INJURY FROM DUMPING: THE PROBLEM OF THE "REGIONAL INDUSTRY"

Jack Gumpert Wasserman*

I. INTRODUCTION

Because of the great physical size and ocean-to-ocean borders of the United States, American producers concentrated in one geographical region may be affected more adversely by "dumped" imports than producers located in other geographical areas. However, the right of injured American producers to obtain a remedy under the Antidumping Act of 1921 (the "Antidumping Act") has been complicated and, at times, frustrated solely because of their geographical location within the United States.

While the problem of the "regional industry" in dumping proceedings has grown during the past 25 years to one of major importance, the Congress not only repeatedly failed to clarify the issue, but compounded the problem in 1974 when it publicly misconstrued the manner in which the statute had been interpreted. The Congress has recently enacted a major revision to the United States dumping laws, including a statutory provision which is intended to resolve the problem. However, the "solution" (which the United States agreed to at the recently concluded "Tokyo Round" of multilateral trade negotiations) will adopt a concept contained in an international agreement which the Congress rejected over a decade ago.

This Article will (i) define the problems created by the old Antidumping Act, (ii) review the different judicial and administrative concepts which had been used in attempts to resolve the problem, (iii) summarize briefly the concept contained in the international

*Partner, Freeman, Meade, Wasserman and Schneider (New York and Paris); Member of the Bars of the States of New York and Florida, the District of Columbia, and the United States Customs Court.


Anti-Dumping Code, and (iv) consider the legislation recently enacted by the Congress.

II. PROBLEMS UNDER THE ANTIDUMPING ACT OF 1921

The basic problems are easily framed. The old Antidumping Act required the Treasury Department, after the filing of a complaint by "any person," to determine whether:

... foreign merchandise is being, or is likely to be sold in the United States at less than its fair value ...

In the event the Treasury Department reached an affirmative determination, the United States International Trade Commission was required to determine within 90 days:

... whether an industry in the United States is being or is likely to be injured ... of the importation of such merchandise into the United States.

Despite almost six decades of experience with this statutory language, two questions were never satisfactorily answered: first, did injury to American producers located in a particular region of the United States constitute injury to "an industry of the United States" and, second, how was the geographic extent of the region to be measured. During the past 25 years, attempts to answer these questions principally turned on the individual views of the various Commissioners and, to a lesser extent, on a single decision by the Court of Customs and Patent Appeals.

Two facts must be recognized while reviewing the Commission's attempts to deal with the problems created by the existence of a regional industry. First, over 16 years ago the United States Customs Court specifically found that the meaning of the Antidumping Act's phrase, "an industry in the United States," was "not clear and unambiguous." Second, in 1975 the Senate Finance Committee misinterpreted the previous decisions of the Commission and the federal courts. As a result of this misinterpretation, the Commission's more recent decisions involving regional industries are based on economic and legal considerations that differ

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6 Id. (emphasis added). See also note 98 infra.
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significantly from those previously relied upon by the Commission.

The problems originated in 1954 when Congress amended the Antidumping Act by transferring the authority to make "injury" determinations from the Treasury Department to the International Trade Commission (then known as the Tariff Commission). 8

From 1955 to 1961, the Commission was required to consider only 16 cases of possible injury from dumping (five of which were presented in 1955). 9 The problem of injury to a regional industry was seriously presented in only one case, but it cast a long shadow. In that case, which involved the dumping of certain cast iron pipe, the Commission determined that the dumped imports were injuring a group of American producers located in the State of California, 10 and the Treasury Secretary issued a "Finding of Dumping." 11 The Commission's determination set the stage for the only important judicial review of the problem. 12

From 1961 to 1963, the problem of injury to a regional industry was of major concern to the Commission in a series of decisions involving the dumping of cement from various countries. The language of the decisions suggests that the Commission was attempting, in the absence of statutory or judicial direction, to formulate a concept which would respond to the question of whether a regional industry was "an industry within the United States" within the meaning of the Antidumping Act. The facts in the "cement" decisions 13 revealed that three American importers were responsible for the importation of cement from a number of countries, including Sweden, Belgium, Portugal, the Dominican Repub-

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9 During the following six years (1961-1967), the Commission was presented with 35 dumping investigations; in 1978 alone the Commission considered 22 cases arising under the Antidumping Act.

10 Letter from Tariff Commission to the Secretary of the Treasury (October 26, 1955) (quoted in Ellis K. Orkowitz Co. v. United States, 50 C.C.P.A. 36 (1963) [hereinafter cited as letter].


12 See text infra, at notes 18-22.

lic, Poland, Israel, and Yugoslavia. In 1961, the Treasury Department ruled that cement from the first three countries was being dumped and requested the Commission to determine whether the dumping was injuring (or was likely to injure) an American industry. In each of its decisions, the Commission found that Portland cement was a heavy product which, because of "transportation costs," could only "be sold economically within a short distance" from the American producer's plant or the port of importation. Based on these facts, the Commission described the "limited geographical area" surrounding the ports of importation as the "competitive market area" and determined that such a market area constituted "an industry" for the purposes of the Antidumping Act. In each decision, the Commission determined that the dumped imports were injuring the "industry" within the meaning of the Antidumping Act.

The following year, the Commission defined New York City and Puerto Rico as the relevant "competitive market area" for purposes of measuring the impact of dumped cement from the Dominican Republic. Unlike the previous decisions, the Commission reached a negative determination. However, twelve months later, the Commission was again faced with the problem of the dumping of cement from the Dominican Republic which was being marketed in the "metropolitan area of New York City." This time, the Commission determined that the dumping of the Dominican cement created a likelihood of injury to the American "industry serving the New York metropolitan market."

The date of the last "cement" decision, April 19, 1963, is important because two months later the Commission turned away from its practice of equating a "competitive market area" with "an industry in the United States." The reason for the Commission's important interpretative change was, apparently, a decision by the Court of Customs and Patent Appeals dated February 13, 1963, that considered the legal aspects of the problem of injury to a regional industry.

16 In the Swedish case, the "competitive market area" consisted of "Rhode Island, Eastern Massachusetts, and Eastern Connecticut"; in the Belgian case the "competitive market area" consisted of the "east coast of Florida" while in the Portuguese decision, the "competitive market area" consisted of "areas" adjacent to the Bridgeport, Connecticut, Fall River, Massachusetts, and Trenton, New Jersey. See note 13 supra.
The decision of the Court of Customs and Patent Appeals had its origin in late 1954 or early 1955 (the precise date is not available) when an American producer of cast iron soil pipe located in Los Angeles, California, submitted a dumping complaint to the Treasury Department against competitive pipe from the United Kingdom. On July 26, 1955, the Secretary of the Treasury determined that cast iron soil pipe from the United Kingdom was being or was likely to be sold in the United States at less than fair value within the meaning of the Antidumping Act and communicated this advice to the Tariff Commission with a request that the Commission determine, in conformity with the Antidumping Act, whether the dumped imports were injuring or were likely to injure an industry in the United States. Three months later, the Tariff Commission reached an affirmative determination of injury and advised the Secretary of the Treasury, by letter, that:

The domestic industry to which the Commission's determination of injury relates was held to consist of the producers of cast iron soil pipe in the State of California.

Based upon the Tariff Commission's determination, the Secretary of the Treasury published a "Finding of Dumping" and commenced the process of assessing the dumping duties required by the statute. Certain American importers of United Kingdom pipe commenced judicial proceedings in the Customs Court principally on the ground that the Tariff Commission's determination of injury to the American producers located in California did not satisfy the Antidumping Act's requirement that there be a determination of injury to "the entire domestic cast-iron soil pipe industry."

Both the Trial Court and the Appellate Division of the Customs Court affirmed the decision of the Tariff Commission. After reviewing the legislative history of the Antidumping Act, the Appellate Division of the Customs Court determined that the Tariff Commission properly concluded that the "industry in the United States ... might be ... less extensive geographically than nationwide."

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18 Letter, supra note 10, at 39.
21 Id. at 590. The Custom Court's review of the legislative history indicates that the drafters of the Antidumping Act did not consider the problem of the regional industry.
On further appeal by the importers, the Court of Customs and Patent Appeals also affirmed the decision of the Tariff Commission, but for reasons significantly different from the reasons advanced by the lower court. In reaching its determination, the Court specifically found that the Tariff Commission "had evidence" that the market area served by the California producers included the seven Western states and that in several of these states there was competition from American producers located in states other than California. In short, the Court ruled that the Tariff Commission had not based its determination on injury to a "regional" industry, but, rather, had determined that there was "evidence" of injury (or "likelihood of injury") to the national industry:

We think it clear that the Tariff Commission considered the nation-wide effect its determination would have. . . . we do not think that the Commission intended to limit itself to the State of California . . . We cannot agree with Appellant that there is anything . . . that would indicate that the Commission intended to limit geographically its actual determination that 'a domestic industry in the United States is being, or is likely to be, injured'.

Thus, despite being presented squarely with the issue, the Court of Customs and Patent Appeals did not support the proposition that an injury decision could be predicated solely upon a finding of injury to a regional industry. Instead, the Court of Customs and Patent Appeals based its decision on the fact that the Tariff Commission had "evidence" of injury to the national industry and not merely to the regional industry represented by the California producers.

Four months after the Orowitz decision, in June of 1963, the Tariff Commission decided, in four virtually identical decisions, that imports of carbon steel wire rods from Belgium, Luxembourg, Germany, and France were not injuring the American steel industry. In each case, the complainants contended that

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28 Hot-Rolled Carbon Steel Wire Rods from Belgium, Determination of no injury or likelihood thereof No. AA1921-27, TC Publication 93, May 1963.
30 Hot-Rolled Carbon Steel Wire Rods from West Germany, Determination of no injury or likelihood thereof No. AA1921-29, TC Publication 95, May 1963.
“each of four geographic areas of the United States ... constitute a separate ‘industry’ within the meaning of the Antidumping Act.” Although the Commission accepted the fact that:

... domestic producers of such articles as wire rods can generally supply nearby users at lower costs than can the more distance domestic producers.\(^7\)

The Commission rejected the complainants’ position that each geographic region constituted a separate market. The Commission stated that:

... Nevertheless, virtually all such domestic producers, in greater or lesser degree, regularly penetrate one another’s ‘natural’ markets. Moreover, both the buyers and sellers in each of such markets take vigilant note of the happenings in each of the other of such markets.\(^8\)

The following year, 1964, the Commissioners were sharply divided over the issue of injury to a regional industry. Early in the year, a majority of the Commissioners reached an injury determination on the grounds that dumped chromic acid from Australia was being sold “at a price significantly lower than all domestic manufacturers’ wholesale prices” and that these low prices disrupted and depressed the prices prevailing in the “major” West Coast market.\(^9\) The dissenting Commissioners rejected the idea that a “regional injury” existed since all of the domestic producers were located in Ohio, New Jersey and Maryland and distributed their products on a national basis.\(^10\)

Later that same year, the Commissioners were bitterly divided in two cases involving the dumping of steel products from Canada. In the first case, the Commission’s investigation revealed that the Canadian steel reinforcing bars in issue were being sold “only” in the “Northwest area of the United States (principally Oregon and Washington).”\(^11\) Based on this fact, three Commissioners appeared to revert to the “competitive market area” concept reflected in

\(^7\) Hot-Rolled Carbon Steel Wire Rods from Belgium, Determination of no injury or likelihood thereof No. AA1921-27, TC Publication 93, May 1963, at 7.

\(^8\) Id.

\(^9\) Chromic Acid from Australia, Determination of injury No. AA1921-32, TC Publication 121, February 1964.

\(^10\) Id.

the earlier "cement cases" and concluded that this region constituted the "competitive market area." Unlike the "cement cases," however, the majority did not state that this competitive market area constituted "an industry" within the meaning of the Antidumping Act. The three Commissioners constituting the majority apparently attempted to obviate the requirement of injury to the "national" industry by explaining that the regional area in question was "served almost exclusively by three domestic mills within that area," that only in "rare instances" did any other domestic mill ship into that area, and that the prices in the area were affected only in "broad ranges by the general price level" prevailing "throughout the remainder of the United States."

Several months later, the Commission was faced with the problem of determining whether the dumping of Canadian steel bars into the Pacific Northwest was causing injury to the three United States producers located in this area. The majority determined the existence of injury on the grounds that the prices of the three domestic producers "were the lowest in the country" and that the depressed prices resulted from the sales of the Canadian steel products. In a stinging dissent, two Commissioners objected to the Commission's departure from its "historical interpretation" of recognizing the existence of an industry "on a regional basis" only when the domestic producers "were devoted to making a single product." After an extensive discussion of the facts, the dissenting Commissioners concluded that the injury found by the majority was "inaptly magnified" by the "geographic segmentation" of the industry.

During the next decade, most of the Commissioners adhered to the principle enunciated in the Orlowitz decision and accepted the concept that injury to a regional industry constituted injury within the meaning of the Antidumping Act only when such injury had an impact on the national industry. Thus, for example, in 1972, the Commission was required to determine whether the dumping of certain Polish cast-iron soil-pipe fittings was causing or threatening to cause injury to the United States industry. In

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22 Id. The Antidumping Act provides that the Commission is deemed to have reached an affirmative determination when the voting Commissioners divide evenly. 19 U.S.C.A. § 160(a) (1979).
24 Id.
25 Id.
reaching a unanimous determination of "no injury," the participat-
ing Commissioners considered the competitive impact of the
dumped fittings on all American producers but "gave special at-
tention" to the American producers located in the "three-State
area of New York, New Jersey, and Pennsylvania" since most of
the dumped imports were "concentrated" in that area.\textsuperscript{36}

In two other cases decided that same year, however, several
Commissioners appeared to reject the prevailing view. In the first
case, two Commissioners determined that the dumping of certain
Japanese asbestos cement pipe was injuring American producers
located in the West Coast market and that "a national industry
may be injured if injury is experienced in a portion of its
market."\textsuperscript{37} The remaining two Commissioners determined that the
"relevant industry" consisted of all facilities in the United States
producing asbestos cement pipe, despite the fact that the West
Coast market area was the only geographic region in the United
States where the Japanese sales had any impact.\textsuperscript{38}

A similar division occurred in the second case in which three
Commissioners determined that the dumping of certain Canadian
kraft pulp was causing injury while two Commissioners deter-
mined that the Canadian pulp was not causing injury.\textsuperscript{39} The major-
ity concluded that the Northeast region of the United States was
being injured by reason of the dumped imports and that this injury
to the Northeastern American producers constituted an injury to
"an industry in the United States."\textsuperscript{40} The dissenting Commiss-
ioners determined that the investigation "was aimed principally
at the industry which consists of all those facilities in the United
States manufacturing hardwood kraft pulp" and that this industry
was not being injured by the dumped Canadian pulp.\textsuperscript{41}

The following year, 1973, the Commissioners again appeared to
require injury to the national industry. In one case, the Commis-
sion considered a situation in which the transportation costs for
elemental sulphur (which was being dumped from Canada) divided

\textsuperscript{36} Cast-Iron Soil-Pipe Fittings from Poland, Determination of no injury or likelihood
thereof in investigation No. AA1921-100, TC Publication 515, September 1972.

\textsuperscript{37} Asbestos Cement Pipe from Japan, Determination of injury in investigation No.

\textsuperscript{38} Id. at 9-10. See also note 30 supra.

\textsuperscript{39} Northern Bleached Hardwood Kraft Pulp from Canada, Determination of injury in in-
vestigation No. AA1921-105, TC Publication 530, December 1972.

\textsuperscript{40} Id. at 5.

\textsuperscript{41} Id. at 8-13.
the United States into "several regional market areas" and that each of these regions had "certain unique characteristics." The Commission investigated the impact of the dumped Canadian sulphur in the North Central states area (which was known in the sulphur trade as the "up-river market"). In finding injury to the "national" industry as a result of injury to American producers located in the regional up-river market, the Commission found that "price activity" in any one of the domestic market areas had "an impact on prices in other domestic market areas." In another case, the Commission, in rejecting a claim of injury, gave "special attention" to American producers of steel bars located "within and outside" Texas which were competing with dumped Mexican bars which were principally sold in that State.

However, one year later the Congress enacted the Trade Act of 1974 which became effective on January 3, 1975, and which significantly amended the Antidumping Act. The Congress did not, however, amend the language concerning "an industry in the United States" despite the fact that the problem of "regional industry" was again specifically considered. In commenting on the meaning of the term, "industry in the United States," the Senate Finance Committee observed that:

... the industry is a national industry involving all domestic facilities engaged in the production of the domestic articles involved.

However, in considering the necessary causal relationship between less-than-fair-value imports and injury to an "industry," the Senate Finance Committee raised the question of whether injury to a "regional industry" constituted injury to a "national industry":

A ... question relating to injury and industry arises when domestic producers of an article are located regionally and serve regional markets predominantly or exclusively and the less-

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43 Id.
44 *Deformed Concrete Reinforcing Bars of Non-Alloy Steel from Mexico*, Determination of no injury of likelihood thereof in investigation No. AA1921-122, TC Publication 605, August 1973.
than-fair imports are concentrated in a regional market with resulting injury to the regional domestic producers.\textsuperscript{47}

In attempting to answer its own question, the Senate Committee ignored the \textit{Orlowitz} decision and observed that in a "number of cases" the Commission had held:

\dots that injury to a part of the domestic industry [amounted to] injury to the whole domestic industry.\textsuperscript{48}

The Senate Committee then expressed its agreement with the "geographic segmentation" principle, but qualified its application on the grounds that "each case may be unique."\textsuperscript{49} In any event, the Senate Committee rejected clarifying legislation since it did not wish:

\dots to impose inflexible rules as to whether injury to regional producers always constitutes injury to an industry.\textsuperscript{50}

Accordingly, the Congress did not amend the language concerning "an industry in the United States" in the Antidumping Act but, rather, decided to leave the issue to "individual case determinations without additional statutory guidelines."\textsuperscript{51}

Unfortunately, the views expressed by the Senate Finance Committee did not reflect the fact that the Commission had, at different times, used significantly different criteria and did not even mention the opinion of the Court of Customs and Patent Appeals. Nevertheless, the comments of the Senate Finance Committee were apparently accepted by the Commission as having the force of law and, as described below, the Commission's more recent decisions suggest that injury to a regional industry alone were sufficient for the Commission to reach an affirmative determination of injury.

Although the Senate Finance Committee published its comments early in 1975, the Commission was not faced with the problem of a regional industry until 1976, when it investigated the impact of certain Canadian ceramic brick and tile, which the Treasury Department had determined was being dumped into the United States.\textsuperscript{52} While the Commission unanimously ruled that the dump-

\textsuperscript{47} Id. at 180-181.
\textsuperscript{48} Id. at 181.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 179.
\textsuperscript{52} \textit{Hollow or Cored Ceramic Brick and Tile, Not Including Refractory or Heat Insulating Articles, from Canada}, Determination of no injury No. AA1921-155, USITC Publication 785, July 1976.
ing was not causing or threatening to cause injury to "an industry in the United States," the Commissioners reached widely different conclusions with respect to the issue of the regional industry. The facts indicated that over 80% of all Canadian imports of the merchandise under consideration entered the Pacific Northwest area (which accounted for 50% to 76% of total United States consumption). Two Commissioners reached a "no injury" determination "irrespective" of whether the industry was considered on a national or a regional basis. The Commission's Chairman concluded that the "relevant" United States industry was the "national" industry, but, after quoting at length from the Senate Finance Committee Report, observed that any injury to the "regional segment of an industry" might constitute injury to "an industry as a whole." Although the Vice Chairman of the Commission also concluded that the United States industry in question consisted of "all" ceramic brick production facilities in the United States, he commented that injury to a regional segment would be an insufficient basis to find injury to the national industry and that it would be "necessary to show" that injury to the region had the "effect of injuring the national industry."

The issue of a "regional industry" has been important in a number of recent decisions. In April, 1978, the Commission unanimously determined that the dumping of certain Japanese steel was causing injury to the United States industry. Two Commissioners joined in a separate decision which set forth their understanding of a "regional industry":

The industry may be considered 'regional' in character, particularly where: (1) domestic producers of an article are located in and serve a particular regional market predominantly or exclusively and (2) the [less-than-fair-value] imports are concentrated primarily in the regional market.

In support of their position, the Commissioners cited the Senate Finance Committee's comments.

Several months later, the Commission was again faced with the issue of regional industry after the Treasury Department deter-

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53 Id. at 4.
54 Id. at 8-12.
55 Id. at 14.
56 Carbon Steel Plate from Japan, Determination of injury in Investigation No. AA1921-179, USITC Publication 882, April 1978.
57 Id. at 4.
mined that certain Canadian cement was being imported at less-than-fair-value. Only three Commissioners participated in this proceeding; Commissioners Bedell and Alberger, constituting a majority, ruled that the Canadian imports were neither causing nor threatening to cause injury to an industry in the United States. Commissioner Moore dissented. Each of the three participating Commissioners wrote a separate opinion.

Commissioner Bedell determined that the "Northeast market" of the United States constituted a "regional" industry, but concluded that the American producers in this market were not being injured by reasons of the dumped Canadian cement.

Commissioner Alberger also determined that the Northeast area constituted a "regional" industry, but determined that "application of the regional concept" would be "inappropriate." In setting forth the reason for his disregard of the "regional industry" approach, Commissioner Alberger quoted the comments of the Senate Finance Committee:

... the Committee believes that each case may be unique and does not wish to impose inflexible rules as to whether injury to regional producers always constitutes injury to an industry.

Accordingly, despite the possibility of injury to American producers located in a limited geographical area, Commissioner Alberger determined that consideration of injury on "a national basis" was more appropriate because shortages of the particular type of cement in question were growing "throughout the country."

In dissenting from the determinations reached by Commissioners Bedell and Alberger, Commissioner Moore concluded that:

... the legislative intent of the Act shows clearly that the Commission has the discretion, upon the discovery of appropriate economic facts and circumstances, to make its injury determinations based on geographical regional segments or market areas within the United States.

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57 Id. at 4-5.
58 Id. at 14.
60 Id.
61 Id. at 18.
After quoting the same Senate Finance Committee language cited by Commissioners Alberger and Bedell, Commissioner Moore also recognized the Northeastern area of the United States as the "regional" market under consideration, but determined that the United States industry located in this region was being injured by reason of the dumping of Canadian cement.64

The Canadian cement case illustrates the enormous ambiguity which developed after the Senate Finance Committee published its views early in 1975. To summarize, each of the three participating Commissioners concluded that the American producers located in the Northeastern region of the United States constituted a regional industry. However, one Commissioner determined that these American producers were not being injured by reason of the dumped imports. One Commissioner determined that the American producers were being injured. And one Commissioner determined that it would be more "appropriate" to disregard the regional industry and consider the national industry.

The ambiguity reached acute proportions when, in May, 1979, the Commission was confronted with the problem of the regional industry in two separate proceedings. In the first case, Commissioners Bedell and Moore determined that the dumping of carbon steel plate from Taiwan was causing injury to the "regional market" consisting of the States of California, Washington, and Oregon. The opinion, which constituted an affirmative determination, concluded that the regional market was "well defined" since "nearly all carbon steel plate that is imported into or produced in these States is used there, and very little is shipped into the region by producers located in other states ...."65 The affirmative determination was supported, again, by a lengthy quotation from the Senate Finance Committee's views and by a Memorandum prepared by the Commission's General Counsel's, Office.66 The Memorandum sets forth the view that there is "ample legislative and judicial comment" to support the proposition that "injury in a particular geographical area" may support a finding of dumping.67 (In support of this view, the Memorandum quotes extensively

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64 Id. at 18.
65 Carbon Steel Plate from Taiwan, Determination of injury or likelihood thereof No. AA1921-197, USITC Publication 970, May 1979, at 4-5. See supra note 32.
67 Id. at A-62.
from the Customs Court's decision in the \textit{Orlowitz} decision but neglects to mention that, on appeal, the Court of Customs and Patent Appeals did not support the finding of the Customs Court.\textsuperscript{68} The Memorandum concludes that the Commission may find "more than one regional marketing area in a dumping investigation" and that either "the west coast" or California and the Pacific northwest could constitute regional marketing areas.

Two Commissioners dissented. Based on the facts, Vice Chairman Alberger and Commissioner Stern concluded that "segmentation" of the carbon steel plate industry "into geographic regions" would be "inappropriate."\textsuperscript{69} The two dissenting Commissioners jointly set out, in "additional views," the three factors which they considered relevant to any decision to "subdivide" the national industry into a regional industry.\textsuperscript{70} First, the geographic region must be "separate and identifiable" and, in this connection, the region "must be sufficiently isolated from the rest of the industry." Second, the dumped products must be "concentrated" in a particular region. (The term "concentration" is described as implying the need for high percentages of "overall imports" to exist in the region under consideration.) Third, the region must be "significant enough" in the sense that the region is not "artificially small." The relevance of each of the three factors is supported by reference to the Senate Finance Committee's views and to selected Commission decisions (and dissenting opinions). Based on the three factors which they considered to be relevant, Vice Chairman Alberger and Commissioner Stern concluded that the "geographic segmentation principle" did not apply to the carbon steel plate industry.

In the second case decided in May of 1979, the Commission unanimously determined that the dumping of European sugar into the Southeastern area of the United States was injuring the domestic producers located in that area.\textsuperscript{71} All of the Commissioners determined that the region suffering injury consisted of the states of Florida and Georgia, which was the area served by

\textsuperscript{68} See, pp. 7-10, supra. See pp. 7-10 infra.

\textsuperscript{69} Id. at 8, 14.

\textsuperscript{70} Id. at 19-25. The views expressed by Commissioners Stern and Alberger clearly attempt to employ the criteria contained in the Anti-Dumping Code negotiated during the "Tokyo Round" of trade negotiations and agreed to by the United States in Geneva on April 12, 1979. See note 82 infra.

\textsuperscript{71} Sugar from Belgium, France and West Germany, Determination of injury No. AA1921-198, 199, 200, USITC Publication 972, May 1979.
the Florida producers of sugarcane and raw cane sugar. As usual, the majority opinion quoted extensively from the views of the Senate Finance Committee. In a separate opinion, Commissioner Stern concluded that the Southeast "constitutes a region for the purpose of determining whether injury to the region constitutes injury to an industry under the Antidumping Act." While there was unanimous agreement with respect to the existence of a regional industry, Commissioners Alberger and Stern based their determination on the grounds that the facts supported such a conclusion in light of the three factors which they set out in Steel Plate from Taiwan.

Where, then, did the matter stand on June 1, 1979? (On that date the Congress received a draft proposal for major foreign trade legislation, which included language specifically addressed to the problem of the regional industry; the draft proposed was the basis for a virtually identical bill introduced into the Congress on June 19, 1979.)

With respect to the basic issue, it was clear that all of the present Commissioners had accepted the view that injury to a regional industry constitutes injury to "an industry in the United States." Support for this position derived almost entirely from the views expressed by one Congressional Committee, and not from the statute or its legislative history. Nor was the concept supported by the federal court with principal jurisdiction over the Antidumping Act. And, in view of the different concepts utilized by the Commission during the past 25 years, there did not appear to be any basis for recognizing a "longstanding administrative construction" in which the Congress had "acquiesced." In short, the legal authority for the proposition that injury to a regional industry constitutes injury to "an industry in the United States" was, at best, tenuous, and, at worst, nonexistent. Nonetheless, the Commission had accepted the proposition.

On the other hand, the Commissioners differed significantly

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72 Id. at 3.
73 Id.
74 Id. at 7.
75 Id. at 19-21.
77 See, for example, Zenith v. United States, 98 S. Ct. 2441, at 2449. See, e.g., Zenith Radio Corporation v. United States, 443, at 457.
with respect to the criteria needed to divide the national industry into one or more regional industries and the degree of injury to the regional industry required to support the imposition of dumping duties on a national basis. The extent of the differences created enormous practical problems for both complainants and respondents. For example, it was extremely difficult to reconcile the view expressed by two Commissioners that imports must be "concentrated" in a particular region with the view adopted by at least two other Commissioners that there may be several "regional marketing areas" which the Commission may consider. This fundamental difference was further complicated by the disagreement among the Commissioners with respect to the level of import penetration which would support a claim of regional injury. (In *Carbon Steel Plate from Taiwan*, the decision which constituted the affirmative determination of injury was based, in part, on the fact that "53 percent of all imports of carbon steel plate from Taiwan in 1978 entered the United States through ports on the west coast." In contrast, the facts in another case indicated that Canadian nails were not being dumped west of the Great Lakes, but were being dumped east of the Great Lakes. The principal Canadian exporter (which alone accounted for over 50% of all Canadian nails in issue) admitted that 97% of its nails were sold in a limited region east of the Great Lakes. Nonetheless, Commissioner Stern, in a separate opinion, reached the conclusion that the American complainants "raised but did not press" the issue of regional injury.) Perhaps the greatest uncertainty which faced both complainants and respondents in June, 1979, was the possibility that the Commission would disregard evidence of injury to an identifiable region on the grounds that it was more appropriate to consider the question of injury on a national basis. 

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79 *Id.* at 5.

80 *Certain Steel Wire Nails from Canada*, Determination of no injury No. 1921-189, USITC Publication 937, February 1979, at 16. Commissioners Stern and Alberger subsequently explained that a "minimum percentage" of imports "which constitutes sufficient concentration" is not possible because different cases will involve different facts. *Carbon Steel Plate from Taiwan*, supra note 65, at 22-23.

81 See, Commissioner Alberger's decision in *Portland Hydraulic Cement from Canada*, supra note 58, at 14-18, and "Memorandum from the General Counsel to Commissioner Moore," *Sugar from Belgium, France and West Germany*, supra note 71, at A-61.
In summary, because the various Commissioners expressed so many different views during the past 25 years, any Commissioner could support almost any rational position by reference to one or more prior determinations and the views expressed by the Senate Finance Committee in 1975. In fact, the sweeping language employed by the Senate Finance Committee provided each Commissioner with ample support for almost any position which may have seemed appropriate in any particular situation. In the absence of Congressional action, the problem of the regional industry would have continued to depend on individual views of the voting Commissioners.

The Congress has, however, acted. On April 23, 1979, the Ways and Means Committee released the text of the various international codes, including an "Anti-Dumping Code," which had been negotiated during the "Tokyo Round" of multilateral trade negotiations and to which the United States had agreed, subject to approval by the Congress. As mentioned above, on June 19, 1979, the President submitted the proposed "Trade Agreements Act of 1979" to the Congress which promptly enacted the bill pursuant to the "fast-track" legislative procedures established by the Trade Act of 1974.

III. REGIONAL INDUSTRY CONCEPT UNDER THE GATT ANTIDUMPING CODE

The "Anti-Dumping Code" negotiated in Geneva contains a definition of the word "industry" which incorporates, to a significant extent, the industry definition contained in the dumping provisions of the General Agreement on Tariffs and Trade ("GATT"). Although the United States has not been bound by the GATT's dumping provisions, it is appropriate to review the regional in-

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84 The GATT's principal dumping provisions are, in fact, contained in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. Article VI of the General Agreement (GATT) condemns dumping and sets forth general principles relating to the assessment of dumping duties. The United States became a party to the GATT on October 30, 1947 (61 Stat. Part 5, A12, 55 U.N.T.S. 187) and agreed to observe the GATT's principles set forth in Article VI, but only to the extent that they were not inconsistent with domestic legislation existing on October 30, 1947. (See Paragraph 1 (b) of the Protocol of Provisional Application of the GATT.) The GATT's implementing provisions
industry concept reflected in the GATT. The GATT's implementing Agreement defined a "domestic industry" as consisting of either all domestic producers or those domestic producers whose "collective output" constitutes a "major proportion of the total domestic production." One of the three exceptions to this definition occurs when, "in exceptional circumstances," a country may be divided into two or more "competitive markets" and "the producers within each market regarded as a separate industry." The Agreement implementing the GATT's concept provided that the division of a total industry into separate industries may occur when, because of the costs of transportation, articles produced by domestic producers located outside the regional area are not sold in the region under consideration or when "regional marketing conditions" (such as "traditional patterns of distribution or consumer tastes") result in a "degree of isolation" similar to that produced by transportation costs.

When Congress, in 1968, considered adoption of the international Agreement implementing the GATT's dumping provisions, the provisions concerning regional industry were criticized by the majority of the Commissioners as being too "narrowly defined" in comparison with the manner in which the Commission had treated the question of a regional industry. Further, it was suggested that the Commission's affirmative decisions in the "cement cases" would have been decided differently had the GATT provisions been in effect. Whatever the reasons, Congress, in 1968, rejected the Agreement implementing the GATT's dumping provisions and retained the Antidumping Act.

were negotiated during the "Kennedy Round" of multilateral trade negotiations. Although the United States signed the Agreement in Geneva on June 30, 1967, the Congress, after considering certain tangled legal and legislative problems, did not enact implementing legislation and directed the responsible federal agencies to resolve inconsistencies between the Agreement and the Antidumping Act in favor of the Act. Pub. L. 90-634: 82 Stat. 1345; See also, International Antidumping Code, Hearing before the Committee on Finance, United States Senate [and collected documents] 90th Cong., 2d Sess., June 27, 1968.


Id. Article 4(a) (ii).

Id.

Id.


Supra note 13.


Supra note 84.
Despite Congress' rejection of the GATT Agreement, the United States delegation to the "Tokyo Round" negotiations agreed, in 1979, to an Anti-Dumping Code, which is substantially identical to the Agreement negotiated during the "Kennedy Round." There are two material differences with respect to the definition of a regional industry. First, the "new" Anti-Dumping Code eliminates the concept contained in the earlier Agreement that a national industry may be divided because of either "transportation costs" or "regional marketing conditions." Second, the "new" Anti-Dumping Code provides that when dumped products are causing material injury to a regional market, dumping duties must be levied solely on products imported into that region, unless the importing country has a constitutional prohibition against the assessment of dumping duties on a regional basis. Since the United States Constitution prohibits such action, the United States may, consistent with the Code, continue to assess dumping duties on all imports entering the United States, provided exporters are given an opportunity either to cease exporting to the regional area or to revise their prices to the regional area in question.

IV. THE NEW UNITED STATES ANTIDUMPING STATUTE—PROBLEMS AHEAD?

As indicated above, the Congress has enacted legislation intended to implement the Anti-Dumping Code agreed to in Geneva. With respect to the problem of a regional industry, the newly enacted legislation differs in some respects from both the Anti-Dumping Code and the earlier GATT Agreement. The legislation permits the United State market to be divided into two or more markets and the producers within each market to be treated as if they were a "separate industry" provided two conditions are satisfied:

(i) The producers within such market sell all or almost all of their production of the like product in question in that market, and
(ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.

83 U.S. CONST., art. I, § 8, cl. 1.
84 Anti-Dumping Code, art. 4(b), supra note 84.
85 Trade Agreements Act of 1979, supra note 76.
86 Trade Agreement Act of 1979, § 771(4)(c), supra note 76. [Section 101 adds a new "Title
After the geographic limits of the market are identified, the legislation will permit the International Trade Commission to reach an affirmative determination of injury "even if the domestic industry as a whole . . . is not injured" provided two further conditions are satisfied: first, there must be a "concentration" of the dumped imports into the "isolated" market and, second, there must be a finding that the imports dumped into the isolated market are injuring those United States producers which account for "all or almost all" of the production within the isolated, competitive market.97

The legislation represents a departure from the concepts previously employed by the Commission. With the enactment of the new legislation, the Congress may have, at long last, answered the question of whether injury to a regional industry constitutes injury to "an industry in the United States."

Any analysis of Congress' intentions concerning the regional industry provisions in the legislation must begin with recognition of a fundamental change in the basic philosophy of the United States. Specifically, the legislation suggests the philosophy of penalizing dumping only when the dumped imports are causing or threatening to cause "material" injury to an American industry (whether that industry is regional or national).98 If accepted, America's antidumping laws would be consistent with the basic concept set forth in the GATT over 30 years ago, as well as the provisions implementing that concept which were negotiated during the "Kennedy Round" in the 1960's, and the Anti-Dumping Code negotiated during the "Tokyo Round." This potential change in philosophy may cast a long shadow over the Commission's future determinations in dumping investigations.

The language of the legislation concerning regional industries is interesting in two respects. First, while the Anti-Dumping Code99
and the GATT provisions\textsuperscript{100} permit the division of a national industry into regional industries in "exceptional" circumstances, the new legislation will permit the identification of a regional industry in "appropriate" circumstances.\textsuperscript{101} Congress' change in the language clearly suggests that the division of a national industry will not be an uncommon occurrence. Second, the new legislation is hardly a model of unambiguous draftsmanship. In attempting to clarify the situation, the definition of a "regional industry" includes references to a "separate industry," a "particular product market," and an "isolated market."\textsuperscript{102} It remains to be seen whether these terms are interpreted as complimentary or contradictory.

Apart from the basic philosophical change in the dumping laws and Congress' choice of language, the legislation contains the seeds of three major problems.

First, the Commission will be required to measure the geographic extent of a regional market in light of the two guidelines established by Congress. These guidelines are similar to the two guidelines which the federal courts have developed to determine the relevant geographic market in antitrust proceedings, and it would not be unreasonable for the Commission to consider (and perhaps employ) the approach adopted by the federal courts.

As described more fully above, the new dumping legislation provides that the United States market may be divided into regional markets if all of the domestic producers located in that market sell "all or almost all" of their productive output in that market, and if that market is not supplied, "to any substantial degree," by domestic producers located outside of the market.\textsuperscript{103}

It is an accepted general rule that the impact on competition caused by acts alleged to violate the antitrust laws must be measured in the context of "both the relevant product market and the relevant geographic market."\textsuperscript{104} (The concept of a relevant product market is beyond the scope of this article.\textsuperscript{105}) The Supreme

\textsuperscript{100} Art. 4(a)(ii), "Agreement on Implementation of Article VI," \textit{supra} note 85.

\textsuperscript{101} Trade Agreements Act of 1979, § 771(4)(c), \textit{supra} note 76.

\textsuperscript{102} \textit{Ibid.} The new legislation is an improvement over the draft proposal which also referred to "competitive markets." See § 771(4), Trade Agreements Act of 1979, \textit{supra} note 76.

\textsuperscript{103} Trade Agreements Act of 1979, § 771(4)(c).

\textsuperscript{104} Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966), at 454 (Emphasis in original), reversed on other grounds, 389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621.
Court has made it clear that for purposes of the antitrust laws the "geographic market in some instances may encompass the entire Nation" while "under other circumstances it may be as small as a single metropolitan area." The Supreme Court has also established two criteria for establishing the perimeters of the geographic market in antitrust proceedings. Specifically, the market must be restricted to a geographic area where, first, "the purchases cannot, as a practical matter, turn to suppliers outside their own area," and, second, the overwhelming percentage of the producing area's output is sold in the geographic area. The two judicially-created criteria closely parallel the two criteria set forth in the new dumping legislation.

There are, of course, important differences between the economic and legal concepts underlying an antidumping proceeding and those underlying a proceeding commenced under one of the several antitrust laws. Not the least of the differences are the facts that dumping is not illegal and that antitrust proceedings involving mergers and acquisitions often require inquiry into whether the geographic area is surrounded by "economic barriers that significantly impede the entry of new competitors." Further, and as a general rule, for purposes of the antitrust laws the courts tend to measure the geographic market by the economic reach of the buyer, while the tilt of the new dumping legislation is toward the reach of the seller. Nonetheless, there are clear similarities between the regional market concept of the relevant geographic market fashioned by the courts for proceedings under the antitrust laws. It remains to be seen whether the Commission will apply the judicial concepts, directly or indirectly, in its future decisions.

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106 But see, Trade Agreements Act of 1979, § 771(4)(D), which defines the phrase "product lines" in the context of an "industry" for purposes of the dumping law and § 771(10) which defines the phrase "like product" for dumping law purposes.


110 "The central issue is where does a potential buyer look for potential suppliers . . . what is the geographical area in which the buyer has . . . a real choice as to price and alternative facilities?" dissenting in United States v. Grinnell Corporation, 384 U.S. 563, 589 (1966) (Fortas, J., dissenting), quoted in Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 458 (9th Cir. 1966).
The second potential problem in the legislation arises from the fact that it and the Anti-Dumping Agreement agreed to during the "Tokyo Round" differ from the Code negotiated during the "Kennedy Round" with respect to whether the reason underlying the existence of one or more regional industries are relevant to a dumping investigation. As explained above, the GATT Agreement permitted the division of a national industry into separate industries because of the costs of transportation or because of "regional marketing conditions." The new legislation omits such criteria, and Congress' omission raises the question as to whether the factors leading to the existence of a regional industry are relevant to the Commission's determination. The question may be important because two Commissioners have stated that in considering whether an industry is regional:

It may be relevant to ask what factors led to geographic segmentation. For example, we would want to know if constraints on transhipment exist by virtue of transportation costs or product characteristics, or if regional distribution is based solely on historical marketing conditions. In light of the otherwise close relationship between the "Kennedy Round" Agreement, the "Tokyo Round Code" and the new legislation, it appears that the Congress has intentionally sought to eliminate the reasons underlying the existence of a regional industry from the Commission's consideration, especially since producers may sell their product in an identifiable market for many reasons other than transportation costs and regional marketing conditions. (For example, producers may be confined to an identifiable region because of the availability or unavailability of raw materials, credit and capital sources, or seasonal considerations.) In short, it appears that the Commission may be required to accept the existence of a regional industry and to exclude the reasons for its existence from the consideration of injury.

The third potential problem arises from the fact that the new legislation requires "a concentration of ... dumped imports into ... an isolated market" before a regional industry can be determined.

111 Supra note 86.

112 "Additional Views of Commissioners Bill Alberger and Paula Stern With Respect To Regional Injury," supra note 78, at 21. See also, Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449, 456 (1966), where transportation costs were described as "an important factor in determining the scope of a relevant market [citation omitted]" in an antitrust proceeding.
to be materially injured or threatened by material injury. The word "concentration" is not defined. The Commission will, therefore, be required to consider the term. Commissioners Alberger and Stern believe that:

The concept of concentration implies that those engaged in unfair practices are focusing their marketing efforts on a particular region.\(^{113}\)

This view suggests that exporters must have some intent or deliberate plan to further their "unfair practices." Apart from the difficult burden of proof which such a view would impose on domestic complainants, imports commonly enter a particular region because of commercial considerations, such as the proximity of the producer (i.e., steel bars from Mexico entering Texas\(^{114}\)), or the availability of shipping services to particular ports. In short, the concentration of dumped imports into a region probably occurs more by reason of commercial circumstances than by design, and any attempt to predicate a finding of injury only when the latter cause exists will materially change the thrust of the dumping laws. The level of concentration must also be addressed when the United States is divided into two "or more" markets. In such instances, the Commission will be required to determine whether the same degree of concentration will be required in each of the markets and, if not, why one degree of concentration is more acceptable than another.\(^{115}\)

Finally, very brief mention should be made of the fact that the regional industry provisions in the "Trade Agreements Act of 1979" will create a number of procedural problems for complainants, respondents, "interested parties" and the Commission. One practical problem arises from the fact that the Commission will be required to collect (in a short period of time) information concerning the shipment of products from all United States producers into a region (which, based on this information, may or may not qualify as a regional market). Since commercial information concerning domestic shipments are commonly granted "business confidential" treatment, neither complainants nor respondents will be fully acquainted with the status of the regional industry issue at the time they present their arguments to the Commission.

\(^{113}\) *Id.* at 22.

\(^{114}\) *Supra* note 44.

\(^{115}\) *Compare* the "cement cases" of the early 1960's, *supra* note 13.
V. CONCLUSION

As noted at the outset of this article, in 1963 a federal court declared the Antidumping Act's phrase, "an industry in the United States," to be "not clear and unambiguous." Since that decision, the interpretations of the phrase have become even more ambiguous, despite the fact that in the intervening years American producers dramatically increased their resort to the Antidumping Act. On three separate occasions in the past twenty-five years, the Congress has amended the Antidumping Act without resolving the problem of the regional industry. The legislation recently enacted by the Congress is intended to resolve the principle problems. Whether the Commission's interpretation of the legislation will result in greater or lesser ambiguity remains to be seen.