸

Generally, there are three types of dumping: sporadic, continuous, and predatory.⁴⁹ Sporadic dumping is the occasional sale of overstock at low prices in a "fire sale" fashion.⁵⁰ In this situation, a foreign producer unloads overstock in a nondomestic market so that its domestic price structure is not endangered.⁵¹ In contrast, a foreign producer who dumps continuously assumes that its long-term costs will be reduced if it manufactures a large number of

⁴⁸ See id., at 550.; "Normal" conditions are those conditions prevailing without government intervention.

⁴⁹ See J. Viner, Dumping : A Problem in International Trade 1-22 (1966); Fisher, The Antidumping Law of the United States: A Legal and Economic Analysis, 5 Law & Pol'y Int’l Bus. 85, 88- 89, 144 (1973) [hereinafter Fisher, Antidumping Law]; Fisher, Dumping: Confronting the Paradox of Internal Weakness and External Challenge, in Antidumping Law: Policy and Implementation 11, 13 (1979) [hereinafter Fisher, Confronting the Paradox]. Some delegates at the drafting of GATT argued that treatment should vary according to the type of dumping. They proposed limiting the restriction on dumping under article VI to only the practice of "systematical dumping".


items, thus realizing maximum economies of scale.\(^{52}\)

Provided a product's average price exceeds its average cost of production, the producer is assured a sustained profit from overall sales.\(^{53}\) Finally, predatory dumping is used to strengthen or secure a foothold in a nondomestic market by forestalling the development of competition or by eliminating existing competition entirely.\(^{54}\) A foreign producer will sell its product abroad at prices below marginal cost for brief periods, driving out competitors.\(^{55}\) Once competition is limited severely, the foreign producer then charges monopolistic prices for the product in the target market, thus recouping its losses.\(^{56}\)

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\(^{52}\) See Fisher, Antidumping Law, supra note 49, at 89.

\(^{53}\) See id. Whether antidumping laws should regulate continuous dumping also is contested. Compare Fisher, Confronting the Paradox, supra note 49, at 13-14, 23 (arguing that continuous dumping scheme cannot endure without government regulation) with Barcelo, supra note 50, at 75-77 (products continuously dumped indistinguishable from other imports).

\(^{54}\) See Fisher, Confronting the Paradox, supra note 49, at 13.


\(^{56}\) Monopolistic pricing can be sustained only if there are high barriers to market entry. "[I]t is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors . . . ." Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 589 (1985).
For decades, injurious dumping has been considered unfair. Both international and domestic rules have developed permitting duties to be levied to offset such practices, even though the distinction between "fair" and "unfair" trade increasingly has become blurred. The prevailing explanation of why dumping practices are unfair is based on market efficiency. Normally, those enterprises that survive are the most efficient and thus deserve the benefits of their efficiency. When, by means of dumping, a producer receives benefits for reasons other than superior efficiency, the market's normal function is undermined. A producer, being able to reduce prices below cost because of a subsidy received from higher prices elsewhere is deemed to

While it generally is agreed that predatory dumping is condemnable and should be regulated, the issue is still debated. Compare Fisher, Confronting the Paradox, supra note 49, at 13 (consensus is that predatory dumping is unfair trade practice) with Barcelo, supra note 50, at 65-69 (same) and Barcelo, supra note 55, at 500-02 (arguing that duties to counteract predatory dumping produce chilling effects on price competition and should be cautiously applied).

57 See J. Jackson, World Trading System, supra note 14, at 217.; A. Lowenfeld has described the practice of dumping facetiously as the "premier sin of international trade." Lowenfeld, Fair or Unfair Trade: Does it Matter?, 13 Cornell Int'l L.J. 205, 206 (1980).

58 See J. Jackson, World Trading System, supra note 14, at 217; J. Jackson & W. Davey, supra note 7, at 648; See Lowenfeld, id., at 206.

be operating "unfairly". Other producers should not be forced to bear the loss from such unfair competitive practices.\(^60\)

Trade laws aimed at unfair dumping practices typically seek to "level the playing field"\(^61\). Implicit in this concept is the notion that a business that sells the same product at different prices to different persons is acting unfairly,\(^62\) and that it must set a single, universal price based on the cost of production.\(^63\) In particular, these laws attempt to prevent predatory "price gouging"\(^64\) by which a large, economically powerful firm uses other aspects of its business to subsidize lower prices for a particular product to undersell small businesses competing in the same market,

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\(^60\) See Hudec, id., at 206.

\(^61\) J. Jackson, World Trading System, supra note 14, at 218. By attempting to "level the playing field," a government seeks to preserve competitive markets from foreign governments advancing their own national objectives through subsidies or from foreign manufacturers engaging in noncompetitive practices by dumping. See id., at 217.

\(^62\) See id. at 223; Jackson, Dumping in International Trade, supra note 7, at 1, 4.

\(^63\) See Barcelo, supra note 50, at 59. Barcelo calls this the "most important misconception about dumping".

eventually reducing competition so in the long run it can raise prices and reap monopoly benefits. 66

While the theoretical rationale behind antidumping laws may be sound, 66 their practical application is considerably more problematic because not every instance of differential pricing represents economic inefficiency or predatory intent. "[T]here can be dumping for honorable and rational enterprise motives of competitive profit maximization." 67 For example, a rational, nonpredatory supplier may set different domestic and export prices in response to varying demand conditions in a genuine effort to maximize profits. 68 Likewise, a corporation may be forced to dump because it perceives technological change to be


66 This rationale is subject to the assumption that predatory pricing permits an enterprise to hold on to its price-cutting advantage long enough to recoup its initial losses. Generally, see Esterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 265-76 (1981) (discussing the likelihood of the recoupment to make predation profitable).


68 See K. Dam, supra note 21, at 170 (difference in price may reflect differences in competitive conditions); Barcelo, supra note 50, at 59 ("A rational, nonpredatory supplier may dump merely because he is responding to different demand conditions in a genuine effort to maximize profits.").
moving so quickly that it must sell its inventory of a particular product or run the risk of its obsolescence. 69
Finally, a corporation may price a product lower in a particular foreign market simply to meet competition in that market. 70

Insofar as antidumping laws fail to distinguish procompetitive from anticompetitive dumping, their ultimate effect will be higher consumer costs. 71 Therefore, the policies underlying antidumping laws often may be at odds with the policies embodied in other laws governing trade, particularly antitrust laws. 72 Antitrust laws generally are intended to benefit consumers. 73 Antidumping laws, on the other hand, protect domestic competitors from low-priced imports even when such protection does not benefit consumers


70 See K. Dam, supra note 21, at 168.

71 See Barcelo, supra note 55, at 501 (mere existence of antiprice discrimination laws produces some chilling effect on price competition).

72 See E. Vermulst, The Antidumping Systems of Australia, Canada, the EEC and the USA, supra note 64, at 425, 459.

73 See Fox & Sullivan, Antitrust— Retrospective and Prospective: Where Are We Coming From? Where Are We Going?, 62 N.Y.U. L. Rev. 936, 957 (1987) (economics tool that can help keep antitrust system on course to help consumers and to facilitate dynamic competition).
or enhance competition. Antitrust policy favors vigorous competition from all sources, including imports. Antidumping policy seeks to protect domestic competitors from unfair foreign price discrimination and is skeptical of vigorous import competition. These policy differences often come into sharp conflict, especially when antitrust laws are viewed as a desirable substitute of remedying antidumping activities, particularly in dealing with unreasonably low price. This argument will be discussed in section C, part III infra.

b. Antidumping Epitome

Special provisions specifically directed at dumping were added during the negotiations of the General Agreement

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74 See K. Dam, supra note 21, at 168 (dumping concerned with protection of domestic industries from international competition).

75 See notes 14 and 94.


in 1947. After several drafts, Article VI was finalized to provide:

The contracting parties recognize that dumping, by which products of one country 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.... In order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping....

As worded, Article VI is an "exception" to GATT, allowing measures that contravene GATT's general principles of trade liberalization and nondiscriminatory treatment.

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These special provisions were approved by the negotiators because "[t]here was general consent among the majority of the countries in the discussions on Anti-dumping ... Duties that circumstances might arise in which such duties may properly be applied.".

79 See J. Jackson, World Trade, supra note 14, at 405-06.

80 GATT, supra note 9, art. VI, paras. 1-2.

81 See EEC--Regulation on Imports of Parts and Components, GATT Doc. L/6657 para. 5.17 (1990) (describing article VI as exception to General Agreement).

82 See J. Jackson, World Trade, supra note 14, at 411. Article VI is an exception because antidumping duties are applied in addition to the normal duty imposed on the imports from the country concerned. As a result, imports from the dumping country are treated less favorably than imports of nondumping countries, thus deviating from the GATT norm of nondiscriminatory treatment.

See A. Lowenfeld, supra note 14, at 155.

Furthermore, because article VI permits governmental interference through the imposition of antidumping duties, it
But the article also is careful to limit the scope of this exception by imposing an affirmative obligation upon GATT contracting parties to use only narrowly circumscribed measures to counteract dumping.\(^83\)

Because antidumping duties easily can be used as a protectionist device,\(^84\) the GATT contracting parties occasionally have attempted to update the antidumping laws to respond to the realities of international economic relations. Following the failure of a previous Antidumping Code,\(^85\) the contracting parties negotiated the Antidumping Code is somewhat incongruous with GATT's principle of trade liberalization.

\(^83\) See J. Jackson, World Trade, supra note 14, at 411; see also EEC-Regulation on Imports of Parts and Components, GATT Doc. L/6657 para. 5.17 (1990) (article VI recognizes legitimacy of certain policy objectives but at same time sets out conditions as to obligations that may be imposed to secure attainment of that objective).

\(^84\) See J. Jackson, World Trading System, supra note 14, at 226. Problems often result from antidumping procedures such as miscalculations of the margin of dumping and inaccurate injury determinations. Such activity can cause distortions of international trade and transform the antidumping duties into a protectionist device.

\(^85\) The Antidumping Code of 1967 was negotiated as part of the Kennedy Round (1962-1967) of trade negotiations. See Agreement on Implementation of Article VI of the GATT, GATT Doc. L/2812 (1967), reprinted in BISD, supra note 9, at 24, 24-35 (15th Supp. 1968). It generally is agreed that the Antidumping Code of 1967 and the Kennedy Round were unsuccessful in reducing nontariff barriers. See L. Glick, supra note 35, at 8 (little progress in nontariff arena at Kennedy Round); J. Jackson, World Trade, supra note 14, at 229 ("[T]he Kennedy Round made little dent on the plethora of ingenious nontariff barriers . . . ."); J. Jackson, J. Louis & M. Matsushita, Implementing the Tokyo Round 164 (1984) (United States not living up to its 1967 antidumping Code..."
Code of 1979, which provides for significant procedural and administrative changes designed to guard against protectionist abuse in the administration of the antidumping laws.

Together, GATT and the Antidumping Code require a showing of a disparity between a product's export price and its "normal" price and proof of material injury or threat of material injury to the competing domestic industry. If both conditions are met, the importing country may apply antidumping duties. Thus combined, article VI of GATT and obligations).


See L. Glick, supra note 35, at 110-11.

The "normal" price is usually the "home market price." See GATT, supra note 9, art. VI, para. 1(a); J. Jackson, World Trading System, supra note 14, at 227.

See GATT, supra note 9, art. VI, para. 1. Injury is based on positive evidence and an objective examination of the volume of the dumped imports, their effect on prices in the domestic market, and the impact of those imports on domestic producers. Antidumping Code of 1979, supra note 86, art. 3, para. 1.

See J. Jackson, World Trading System, supra note 14, at 227. Such duties must remain consistent with the rules in GATT and the Antidumping Code of 1979. See id. at 227-28. Note that GATT does not impose an obligation on contracting parties to act when dumping occurs. Rather, it
the Antidumping Code of 1979 represent the current international commitments concerning dumping and provide the means of redress available to contracting parties.\(^{91}\)

B. The Current Trends and Inadequate Relief

1. Wide Spread Use of Antidumping Laws

It is clear that the antidumping code is too vague due to the ambiguity of the terminology. This vagueness has allowed the national jurisdictions to implement unilateral interpretations, either in law or in practice, and claim GATT consistency where it may not be exist. In the absence of clear guidance from the code, such claims are hard to refute.

It would seem that many of the interpretations adopted by the four jurisdictions (the United states, the E.C., Australia and Canada) either clarify unclear and opaque elements of the antidumping code or deal with issues that were simply not addressed in the code.

The difficulty with these unilateral interpretations is that they typically go in the direction of facilitating merely permits them to act against dumping.

\(^{91}\) See J. Jackson, World Trading System, supra note 14, at 227. The Antidumping Code, like all other codes resulting from the GATT Rounds, is not an amendment to GATT but is a "stand-alone" treaty binding in theory only upon those GATT parties who are signatories to that code.
antidumping findings and/or expanding the scope of antidumping measures. This problem is exacerbated by the fact that interpretations proposed in one jurisdiction may be justified on the ground that other jurisdictions have adopted similar or even broader interpretations. As a result, after twenty years of use, the code has led to the evolution of four hybrid systems in the United States, the E.C., Australia and Canada. Moreover, rules of GATT are subject to use Antidumping procedures because they are static, fixed for over a decade and exposed to abuse by import-competing firms with the motive, money and the time to find and exploit their loopholes. As with the political constitutions, what counts is less the rules themselves than the balance established between the institutions of relatively equal power but driven by different motives. There is no balance in the current GATT Antidumping rules: firms are the driving force of the mechanism; the public authorities are merely its enforcers.  

Meanwhile, 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

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exploiting a monopoly). Unfortunately, the current system cannot differentiate between good and bad cases of price discrimination, as discussed in section 2 supra. 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.

A grave flaw in the current antidumping scheme is its failure to deter injurious dumping adequately.\(^\text{93}\) Presently, dumping is a risk-free, no-lose proposition to the extent that relief is entirely prospective.\(^\text{94}\) Moreover, foreign companies have been ingenious in their ability to circumvent the imposition of even a prospective antidumping duty. Whatever the countries do with respect to legislation, companies are always many years ahead. Evasive activities include "hit and run" dumping,\(^\text{95}\) inventory dumping,\(^\text{96}\) short


\(^{94}\) See Hearing on S. 1655 Before the Subcomm. on International Trade of the Senate Comm. on Finance, 99th Cong., 2d Sess., at 58 (testimony of Barton C. Green, General Counsel and Secretary, American Iron and Steel Inst.) (1986); id. at 65 (testimony of William Knoell, President and Chief Executive Officer, Cyclops Corp.); 133 Cong. Rec. S5615 (daily ed. Apr. 28, 1987) (statement of Sen. Specter).

lifecycle dumping, diversionary dumping and strategic dumping.

"Hit and run" dumping occurs most often in cyclical and seasonal markets. Where there is a sharp, sudden, and cyclical downswing in demand, there is a major incentive for companies to increase export sales, even below fully allocated costs. This may be done to minimize a seasonal devaluation in the price of a product. In this instance, any damage to a domestic industry occurs before any antidumping action can be prepared and filed. In inventory dumping, foreign manufacturers can dump inventory by setting up subsidiary companies in the United States to import

Partner, Steptoe & Johnson). see also, Alford, supra note 77, at 698.


98 See R. Alford, supra note 77, at 696. ; see also T. Vakerics, D. Wilson & K. Weigel, Antidumping, Countervailing Duty and Other Trade Actions, 24 n.66 (Supp. 1989) (diversionary dumping subject to new 1988 laws when parts sent to third country to be made into final product or when third country used to circumvent antidumping order on final product).

inventory and sell merchandise manufactured in the foreign plant. Dumping occurs from the domestic subsidiary only after the merchandise has passed through customs. Because duties can be imposed only upon the crossing of a border, such activity is immune from any possibility of a duty. Short life-cycle dumping occurs when there is a fast turnover of or a short life span of a product because of expanding technology. By the time a dumping case can be brought, the market has moved on to the next generation of products. Diversionary dumping occurs when a foreign industry sends its product into another market to avoid the preexisting duty that would be imposed on the product if it were imported directly into the country from the country of origin. In the type of strategic dumping, producers do not cover the incremental or variable costs of serving the low-cost market. The incremental profit from the sales of the product in another market is negative, and the additional cost of the later market exceeds the additional earnings that come from that market. Such pricing may seem irrational, but in fact may be part of a long term, strategic plan for growth. Indeed, the new thinking in trade policy argues that comparative advantage no longer adequately explains the trade flows seen in the world today. More powerful explanations of trading patterns are "scale economies" in production (which can occur irrespective of

100 See S. Benz, id.
comparative advantage), cumulative experience conferred on first movers, and the advantage of innovation. . . . Certain industries may generate important spillover effects in the rest of the domestic economy, particularly in the area of improved technology.

It could be argued that such dumping is most likely to occur as a direct result of government policy. However, large conglomerate corporations would be capable of exploiting the gains from expanding the scale of production, benefiting from the learning by doing experience (learning curve experience), and from entering the market before competing producers.

The existing prospective remedy cannot prevent such dumping activity because the foreign industry has raised its prices above the discriminatory level by the time a dumping proceeding is brought or a final order is issued. One proponent of retrospective remedies for dumping noted that the pendency of a dumping case actually encourages a foreign producer to ship in as much as it can prior to the conclusion of the case and the issuance of the final dumping order to avoid any duty.\(^1\)

Wide spread use of Antidumping procedures in four jurisdictions occurs because, in comparison to safeguard

laws, access to Antidumping procedures is easier, requirements more transparent, and the probability of an unexpected outcome lower. Also, while Antidumping is a less efficient instrument than a non-discriminatory action, it will have some protective effects, especially in the short term.

Particularly, in the European Community antidumping legislation is the most attractive route for firms to take if they desire to obtain relief from import competition, as private parties do not have direct access to the safeguard laws in the E.C. One might expect that safeguard procedures should be more attractive to firms hurt by import competition than Antidumping. There is an extra burden of proof associated with Antidumping: showing that dumping has occurred. Both procedures require that injury be demonstrated. Also, it may not be much of a constraint to demonstrate that dumping has occurred as it can be expected to take place under a wide variety of circumstances. Further, to the extent that methods of determining the dumping margins by the investigators are flexible, demonstration of dumping may even be possible in cases where home and foreign price are identical. In EC investigations,

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typically, procedures appear to be biased in terms of both finding dumping and determining dumping margin.\textsuperscript{104}

Given that establishment of dumping often may not be much of a constraint, all the other procedural aspects of dumping laws are more likely to lead to a positive finding than those under safeguard procedures. The latter is subject to political discretion, as there is a need to take into account retaliation or compensation. GATT language\textsuperscript{105}, after all, allows the retaliation if emergency protection is imposed in those cases where compensation has not been offered, or is deemed to be inefficient. This is not the case under Antidumping procedures since dumping has been defined to be counteravailable as long as injury can be shown.\textsuperscript{106}

But the injury requirement of Antidumping procedures is less stringent (easier to satisfy) than the one under safeguard procedures. Art. XIX of the GATT speaks of "serious" injury, while Antidumping language (Art. VI) speaks of "material" injury. Neither is well defined, but in national implementing language, the serious injury is a more stringent criterion than the material injury.\textsuperscript{107} Also, in

\begin{itemize}
  \item \textsuperscript{105} See GATT, supra note 9, art. XIX.
  \item \textsuperscript{106} See B. Hoekman and M. Leidy, supra note 102, at 38.
\end{itemize}
the safeguard procedures, most countries require policymakers to take into account the effect of imposing protection on the economy as a whole. This will reduce the likelihood of an affirmative action. Related to this is the possibility that foreign policy considerations may inhibit action on the part of the policymakers. This is less likely to occur in the case of Antidumping. The laws stipulate the necessary conditions for an affirmative finding. If these are met, Antidumping duties will be imposed (unless a VER, Voluntary Export Restraint, is negotiated or the exporter makes an undertaking to remove the injury). If they are not met, a negative determination will follow. Furthermore, antidumping actions are permanent in the sense that there is no automatic degressivity of the measures imposed or time limits to these actions.

Finally, domestic import competing firms may prefer Antidumping laws because provisional measures are available. Even if the investigation determines that no injury occurred, provisional measures may be sufficient to inhibit exporters. In the first place, these provisional measures may lead to substitution of demand away from the products under investigation. Once trading relationships have been severed, they may be difficult to re-establish. Also, risk-averse importers may not want to be affiliated with producers that are "tainted", and that may be the target of

Discussion, Paper No. 190, U. of Mi. (1986).
other actions. Secondly, the existence of provisional measures tends to increase the pressure on the exporters to agree to a VER. From the perspective of international trade, VERs (GATT-incompatible measures) are dangerous because they create a "coalition for protection" between the exporters and the import-competing industries, getting benefits from the guaranteed market share.

2. Strategic Use of the Antidumping Measures

a. Corporate Strategy

Antidumping measures could be favored in corporate strategies because it offers import competing firms a powerful instrument for raising their rivals' costs. Domestic industries seek to reduce price competition in their market by pursuing antidumping actions to coerce foreign suppliers to maintain minimum import prices.\(^{108}\)

Anticircumvention rules provide a good example. If adopted, as in the Dunkel Drafts, these rules would force the efficient firms to invest in countries that have no initial comparative advantage. The ultimate consequence would be that foreign firms would be induced to forgo any possibility of arbitrage in the future among the markets supplied by their various plants; in other words, the

\(^{108}\) See P. Messerlin, supra note 92, at 126.
results would be to create the trade barriers for the lifetime of the plants.

Another strategic use involves plants specializing in export sales. The profitability of such plants can be hurt by antidumping measures restricting their exports. If there is no other way to divert the plants' output without incurring large losses, the plants' value - and possibly that of the exporting firm's assets generally - will be artificially reduced; thus opening the door for the original complainant to buy the plant at an artificially low price and then restore the plant to profitability by securing the removal of the antidumping measures. And the explanation of subtle antidumping action might be that complaints try to persuade the exporting nation to remove the barriers that facilitates the domestic monopoly power in that country. They utilize antidumping measures for the competitive purposes.  

b. Getting away with the legal traps of antidumping law and sec. 482 of the U.S. Internal Revenue Code (Circumvention and Circumvention)

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109 Id. at 127.

110 See R. Denton, supra note 6, at 225.
Under the U.S. antidumping law, if the sales price a U.S. affiliate charges to the first unrelated purchaser in the United States is too low, the product may be found to have been "dumped" in the U.S. market. On the other hand, the transfer price for products imported into the United States from an affiliate is too high, then the U.S. importer can run into Sec. 482 of the Internal Revenue Code. I want to point out the reasons for, and the mechanics of, the two statutory provisions and how U.S. companies (subsidiaries) may seek to avoid the traps of these two laws.

When sales are made by a foreign producer to a related U.S. company, the antidumping law does not examine the transfer price between the two related parties; rather, it examines the first arm's-length transaction in the U.S. (in other words, the sales price charged to the first unrelated U.S. purchaser). Using the price to the first unrelated purchaser avoids the problems inherent in using transfer prices, which can reflect objectives regarding the distribution of income within a corporate family, rather than market value of the product concerned. Transfer price may be a factor in the calculation of certain charges and adjustments to the price charged to the first unrelated purchaser. This price may be subject to scrutiny in an

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112 See sec. 482, I.R.C. (Internal Revenue Code).
antidumping investigation if the merchandise imported by the foreign firm’s related U.S. affiliate undergoes further manufacture or assembly in U.S. prior to its sale to the first unrelated U.S. purchaser. 113

A foreign manufacturer with a U.S. affiliate tries to minimize the risk and potential magnitude of a tax adjustment or antidumping duty liability. Regarding the antidumping law, to avoid the antidumping liability the point for pricing is to ensure that U.S. price are not generally lower than prices comparable goods in the home or the third country markets. The lower U.S. prices are in relation to home and third country prices, the more likely that it could be found to be dumped in U.S..

The way to avoid the dumping allegations by U.S. producers and the antidumping duties is to charge a relatively high price to unrelated purchasers in U.S.. However, the higher that price is in relation to the transfer price between the U.S. company and its foreign affiliate, the greater the U.S. affiliate’s potential tax liability. To minimize the tax liability under these circumstances, the related U.S. and foreign companies may decide to increase the transfer price. However, if the transfer price is increased, it would be more likely to be found the underpayment of income taxes for the U.S. treasury.

By establishing both internal transfer prices and external prices to unrelated customers, the efforts, to avoid the collision with either or both antidumping and tax laws, seem to be continued. And also, a transformation of U.S. subsidiary into a "branch" becomes a trend in favor of both matters of jurisdiction and tax minimization, particularly relating to the foreign manufacturer with a U.S. affiliate.

c. Bilateral Agreement

On the other hand, far from the protectionism being on the wane, bilateral agreements appear to be the norm in solving the world trading problems. 114 Despite the contracting parties' commitment to a standstill on trade restricting measures during the course of Uruguay Round, so-called "gray area" measures comprising Voluntary Export Restraints, market-sharing arrangement, and the other measures designed to circumvent GATT rules continue to proliferate, bringing to an estimated 50 percent the share of the world merchandise trade that is in effect "managed" in one way or other. 115 These trends have not helped meaningful progress of the multilateral negotiation. We must


115 Id.
note the rise of "process protectionism", the threat of or the recourse to measures such as antidumping duty investigations designed to discourage imports or provoke export restraints. Bilateral deals such as the U.S.-Canada Free Trade Agreement impinge on the area previously regulated under the GATT and also raise questions about the role of the bilateral agreement in the open global trading system based on the principles of the non-discrimination and most-favored nation treatment. 116 For the developing countries, these deals must be considered that the fear of the "fortress Europe" will be realized if the other major trading powers of the world unite in an economic arrangement that provokes the E.C. into adopting more restrictive policies. 117

3. Inadequacy of Antidumping Laws.

U.S. national antidumping law, exercised under the auspices of the GATT 118, may no longer be up to its

116 See GATT, supra note 9, Art. III, Para 1 and Art. I.


assigned task. Indeed, the GATT antidumping code was drafted long ago to deal mainly with goods that could be dumped on to the dockside in sacks. The code cannot cope with high-tech products whose prices reflect obsolescence measured in months and are exported through complex worldwide networks by firms.\(^{119}\)

At the same time, antidumping law may be largely inadequate in addressing the results of what in many cases is a systemic, coordinated industrial strategy. Since U.S. antidumping law is only effective in one national market, it is seriously limited; it is overinclusive and its remedies are of limited benefit to producers since they provide no help in third markets. The reasons for such inadequacy are as follows.

First, for instance, U.S. antidumping law is overinclusive in that it makes even above-cost price discrimination between national markets, where demand elasticities are unmatched, vulnerable to attack. This can occur because dumping under the 1921 Antidumping Act does

\[^{119}\text{See Protectionism's Clever Wheeze, ECONOMIST, Dec. 3, 1988, at 16.}\]
not require a finding of below-cost sales. Instead, a sale of a product at "less than fair value" (LTFV) can be found even if the foreign producer price is profitable.  

Pricing activity that can violate the 1921 Antidumping Act is much clearer (even if theoretically suspect) than pricing activity which can constitute predation under the Sherman Act. As a result, a dumping violation may exist even where a predatory pricing violation of the antitrust laws has not taken place; a situation in which pricing is not below average variable or marginal cost may constitute dumping, but not predation.

Another limitation of national antidumping law is that duties can only be applied in each national market. While large, duplicative transaction costs are involved in prosecuting each antidumping case, below-cost pricing activity may continue in third-country markets where the antidumping remedy is not available or has not been invoked.

Moreover, although the successful prosecution of an antidumping case does result in the imposition of additional duties, thus raising the domestic price of the dumped product, antidumping remedies are limited in that the duties do not directly benefit the injured producer. The cost of an antidumping action falls on the producer in the low-price

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120 19 U.S.C. s 1677(b) (1982).

market, and a successful action merely restores its competitive position.

Also, the dumping laws are reactive rather than preemptive and do not take effect for a number of months after dumping has commenced. Antidumping duties can be applied prospectively only, and do not remedy injuries from the past.

Finally, the clearest indication of the failure of the antidumping laws to prevent the predatory behaviors through dumping is shown by the fact that following repeated dumping campaigns,

a number of foreign companies have captured a

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123 As a result of time constraints, the Commerce Department may not impose a duty reflecting the actual dumping margin until two years or more have passed since the dumping practice began. See Howell, Benz & Wolff, Id., at 251 n. 146. A successful antidumping case results in a final affirmative determination and the imposition of an ad valorem duty, which may decline if the price of the dumped commodity continues to go down. The final duty may be raised to accommodate this phenomenon, but only following a statutory annual review which occurs more than one year following the final affirmative determination. 19 U.S.C. s 1675(a)(1) (1982 & Supp. IV 1986).
major, and in some cases dominant, share of the target market in product areas covered by antidumping orders.... The imposition of antidumping duties...suggests that dumping pays: the competitive benefits reaped from dumping outweigh the cost of antidumping duties. Foreign firms can simply absorb the duties as a "routine cost" of doing business abroad. 124

124 See Howell, Benz & Wolff, Id., at 251-52.
III. THE "DUNKEL DRAFTS" AND AFTER THE URUGUAY ROUND

The Uruguay Round of multilateral negotiations in the GATT has become a focal point for world trading policy in the late 1980s and 1990s, and the outcome of the round will go far to determine the future of global trading system. The Uruguay Round started its negotiations with two interrelated goals: to blunt protectionist pressures that were eroding support for the multilateral trading system and to bring the GATT up to date by extending the coverage of its rules to important areas of international trade not subject to, or inadequately covered by, existing GATT provisions. To achieve such results, two critical challenges had been faced: to renew the confidence in the efficacy of the multilateral disciplines of the GATT and to provide a viable alternative to unilateral actions as well as bilateral and regional trading arrangements.

The Uruguay Round agenda was ambitious because diverse interests and the needs had shaped it. Many wanted negotiations on dispute settlement, safeguards and subsidies because of the increasingly protectionist practices that had

See Dunkel Drafts, supra note 10.
cropped up since the Tokyo Round\textsuperscript{126}, in Geneva (1973-79), to bypass the stronger enforcement mechanisms instituted during that Round.\textsuperscript{127}

During the 1980s, antidumping has emerged as the dominant mode of the protection in the manufacturing trade area. More than 2000 antidumping cases have been filed in the past decade alone.\textsuperscript{128} Furthermore, many antidumping actions have been terminated by agreements to fix minimum prices and quantitative restrictions on the product in question. As a result, industries such as steel and chemicals in the United States and electronics in the European Communities, are increasingly modeled by protectionists and anticompetitive instruments.\textsuperscript{129} The protective effects of the antidumping are powerful enough to threaten the trade liberalization envisaged in the Uruguay Round.

A. Recurrent Dumping and Protecting Protection

During Uruguay Round, both the United States and the European Community have proposed extending the antidumping code to cover so-called new issues. Their proposals conceive

\textsuperscript{126} See A. Lowenfeld, supra note 14, at 23.


\textsuperscript{128} See P. Messerlin, supra note 92, at 108.

\textsuperscript{129} Id., at 109.
relief from dumping as a paramount right and openly aim at making AD actions more "effective". New concepts of issues would be "recurrent injurious dumping" and "repeated corporate dumping".

1. Recurrent Injurious Dumping\textsuperscript{130}

Recurrent injurious dumping would occur when a foreign exporter of a product already restricted under the previous antidumping measure undertakes changes in its production to avoid application of the antidumping measures; foreign exporters used to be persuaded, or be forced, to undertake to revise prices so as to eliminate the dumping margin, the injury, or, more drastically, to cease exports.\textsuperscript{131}; price undertakings have been used by the European Community from the outset, and a high proportion of European Community antidumping cases are concluded by this undertakings.

Two types of recurrent injurious dumping are considered. They roughly correspond to the concept of "circumvention" which the European Community has developed in its own proposal.

The first type comprises situations where the changes are "so minor" that a de novo investigation of dumping and

\textsuperscript{130} Id., at 125.

injury is deemed unnecessary. If circumvention is found to exist, antidumping duties will be applied from the time the inquiry is instituted. The second type involves more significant changes in production. For instance, in one situation, the original exporters export parts for assembly by a related party in the importing country, and the value of the parts is less than a certain percentage(to be fixed by the code) of the total value of the finished product. In another situation, a third country producer related to a previously investigated firm exports the product covered by the original dumping finding. Cases of "significant" change in production would require full investigations, but with more expeditious rules and procedures because of the related prior dumping.

Repeated corporate dumping would occur when a single corporate entity engages in repeated dumping in a single national market across the same general category of merchandise. Again the imposition of the duties would start from the initiation of the investigation.

These important issues may have a vital impact on the foreign investment and on the corporate planning, and had a high priority in the GATT negotiation.

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132 See Messerlin, supra note 92, at 117.

133 Id., at 118.
2. Protecting Protection

Whether "recidivist" dumping will occur is determined by the type of antidumping measures taken. It is unprofitable for any dumper to dump again if the cost imposed by the antidumping measure is greater than the benefit it received through a price undertaking (a negotiated fixing of a minimum increase), where the gains (the rent associated with price increase) may be higher than what the dumper hoped to get from the price discrimination.\[^{134}\]

Price undertakings are frequent in the E.C. practices,\[^{135}\] and the way in which the United States enforces duties leads to a kind of de facto price undertaking. Existing antidumping measures, thus, induce foreign exporters to dump again.

High antidumping duties trigger circumvention, just as high taxes trigger tax fraud. Anticircumvention cases are a sign that domestic lobbies have been so successful in obtaining high duties, and so successful in producing competitive products, that the construction of foreign-owned assembly plants in importing countries has become the most viable solution, as discussed in Section B of part II.

\[^{134}\] See Howell, Benz & Wolff, supra note 122, at 251-52.

\[^{135}\] See Council Regulation (EEC), Art. 16 of reg. 2176/84: Provisional Antidumping duties can be imposed if an Undertaking is breached.
B. Is the "Dunkel Drafts" a Perfect Text?

In the Uruguay Round negotiations, on December 20, 1991, GATT Director-General "Arthur Dunkel" issued a draft agreement on most of the topics covered by the round, including a new GATT Antidumping Code. Because the countries involved were unable to agree on much of anything, the Dunkel antidumping Draft was written by personnel in the GATT Secretariat, and was not a product of negotiation. Although the GATT antidumping draft contains more detail than the existing Code, particularly with respect to the calculation of antidumping margins, any claims of methodological precision are vastly inflated.

From the perspective of the use of unfair trade laws, the Dunkel text would make antidumping duty cases more expensive to bring and more difficult to win. Under the Dunkel text, even cases that are won will result in less effective relief of shorter duration. Moreover, almost all of the key provisions are subject to multiple interpretations and lack of clarity is likely to spawn a great deal of litigation.

For ease of reference, the following analyses is tied to specific provisions in the Dunkel text.


1. New Cost of Production\textsuperscript{138}

This paragraph allows that up to 20 percent of the sales analyzed in the home market can be sold at below the cost of production, but still can be used in order to determine the dumping margin. It is unlikely that even extremely low-priced sales (potentially dumped sales) would be found to have margins when these sales are compared to home market sales that were sold below the cost of production. The proposed language for expanding the minimum threshold will allow this type of distorted comparison.

Furthermore, this proposal would give foreign manufacturers added flexibility to manipulate prices to avoid dumping liability. The Dunkel text would also require that below-cost calculations be determined in accordance with the accounting principles of the exporting country. The proposed change may require the use of accounting methodologies that fail to measure actual costs incurred to produce the subject merchandise.

2. Start-Up Costs\textsuperscript{139}

The Dunkel text proposes an adjustment to the cost of production for start-up costs. The adjustment provides that

\textsuperscript{138} Dunkel Drafts, Paragraph 2.2.

\textsuperscript{139} Id. Paragraph 2.2.1.1.
cost of production will be the costs incurred at the end of the start-up period, or if that period extends beyond the period of investigation, the most recent reasonable costs available.

Allowing an adjustment for start-up costs that are reflective of only the end of the start-up period is distortive. A producer generally will experience higher costs at the beginning of this period. Using the lower costs incurred at the end of the start-up period does not account for legitimate costs, or any R&D that may have been necessary to begin production. Using only the costs incurred at the end of the start-up period does not provide a representative picture.

Even if it were possible to pinpoint the end of a start-up period, this would be a near impossible task to undertake and still meet its statutory deadlines.

3. Minimum Profit and GS & A

The Dunkel text proposes to eliminate the statutory minimums of ten percent for general expenses and eight percent for profit when constructed value is used as a basis for foreign market value. Under paragraph 2.2.2, basing the profit portion of constructed value on the producer's actual

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140 General, Selling and Administrative expenses [hereinafter GS & A]; see Id. Paragraph 2.2.2.

experience would actually serve to reward firms that sell the subject merchandise at less-than-fair value. Constructed value is used when home market or third country sales are not suitable for price comparison purposes, generally because home market transactions are sold at prices below their cost of production. A manufacturer that sold substantial quantities of home market sales below its cost of production would necessarily earn little profit or incur a loss on these sales. It is for this precise reason that below-cost sales are not used to determine foreign market value. Therefore, use of a company's actual profit experience on the like product would defeat the very purpose of using constructed value rather than actual prices.

There is also a problem of quantification of GS & A expenses because it is unclear whether an actual GS & A expense amount and an actual profit amount should be based on the expense and profit experience of the parent corporation or only on the expense and profit experience of the subsidiary that manufactures the product subject to investigation. Additionally, in some companies the parent corporation incurs GS & A expenses on behalf of its subsidiaries. If these expenses are not properly allocated or assigned to each subsidiary the actual expenses could be understated, resulting in an understatement of the margins of dumping. For this reason, it is often difficult to precisely determine "actual" GS & A expenses for specific products. The Dunkel proposal does not take into account
these difficulties and could result in an understatement of margins of dumping by ignoring these market realities.

4. Circumstance of Sale Adjustments\textsuperscript{142}

Once normal value and export price have been established, adjustments must be made to both in order to effect a fair comparison between the export price and the domestic price in the exporting country. But, the legal and practical application of the adjustments displays a tilt towards finding dumping. This tilt is most clear in situations where foreign producers sell in their home and export markets through related sales organizations. In such cases, the authorities essentially establish the export price at an ex-works level while leaving some overhead expenses in the normal values, thereby inflating the later. The tilt seems most pronounced in the EEC\textsuperscript{143}. The fact that the adjustments are not made automatically, but have to be proven by the foreign producers, may put a heavy evidentiary burden on those producers and provides the case handlers assigned to the investigation with a large amount of discretion.

The Dunkel text requires each national dumping authority to adjust normal value or foreign market value in

\textsuperscript{142} See Dunkel Drafts, supra note 10, Paragraph 2.4.

\textsuperscript{143} See E. Vermulst, supra note 72, at 451.
a foreign respondent's favor for differences in levels of trade between the home market and the export market, even if the foreign respondent has not demonstrated its entitlement to such an adjustment. Indeed, the broad language in the Dunkel text referring to adjustments for circumstances of sale can be read to eliminate any burden on a respondent to demonstrate entitlement to these adjustments.

When a foreign respondent cannot convincingly substantiate a level-of-trade between the home market and the export market or some other adjustment that would lower or eliminate its margin of dumping, then no adjustment should be awarded. The burden of proof is placed on the respondent under current law because the respondent is the only party in possession of the information necessary to demonstrate entitlement to the adjustment. If a foreign respondent that is seeking an adjustment cannot come forward with sufficient evidence to support its claim, then it is unreasonable to expect the national dumping authority to generate evidence on its own. A corollary to this principle is that the evidentiary standard required to establish entitlement should not be diluted to the point where an adjustment is made without a solid basis in fact.

While the GATT approach in itself seems sound, it is too vague to prevent contracting parties from adopting concrete interpretations that seem at odds with the basic GATT aim of a fair comparison.
5. Averaging

The Dunkel text proposes that United States prices will be averaged in investigations. This proposal would require an alteration to longstanding Commerce Department practice, which has looked at U.S. prices on a transaction by transaction basis.

The practical, negative effect of this provision is that foreign producers will be permitted to dump goods in the importing countries, so long as they offset those dumped sales with sales that are not dumped.

Although the Dunkel text provides exceptions to the use of averaging, the burden of proving the entitlement to the exception will not be easy to overcome. As a result, the text will minimize overall dumping margins by charging higher prices on sales where there is little or no competition.

6. Cumulation

The Dunkel Text, like the current Code, has no explicit provision on cumulation. The U.S., Mexico,

144 See Dunkel Drafts, supra note 10, Paragraph 2.4.2.

145 cumulation of dumped imports from a variety of countries in order to meet an injury/causation test; see id. Article 3.

E.C., Canada, Australia and other countries have applied cumulation rules, which can be particularly harmful to small and new LDC (less developed countries)'s entrant into developed countries' markets, despite the absence of any Code provision. Some have criticized the Dunkel Text's failure to include an explicit provision authorizing cumulation of dumped imports from multiple countries when making an injury determination.

The Dunkel antidumping text omits any reference to cumulation. Because cumulation is expressly authorized by the draft Subsidies Code, omission of any reference to cumulation in the dumping text implies that cumulation is not permitted in dumping cases. Prohibiting cumulation in dumping cases would be a major change from current law that would make it substantially more difficult for domestic industries injured by imports from several sources collectively to obtain relief.

Elimination of cumulation will also significantly increase the burden upon petitioners in establishing injury by reason of imports. While the principle of cumulation is set forth in the draft text on the Subsidies Code, this text states that the only imports to be cumulated are those subject to countervailing duty investigations. Merely inserting similar language in the dumping text would imply

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that, while cumulation is permitted of dumped imports and, separately, of subsidized imports, "cross-cumulation," i.e., cumulation of dumped with subsidized imports, is not permitted. This change is to be considered a more reasonable way not to allow the potential abuse of current code for protectionist purpose, in injury determination.

7. Margins Analysis in Injury Determinations

The Dunkel text adds a new factor, "the magnitude of the margin of dumping", to the list of relevant factors to be assessed in examining the impact of dumped imports on the industry. The insertion of this factor suggests that the Commission will now be required to determine whether the margin is of sufficient degree to cause injury, or to somehow relate the margin to the pricing practices of the foreign producers.

The "traditional" injury analysis does not consider the size of the dumping margin in an injury analysis. Thus, if a domestic industry is being injured by the price or volume effects of the imports, the magnitude of the margin of dumping is irrelevant. Requiring the consideration of the size of the margin adds an additional difficulty to the domestic industry's attempt to prove injury in dumping cases.

\[148\] See Dunkel Drafts, supra note 10, Paragraph 3.3.

8. Standing

Article 4.1, 5.2, 5.3, 5.4 and 6.11 would withhold initiation of an investigation until petitioning domestic producers have affirmatively proved that they account for an unidentified "major proportion" of total domestic production of the like products. Moreover, in a footnote to Article 4.1(i), the Dunkel text appears to impose a strict definitional limit on which domestic producers could be considered related to the exporters and importers of the dumped imports. The detailed changes proposed by the Dunkel text are purportedly motivated by a desire to limit frivolous petitions.

9. De Minimis Standards

The Dunkel text includes a new de minimis dumping margin standard of two percent below which antidumping duties shall not be imposed. This will require a change in U.S. law to raise the existing 0.5 percent de minimis standard to two percent. The Dunkel draft provision would require "immediate termination" of antidumping cases when the margin of dumping is less than 2 percent. In practical

149 Id. Paragraph 4.1.

150 Id. Paragraph 5.8.
terms, however, this will have no impact on vast majority of dumping cases. Moreover, it is established practice in the E.C. and Canada to consider the dumping margins of less than 1.5 percent to be de minimis, while Australia does not have a formal de minimis rule.

10. Measures to Prevent Circumvention of Definitive Antidumping Duties

One of the most significant departures from the GATT Antidumping Code was the introduction of anticircumvention by the European Community in July 1987. That is so-called "parts" amendment. This measure was clearly aimed at Japanese companies who allegedly were trying to circumvent the European Community’s antidumping laws through the establishment of normal assembly plants in the European Community. However, the effective requirement to show at least 40 percent European content in a "buy European" format, is a blatant form of protectionism duly censured by the GATT.

The United States has adopted much less draconian measures to deal with anticircumvention under the 1988 Omnibus Trade and Competitiveness Act. In this Act, additional measures were included to deal with the products

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151 Id. Paragraphs 10.4 and 10.5 and Article 12.

of only minor alterations or limited further assembly in the U.S./third countries.\textsuperscript{153} Such measures can represent a legitimate means of controlling the circumvention of antidumping orders and, if properly enforced, should pose no special protectionist problems. However, given the amount of discretion involved, there is always the risk that such measures will be used as protectionist tools.

The addition of the anticircumvention provisions in Dunkel Draft, is a significant change to the current U.S. code. Article 12 addresses the problem of circumvention of antidumping duty orders by assembling the covered merchandise in the importing country. Paragraph 10.5 addresses the problem of third country assembly of covered merchandise. Paragraph 10.4 addresses the problem of "country hopping," whereby respondent companies simply shift production of the covered article to a third country to evade the imposition of antidumping duties.

The Dunkel draft's treatment of circumvention requires a new injury test prior to an affirmative determination of circumvention, but fails to address diversion of a covered article to a third country,\textsuperscript{154} minor alterations\textsuperscript{155} or later-developed merchandise.\textsuperscript{156} Article 12 also appears to

\textsuperscript{153} Tariff Act of 1930, Sec. 781(b)-(d)(1982).
\textsuperscript{154} 19 U.S.C. s 1677j(b)(1)(B)(i).
\textsuperscript{155} 19 U.S.C. s 1677j(c).
\textsuperscript{156} 19 U.S.C. s 1677j(d).
specify the conditions under which the antidumping duty order could be applied to parts of products, thus perhaps precluding the filing of a dumping case on products and parts thereof together.

As far as production of the dumped product in the country of import or in the third countries is concerned, the rule of origin might provide a logical framework for reference. The problem is that there are no uniform rules of origin and that certain jurisdictions have many different sets of origin rules.

It would seem to be in the interest of all GATT contracting parties to have uniform rules on circumvention. Such rules should strike a balance between allowing legitimate business practices and obstructing clear attempts to evade the antidumping laws, that is, a balance between the legitimate corporate investment and planning strategies and illegitimate circumvention strategies. It should apply the same standards to domestic and foreign producers (national treatment requirement).

Finally, the problem is that simple adoption of this provision would reinforce antidumping measures that are often used by firms to cartelize the importing market. Thus, safeguards should be added to insure that anticircumvention provisions - much like price undertakings - do not encourage cartel in the importing market. Failure to include such a provision, however, would likely result in any event in the
proliferation of unilateral actions to stop the circumvention of antidumping duties.

11. Sunset\textsuperscript{157}

The Dunkel Text rejects the notion of an automatic termination clause, and instead adopts the current E.C.\textsuperscript{158}, Australian, and Canadian procedure, but not the United States procedure, for reviewing antidumping orders after five years. The burden falls squarely on the authorities, not petitioners or respondents, to determine whether the duties should remain in place in beyond five years, but the text does make clear that one year without dumping does not necessarily preclude a finding that the order should continue in effect.

A potentially serious loophole in the sunset provision is the absence of a definitive deadline for the completion of sunset reviews. Without such a dead line, the sunset provision could prove ineffective, and foreign antidumping orders could remain in place long after dumping and injury have ceased.

In sum, weak GATT rules open the door to the aggressive use of unilateral measures, which can mask protectionist intent and undermine multilateral process. In

\textsuperscript{157} See Dunkel Drafts, supra note 10, Paragraph 11.3.

the absence of a stronger GATT system, unilateral measures could easily be deployed with increasing fervor and frequency.

The Dunkel text on dumping contains a few procedural improvements in the international codes for exporters concerned with transparency and fairness in other countries' implementation of these laws, but the cumulative effect of the text is still susceptible to multiple interpretations that result in a proliferation of litigation. Reform of the GATT antidumping code should impose tighter criteria for calculation of dumping and bar the use of price undertakings to resolve the antidumping cases, generating anticompetitive effects.

C. Suggestions for Improvements

As world economic interdependence has increased, it has become more difficult to manage relationships between various economies. This problem can be analyzed to the difficulties involved in trying to get two computers of different makes to work together. To do so, one need an interface mechanism to mediate between the two computers. Likewise, in international economic relations, and particularly trade, some interface mechanism may be necessary to allow deferent economic systems to trade together harmoniously.159

Over the past years, the antidumping system has become one of the most important interfaces in international trade

159 See J. Jackson & W. Davey, supra note 7, at 650-51.
The apparent needs felt for antidumping actions are also clear from the fact that even in the proposed U.S.-Canada Free Trade Agreements and in the free trade agreements between the EEC and EFTA countries, antidumping actions remain possible. This interface 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. 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.

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160 See J. Jackson, supra note 14, at 214-21.

161 See Michael Hart, Dumping and Free Trade Areas, supra note 64, at 326 (J. Jackson & E. Vermulst eds. 1989).

162 See R. Denton, supra note 6, at 240.
1. Improvements in the Safe-Guards Mechanism

The weakness of the safeguards clause of the GATT Art. XIX have led to its disuse; instead countries have deployed a rash of extra-GATT controls (particularly VERs) and often have used antidumping duties. It could be explained that if it is tough to use Art. XIX and easy to get relief through the VERs or antidumping actions, an industry seeking relief will choose one of the later. So, the revision to antidumping code and the reform of the GATT safeguards clause are intertwined in the policies of GATT member countries.

Before suggesting possible improvements, we need to recognize that economic rationalization and the injection of competition considerations might be useful reference points. From a normative perspective, antidumping actions are clearly an inefficient way to deal with problems of import competition. To a large degree, antidumping legislation and implementing measures act as a system of selective safeguards. From a multilateral perspective, the general problem is that the incentives facing firms are biased toward requesting, and receiving, discriminatory forms of protection. Thus, to alter the status quo requires that these incentives be changed. This can be done unilaterally and multilaterally. Safe-guards and antidumping measures have been discussed multilaterally in the context of the Uruguay Round.
The structural adjustment measures before restricting imports would be recommended. This approach is related to the mitigation of pressures that force exporters into a VER negotiation. On the other hand, lax discipline on safeguards (such as the sanction of limited selectivity) would allow some of the present gray-area measures to continue. That is, a relaxation of the conditions governing the use of Art. XIX could make it easier to substitute other VER measures.

So, one possibility would be a modification of the GATT compensation requirement. This could be achieved through the domestic institutional reform - "effective adjustment assistance". Unfortunately, an adjustment requirement would pose an added burden for the countries seeking Art. XIX relief and might further discourage its use. For example, Sec. 201 of the Trade Act of 1974 has hardly been used since the adjustment provision was added to it in the Omnibus Trade and Competitiveness Act of 1988.

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163 See A draft text of agreement prepared by the group chairman, Brazilian Ambassador G. Marciel.; The E.C.'s position in Uruguay Round (GATT Focus, and News of the Uruguay Round, 1989 and 1990); see also generally C. Hamilton & J. Whalley, Safeguards, supra note 92, at 85-87.

164 See Jagdish N. Bhagwati, Protectionism 117 (Cambridge: The MIT Press, 1988).; the government can ease the adaptation to competition from import in two ways.: (1) adjustment assistance can enhance mobility, and upgrade the quality of man power and capital. (2) the method of temporary protection - OMA(orderly marketing agreements) or import restriction (Tariff or Quota) under the Escape Clause.

Thus the safeguards system needs revision to provide incentives to industries to opt for import relief through the adjustment-oriented Art. XIX approach instead of seeking other GATT remedies (antidumping actions) or going outside the statutes entirely and getting political support for negotiating VERs.

If the governments are to resist protectionist pressures, they will need effective institutional mechanisms to ease the consequences on workers, firms and communities of the changes wrought by a more open and integrated world economy.

In this approach, safeguard protection would be provided only as increased tariffs, not as quotas, and the proceeds of the increased tariffs would be used to fund the adjustment assistance. The tariff increase would decline over a specified period as adjustment takes place.\(^\text{166}\) If Art. XIX’s compensation requirements were suspended during the period of adjustment, implementation of this adjustment would be facilitated.

The safeguards arrangements, however, cannot be evaluated in isolation from the rest of the trading system. To break the present impasse, it is required for an approach to safeguards be based on tightening the GATT disciplines on other import relief measures (gray-area measures, antidumping, and countervailing measures), rather than

\(^{166}\) Id., at 119.
relaxing safeguards disciplines (such as through a move to limited selectivity). The need to link the use of safeguards actions to adjust assistance to help defuse pressures for familiar trade-restricting measures in the future, is inevitable.

2. Substitution for Dealing with Unfair Pricing

Antidumping laws are counterproductive in a market economy and there could be an option to eliminate that law in favor of competition law. Antidumping laws tend to protect competitors, instead of the competitive process and pose a serious obstacle to free market forces in a global trading environment. Competition laws, on the other hand, are more compatible with the international markets that are becoming more common as the global economy becomes increasingly integrated. Competition laws promote open markets in which the entry and expansion of businesses is not to be hindered by anti-competitive behaviors of existing firms. If this attitude were applied in the trade policy area, it would encourage the removal of trade barriers and

stifle any desire to protect domestic competitors. Consideration should be given to relying on a competition law approach to price discrimination and predatory pricing in place of antidumping laws.

The underlying assumption of the antidumping laws is that the dumping is justifiably prevented because its cost, i.e. the injury it causes to producers, exceeds its benefits to users who acquire low priced dumped goods. This assumption is reasonable enough if dumping is predatory and hence makes a market less competitive; but, it is not, if dumping is nonpredatory and enhance competition.168 The problem is that a law which condemns all dumping that causes injury to domestic industry will invariably snag in its net both predatory and nonpredatory dumping. Dumping(price discrimination) that is nonpredatory and can enhance the competition arises if a firm seeks to maximize short run profits, as opposed to destroying competition.

In trade law, "unfair" tends to be defined in moralistic terms, based on the legitimacy of competitive advantages enjoyed by foreign producers. Fair often means equal treatment, protection of competitors or market shares, maintenance of the status quo, and other deterrents to adjustment. Those approaches tend to be frowned upon in competition law. In most cases, antidumping laws produce

results that would not be sustainable under domestic competition laws. The results tend to run counter to the proper operation of free markets and therefore have a negative impact on consumers. In other words, it means that an antidumping law, rather than promoting any sensible economic result, is merely a means to discriminate between domestic and foreign competitors.

The risk of maintaining the antidumping rules would defeat vigorous price competition that is not predatory and therefore would inhibit vigorous competition. Moreover, the risk of having to face antidumping actions could inhibit the rationalization of dumping and this would be counter the goal of improving global competitiveness. The predatory trade would be handled through the provisions of the competition laws. The healthier degree of price competition and the efficiency of economy can be augmented by the replacement of the antidumping laws with the existing competition laws.

The laws on price discrimination and predatory pricing are the areas of "particular overlap" between the two sets of laws and are analogues.  

169 Competition laws are thus seen as the desirable "substitute systems of rules for dealing with unfair pricing".  


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169 Id., at 76.

available to remedy unreasonably low pricing in the form of predation, requires injury to competition, and takes into considerations both objective evidence of below cost pricing and market structure, and evidence of subjective predatory intent. Thus, their substitution for antidumping laws is an economically logical and legally feasible option for the removal of barriers to the future international trade, with regard to the lack of competition policy rules in the GATT as the loophole in the Bretton Woods system.

\[171\] Sec. 2 of Sherman Act and to lesser extent Sec. 3 of the Robinson-Patman Act.
IV. CONCLUSION

Given the premises of the GATT system, the international trade system needs some mechanisms which attempt to control distortive measures, either at the public or private level. 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.

The consistent use that is made of antidumping and the trend that exists in terms of expanding its scope have implications in the international trading system. In particular, antidumping offers a discriminatory form of protection that is often not transparent, and distorts production, consumption and trade. Its existence is likely to have implications for any Uruguay Round safeguards agreement, as in practice antidumping provides alternative to safeguard-type temporary emergency protection.

Many of the so-called "problems" with existing antidumping laws evidence a concern not for promoting competition, but for protecting competitive advantage. In other words, in applying the antidumping laws, governments are more producer-oriented than consumer-oriented, and there needs to return to the core principles of antidumping
legislation. Various possibilities have been identified in terms of improving the current situations, all of which can be implemented on a unilateral basis. However, the value of unilateral actions will be limited from a global perspective, and multilateral agreement would be the preferred option. Thus, by the suggested proposals, it could be argued that the proper operation of international free markets encourages antidumping laws to play a limited role to curb the anticompetitive behaviors (predatory).\footnote{172}

In sum, national authorities need to administer the more competition-oriented antidumping policies. But, any legal framework taken to strengthen and modernize antidumping laws should be done with a view toward careful compliance with the principles of GATT. Therefore, it is to the advantage of all parties to ensure a rational application of the antidumping laws.

\footnote{172 See, supra note 167.}
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