American Response to Dumping from Capitalist and Socialist Economies Substantive Premises and Restructured Procedures After the 1967 Gatt Code

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Dumping consists of selling abroad at less than "normal" or "fair" value. In the typical case a producer, for any one of a number of motives, sells in a foreign market at a price lower than that at which he sells in his home market or other primary market. This practice is...
feared and condemned because it may unfairly injure other producers who sell in the national market where the goods are dumped, and because it may impair normal conditions of competition among those producers.

Like other national antidumping laws that observe the standards of the General Agreement on Tariffs and Trade, the United States law is designed to defend domestic industry against injury from the importation of foreign merchandise at differentially low prices. Accordingly, there are two prime elements that must be found before remedial action can be taken: differentially low prices ("at less than fair value") of the imported goods, and injury to a domestic industry. Where both are established, a special equalizing duty is imposed.

Dumping takes its most damaging form when "predatory" sales are systematically made at reduced export prices to forestall, reduce or eliminate competition in a particular national market, so that higher

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The critical characteristic of dumping, as it concerns us, exists when the price for sale to the importing market (e.g., the United States) is lower than the price (or value otherwise computed) in the exporter's other primary market (e.g., his home market).


2 Article VI of the GATT "recognizes" that dumping "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." 62 Stat. 3682 (1947). The provisions of GATT art. VI have been extensively elaborated by the International Antidumping Code, signed at Geneva on June 30, 1967 as part of the Kennedy Round of trade negotiations, 32 Fed. Reg. 14,962 (1967), T.L.A.S. No.—— (effective July 1, 1968), 6 INT'L LEGAL MATERIALS 920 (1967) [hereinafter cited as Code], discussed extensively in part II of this article. See Comment, The Kennedy Round GATT Anti-Dumping Code, 29 U. Pitt. L. Rev. 482 (1968). Regarding pre-Code European antidumping laws, see Section of International and Comparative Law, Analyses of the Antidumping Laws of the Federal Republic of Germany, France, Italy, and the United Kingdom, 10 A.B.A. INT'L & COMP. L. BULL. 14 (Dec. 1965).

3 The fundamental plan of the law is found in § 201(a) of the Act, which reads in part as follows:

Whenever the Secretary of the Treasury . . . determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.


prices can thereafter be charged in that market.\textsuperscript{5} The first explicit American antidumping law, a criminal statute enacted in 1916,\textsuperscript{6} was addressed to this kind of dumping, “done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing” trade.\textsuperscript{7} But dumping occasioned by non-predatory motives—for example, to relieve random surpluses on the home market\textsuperscript{8} or to maintain factories at capacity production\textsuperscript{9)—may nevertheless have injurious effects in the national market where the goods are sold.\textsuperscript{10} When a new American antidumping law was enacted in 1921,\textsuperscript{11} its principal legislative purpose may have continued to be the prevention of predatory dumping,\textsuperscript{12} but the requirement of intent to injure was removed and the reach of the law was extended to all sales below fair value by reason of which an industry in the United States “is being or is likely to be injured.”\textsuperscript{13} The Antidumping Act of 1921 provided for the administrative assessment of equalizing duties rather than the use

\begin{footnotesize}
\begin{enumerate}
\item Viner 26. The pre-empted competitors, of course, may be other exporters into the national market as well as domestic producers. The periodic or systematic character of this form of dumping has led it to be termed “intermittent,” to distinguish it from the less-damaging “sporadic” or occasional dumping of surpluses on the one hand and from “permanent” or “long-run” dumping on the other. See Viner 23-31, 110-26, 132-33; Ehrenhaft, Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties, 58 Colum. L. Rev. 44, 46-48 (1958).
\item Viner regarded the potential injury from such sporadic dumping as relatively unimportant. Viner 245, 129-40.
\item See pp. 172-77 infra; Viner 27-28, 31.
\item Act § 201(a), 42 Stat. 11 (1921), 19 U.S.C. § 160(a) (1964).
\end{enumerate}
\end{footnotesize}
of criminal penalties.14 It is in that Act, as amended and as supplemented by Treasury regulations,15 that the basic American legislation on this subject continues to be found.16

I wish to consider the Antidumping Act of 1921 in three aspects, as to which I believe it is fair to say the scholarly literature is either scanty or at least partly out of date. The first section of this paper will explore the economic premises of the law: why should a higher duty be assessed upon dumped goods than upon other similar goods imported at a similar price? In the second part I will briefly examine the procedures and the legal criteria observed in determining whether a dumping duty shall be imposed, with particular attention to the GATT Antidumping Code of 1967 and the new regulations promulgated by the Treasury in 1968 to conform procedures under the American law to that Code. The final section probes the nature and theory of the price comparison inquiry, by considering the manner in which that inquiry should be pursued in cases where the price of the exported product has been affected by measures of state interference in or control over the exporting economy. This question is examined most closely with respect to the products of Yugoslavia, whose economy fits neither the capitalist model the draftsmen of the Antidumping Act seem to

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14 Id. § 202(a), 19 U.S.C. § 161(a) (1964).


16 The export price discrimination that may result from a system of governmental (or private) subsidies—sometimes called "bounty dumping"—is dealt with by separate legislation in the American scheme of import regulation. The anti-bounty statute imposes a "countervailing duty" in the amount of the bounty or subsidy found to have been bestowed upon the imported goods. Tariff Act of 1930, § 303, 46 Stat. 687, 19 U.S.C. § 1308 (1964); for history (antedating antidumping legislation), see Ehrenhaft, supra note 5, at 52-53. Although the practice of export subsidization can result in sale abroad at lower prices than in the home market and thus can present economic effects similar to dumping (see Viner 126-28, 134-35), American law responds quite differently to subsidized imports. Neither of the two essential components of an antidumping finding is material: sale below home-market price need not be shown, and there is no requirement of injury to a domestic industry. (The statute's non-conformity to the GATT's requirement of finding threatened or actual injury to a domestic industry, art. VI(6), is permitted because the American statute antedated GATT. See note 61 infra.) See generally Ehrenhaft, supra note 5, at 54-58; Ebn, supra note 7, at 824-36; F. Davis, The Regulation and Control of Foreign Trade, 66 Colum. L. Rev. 1428, 1444-46 (1966). Although the countervailing duty statute has been little used in the seventy years of its existence, Senate Comm. on Finance, 90th Cong., 2d Sess, Compendium of Papers on Legislative Oversight Review of U.S. Trade Policies 77 (2 vols. Comm. Print 1968) [hereinafter cited as Compendium], there are indications that the administration intends to employ it more readily than in the past. See, e.g., N.Y. Times, June 27, 1968, at 1, col. 2 (city ed.); Roth, The Future of American Trade Policy, 59 Dept Stat Bull. 100, 101 (1968).
have had in mind nor the strict socialist paradigm of which recent Treasury decisions have taken some account.

I

THE ECONOMIC PREMISES OF THE ANTIDUMPING ACT

It should be clear that the American antidumping laws present no barrier to the importation of goods on the ground merely that those goods undersell domestic products, even where domestic producers are thereby injured. Such low-priced imports are in principle welcomed under the liberal American trade policy, and in general are restricted (if at all) only by conventional tariffs. But if imported goods that are differentially priced undersell domestic products and thereby injure domestic producers, the antidumping duty may be imposed.\(^1\)

\(^{17}\) The Antidumping Act is designed, not to restrict competition from imports as such, but . . . to bolster the forces supporting a healthy competition within the domestic economy. . . . Price competition reflecting improved technology, increased efficiency, and superior types of marketing—each redounding to the benefit of the consuming public and each contributing to the vigor of the national economy—is compatible with the legislation here concerned. Portland Cement from the Dominican Republic, 28 Fed. Reg. 4047 (Tariff Comm'n 1963).


\(^{20}\) Under Tariff Commission practice, injury is not found unless the dumped goods sell in the American market at a lower price than the competitive domestic product. Hendrick, The United States Antidumping Act, 58 AM. J. INT'L L. 914, 928-30 (1954); Hendrick, Administration of the U.S. Antidumping Act—Procedures and Policies, in COMPENDIUM, supra note 16, at 173-74. The fact that the Treasury finds imports to be sold at less than fair value creates no presumption of injury, which must be separately found on the evidence. Hendrick, in COMPENDIUM 172; Coudert, supra note 12, at 205-06 n.109; Ehrenhaft, supra note 5, at 67-68.
What considerations justify a policy that accords more restrictive treatment to differentially-priced imports than to other imports that may undersell the competing domestic product? Superficially, the American consumer derives the same advantages of cheapness from the dumped as from the non-dumped imports; thus the antidumping law seems to depart from the free trade policy that encourages the importation of inexpensive goods. Interestingly, however, the soundest theoretical basis for treating dumped goods more restrictively seems to lie in an economic doctrine that not only makes the consumer's ability to buy cheaply the ultimate desideratum but is indeed the very premise of the general policy favoring free trade.\(^2\) This theory—the economic law of comparative advantage—teaches that free international competition will induce a pattern of international specialization along the lines of relative productive efficiency, which in turn will minimize prices throughout the international trading area involved.\(^2\) Thus, if a producer in one country possesses natural or earned advantages that enable him to sell more cheaply in another country than can the domestic producers, he should be allowed to do so; the exporting producer is fairly rewarded for his efficiency, and consumers in the importing country get the goods at the lowest price. On the other hand, an export-

Some economists have suggested that, in certain circumstances such as those where a domestic oligopoly maintains inflexible prices, dumping may be a needed factor to stimulate competition and thereby to benefit consumers in the American market. See Adams & Dirlam, Steel Imports and Vertical Oligopoly Power, 54 Am. Econ. Rev. 628, 648-50 (1964). But cf. The Steel Import Problem, 23 STEELWAYS, Nov.-Dec. 1967, at 2. The important question of whether, in making its injury determination, the Tariff Commission should “protect competition” or should “protect competitors” is beyond the scope of the present paper. See Comment, The Antidumping Act—Tariff or Antitrust Law?, 74 Yale L. J. 707 (1965).

\(^{22}\) If the free-trade doctrine be regarded as the positive doctrine that commerce and industry should be kept in their natural channels and not merely the negative doctrine that nothing be done by legislatures to force them out of their natural channels, it would not merely be invalid to cite the doctrine as opposed to restrictions on dumping but it would be valid to argue that it calls for such restrictions.

Viner 147. The fundamental economic policies underlying the antidumping laws have received surprisingly little attention in the legal literature, which either ignores the question or makes passing allusion to the idea of unfair competition.

\(^{23}\) On the theory of comparative advantage generally, see F. Samuelson, Economics 646-51, 657-67 (7th ed. 1967) [hereinafter cited as Samuelson]; Kindleberger, supra note 1, at 87-105; P. Ellsworth, The International Economy 120-28, 144-46, 153-55 (1950); Haberler, supra note 1, at 125-44. Obviously, considerations of national security, protection of infant industries, maintaining employment in depressed areas and the like will lead even the most ardent free-trading nations to protect certain domestic industries against import competition. See Ellsworth, supra, at 363-85. Such considerations may be treated as extraneous for the analysis that follows.
ing producer should not be permitted to undersell and thereby to injure domestic producers if he can do so only by exploiting artificial or anticompetitive circumstances rather than by exploiting his superior efficiency.

On these premises, the practice of dumping can be condemned for two reasons. First, the fact that the price for export to the United States is lower than the price the seller charges in his primary market is itself taken as evidence that the export sales are somehow subsidized by monopolistic profits extracted from the primary market; thus the dumper has only an artificial and not a legitimate advantage over the American competitors he undersells. Second, while standing to lose the favorable prices or supplies furnished by domestic producers who might be injured by the dumping, the American consumer gains no assurance that the imported goods will continue to be available at the low dumped price.

The assumption must be, of course, that the domestic producers are efficient and vigorously competing. Then, on the above grounds, the American consumer will be protected by an administrative technique that protects the American producers against injury. The two counts against dumping can be restated in comparative advantage terms: (1) dumpers do not have an economically legitimate advantage, and/or (2) the benefits flowing from any advantage possessed by the dumper are temporary and unreliable. The latter point is the stronger, and will be examined first.

In the analysis that follows, it will be assumed that the dumper exports at a price that not only is lower than his home-market price but also is lower than the prevailing price of the competitive domestic product in the United States. This assumption sets the relevant conditions for comparative advantage analysis, enabling us to inquire whether the lower dumping price reflects a genuine advantage. Further, since under Tariff Commission practice injury will be found only if the dumped goods undersell the domestic goods, the assumption makes the inquiry a realistic one in terms of the antidumping law's chief requirements.

A. The Undependability of the Benefits of Dumping

Where the imported goods are not dumped but are sold to the United States at the same price as to the home market, that uniformity of price probably reflects more or less stable productive conditions enabling the exporter to sell normally at that price. Presumably he is
making money at that price; the probabilities are small that he is setting an identical money-losing price (which could be maintained only for a limited period) in both the home and the export markets. Therefore legislative policy may fairly act on a presumption that the supply of such uniformly-priced imported goods will be of indefinite duration.\footnote{Indeed, if free-trade policy is to mean anything, there must be such a presumption. If it were taken that even uniformly-priced goods could not be relied upon to be available at the given price, there would be justification for imposing equalizing duties on all goods that undersold the domestic product. Section 336 of the protectionist Tariff Act of 1930, 19 U.S.C. § 1336 (1964), which did roughly that, is now virtually inoperative as a result of the reciprocal trade agreements program, see Reciprocal Trade Agreement Act of 1934, § 2, 19 U.S.C. § 1352 (1964), and the statutory most-favored-nations principle. See Trade Expansion Act of 1962, § 251, 19 U.S.C. § 1881 (1964). See also Headnotes to Revised Tariff Schedules, 19 U.S.C. § 1202 (1964).}

Although such non-dumped imports may undersell and thereby injure American producers, the prospect of their continued cheapness and availability affords a reasonable prospect of long-run benefits to consumers in the United States. It is the essence of comparative advantage theory that domestic producers should have to adjust to the foreign competition in such a situation.\footnote{See Ellsworth, supra note 23, at 123-25, 144-46; Steel Reinforcing Bars from Canada, 29 Fed. Reg. 3840, 3841 (Tariff Comm'n 1964).}

By contrast, it can almost never be presumed that a particular course of dumping will last more than temporarily or briefly. "[T]he evil of dumping from the point of view of the importing country is its uncertain duration." Economists recognize the possibility of "permanent" or "persistent" dumping, and concede that there would be no economic case to be made against such a continuous flow of cheap goods, regardless of the cause of their cheapness.\footnote{See, e.g., Viner 138-39, 144-45; Ellsworth, supra note 23, at 386; Haberler, supra note 1, at 314-15; Ehrenhaft, supra note 5, at 48 n.20.}

But "[t]here is no practical means whereby an importing country can discriminate beforehand between dumping which is destined to continue indefinitely and dumping which will cease . . . ." And since, as the analysis in the next section will show, the situations in which an exporter can profitably maintain dumping beyond the short run are few (even in declining-cost industries), the economic pressures will militate to cut the dumping short.

\footnote{Viner 139.}

\footnote{Viner also stated:
Only in the case of dumping resulting from the existence of a system of official export bounties which is strongly entrenched in national policy would it appear to be safe for individuals in the importing country to plan their business for the future on the assumption that the dumping will continue indefinitely and may not suddenly cease. Id. See note 16 supra.}
It is therefore proper to erect a presumption, for the purposes of legislative policy, that dumping will be temporary.\textsuperscript{29} The only benefit of dumping—a supply of low-priced goods—should on like grounds be presumed to be temporary and undependable.\textsuperscript{30} Here, then, we have the principal economic justification for the Antidumping Act. There is no basis to say (as in the case of non-dumped imports) that the injury inflicted upon domestic producers will be offset by a redeeming economic advantage in the dumper that can be relied upon to maintain the correlative benefit of cheapness that the law of comparative advantage promises. To the contrary, comparative advantage theory in this situation argues in favor of protecting domestic competition against disturbance and domestic producers against injury. The domestic industry is more readily presumed capable of maintaining low prices than is the foreign competitor whose temporarily lower price cannot be depended upon.

The issue of whether the presumption of unreliability can or should be overcome, upon a showing that the dumping can be permanent, will be considered after an examination of the variant patterns of production costs.

While dumping of course does not cause legally-cognizable injury in all instances, temporary dumping\textsuperscript{31} is likely to cause economic injury because it creates an unstable situation to which competitors in the domestic market may not readily be able to adjust—and, indeed, should not be expected to adjust.\textsuperscript{32} If the domestic industry is an efficient one (as we must assume throughout the present analysis), the domestic economy has an interest in keeping domestic producers engaged in their present lines of production, rather than in requiring them to shift

\textsuperscript{29} See Viner 146-47, 139.

\textsuperscript{30} There is a sound case, therefore, for the restriction of imports of dumped commodities, not because such imports are cheap in price, nor because their prices are lower than those prevailing in their home market, but because dumping prices are presumptive evidence of abnormal and temporary cheapness. Id. at 147. See also Haberler, supra note 1, at 314.

\textsuperscript{31} Temporary dumping may be differentiated as between that which is occasional or "sporadic" and that which is systematic or "intermittent"; the former is the less important but is nonetheless capable of bringing injury. See Viner 139-40, 146-47. Under the American practice, antidumping proceedings may be closed when the Secretary of the Treasury is satisfied that the dumping sales have ceased. Note 91 infra. The paragraph in the text is directed primarily to the consequences of intermittent dumping.

\textsuperscript{32} Short-run dumping, whatever its objective, may result in serious injury to or even the total elimination of the domestic industry. The gain to the consumer for a short period of abnormally low prices may not be nearly great enough to offset the damage to the domestic industry, including the capital invested therein, the labor which it employs, and the managerial ability which directs it. Viner 140. See also Haberler, supra note 1, at 314; Ellsworth, supra note 23, at 386.
over to other lines, as they perhaps ought to do to adjust to a permanent flow of competitive low-cost imports. An idling of the capital and labor employed in such an industry comes at a particularly high social cost. The unemployed capital and labor are wholly lost to the economy for at least the short-run period during which they cannot be shifted into any other line of production. And in the longer run the idled factors should not be shifted into other lines, since (apart from the dumping, which cannot be counted on) it is the pre-dumping combination of capital and labor that makes the product available to consumers at the lowest price. But if the dumping continues long enough to necessitate a shift to other lines, the new uses of the capital and labor will usually be less remunerative to the possessors of those factors, and less valuable to the economy as a whole, than the old. Thus temporary dumping not only idles production, but in addition it tends to divert the factors of production to less economic employment. Ultimately it may also cause prices to rise, either because the dumper gains a monopoly or because the efficiency and ability to compete of the domestic producers have been impaired. Even though the dumping is temporary, then, it may bring enduring injury to the domestic economy.33

B. Dumping as Reflecting a “Subsidy” Rather Than a Legitimate Advantage

The second ground for condemning dumping on comparative advantage premises stems from the simple perception that a dumper cannot afford to export his product at a cheap price unless he possesses some sort of monopolistic control over his primary markets, sufficient to enable him to charge higher prices there than he could exact under competitive conditions. Thus, rather than exploiting a natural or earned advantage, the dumper is availing himself of an anticompetitive position that gives him the financial ability to maintain an artificially lowered export price, inconsistently with the theory whereunder free international competition maximizes international economic benefit. The dumper is seen to be entering the American market with an unfair “subsidy”; not even a liberal trade policy should allow the presumably efficient domestic producers to suffer injury at the hands of such a competitor.

How far can one say that the mere existence of differential prices must reflect monopoly power in the primary market, the exploitation of which enables the sale of exports at the lower price?

33 But cf. note 21 supra.
Economists consider an enterprise to have monopoly power whenever it can set its prices at any level higher than the marginal cost of production—that is, the incremental variable cost of making an additional unit—quite irrespective of whether the firm is a "monopolist" in the sense of being the only seller in its field.\(^\text{34}\) Thus in economists' terms dumping can never be profitably practiced unless the dumper enjoys some degree of monopoly power in the higher-priced market; otherwise, competition in that market would have forced the price down to the level of marginal cost, and it would be unprofitable to sell abroad at any price below that level.\(^\text{35}\)

But this does not establish that the monopoly power (which exists in all cases of dumping except those in which the seller involuntarily takes a loss, as when he gets rid of a surplus) is the causative factor that enables the seller to export at the lower price. This issue must be subjected to analysis in terms of three sets of variables: (1) whether the export price exceeds the marginal cost of production (and, if so, whether it exceeds the average total cost); (2) whether we are speaking of the short run (during which fixed costs are constant) or the longer run (during which the producer must renew and may enlarge his fixed-cost investment, as for plant and equipment); and (3) whether the producer experiences rising costs or declining costs per unit as his output is increased.

The question in each case becomes one of the extent to which the buyers in the home market, by paying a higher price, may bear a disproportionate share of the costs that are attributable to the dumped goods.\(^\text{36}\) We therefore focus on the way in which the seller recovers the costs of that last increment of his total production that represents the quantity dumped. Total costs always consist of fixed costs plus variable costs. The seller's marginal cost of production is the incremental variable cost of producing an additional unit. Since we are treating

\(^{34}\) "Monopoly power," here, is equated with the status of a firm in an industry in which "imperfect" rather than "perfect" competition exists, such that the producer can have some control over the price at which he sells. See Samuelson 466-76. A more pragmatic and realistic criterion of monopoly power over price might be the ability to earn supernormal profits (i.e., to cover more than average costs, which include a "normal profit") over an extended period of time. As suggested by the analysis that follows, it is quite possible for a firm to dump profitably abroad while remaining subject to "effective competition" that prevents it from earning supernormal profits at home.

\(^{35}\) "An approach to monopolistic control of the home market is perhaps the most important prerequisite to the existence of dumping as a systematic and normal practice." Viner 376. "[A] necessary condition [for successful dumping] is monopoly upon the home market." Haberler, supra note 1, at 301. "[Dumping] arises only because of the monopolistic element in the home market." Kindleberger, supra note 1, at 275.

\(^{36}\) See Haberler 311-12.
the dumped output as being the last increment of the seller's production, we may for present purposes use the term "marginal cost" to refer to the average variable cost of that entire increment, even though it consists of more than one unit.

In the short run, during which fixed costs are constant, a sale will be profitable whenever it exceeds the marginal cost (that is, the average variable cost) of producing the increment of goods dumped; fixed costs can be ignored entirely in deciding whether the home-market buyers bear any disproportionate share of the costs of producing that part of the seller's output. In the longer run, however, the seller must renew his fixed investment, and so if his business is to be profitable he must recover his total costs (variable plus fixed costs).

1. Sales Below Marginal Cost

Sale at a price below marginal cost always means an out-of-pocket loss. The price does not even cover all of the variable cost of the product sold, let alone any part of the fixed costs.

Dumping sales below marginal cost may be voluntarily undertaken for predatory motives, or perhaps to preserve a customer relationship during a period of fluctuating costs (which might or might not be predatory). Of course a predatory dumper may ultimately succeed in recouping his losses from the export market, by later raising his price in that market. Otherwise the seller must subsidize his dumping by making primary-market sales at prices above marginal cost, which he can do only if he possesses monopoly power in that market. This conclusion holds whether we speak of the short or the longer run, or of rising-cost rather than declining-cost sellers.

Where the sale below marginal cost might be termed "involuntary"—as where the seller is trying to cut his loss on a surplus by exporting it for whatever price it will fetch—it is harder to identify a

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87 The "marginal cost" referred to here (above which the subsidizing home-market sales must be priced) is the marginal cost of producing the goods sold on the home market. Depending upon whether the cost pattern is a rising or a declining one, the marginal cost of the home-sold product may be higher or lower than that of the incremental output dumped abroad. In the rising-cost pattern, the marginal cost of the product sold at home will be lower than the marginal cost of the exported product; in these circumstances it is possible to subsidize the exports without actually dumping, since the profitable home price may be less than the unprofitable export price.

88 It is analytically possible to conceive circumstances in which a rising-cost seller could reimburse his dumping losses through home sales at a price that exceeded the average total cost but not the (higher) marginal cost at that level of production. Such a pricing decision would result from a miscalculation as to how best to maximize profits in the home market, rather than from an absence of monopoly power to set price above marginal cost.
subsidy. This is purely a short-run phenomenon. The seller does not rely on his home-market buyers to reimburse any part of the costs not covered by the export price. On the other hand, it cannot be said that such a seller possesses a genuine economic advantage that confers benefits upon the importing country through sporadic sales of this nature. The antidumping law properly restricts such imports if they cause injury.

2. Sales Above Marginal Cost—Short Run

Here there is no subsidy that enables the seller to export at the dumping price. In the short run we are not concerned with the seller's ability to stay in business or to maintain dumping over a substantial period of time, but only with how he makes particular pricing decisions during the span in which his fixed investment remains constant. Hence, the producer's fixed costs can be completely ignored; he can profitably sell additional output abroad for any price that covers the marginal cost (i.e., the average variable cost) of that output. When he does so, his only relevant costs are fully recovered from the export sale itself. The dumping is in no way made possible by the higher home price, since the home-market buyers bear no portion of the pertinent costs. No subsidy exists, whether the seller experiences a rising or declining cost pattern. Thus the dumper who undersells the American producers in these circumstances is not ipso facto exploiting an artificial monopolistic advantage. Again, however, he has no authentic comparative advantage, since the short run is too brief a span in which to declare that the existence of unsubsidized low-priced dumping sales establishes the existence of such an advantage.

3. Sales Above Marginal Cost—Longer Run

Except in the case of exports that are directly subsidized by bounty, dumping over a period longer than the short run can normally be maintained in appreciable quantities only by a seller whose costs of production decline as output increases. He may be a producer who in the absence of dumping has existing excess capacity that can be renewed periodically at relatively low cost, or one who could realize economies of scale by expanding capacity. For completeness, the circumstance of the rising-cost seller is briefly considered first.

a. Rising-Cost Sellers. When operating at or near full capacity, a seller's average and marginal costs commonly rise as additional production is undertaken. Although it is possible to envision a situation in
which the curve of marginal costs is rising but still lies below that of 
average total costs,\footnote{The curve of average costs would actually be falling in this situation. It is quite 
unlikely that such a cost pattern could persist for an appreciable period, but if it did, 
the dumping sales at a price above marginal cost but below average costs would 
necessarily be subsidized by the home buyers' bearing a disproportionate share of the 
fixed costs; the analysis is similar to that in the declining-cost pattern, discussed at 
pp. 178-75 infra.} the point is soon reached at which marginal cost 
exceeds average cost for additional quantities of output. Beyond that 
point, if the producer finds a market abroad at a price above his mar-
ginal cost, he is by hypothesis selling at a price above his average total 
costs, and therefore is recovering from the export market all of the costs 
(fixed and variable) attributable to the export sales. He does not rely on 
home-market buyers to cover any share of those costs, and the latter 
therefore do not subsidize the export. It is true that the seller's home-
market price, to invoke the antidumping laws, must stand even higher 
average total costs than the export price, so that the home sales 
generate greater unit profits than do the export sales. The ability to 
price at such a level in the home market undoubtedly bespeaks con-
siderable monopoly power, the exercise of which is yielding the seller 
supernormal profits.\footnote{See note 34 supra.} But his enhanced financial strength is not in any 
way a factor that makes the dumping possible,\footnote{That the dumper is gathering supernormal profits from home sales does not 
itself create or reflect a subsidy, so long as the dumping sales are priced above marginal 
costs (and therefore above average costs); it would, however, enhance the seller's ability 
to penetrate the American market at predatory prices set below marginal costs or (what 
can be economically much the same thing) to support expensive promotional campaigns 
in that market.} since the dumping price covers all the costs of the dumped goods. Such a seller has a 
genuine cost advantage over producers in the export market whom he 
can undersell at any price exceeding his marginal cost. 

But it is unlikely that he could dump a great quantity in this 
fashion. His rising marginal costs would quickly reach the level of the 
export price (more precisely, the marginal revenue from the export 
sales, a lower figure), beyond which the dumping would no longer be 
profitable.\footnote{If we add into the analysis the factor of possible fluctuation over time of the seller's 
costs, however, we may recognize the possibility that the high home profits gathered 
during the low-cost portion of the cycle might enable the dumper to maintain his low 
dumping price during a part of the cycle when his average costs rose above that price; 
then there would be a subsidy.}

\textbf{b. Declining-Cost Sellers.} For producers possessing existing ex-
cess capacity and those who can enjoy economies of scale by expanding
capacity, the curve of marginal costs will stand below that of average total costs, and both curves will fall as production is increased. For these producers (just as for those with rising costs) to break even in the long run, any sales priced below average costs must be compensated for by other sales at prices above that level. But the nature of the declining-cost pattern is such that it encourages the producer to adopt a policy of selling abroad at a price below his average costs.

The decreasing-cost producer can always sell abroad profitably at any price exceeding the marginal cost of the incremental output, even though that price is below average total cost. His ability to dump permanently—i.e., in the economic long-run—depends solely on the long-run profitability of his business in other markets (which here, for simplicity, we will assimilate to the home market). If his home-market business is profitable in the long run, which means that he is wholly covering his fixed as well as his variable costs, he can dump indefinitely at any price above marginal cost, even though that price makes no contribution to the recovery of fixed costs that by definition is necessary in the long run. If his home-market business is unprofitable, he can still dump profitably at any price exceeding marginal cost, although of course he cannot do so permanently if he cannot stay in business permanently.

Here we approach the central economic question of dumping. The dumper, whose price may reflect only marginal costs, competes with an American producer who will be injured unless he can recover his total costs. Which has the comparative advantage? Average total cost, since it takes account of all long-run elements of cost and therefore is consistent with permanency of price levels, is the familiar measure.

44 It is possible to imagine one case of dumping that can persist economically in the long run (i.e., indefinitely or permanently), even though total fixed costs are not fully recovered from the home market. This would happen where home sales must be priced just below the average total costs of the quantity produced for home sale, but the dumping sales can be priced sufficiently above the marginal costs to make up the part of fixed costs not covered by the home sales. Realistically, however, in declining-cost industries, where competition characteristically induces price instability, such a delicate balance is unlikely to continue for a substantial period of time.

45 For the present long-run analysis, we must presume that in the absence of dumping the American producer is capable of staying in business indefinitely, and therefore is covering his total costs, including fixed costs; his price must then approximate (or exceed) his average total costs. It also seems necessary (though it may be unrealistic) to assume a state of long-run competitive equilibrium among the American sellers, where-under the individual firms cannot exact prices substantially above the level of their average total costs. Of course, if the American producers experience declining costs in the manufacture of the product, equilibrium among them is improbable, as is the ability to sell above the level of average costs. See text accompanying note 49 infra.
of economic advantage. But where the dumper is economically capable of permanently maintaining exports on the basis of his marginal costs, should not his advantage be measured by the dumping price, subsidy or no subsidy? After a further examination of the economics of dumping by declining-cost producers, I shall return to this question, and explain my negative answer to it.

Normal profit-maximization strategies heighten the declining-cost producer’s incentive to engage in dumping, as a regular practice, whenever he is unable to increase his home sales but can find dependable markets abroad. The critical factor is the producer’s ability to lower his average unit costs by expanding his volume of production. By enlarging his production to the extent justified by potential sale of the increment abroad, he reduces his average costs on the entire output, including that sold in the home market. The savings thus realized make the home sales more profitable. The increment is sold abroad at a price which, while it must of course cover marginal costs, may be lower than the average total costs at the increased level of production. Dumping sales at such a price manifestly do not fully reimburse their pro rata share of the fixed costs. But, at particular prices and quantities, the amount by which the dumping sales fall short of covering average total costs (including fixed costs) will be more than made up by the cost savings on the portion of the output sold at home. Profitability is enhanced, then, not simply by selling abroad at a price above marginal costs, but through a reduction of average costs that make home sales more remunerative.

Conceivably the export price can be set below the home-market price but still above the level of the seller’s average total costs as reckoned on his expanded output. In this case there is dumping but no subsidy, since all costs referable to the exported product are recovered from the foreign sales. But export sales at any price below the level of average total costs cannot exist, beyond the short run, without a subsidy. As stated, such a price does not fully recompense the fixed costs ratably attributable to the dumped goods; the home buyers, by paying a higher price set by the exercise of at least some degree of monopoly power in their market, inevitably bear a disproportionate share of the fixed costs that must be recaptured over any period beyond the short run. Thus the seller’s market power at home generates the ability to


47 Obviously, as in all dumping cases, transportation costs or other factors must segregate the two markets, so that the goods sold abroad may not practicably be reimported and undercut the home market price. See Haberler 501.
sell abroad at a lower price, and can be viewed as subsidizing the dumping. The subsidy makes it possible for the seller to enter the American market more cheaply than would be economically possible at a uniform price not differentiated between home and export sales.

Because competition among multiple sellers in declining-cost industries is characteristically unstable, it is frequently true that such sellers cannot recover all of their costs in the home market. Falling cost curves tempt firms into tactics of overproduction and repeated price reduction, which press prices below average costs and downward the level of marginal costs. Such producers—who fit the classic pattern of the "sick industry"—cannot regenerate their fixed costs and therefore cannot stay in business over the long run. Through price-fixing agreements and otherwise, however, they may attempt to continue operation for an "intermediate run" so long as they can recoup variable costs, in the hope also of defraying or renewing part of their fixed costs. This situation, then, calls for recognition as one in which purely short-run analysis will not serve. The incentive to dump will be governed by the same considerations as control the seller who operates profitably in the long run, and the same technique of profit-maximization (described above) will apply. The fact that home-market sales are priced below average cost, and consequently are unprofitable in any period beyond the short run, affects only the potential duration of the dumping, not its economic appeal to the seller. The home buyers, by the subsidy of bearing a disproportionate share of the fixed costs that are in fact recompensed, enable the seller for some period of time to sell to the United States at the lower price. Thus the seller's transitory price advantage in the American market should not be taken as evidence of a true comparative advantage.

The ability of a declining-cost producer to price above average costs is most likely to be found where the producer holds a literal monopoly in his home market. When one of the competitors experiences a descending cost curve that prevails over the entire range of demand in the relevant market, he can quickly become a true monopolist. By continually lowering prices and expanding production to serve a larger

48 "[T]he entrepreneur covers his general overhead costs, or a more than proportionate part of them, by home sales and ... the high home price makes possible the cheap foreign sales." Id. at 312. One might, however, employ a different analytical approach, under which no subsidy to the export sales would be found. On this view, the dumping sales contribute at least proportionately to the fixed costs (albeit indirectly) by making possible the savings on production for home sale, enabling fixed costs to be recovered more quickly in the home market.

49 See Samuelson 446.

50 See id. at 460, 446.
share of the market, he progressively lessens his unit costs. As his competitors' share of the market contracts, their unit costs (based on reduced output) must rise, rendering them increasingly unable to compete on the basis of price. The single seller who survives such a course of events will now possess full monopoly power to set price in his home market. Unless restrained by government, he will of course set that price at a profit-maximizing figure, which will in any case stand above the level of average costs.

Where such a producer's cost structure continues to decline beyond the point at which domestic demand is fully satisfied, he is stimulated to produce additional quantities for sale abroad. Since the home market wholly requites the dumper's fixed costs, he can maintain dumping profitably and permanently at any price that exceeds the marginal cost (average variable costs) of the incremental output.

Again, the foreign sales are subsidized by the exercise of monopoly power that has regained the fixed costs from the home market. Nonetheless this kind of dumping is capable of continuing permanently to provide goods to the United States at a lower price than do the competing domestic producers. The likelihood of such permanence would be reinforced if the dumping seller enjoyed a "natural monopoly," with the potential of selling at ever-decreasing prices, reflecting ever-decreasing costs, through the whole of the foreseeable demand in the entire world market. Does such a producer, despite the subsidy of his home-market monopoly, display an advantage for which the Antidumping Act should make an exception?

On balance, I believe the policy of the Act soundly applies to this situation, on comparative advantage grounds as well as others. If there are American producers who are selling the product at a price close enough to the dumper's that they will be injured if no equalizing duty is imposed but will be protected if the duty is applied, the American consumer is probably not paying the American producer a great deal more than he would pay the dumper in the absence of a dumping duty. His detriment, even in the short run, is not likely to be great. On the other hand, the consumer might be severely injured if the dumper, after he had displaced the domestic producers in the American market, abused his new-found monopoly by raising prices. One might in these circumstances prefer a form of administrative price regulation, in the public-utility style, to regulation by the antidumping laws.\footnote{Cf. Shipping Act of 1916, § 14b, as added by Shipping Act Amendments of 1961, § 1, 46 U.S.C. § 813a (1964), which permits carriers to offer lower rates to exclusive than to non-exclusive shippers, on the condition that the lower rates "not be increased before a reasonable period." Low-cost dumped goods, offering the prospect of permanent...
tive price surveillance might well be more supple, and afford finer economic adjustments, than can the antidumping laws. But this sort of regulation is difficult to enforce when the seller's physical capital is not held "hostage" within American geographical jurisdiction. And it could not insure against the possibility that the foreign supplier would chafe under the regulation and withdraw his supply entirely, thereby annihilating the promise of permanency upon which the differentiated treatment of his imports must have been founded. Indeed, the economically-probable permanency might in particular circumstances lapse for other reasons, including war, political dissension with the seller's country, and like asymmetries.

Turning back in review of the other cost patterns that have been examined, we encounter either a subsidy (sales below marginal cost), or an insufficient period in which the cheap goods are likely to be available (sales above marginal cost in the short run), or the improbability that an appreciable quantity of the goods could be made continuously available (sales above marginal cost, and therefore above average total cost, by a rising-cost seller). None of these exemplars, consequently, reflects an authentic comparative advantage that under free-trade premises would justify the toleration of injury to a presumably efficient American industry. There remains the theoretically possible case of the declining-cost producer who can and will sell in the United States, over the long run, at a dumping price that exceeds his average total costs. Any such seller would possess a genuine economic advantage in relation to the American producers he could undersell on that basis, and on principle should be accorded the same treatment as the producer of non-dumped merchandise. His case is probably not a common one, however, since the declining-cost pattern encourages sale abroad at prices below average costs. Even where such a seller exists, the ever-present uncertainty about the continued availability of goods at a low dumping price, compounded here by the question of whether the price in fact exceeds average total costs, seems to warrant treating him the same as other dumpers.

II

The New Anatomy of Antidumping Proceedings

Antidumping proceedings follow this sequence:52 (I) Submission of information of suspected dumping, by either a Customs official or availability, might be permitted to enter the American market on a similar condition that their prices not be increased or that they be kept within a regulated range.

52 For general treatment of the antidumping laws, see Conner & Buschlinger, The
any private person; (2) investigation by Customs officials; (3) determination by the Treasury Department of whether there are sales in the United States at less than fair value (that is, performing the price comparison to determine the existence of dumping sales at differentially low prices); (4) issuance by the Commissioner of Customs of a notice withholding appraisement of the merchandise; (5) determination by the Tariff Commission of the existence or likelihood of injury to a domestic industry; (6) formal publication of a "finding of dumping" by the Secretary of the Treasury; and (7) imposition of the "special dumping duty" upon shipments found to be dumped. The two most important steps, corresponding to the two prime substantive elements of remedi able dumping, are the price comparison by the Treasury and the determination of injury by the Tariff Commission.

Particulars of these procedures have recently been modified by new Treasury regulations, effective July 1, 1968, which were promulgated in an effort to accommodate American antidumping practices to the provisions of the International Antidumping Code. That Code, signed


54 The text of the Code can be found in 32 Fed. Reg. 14,962 (1967) and in Compendium 129-36. The Code was the subject of a Hearing on International Antidumping Code Before the Senate Comm. on Finance, 90th Cong., 2d Sess. (1966) [hereinafter cited as International Antidumping Code Hearing], which contains the text of the Code at 263-74. The Code was signed by the United States, the European Economic Community, and the following seventeen governments: Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, Netherlands, Norway, Sweden, Switzerland, United Kingdom, and Yugoslavia. As of June 27, 1968 all but Canada and Greece were prepared to implement the Code, effective July 1, 1968. The Council of the European Economic Community adopted a conforming antidumping regulation April 5, 1968. International Antidumping Code Hearing 19.
at Geneva on June 30, 1967, as a result of the Kennedy Round of trade negotiations under the General Agreement on Tariffs and Trade, interprets and elaborates the GATT provision (article VI) concerned with dumping.\textsuperscript{55} The stimulus for such a Code primarily came, on the one hand, from the desire of the United States that her trading partners adopt more open hearing procedures and (in some cases) more liberal substantive standards in the administration of their antidumping laws, and on the other hand from the wish of other countries to obtain a liberalization of the American withholding of appraisement procedure and of certain tests for determining injury that were felt to have protectionist effect.\textsuperscript{56}

As an executive agreement entered into without prior congressional mandate, the Code has no force of law in the United States that would override federal statute or administrative action pursuant to statute.\textsuperscript{57} Although the Code was negotiated with a close eye to Ameri-

\textsuperscript{55} Code preamble para. 4. Negotiations on the Code were part of the Kennedy Round effort to reduce nontariff barriers. See Code preamble paras. 1-2; Rehm, The Kennedy Round of Trade Negotiations, 62 AM. J. INT'L L. 403, 427-31 (1968). For analysis and discussion of the Code, see International Antidumping Code Hearing passim; Executive Branch, Analysis of International Antidumping Code in Relation to Antidumping Act, 1921, id. at 279-315; U.S. TARIFF COMM'N, REPORT TO SENATE COMM. ON FINANCE ON S. CON. RES. 38, REGARDING THE INTERNATIONAL ANTIDUMPING CODE SIGNED AT GENEVA ON JUNE 30, 1967, 90th Cong., 2d Sess. (1968) [hereinafter cited as TARIFF COMM'N REPORT ON THE CODE], reproduced in International Antidumping Code Hearing 319-88; American Mining Congress, Staff Study of International Dumping Code, in COMPENDIUM 84-128; Comment, The Kennedy Round GATT Anti-Dumping Code, 29 U. PITT. L. REV. 482 (1968).

\textsuperscript{56} The United States also sought to influence the shape of the pending European Economic Community antidumping regulation, and to obtain Canada's commitment to adopt an injury requirement in her antidumping law. For an Executive Branch statement of the "legislative history" of the Code, see Rehm, supra note 55, at 427-31. See also International Antidumping Code Hearing 11-14 (testimony of W. M. Roth and Matthew Marks); Roth, What happened in the Kennedy Round, 57 DEP'T STATE BULL. 128, 128 (1967).


can statutory requirements,\(^5\) much of its draftsmanship is despairingly intricate and obscure,\(^5\) and its provisions appear at certain points to conflict with the Antidumping Act. In any event the instrument is not self-executing,\(^6\) but merely commits signatories to take all necessary steps to conform their laws and procedures to its provisions.\(^6\) The Executive Branch has taken the position that the necessary conformity of American law can be entirely accomplished, without amendment of the Antidumping Act, through revision of the Treasury regulations and through the observance by the Tariff Commission of the Code's standards of injury.\(^6\) The assertion that no conflict exists has been vehemently disputed in the Congress.\(^6\) In September 1968 the Senate attached to unrelated legislation a rider which would have directed the Treasury and the Tariff Commission to continue to apply regulations and interpretations as they existed before the effective date of the Code, and to ignore the Code until such time as its provisions might be im-

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\(^*\) See, e.g., S. Con. Res. 38, 90th Cong., 1st Sess. (1967), introduced by Senators Hartke and Scott, which would declare that the Code conflicts with the Act, and should become effective only when implemented by legislation; Letter of Senator Hartke to other senators, July 25, 1967, reproduced in COMPENDIUM 153; International Antidumping Code Hearing 20-62, 81-84 (comments of Senators R. Long and V. Hartke).
plemented by legislation. These strictures, however, were largely moderated by the House-Senate conference, with the apparent result that the administering authorities, acting within their existing discretion, may implement the Code to the extent it does not conflict with the Act.

The provisions were added by the Senate to H. R. 17324, 90th Cong., 2d Sess. (1968), a bill to amend the Renegotiation Act of 1951, by adding title II thereto. The amendments also contained specific limitations upon the power of the Secretary of the Treasury to terminate proceedings. The Senate's action followed an earlier attempt in the same Congress to nullify the Code. S. Con. Res. 38, 90th Cong., 1st Sess. (1967), reproduced in International Antidumping Code Hearing 9.


In a broader setting, the controversy over the antidumping laws might be viewed as a persistent strain in a continuing struggle between the free-traders of the Executive Branch and the protectionists of Congress for supremacy in determining United States trade policy. Such a tension is amusingly reflected in the exchanges between Senators and Executive Branch witnesses in the June 1968 International Antidumping Code Hearing 30-38, 11-47 passim. See also 19 U.S.C. § 1366 (1964), Editorial, N. Y. Times, Sept. 30, 1968, at 46, col. 2 (city ed.).

The agreed conference version of the amendments can be found at 114 Cong. Rec. S 12,168 (daily ed. Oct. 7, 1968) and at 114 Cong. Rec. H 9506 (daily ed. Oct. 3, 1968). In addition to declaring that nothing in the Code "shall be construed to restrict the discretion of" the Tariff Commission in antidumping cases, the key provisions state that the Commission and the Secretary of the Treasury shall:

1. resolve any conflict between the International Antidumping Code and the Antidumping Act, 1921, in favor of the Act as applied by the agency administering the Act, and
2. take into account the provisions of the International Antidumping Code only insofar as they are consistent with the Antidumping Act, 1921, as applied by the agency administering the Act.

The provisions of the Senate version, requiring adherence to prior regulations and precedents, and requiring the Code to be disregarded until implemented by legislation, were deleted. The conference wording that refers to the Act "as applied by the agency administering the Act," however, leaves ambiguity as to whether the Tariff Commission might permissibly exercise its "discretion" by narrowing its past concepts of injury to bring them more into line with the Code. See colloquy between Senators Russell Long and Javits, 114 Cong. Rec. S 12,163-69 (daily ed. Oct. 7, 1968).

Although the Treasury has issued new regulations to accomplish conformity to the Code in matters within its authority (as discussed below), it is problematical whether the Tariff Commission will proceed to implement the Code's standards of injury. In its report of March 13, 1968 to the Senate Committee on Finance, a majority of the Commission (Comm'trs Sutton, Culliton and Clubb) identified important differences between
One principal point of controversy concerns the possible inconsistency of the Code's requirements with the plan of the Antidumping Act whereunder the price comparison determination is made by the Secretary of the Treasury and the injury determination is made "thereafter" by the Tariff Commission. The Code, through an intricate interplay of articles 5(b) and 10(a), appears to require simultaneous consideration of injury along with the price comparison question during the earlier stages of the proceedings conducted by the Treasury. By an ingenious and subtle revision of the former procedures, the new Treasury regulations have attempted to reconcile the Code with the Act.

A. Initiation of Proceedings

Any district Customs officer or any person outside the Customs Service who has information of "suspected dumping" may commence an antidumping proceeding by communicating that information to the Commissioner of Customs (a Treasury Department official). The communication should, to the extent feasible, identify the product, the exporter, the producer, and the exporting country. In addition it
should supply any available information about prices and sales of the product either in the exporting country or for exportation to third countries. To fulfill the administrative provisions of the International Code, the regulations also specify that evidence of injury should accompany the initial communication. If the information submitted conforms substantially to all these requirements, the Commissioner of Customs conducts a summary investigation. If he determines that the submitted information is patently in error or that the merchandise is not being or is not likely to be imported in more than insignificant quantities, he will close the case. Otherwise, he will publish in the Federal Register an “Antidumping Proceeding Notice,” summarizing the information submitted, specifying the shipments affected, and indicating the date upon which the information of suspected dumping was received in acceptable form. The Commissioner thereupon undertakes a “full scale investigation” to prepare information for the use of the Secretary of the Treasury in determining the price comparison question. The entire case then goes to the Secretary for determination of the price comparison issue.

B. The Price Comparison to Determine Whether There are “Dumping Sales”

What is commonly thought of as “dumping”—sale at a differentially low price—takes place under the terminology of the Antidumping Act when the merchandise is sold “at less than its fair value.” (Under the scheme of the Act, the term “dumping” strictly should not be used unless injury has also been found.) For simplicity of reference, I will

1 Id. §§ 53.27(f)-(h).
2 Code arts. 5(b), 10(a). See note 127 infra.
3 Regulations § 53.27(c).
4 If it does not, the Commissioner will return it to the person who submitted it, with advice concerning its deficiencies. Id. § 53.28.
5 Id. § 53.29.
6 Id.
7 Id. § 53.30. The date has significance for retroactive application of withholding of appraisement and of the antidumping duty. See notes 126, 158 infra.
8 Regulations §§ 55.31, 55.32(a).
9 The new regulations explicitly empower Customs representatives to conduct investigations in any other country that does not object. Regulations § 53.31(a). Article 6(c) of the Code sanctions this practice provided the host government is notified and does not object, and provided that the agreement of “the firms concerned” is obtained.
11 In contrast, art. VI of GATT defines “dumping” as simply the act “by which products of one country are introduced into the commerce of another country at less than the normal value of the products.” 62 Stat. 3682 (1948). Article 2(a) of the Code uses substantially identical language. Injury to domestic industry, under such usage, is a separate question.
use the term "dumping sales" in place of the clumsy locution "sales at less than fair value."

The Secretary of the Treasury compares the price to the United States importer ("purchase price") with the "fair value" of the merchandise.82 (1) In the usual case the fair value is measured by the price at which such or similar merchandise is sold for consumption in the country of exportation. (I shall refer to this measure as the "home-market price" test of fair value.)83 (2) If the quantity of home-market sales is small in relation to the quantity sold by the exporting country to countries other than the United States, then the price for export to such countries is taken as the measure of fair value (the "export price" test).84 (3) If the available information concerning home-market price and export price is deemed insufficient, a theoretical fair value will be "constructed" on the basis of cost and expense figures and an allowance for profit (the "constructed value" test).85 (4) Whenever the merchan-

82 Regulations §§ 53.3(a), 53.4(a). Section 205 of the Act, 19 U.S.C. § 162 (1964), defines "purchase price" and specifies the adjustments to be made for factors not reflected in the actual price. Where the exporter and importer are related, see id., §§ 207, 208, 19 U.S.C. §§ 165, 167 (1964), the comparison will be made on the basis of the "exporter's sales price," defined in id. § 204, 19 U.S.C. § 163 (1964), instead of the purchase price. The exporter's sales price is used when merchandise is imported on consignment. Use of the exporter's sales price is sanctioned by art. 2(e) of the Code. For an interesting comparison of "purchase price" and "exporter's sales price," see Rayon Staple Fiber from France, 24 Fed. Reg. 10,092 (1959).

83 Regulations § 53.3. This provision incorporates the first of the two standards of "foreign market value" established by § 205 of the Act, 19 U.S.C. § 164 (1964), for other purposes (i.e., concerning the initiation of withholding of appraisement, Act § 201(b), 19 U.S.C. § 160(b) (1964), and concerning imposition of the special antidumping duty, Act § 202(a), 19 U.S.C. § 163(a) (1964)).

Offers will be considered evidence of fair value if there were no sales, Regulations § 53.10, but no pretended offer or sale will be considered. Id. § 53.12. If sales were made at varying prices, the price at which the preponderance of goods were sold will be used; if there is no such preponderance, a weighted average of the prices will be used. Id. § 53.13.

84 Regulations § 53.4. This provision incorporates the second of the two standards of "foreign market value" established by § 205 of the Act, 19 U.S.C. § 164 (1964); see note 83 supra. Generally, if the quantity sold in the home market is less than 25% of the quantity exported to countries other than the United States, the export price test will be used. Regulations § 53.4(b); see Hendrick, in COMpendium 161-62; 19 C.F.R. § 14.7(a) n.15, example 2 (1967).

85 Regulations § 53.5. This provision incorporates the definition of "constructed value" established by § 206 of the Act, 19 U.S.C. § 165 (1964). Section 206 defines constructed value as the cost of materials and of fabrication, plus at least 10% of these costs as an allowance for overhead ("general expenses"), plus at least 8% of all these as an allowance for profit.

The Secretary of the Treasury has stated that, because of variation in accounting methods among countries, the constructed value test of fair value is "warranted only as a last resort." Hearings on Amendments to the Antidumping Act of 1921 Before the House Comm. on Ways and Means, 85th Cong., 1st Sess. 12 n.1 (1957).

Use of the export price and constructed value tests is sanctioned by art. 2(d) of the Code.
dise comes from a country that has a state-controlled economy, the Treasury applies a special constructed value, which is determined (in the language of the regulations) on the basis of "normal costs, expenses, and profits as reflected by the prices at which such or similar merchandise is sold," either domestically or for export, by producers in "a non-state-controlled-economy country."68 (I shall call this the "third-country price" test.)

To make the price comparison equitable, adjustments will be made for factors that affect the differential between fair value and purchase price. Thus, quantity discounts actually granted to the American importer will be considered,87 as will "bona fide differences in circumstances of sale" such as differences in terms of credit, guarantees, servicing warranties, technical assistance, and assumption of advertising costs.88 Similarly, differences in the merchandise and in the cost of manufacture may be taken into account.89

From the information before him (both that adduced by the Customs investigation and that submitted by interested persons), the Secretary determines whether there are dumping sales.90 A negative determination91 must first be published on a tentative basis, and an

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87 Regulations § 53.7. See Hendrick, in COMPENDIUM 162-63.

88 Regulations § 53.8. See Hendrick, in COMPENDIUM 164-65. See also the definition of "similar merchandise" in § 212(2) of the Act, 19 U.S.C. § 170a(2) (1964).

89 Regulations §§ 53.32, 53.33, 53.35, 53.37. During all proceedings, both before the Treasury and before the Tariff Commission, interested persons may make written submissions and may request oral hearings. Id. §§ 53.32(b), 53.33(b), 53.37 (Treasury); 19 C.F.R. §§ 208.4, 208.5 (1967) (Tariff Comm'n). (On the timing of Treasury proceedings, see note 120 infra.) Generally, information submitted will be available for examination by any person. Regulations § 53.23 (Treasury); 19 C.F.R. § 201.5 (1967) (Tariff Comm'n); see Administrative Procedure Act § 3, 5 U.S.C.A. § 552 (1967). Parties may, however, request confidential treatment of submitted information, which will ordinarily be granted if the information concerns business or trade secrets, production or distribution costs, or details of particular sales. Regulations §§ 53.23(b)-(c) (Treasury); 19 C.F.R. §§ 201.5(a), 201.6 (1967) (Tariff Comm'n); see Administrative Procedure Act § 3(b)(4), 5 U.S.C.A. § 552(b)(4) (1967).

90 Regulations §§ 53.32, 53.33. If the quantity involved or the difference between purchase price and fair value is not "more than insignificant," a negative determination will be made. Id. § 53.14; Hendrick, in COMPENDIUM 166, 179-80 n. 68. The Secretary may terminate the proceedings at any time during the investigation when satisfied that the dumping sales have ceased, or that the price of the goods has been revised to eliminate the dumping margin, or that other controlling circumstances have changed. Regulations § 53.15. See generally Hendrick, in COMPENDIUM 166-67. The Secretary will not discontinue proceedings, despite assurances from the exporters or importers that sales will no longer be made, if he believes "hit and run" dumping to be involved. Titanium Dioxide from Japan, 31 Fed. Reg. 3198 (1966). Cf. Chromic Acid from Australia, 29 Fed. Reg. 2919 (1964).
opportunity is afforded to interested persons to present additional information and argument before a final determination is made.\textsuperscript{92} When the Secretary's determination is affirmative, it is published on a definitive basis,\textsuperscript{93} allowing the Commissioner of Customs forthwith to order withholding of appraisement,\textsuperscript{94} and allowing the case to be referred immediately to the Tariff Commission for its determination of the injury question.\textsuperscript{95} Such an affirmative determination of the price comparison issue, however, retains a tentative quality about it.

C. Withholding of Appraisement

Duties ordinarily are not reassessed after the processes of appraisement and final liquidation of duties have been completed.\textsuperscript{96} If dumped goods could continue to receive routine appraisement during the pendency of antidumping proceedings, then, they would entirely escape any dumping duty ultimately determined to be appropriate. The dumper would be encouraged to increase his dumping during that period, thereby intensifying the injury to American industry that the antidumping law is designed to prevent. Hence the law supplies the interim protective device of suspending or "withholding" appraisement of the goods, which postpones the final determination of duties until completion of the antidumping proceedings.\textsuperscript{97} During the pen-

\textsuperscript{92} Regulations § 53.33.

\textsuperscript{93} Id. §§ 53.35, 53.36. The former regulations called for a "tentative determination" where the finding was affirmative as well as where it was negative; notice of the tentative determination invited interested persons to submit written materials and to request an opportunity to be heard. 19 C.F.R. § 14.8(a) (1967). Such notice is now given, in advance of final determination, only when it appears to the Secretary that his determination will be negative. Regulations §§ 53.33(a)-(b).

\textsuperscript{94} The "withholding of appraisement notice will be issued concurrently with the Secretary's determination pursuant to § 53.35 . . . ." Regulations § 53.34(a).

\textsuperscript{95} Id. § 53.38. See note 119 infra.

\textsuperscript{96} See Hendrick, in \textit{Compendium} 159-60.

\textsuperscript{97} The basic statutory provision is § 201(b) of the Act:

Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him or to any person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value), he shall forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to him or any person to whom authority under this section has been delegated, until the further order of the Secretary, or until the Secretary has made public a finding as provided for in subdivision (a) in regard to such merchandise.
dency of withholding, the merchandise may nevertheless be appraised in the usual manner if Customs officials are satisfied that the particular shipment is not being dumped;\(^9\) otherwise, the importer can obtain immediate entry of the goods only by posting a bond to cover possible dumping duties.\(^9\)

Withholding of appraisement is initiated by publication of an appropriate notice under the authority of the Commissioner of Customs\(^10\) whenever there is "reason to believe or suspect" the existence of dumping sales.\(^10\) Until 1968, this question was decided and the notice of withholding was published on the basis of preliminary investigations by the Commissioner, conducted before the stage at which a definitive determination concerning dumping sales might be made by the Secretary.\(^10\) Because the case awaited decisions both by the Secretary and then by the Tariff Commission, appraisement might be withheld for a considerable period of time, which in the recent past averaged about a year.\(^10\) During the period of withholding, of course, importation of the allegedly dumped goods would be inhibited, since the importer would not know what duties he might ultimately have to pay. Moreover, withholding was imposed solely on a preliminary consideration of the price comparison question, without affording the importer opportunity to present information or defenses touching the question of injury.\(^10\) For these reasons, the former procedure was fairly subject

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\(^8\) Withholding of appraisement is sanctioned as an "appropriate provisional measure" by art. 10(b) of the Code, subject to certain conditions. Other approved provisional measures used by other nations are provisional duties (which may be refunded in whole or in part at the close of the proceeding) and the requirement of a deposit or bond equal to the amount of the antidumping duty provisionally estimated. Code art. 10(b); see Hendrick, in COMPENDIUM 177 n.24.

\(^9\) Regulations § 53.48(b).

\(^10\) Id. §§ 53.53, 53.54; Act § 208, 19 U.S.C. § 167 (1964).

\(^11\) Regulations § 53.34. The Act § 201(b), 19 U.S.C. § 160(b) (1964), calls for the notice to be published by the Secretary, but his authority has been delegated to the Commissioner of Customs. T. D. 53,654, 89 TREAS. DEC. 334 (1954). Upon publication of the notice, district customs officials withhold appraisement and release of the subject merchandise. Regulations §§ 53.48, 53.53.


\(^13\) 19 C.F.R. §§ 14.6(c), 14.8(a) (1967). As a matter of practice, withholding was not usually authorized until the Treasury had made a tentative determination of dumping sales. TARIFF COMM’N REPORT ON THE CODE, supra note 55, at 31.

\(^14\) The prior regulations, 19 C.F.R. § 14.6(b)(3) (1967), requested the complainant to submit available information as to the total value and volume of domestic production of the merchandise in question. But they contained no provision that such information—or any other matter pertinent to the question of injury—be evaluated or considered in for earlier examples of long delay.
to the criticism that it had a protectionist effect—deterring for long periods the importation of goods upon which it might ultimately be found that no dumping duties should be imposed.106

The new GATT Code substantially restricts such use of the withholding of appraisement device. Provisional measures like withholding are limited to a three-months' duration,106 and they may not be imposed unless there is "sufficient evidence of injury."107 The authors of the 1968 Treasury regulations have responded to these requirements with a dazzling tour de force of draftsmanship, the results of which become almost blindingly complex when viewed in the light of the statute and the practical considerations reflected in the prior practice.

To take the simplest point first, the new regulations allow the Commissioner to order withholding of appraisement only "if there is evidence on record concerning injury."108 Of course, the only evidence of injury that the Commissioner (or any other official) has at this point is what the complainant submitted as part of his original information.109 Whether the mere existence of such ex parte "evidence on record" fulfills the Code requirement of "sufficient evidence" is questionable.110 In any case, the regulations make no explicit provisions for evaluating that information before issuance of the withholding notice;111 to do


105 On the inhibitory effects of the delay and uncertainty wrought by the withholding of appraisement, see Prosterman, supra note 104; Coudert, supra note 52, at 198-200; Rehm, supra note 55, at 429; Ehrenhaft, supra note 52, at 60-61. But see Conner & Buschlinger, supra note 52, at 129-51.

106 Code art. 10(d). An exception, allowing withholding to continue up to six months on request of the exporter and the importer, is reflected in Regulations § 53.54(b).

107 Code art. 10(a). Article 5(b) of the Code requires that evidence of both dumping sales and injury be considered simultaneously "in the decision whether or not to initiate an investigation." The intention, obviously, is to free from the burdens of an antidumping proceeding (and of provisional measures) goods which clearly can be shown not to be causing injury (for example, because their price merely meets competition in the domestic market). See Prosterman, supra note 104, at 320-23.

108 Regulations § 53.54(a).

109 See note 73 supra. It is unclear how much evidence must accompany the complaint; the requirement probably is not stringent. See remarks of Senator Javits, 113 CONG. REC. 12,107 (daily ed. Aug. 23, 1967).

110 Article 5(c) of the Code would require that the complaint be rejected and the investigation terminated if there is not sufficient evidence of injury "to justify proceeding with the case." See also note 107 supra.

111 Since the new regulations have come into force, the Commissioner of Customs, in antidumping proceeding notices, see note 77 supra, has explicitly declared that there "is evidence on record concerning injury to or likelihood of injury to or prevention of
so might trench upon the statutory power of the Tariff Commission.\textsuperscript{112} 

The regulations, faithfully to the Code, limit the period of withholding to three months.\textsuperscript{113} But how, one may ask, can there be enough time for the Secretary to conclude his price comparison determination and then for the Tariff Commission "thereafter" to conclude its injury determination, especially when it is remembered that the statute assures the Commission three months in which to act?\textsuperscript{114} Obviously, the period of withholding cannot be allowed to expire before the case is concluded by Tariff Commission action, for otherwise the importer would be entitled to have the goods appraised and introduced into internal commerce before a dumping duty could be assessed.\textsuperscript{115} The regulations answer by providing that the withholding notice be published \textit{concurrently} with the Secretary's affirmative determination of the existence of dumping sales.\textsuperscript{116} Since it is further provided that the case shall be referred to the Tariff Commission upon the making of such affirmative determination,\textsuperscript{117} the three-month withholding period coincides with the three months within which the Tariff Commission may consider the injury question.

But this arrangement raises difficulties at the other end of the proceeding—with respect to dumped goods coming in before the date on which withholding of appraisement can now be ordered. First, is establishment of an industry in the United States." \textit{E.g.}, Transformers from Japan, 33 Fed. Reg. 12,920 (1968); Plastic Mattress Handles from Canada, 33 Fed. Reg. 12,792 (1968); Loudspeakers from Japan, 33 Fed. Reg. 12,792 (1968). \textit{See Regulations § 53.30(c).} Nothing in the provisions stating the nature of investigations by the Commissioner or the Secretary, \textit{id. §§ 53.29, 53.31, 53.32,} expresses any authority or procedure to develop information about injury, to receive rebuttal evidence from the importer, or in any way to appraise such information about injury as has been supplied by the complainant. If proceedings were to be dismissed on grounds of insufficient injury evidence, this would have to be done under general powers to discontinue proceedings, \textit{see id. §§ 53.15(a), 53.31(b),} since no specific power to do so is expressed.

\textsuperscript{112} \textit{See TARIFF COMM'N REPORT ON THE CODE, supra} note 55, at 25 (majority view). The minority understands the Treasury's role only to be that of "assuring itself that initiation of the investigation would not be futile, in the sense that it would be a waste of taxpayers' money for the Government to initiate a full anti-dumping investigation," and on that assumption believes there will be no interference with Tariff Commission functions. \textit{Id.} at 59.

\textsuperscript{113} Regulations § 53.34(a). The voluntary six-month period, note 106 \textit{supra}, will not be further considered.

\textsuperscript{114} Act § 201(a), 19 U.S.C. § 160(a) (1964).

\textsuperscript{115} The goods would not be caught by the provision for retroactive application of the dumping duty, since the duty is applied only to goods that have not been appraised prior to publication of the "dumping finding" that concludes the litigation and imposes the duty. Regulations § 53.56(a).

\textsuperscript{116} \textit{Id.} § 53.34(a).

\textsuperscript{117} \textit{Id.} § 53.38.
the new scheme consistent with the apparently mandatory statutory requirement that withholding "shall" be ordered as soon as there is "reason to believe or suspect" that dumping sales exist, rather than at the logically later time of definitive determination of the question by the Secretary. Both conceptually and practically, under what one might take to be the clear purport of the Act, the initiation of withholding must come before the definitive determination itself. Withholding is, after all, a provisional remedy intended to protect against dumping during the very pendency of definitive proceedings. Moreover, it rests on a lesser quantum of proof, such as is available at an earlier stage. The statutory legitimacy (if not the ingenuity) of the new concurrent-action technique may be gravely questioned.

A second and quite practical question is whether the new arrangement means that no action can be taken to stem the dumping until the conclusion of all the investigations and hearings leading to the Secretary's determination (a process that under prior practice ordinarily took several months). Here again the draftsmen of the regulations have been ingenious, if not ingenuous. The essence of their solution is that the Secretary's affirmative determination will be definitive in form (allowing immediate commencement of withholding and reference to the Tariff Commission) but tentative in substantive effect. The regulations seem clearly to contemplate (although they do not straightforwardly provide) that much of the actual litigation and evaluation of the question of dumping sales can take place after the supposedly

118 See the structure of § 201(b) of the Act, 19 U.S.C. § 160(b) (1964), set forth in full in note 97 supra. The new regulations pay lip service to the statute by conditioning withholding upon the Commissioner's having "reasonable grounds to believe or suspect" the existence of dumping sales, Regulations § 53.34(a), but the same section further conditions commencement of withholding upon the Secretary's affirmative determination. Despite the statutory language that the Secretary "forthwith . . . shall authorize . . . withholding" upon having reasonable grounds to suspect dumping sales, it might be argued that the words "under such regulations as he may prescribe" grant the Secretary discretion to commence withholding at a later time. Cf. Act § 407, 42 Stat. 18 (1921), 19 U.S.C. § 173 (1964): "That the Secretary shall make rules and regulations necessary for the enforcement of this Act." It seems doubtful that the quoted authority is a delegation of legislative rather than procedural rule-making powers. See Kreutz v. Durning, 69 F.2d 802 (2d Cir. 1934), inconclusive on a related point.

119 Under the statutory scheme, it would not seem permissible to refer the case to the Tariff Commission until the Secretary has made a definitive determination on the question of dumping sales. "Whenever the Secretary . . . determines that [there is the likelihood or actuality of dumping sales] . . ., he shall so advise the United States Tariff Commission . . . ." Act § 201(a), 68 Stat. 1138 (1954), 19 U.S.C. § 160(a) (1964). See Tariff Comm'n Report on the Code, supra note 55, at 22-23. The previous regulations permitted reference to the Tariff Commission upon the making of a "determination," which, it is clear from the context, meant only the "final determination" and not the "tentative determination" earlier described in the same provision. 19 C.F.R. § 14.8(a) (1967).
definitive determination, which can be revoked or modified during the three-month period for withholding and for Tariff Commission consideration of the injury issue. The purpose evidently is three-fold: to

120 Regulations §§ 53.37, 53.39, 53.39(d). Concededly, these artfully-worded provisions do not plainly disclose the intention I have asserted in the text. When the current regulations were in proposed form, the intention was clearer. Section 53.38 of the proposed regulations authorized any person believing the Secretary's determination to be in error to request an opportunity to present evidence and argument, whereafter under § 53.39 the determination might be modified or revoked. 32 Fed. Reg. 14,959-60 (1967). This is much the same sort of process that took place between the tentative and final determinations under the prior practice. 19 C.F.R. § 14.8(a) (1967). Under the final regulations now in force, the pertinent provision, § 53.37, retains the caption, "Affirmative determination—opportunity to present views," but has changed the test to authorize further proceedings at the request of any person believing the withholding action to be in error. In substance, however, it is the determination itself that is reopened, not merely the withholding action. Sections 53.39 and 53.33(d) continue to provide, as they did in the proposed regulations, for revocation or modification of the determination "if the Secretary is persuaded from information submitted or arguments received that his determination ... was in error." In fact, nothing is said about revoking or modifying the withholding action, despite the revised wording of § 53.37 (corresponding to § 53.38 of the proposed regulations).

It is true that there is an opportunity for "submission of views" before the determination is made. Regulations § 53.32(b). But the construction presented in the text, allowing substantial litigation after that determination, is the only one that fulfills the purposes of prompt withholding and of simultaneity of consideration of dumping sales and injury. As explained by counsel who participated in negotiation of the Code, "[W]hile the Tariff Commission is conducting its investigation the Department of the Treasury will review its determination of dumping." Rehm, supra note 55, at 433. Any other interpretation would defeat this objective of simultaneity. The Code's three-month limit on withholding supplies another reason not to use a "tentative" determination first (as continues to be done with negative determinations, Regulations § 53.33(a)). A tentative determination so labelled would under Code art. 10(a) permit withholding to begin, but would not allow immediate reference to the Tariff Commission, see note 119 supra, and thus the three-month withholding period would expire before the Commission had its statutory three months in which to consider injury. Hence the first affirmative determination must be treated as a definitive one, in order that the periods of withholding and Tariff Commission consideration can coincide.

In this posture, the determination must come early—before the litigation would have been concluded in the manner of prior practice—so that the contemporaneous commencement of withholding will not be long delayed, which would possibly violate the statutory requirement to begin withholding as soon as there is "reason to believe or suspect" the existence of dumping. See note 118 supra. The practical procedure would then conform to the prior practice, whereunder the Treasury usually issued the withholding order at the time of making its tentative determination of dumping sales. See note 112 supra. The conclusion seems inescapable that the design of the regulations contemplates the conduct of much of the actual litigation after the affirmative determination is made.

Although there may often be merit in announcing administrative decisions tentatively and allowing supplementation of evidence and argument thereafter, see W. GELBHORN & C. BYSE, ADMINISTRATIVE LAW 748-50 (4th ed. 1960), it would seem questionable practice to regularize the reopening of determinations but at the same time to treat those determinations as final for the purpose of bringing about consequences (here, reference to the Tariff Commission) that may flow only from a final determination.

Despite Regulations § 53.39, and all the rest of this scheme designed to reconcile
speed up the affirmative determination so that withholding can (con-
currently) begin at an early stage to stem dumping sales, to cast the
determination in a definitive form so that jurisdiction can be vested
straightaway in the Tariff Commission, and to comply at least super-
ficially with the Code's requirement that evidence of dumping sales
and of injury be considered simultaneously after the date on which
withholding may first be ordered.\(^{121}\) Although the draftsmen's adroit-
ness in tracking a course between statute and Code is awesome,\(^{122}\) it may
be seriously doubted that their new arrangement comports with the
statutory stipulation that the Secretary make his determination and
the Tariff Commission make its determination "thereafter."\(^{123}\) If the
new regulations are administered as I have construed them, however,
they will probably result in getting the case to the Tariff Commission
faster than previously, thereby reducing the overall time necessary to
conclude the entire antidumping proceeding.

Another aspect of withholding of appraisement which is subjected
to uncertainty by the new regulations is that of retroactive applica-
tion. Retroactivity of withholding (as distinct from retroactive applica-
tion of the dumping duty itself)\(^{124}\) is the withholding of appraisement
on goods which were entered but for some reason had not yet been
appraised before publication of the withholding notice.\(^{125}\) The statute
is open to the construction that retroactive application of withholding
is mandatory, although there may be discretion in the Treasury as to
divergent requirements, it may well be doubted that the Treasury will lightly revoke
its determinations. To do so could provoke a dispute with the Tariff Commission, which
might contend that the power of the Secretary to close the case (by revocation) is abated
during the period in which the Commission is seized of the injury question.

\(^{121}\) Code art. 5(b) mandates simultaneous consideration of both dumping sales and
injury "starting on a date not later than the earliest date on which provisional measures
may be applied." (Emphasis added.) If as suggested (see text accompanying note 118 \textit{supra})
the Act should be construed to require withholding to begin \textit{before} the Secretary makes
his final determination, compliance with this provision of the Code would not seem pos-
sible, since neither the Secretary nor the Tariff Commission would have authority to
consider the merits of the injury issue during the interim between commencement of
withholding and issuance of the Secretary's determination in a form sufficient to allow
reference to the Tariff Commission. See notes 119, 114 \textit{supra}; \textit{TARIFF COMM'N REPORT ON
THE CODE, supra} note 55, at 25.

\(^{122}\) It seems not too much to say that the relevant portions of the regulations—
interrelated to the point of demanding pick-lock dissection to understand them—represent
the work product of skilled and honorable legal craftsmen who have been forced to resolve
the divergent influences of the Act, the Code, administrative due process, and prior prac-
tice in an essentially deceptive way.

\(^{123}\) Act § 201(a), 19 U.S.C. § 160(a) (1964). See \textit{TARIFF COMM'N REPORT ON THE CODE
22-25.}

\(^{124}\) On retroactive application of the special dumping duty, see note 158 \textit{infra.}

\(^{125}\) See Hendrick, in \textit{COMPIENDIUM 160; Conner & Buschlinger, supra} note 52, at 129,
131-32.
the period of time within which goods must have entered to be subject to withholding.\textsuperscript{126} Under the prior practice, withholding was applied retroactively in some circumstances but not in others.\textsuperscript{127} The language of the Code seems to preclude all retroactive application of provisional measures like withholding.\textsuperscript{128} The 1968 Treasury regulations hedge the question, providing that appraisement shall be withheld on merchandise entered after the date on which the notice of withholding is published, "unless the [notice] specifies a different effective date."\textsuperscript{129} Obviously, if withholding is not made retroactive, goods can entirely avoid dumping duties if they can enter and obtain appraisement at any time up to the date of the Secretary's determination and the concurrent announcement of withholding.\textsuperscript{130}

In their upshot, then, the new regulations have moved in the anti-protectionist direction contemplated by the limiting provisions of the Code: the duration of withholding is shortened, retroactive application of withholding is apparently diminished, and the overall proceeding is speeded up.

D. The Injury Determination

When it receives advice that the Secretary of the Treasury has determined the existence of dumping sales,\textsuperscript{121} the United States Tariff Commission\textsuperscript{132} will determine "whether an industry in the United

\textsuperscript{126} See the text of the relevant statute, Act \textsection{} 201(b), 19 U.S.C. \textsection{} 160(b) (1964), supra note 97. The argument for discretion, of course, rests on the words "under such regulations as he may prescribe." See note 108 supra. Such discretion seems to be assumed in the statement of the "Executive Branch," \textit{International Antidumping Code Hearing}, supra note 54, at 279, 812. The date on which "the question of dumping has been raised . . . or presented," Act \textsection{} 201(b), 68 Stat. 1139 (1958), 19 U.S.C. \textsection{} 160(b) (1964), from which the 120-day period is counted back, is to be specified in the Commissioner of Customs' initial Antidumping Proceeding Notice. Regulations \textsection{} 53.30(b).

\textsuperscript{127} 19 C.F.R. \textsection{} 14.9 (1967). Withholding was applied retroactively, between 1964 and 1968, only when the exporter and importer were "related." Conner & Buschlinger, \textit{supra} note 52, at 129; Coudert, \textit{supra} note 52, at 199; see Act \textsection{} 207, 19 U.S.C. \textsection{} 166 (1964).

\textsuperscript{128} Article 11 of the Code states that provisional measures shall only be applied to products that enter for consumption after the date of the decision to apply the provisional measures; the exceptions enumerated in art. 11 allow retroactive application of antidumping duties but not of provisional measures.

\textsuperscript{129} Regulations \textsection{} 53.48(a). When the regulations were in proposed form, they did not include the phrase quoted in the text, and made no provision whatsoever for retroactive application of withholding. Proposed Regulations \textsection{} 53.48(a), 32 Fed. Reg. 14,960 (1967). The regulations do not retain the distinction cited in note 127 supra.

\textsuperscript{130} To the extent withholding is not applied retroactively, the inhibitory effects of withholding, see pp. 187-88 \textit{supra}, might be somewhat eased. See Conner & Buschlinger, \textit{supra} note 52, at 131-32.

\textsuperscript{131} See Regulations \textsection{} 53.38.

\textsuperscript{132} The Commission is an independent agency of the United States, composed of six commissioners. See \textit{Tariff Act of 1930}, \textsection{} 330, 19 U.S.C. \textsection{} 1330 (1964).
States is being or is likely to be injured, or is prevented from being established, by reason of the importation" of the differentially-priced products. Neither the statute nor the Tariff Commission's regulations afford any further specification of what is meant by "injury" (or by "industry"). Congress has repeatedly refused to enact statutory elaboration of these terms.

Important definitional standards concerning these terms are embodied in the new Code. The Code standards, if applied by the Tariff Commission, would generally tend to narrow the applicability of the Antidumping Act as it has been interpreted in the past. In a report to the Senate Finance Committee dated March 13, 1968, a majority of the Tariff Commission expressed the view that, since the Code does not have the force of domestic law in the United States without implementing legislation, it cannot control Tariff Commission decisions interpreting or applying the statutory terms. Until such time as the Code standards may be adopted by the Commission, then, the construction of the injury aspect of the Antidumping Act must continue to be sought in the actions and statements of the Commission. The work of the Commission in this field has been well treated elsewhere, and will receive only summary description here.


134 19 C.F.R. §§ 208.1-208.6 (1967). The regulations are brief (less than one page), terse, and wholly procedural in content. The Commission apparently contemplates no amendments to these regulations as a result of the coming into force of the Code. TARIFF COMM'N REPORT ON THE CODE 33.


136 The most significant Code provisions concerning injury are those specifying the circumstances in which remediable injury may be found (art. 3(a) requires that the dumped imports be "demonstrably the principal cause of material injury") and defining the scope of a domestic industry. Code art. 4. These standards are not, of course, reflected in the new Treasury regulations, which deal only with those aspects of antidumping proceedings conducted by the Treasury and do not purport to affect Tariff Commission proceedings.

137 See TARIFF COMM'N REPORT ON THE CODE, supra note 55, at 10-21.

138 Id. at 32-33; see note 65 supra.

139 The Commission majority did make the laconic statement that the Code might "prompt useful reconsideration of the procedures promulgated under existing law to conform them with the Code to the extent necessary ...." TARIFF COMM'N REPORT ON THE CODE 33 (emphasis added).

140 See Hendrick, in COMPENDIUM 170-76; Baier, Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States, 17 STAN. L. REV.
The relevant "industry" will usually comprise all American producers.\textsuperscript{141} Where, however, most of the producers sell only in geographically limited markets—especially where high transportation costs inhibit expansion of those markets—the relevant industry may consist of the producers within affected regions.\textsuperscript{142} There can also be segmentation on a product-line basis: if a manufacturer makes several products, only its subdivisions making products similar to the dumped goods and competitive with them will be included in the relevant industry.\textsuperscript{143}

No presumption of "injury" arises from the fact that goods are sold at differentially low prices;\textsuperscript{144} the dumping must be shown to cause an injury.\textsuperscript{145} Although one recent case has suggested otherwise,\textsuperscript{146} the

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\textsuperscript{141} \textit{E.g.}, European Steel Wire Rod Cases, 28 Fed. Reg. 7368, 6476, 6474, 6606 (1963); White Portland Cement from Japan, 29 Fed. Reg. 9636 (1964). In Steel Jacks from Canada, 31 Fed. Reg. 11,197 (1966), the sole United States producer of similar tools was regarded as constituting the industry.


\textsuperscript{143} See general discussion in Baier, supra note 140, at 427-28. Sometimes the Commission very narrowly defines what products are "in competition with" the dumped products. Thus, the baby carriage industry was limited to manufacturers that produced baby carriages with specific accessories in Plastic Baby Carriers from Japan, 29 Fed. Reg. 13,990 (1964). Sometimes different, but interchangeable, products will be considered together. See Titanium Dioxide from France, 28 Fed. Reg. 10,467 (1963) (anatase and rutile titanium dioxide considered together); Titanium Dioxide from Japan, 29 Fed. Reg. 5522 (1964) (same); Nepheline Syenite from Canada, 25 Fed. Reg. 8394 (1960) (nepheline syenite and feldspar considered together). See also art. 2(b) of the Code, commented upon in TARIFF COMMISSION REPORT ON THE CODE 18.

\textsuperscript{144} White Portland Cement from Japan, 29 Fed. Reg. 9636 (1964); Titanium Dioxide from France, 28 Fed. Reg. 10,467 (1963); see Hendrick, in COMPRENDIUUM 172. Article 3(a) of the Code seems to require this rule: "The determination [of injury] shall in all cases be based on positive findings and not on mere allegations or hypothetical possibilities."

\textsuperscript{145} Carbon Steel Bars and Shapes from Canada, 29 Fed. Reg. 12,599 (1964); Vital Wheat Gluten from Canada, 29 Fed. Reg. 5921 (1964); European Steel Wire Rod Cases, 28 Fed Reg. 7368, 6475, 6474, 6606 (1963); see Conner & Buschlinger, supra note 52, at 137; Note, supra note 52, at 736-37. Article 5(a) of the Code requires that the dumped imports be "the principle cause of material injury," and also indicates that all other factors con-
Commission has generally required that the injury be "material" or "significant." Whenever dumped goods have been sold in the United States at prices above or equal to the United States market price, the Commission has not found injury. The fact that American producers have had to lower their prices in order to compete with the dumped goods has been treated as weighty, but not conclusive, evidence of injury. If the dumping has caused United States producers to operate at a loss, or has idled their production facilities, injury has readily been found. A finding of injury is also likely if the dumped imports have captured a significant portion of the American market, particularly if that portion is increasing.

Although the Antidumping Act does not require a finding of predatory intent, the intent coupled with the
ability to injure or weaken competitors in the American market has been considered evidence of injury\textsuperscript{153} or of likelihood of injury.\textsuperscript{154}

Sometimes a foreign producer will sell at a differentially low price in order to "meet competition" in the American market. Since injury is not found unless the dumped goods undersell those of American producers, meeting the competition of the domestic producers is an effective defense.\textsuperscript{155} If the competition being met is that of a foreign producer who is underselling domestic producers but is not dumping, the situation is not clear. In a group of related cases involving this issue injury was not found, but the dumping was considered an insignificant factor in the disruption of the American market when measured against the large volume of similarly low-priced but non-dumped goods imported from another country.\textsuperscript{156}

E. The Formal Finding and Imposition of the Special Dumping Duty

Upon an affirmative injury determination by the Tariff Commission, the Secretary of the Treasury publishes a formal "finding," specifying the class or kind of merchandise upon which Customs officials are to assess the "special dumping duty."\textsuperscript{157} The special duty is assessed upon goods entered after the date of publication, and also upon goods entered within a certain earlier period where for any reason (including withholding of appraisement) those goods have not yet been appraised.


\textsuperscript{156} European Steel Wire Rod Cases, 28 Fed. Reg. 7368, 6476, 6474, 6606 (1963). The decisions also held it immaterial whether the dumped or the non-dumped imports first started selling in the U.S. market. It has been argued that the defense allowed by these cases enables the dumper and non-dumper together to destroy the United States producers and bring about an ultimate monopoly for the non-dumper. Note, supra note 52, at 737-38. But if the non-dumper has the productive capacity to take over the dumper's share of the U.S. market, absence of the dumper would not prevent any tendency toward monopoly, and indeed might hasten it.

\textsuperscript{157} Act §§ 201(a), 202(a), 19 U.S.C. §§ 160(a), 161(a) (1954); Regulations §§ 53.40, 53.56(a).
by the date on which the finding is published.\textsuperscript{158} As long as the dumping finding remains in force, Customs officials examine each shipment to determine whether it is sold at a dumping price;\textsuperscript{159} the amount of the duty assessed upon each importation will equal the margin of price difference so found, reckoned as of the date of purchase.\textsuperscript{160} If the dumping has stopped or other relevant conditions have changed, the Secretary (on his own initiative or upon application of interested persons) may revoke or modify the dumping finding.\textsuperscript{161}

Judicial review of a negative determination is not expressly made available to the complaining domestic industry;\textsuperscript{162} the importer, however, can appeal an affirmative finding to the Customs Court.\textsuperscript{163}

III

A PROPOSED APPROACH TO THE DETERMINATION OF FAIR VALUE IN RESPONSE TO STATE INTERVENTION IN THE EXPORTING ECONOMY—ILLUSTRATED BY REFERENCE TO YUGOSLAVIA

I wish now to narrow the discussion to the field of the price comparison inquiry, which should be sharpened to take more realistic

\textsuperscript{158} Act § 202(a), 19 U.S.C. § 161(a) (1964). The regulations fully apply the provisions of the statute to require assessment of the antidumping duty against goods entered as early as 120 days before the "date on which the question of dumping was raised or presented," Regulations § 53.30(b), provided they have not been appraised prior to publication of the finding imposing the antidumping duty. \textit{Id.} § 53.56(a). Such retroactivity appears to go somewhat beyond that authorized by the exceptions enumerated in art. 11 of the Code. Of course, the practical effect of the retroactivity rule will depend in the particular case upon the promptness with which withholding of appraisement was begun, and also, to some extent, upon whether the withholding itself was retroactively applied. \textit{See} notes 129, 130 \textit{supra}.

\textsuperscript{159} Regulations § 53.56(a).

\textsuperscript{160} \textit{Id.} § 53.59; \textit{Act} §§ 202(a), 209, 19 U.S.C. §§ 161(a), 168 (1964) The statement in the text is phrased to avoid terminological complications arising from the fact that the existence of dumping sales is determined by the Secretary on the basis of "fair value" while the dumping duty is assessed against particular importations by reference to "foreign market value" (or, if such a value cannot be ascertained, "constructed value"), which may or may not be just the same as "fair value." \textit{See} Hendrick, in \textit{Compendium} 169.

If the foreign exporter or producer has promised to reimburse the importer for any dumping duties paid, the computation is adjusted so that the amount to be reimbursed is itself assessable as a dumping duty. Regulations § 53.52; Hendrick, in \textit{Compendium} 168-69.

\textsuperscript{161} Regulations § 53.41. The provision for revocation by the Secretary on his own initiative expresses prior practice, \textit{see} Hendrick, in \textit{Compendium} 170, and conforms to art. 9(b) of the Code.

\textsuperscript{162} On the possible availability of review under the Administrative Procedure Act § 10, 5 U.S.C.A. §§ 701-06 (1967), \textit{see} Coudert, \textit{supra} note 52, at 203-04; \textit{Note, supra} note 52, at 745-48; Kohn, \textit{supra} note 52, at 422-27.

\textsuperscript{163} \textit{Act} § 210, 19 U.S.C. § 169 (1964); \textit{see} 19 U.S.C. §§ 1514, 1515 (1964) (protest and review of Customs officials' decisions).
account of the nature and structure of the economies from which allegedly dumped goods come. As many national economies—communist and non-communist—move away from the Smithian free-enterprise market-economy model, their deviant features present important economic issues that ought to be openly dealt with, to a degree far beyond what is now done, in ascertaining "fair value."  

More specifically, I shall consider the relevance to the fair value determination of measures of state intervention in the domestic economy of the exporting country. Obviously, state intervention exists most pervasively in communist countries. But if Britain institutes a comprehensive system of price ceilings, or the French government engages itself directly in the production and sale of Renault automobiles, or the Italian government subsidizes new industries in the Mezzogiorno—should such facts be ignored by the Treasury in making its price comparison? The joint American-Yugoslav forum before which I was asked to present this paper has offered a fortunate occasion to examine these issues. The fascinatingly mixed economy of Yugoslavia affords an apt vehicle for exploring the fashion in which the Treasury might most appropriately respond to diverse measures of state intervention. The study has direct policy connotations for the question of how to determine the fair value of the products of Yugoslavia and of other Eastern European countries, some of which have recently begun to follow Yugoslavia's lead away from orthodox communist dirigism and toward a market economy. But the analysis reaches more broadly, and can be applied to the products of any country, communist or "free," in

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164 The Tariff Commission performs its injury determination, of course, by examining the circumstances of the relevant domestic American industry, and has little occasion to be concerned with the nature of the exporting economy. Imaginative counsel might, however, find ways to relate to the issue of "predatory intent," see notes 152-54 supra, characteristic practices of statist economies that may encourage dumping, such as setting export quotas, acquiring convertible currencies, or implementing "cold war" policies. See Feller, The Antidumping Act and the Future of East-West Trade, 66 Mich. L. Rev. 115, 121-22 (1967); Fensterwald, United States Policies Toward State Trading, 24 Law & Contemp. Proc. 369, 378-79 (1959); Hazard, State Trading in History and Theory, 24 Law & Contemp. Proc. 243, 246 (1959); Wilczynski, Dumping and Central Planning, 74 J. Pol. Econ. 250, 251 (1966); Ehrenhaft, Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties, 58 Colum. L. Rev. 44, 49 n.26 (1958). In determining that no injury existed or was likely in cases involving communist-country exports, on the other hand, the Commission has cited the "ideological objections" of Americans to use of the product. Window Glass from U.S.S.R., 29 Fed. Reg. 13,581, 13,582 (1964). See also Leather Workshoes from Czechoslovakia, 31 Fed. Reg. 10,906 (1966).

165 Private monopoly or oligopoly represents another form, not state-induced, by which the purity of the market-economy model can be diluted. See pp. 168-69 supra and p. 250 infra.

166 On the movement toward freer markets in Eastern Europe, see the references cited note 210 infra.
which state intervention markedly alters the action of an open market economy.

The published Treasury decisions, which are exceedingly terse, do not intimate the slightest concern with the possible relevance of such macroeconomic phenomena as price control, state trading, or subsidies in the national economies from which the allegedly dumped goods are exported. When it is remembered that the central term "fair value" is nowhere defined in the Act\(^{167}\) and that the Secretary of the Treasury at least arguably possesses authority to make regulations giving detailed content to such a term,\(^{168}\) there appears to exist an ample scope for the Secretary to refine the present tests to take realistic account of acts of state intervention that might distort fair-value determinations. The sole inquiry of this nature that has yet been articulated, however, is the quite simplistic one of whether the allegedly dumped goods come from a "controlled economy country."

A. The Present Fair Value Test for the Products of "Controlled Economy Countries"

The Treasury has evolved a special test of fair value for the products of countries having "controlled economies," and has consistently through the 1960's applied it to merchandise exported from communist nations other than Yugoslavia.\(^ {169} \) The measure is the price in the home market of a "non-state-controlled-economy country," or,

\(^{167}\) The term appears only in § 201 of the Act. 19 U.S.C. § 160 (1964). The Treasury, in a 1957 report to Congress, quoted in Ehrenhaft, supra note 164, at 63, declared that the price comparison between fair value and purchase price is nothing more than "an exercise in arithmetic." It is a theme of part III of this article that some sophisticated economic analysis must be undergone, to ascertain the most apt measure of fair value, before the simple arithmetic can be performed.


alternatively, the price at which such third country sells at export.\textsuperscript{170} For the ensuing discussion, it is useful to distinguish this "third-country price" test from the "normal" tests of fair value—namely, home-market price, export price, and constructed value.\textsuperscript{171}

All of the cases in which this test was used have involved the products of Eastern European countries (that is, none has involved Cuba or the Asian communist areas),\textsuperscript{172} and the third country whose price was used has in almost every case been Western European.\textsuperscript{173} Presumably the Western European nation chosen is the one in which general economic conditions are thought to be most similar to those of the exporting country.\textsuperscript{174} The Western European price is adjusted for transportation costs, and for measurable differences in quality and production efficiency, before the price comparison is made.\textsuperscript{175}

1. \textit{Statutory Basis of the Third-Country Price Test}

There is little authority from which to glean the statutory provenance of the special measure of value that is applied to the products of

\textsuperscript{170} Regulations § 53.5(b). The regulations contained nothing explicit about controlled economies, or about the test of fair value to be applied to their products, until 1968. Under both the prior practice and the scheme of the new regulations, the special test is regarded as a form of "constructed value." In obeisance to the statutory standards of constructed value, Act § 206, 19 U.S.C. § 165 (1964), the new Regulation § 53.5(b) specifies that the value is reckoned "on the normal costs, expenses, and profits as reflected by" the prices in a non-controlled economy. For all practical purposes, however, the quoted language could probably be omitted without loss of intended meaning.

The price at which the non-controlled countries (France and Mexico) sold similar merchandise for export to the United States was used as the test of fair value in Cast Iron Soil Pipe and Fittings from Poland, 32 Fed. Reg. 2901 (1967).

The second supplementary provision to para. 1, ad art. VI of annex I to GATT recognizes that "a strict comparison with domestic prices . . . may not always be appropriate" "in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State . . . ." The Code's limitations on how the price comparison may be made are "without prejudice" to the provision just quoted. Code art. 2(g).

\textsuperscript{171} See pp. 184-85 supra.

\textsuperscript{172} Imports from mainland China, Cuba, North Korea, and North Vietnam are prohibited (with certain exceptions) by the Foreign Assets Control Regulations, 31 C.F.R. §§ 500.204, 500.536 (1967), and the Cuban Assets Control Regulations, 31 C.F.R. §§ 515.204, 515.536 (1967), issued pursuant to the Trading With the Enemy Act of 1917, § 5, 50 U.S.C. app. § 5 (1964).


\textsuperscript{174} See Feller, supra note 164, at 132. Mr. Feller's article, which carries the authority of the author's experience in the Office of the General Counsel of the Treasury Department, is a valuable source of information and analysis concerning the practice and problems involved in communist-country dumping investigations.

communist states. The nearest hint afforded by the decisions is the single statement in one case that home-market sales of cement in Poland were "not made in the ordinary course of trade within the meaning of the statute," and therefore that the home-market price should not be used.\footnote{Portland Cement from Poland, 28 Fed. Reg. 6660 (1963).} The Treasury apparently on parallel grounds also automatically dismisses the use of a communist country's price for export to countries other than the United States, even though that price may have been arrived at by bargaining with a third-country purchaser not subject to the communist exporting country's control.\footnote{See Feller, supra note 164, at 128-29, arguing that the export price (which he terms the "third-country price") is subject to quite different considerations from those affecting the home-market price in communist countries, and indeed that the export price ought to be taken as the usual test of fair value for communist-economy products.}

The rationale evidently derives from a statutory provision, incorporated by the regulations to define the home-market price and export price used to measure fair value, which stipulates that those prices must be based on sales "in the ordinary course of trade."\footnote{"[F]oreign market value of imported merchandise shall be the price . . . at which such or similar merchandise is sold . . . in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or . . . for sale for exportation to countries other than the United States) . . . ." Act § 205, 72 Stat. 584 (1958), 19 U.S.C. § 164 (1964). This standard of "foreign market value," which is established to measure the special dumping duty to be assessed on particular shipments rather than to test initially for the existence of sales below fair value, is incorporated into the Regulations' statement of the home-market price test, § 53.3(a), and of the export price test. Regulations § 53.4(a). For the prior similar practices, see 19 C.F.R. §§ 14.7(a)(1)-(2) (1967); House Ways & Means Subcomm. on Customs, Tariffs, and Reciprocal Trade Agreements, Report on United States Customs, Tariff, and Trade Agreement Laws and Their Administration, 85th Cong., 1st Sess. 92-93 (Comm. Print 1957). The term "sold or, in the absence of sales, offered for sale" is qualified by the statute to mean sales or offers "in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise . . . .", Act § 212(1)(B), 72 Stat. 586 (1958), 19 U.S.C. § 170a(1)(B) (1964), and the term "ordinary course of trade" is itself defined to mean "the conditions and practices which, for a reasonable time prior to the exportation of the merchandise under consideration, have been normal in the trade under consideration . . . ." Act § 212(2), 72 Stat. 586 (1958), 19 U.S.C. § 170a(2) (1964).} In \textit{J. H. Cottman \& Co. v. United States},\footnote{20 C.C.P.A. 344 (Cust. 1932).} the only reported judicial pronouncement on
the relevance of state intervention to the price comparison question,\textsuperscript{180} the Court of Customs and Patent Appeals held that a Moroccan government monopoly's sales of phosphates that were restricted against resale were not made "in the ordinary course of trade," and declared that sales, to form an appropriate basis for comparison, must be made in a "free, open, unrestricted market . . . under normal competitive conditions."\textsuperscript{181}

Having rejected the preferred home-market price and export price tests of fair value, the Treasury was left with using a constructed value, which under the statute is supposed to be computed by reference to the costs, expenses and profits of the exporting producer. The Treasury seems in all the communist-country cases to have found or assumed an "absence of information as to the actual costs . . . expenses and profit,"\textsuperscript{182} and therefore has turned to a third-country price, apparently on the theory that it is the "best evidence available" as to such component figures.\textsuperscript{183} The "best evidence available" criterion, however, functions in the statute only to enable the Treasury to disregard transactions between related persons,\textsuperscript{184} and it has been doubted that typical transactions within communist countries are between related persons within the definitions of the Act\textsuperscript{185} to justify the use of a Western European price instead of a constructed value based on actual costs, expenses and profits in the exporting communist country.\textsuperscript{186} A firmer statutory ground might be found in the statutory definition of "constructed value," which requires that the figures used in computing that value reflect transactions "in the ordinary course of trade" or "in the ordinary course of business."\textsuperscript{187} Because any available figures reflect transactions that are not "in the ordinary course," the Treasury has no

\textsuperscript{180} Actually the case was concerned not with the initial comparison of prices to determine the existence of dumping sales, but rather with the specific assessment of antidumping duties against the shipment in question. An examination of the opinions in this tortuous litigation (the case went to the Court of Customs and Patent Appeals three times) fails to disclose what test the Treasury finally did use to compute the margin of dumping. United States v. J. H. Cottman & Co., 18 C.C.P.A. 132 (Cust. 1930); J. H. Cottman & Co. v. United States, 20 C.C.P.A. 344 (Cust. 1932); United States v. J. H. Cottman & Co., 23 C.C.P.A. 378 (Cust. 1936).

\textsuperscript{181} 20 C.C.P.A. at 357.


\textsuperscript{183} See Feller, supra note 164, at 129-30, 126.

\textsuperscript{184} Act § 206(b), 19 U.S.C. § 165(b) (1964).

\textsuperscript{185} Id. § 205(c), 19 U.S.C. § 165(c) (1964).

\textsuperscript{186} Feller, supra note 164, at 129-31; cf. Coudert, supra note 178, at 226.

\textsuperscript{187} The costs of materials and of fabrication or other processing are based upon production "in the ordinary course of business," Act § 206(a)(1), 19 U.S.C. § 165(a)(1) (1964); the amounts for general expenses and profits are those reflected in sales "in the ordinary course of trade." Id. § 206(a)(2), 19 U.S.C. § 165(a)(2) (1964).
choice but to disregard figures from the exporting economy and simply to do the best it can to construct the value in some other manner consistent with the spirit of the Act.\footnote{The statutory definition of "constructed value" does not specify how the Treasury is to proceed either when information as to costs, expenses and profits is unavailable or when that information reflects transactions that are not in the "ordinary course." Act § 206, 19 U.S.C. § 165 (1964). Regulation § 53.5 does not close this gap. The Treasury has apparently acknowledged the shaky basis of its third-country price test. See Coudert, supra note 178, at 226-27.}

2. The Economic Premises of the Test

The practical rationale for using the third-country price test, on the other hand, seems fairly clear. Prices in a "controlled" economy are often the instruments of social and political engineering, and may be set at artificial levels for reasons having nothing to do with natural economic relationships as those would be judged in a free-market economy. Such prices are not "in mutual communication" with the prices at which the allegedly dumped goods are exported, and thus a legitimate economic comparison is precluded.\footnote{See Feller, supra note 164, at 126.} More pointedly, the purposes of the Antidumping Act would be frustrated if the Treasury were required to ascertain fair value by reference to an uneconomically low home-market price set by a state-run enterprise that had behind it the potentially unlimited financial power of the state to absorb losses (and, incidentally, to finance dumping for political reasons).\footnote{See Wilczynski, supra note 164, at 251-52, 261. It has been argued that communist countries cannot be relied upon as a dependable source of goods or materials. Fensterwald, supra note 164, at 379-80.} The same would be true if constructed value had to be computed from artificially determined domestic cost figures.

By resorting to a third-country price as its referent, however, the Treasury altogether bypasses any inquiry into the economic validity of the domestic figures in the exporting communist economy. The Treasury itself is acting at least somewhat imprecisely and artificially, since it has no way of knowing whether the particular third-country price chosen is really too high or too low.\footnote{See Feller, supra note 164, at 131-32. See also note 209 infra.}

3. The Criteria of "State Control"

In what circumstances is this practical although undoubtedly somewhat crude test to be employed? The Treasury's criteria of a "controlled economy" are left wholly unarticulated in the decisions and the regulations. So far as I have determined, no non-communist country has been
treated as possessing such an economy by having the third-country price test applied to its products. From the cryptic opinions in the cases, one is tempted to conclude that communist economies are treated as "controlled" because "everybody knows they are." The 1968 regulations, embodying for the first time specific mention of the third-country price test, yield no fresh guidance about what factors may determine whether an economy is controlled. "Ordinarily," the third-country price is to be utilized where the exporting country's economy "is controlled to an extent that sales . . . do not permit a determination of fair value under [the home-market price or the export price tests]."  

B. A Suggested New Approach to "State Control" Questions

Even though the new regulation is cast in terms that almost entirely beg the question, one might discern in its language the germ of a new approach to the problem of state influence. The threshold inquiry would no longer be simply whether the entire economy is "controlled" vel non, but rather would become one of assessing the degree to which "control" affects the particular product in issue. The Treasury would consider whether the ordinances of state intervention operate to affect the pricing of the allegedly dumped product "to an extent" that renders the normal tests of fair value inappropriate. On this view the new regulation can furnish a foundation for the more refined and explicit consideration of macroeconomic facts that I believe the price comparison demands in such cases.

The fundamental economic inquiry should be whether, in the circumstances of each case, state interference distorts the relationship that the home price of the goods in question would bear to other prices under a generally free market economic system.

1. The Economic Measure of Value

The price comparison determination under the scheme of the Act is essentially a matter of relating economic values. Western economists have recognized that the value of any product or service or factor of production is always a relative one, and must be measured in terms of the relation its price bears to other prices on the open market. There

192 Only comparatively recently have the Treasury's opinions made explicit the thought that the third-country test is used because the communist exporting country has a "controlled economy." Fur Felt Hat Bodies from Czechoslovakia, 31 Fed. Reg. 15,024 (1966), seems to be the first instance. In more recent cases, the Treasury has spoken of a "state-controlled-economy country," e.g., Titanium Sponge from the U.S.S.R., 33 Fed. Reg. 5467 (1968); Cast Iron Soil Pipe and Fittings from Poland, 32 Fed. Reg. 2901 (1967).

193 Regulations § 533.5(b).
can be no other, absolute measure of value, such as might be sought by reference to the factors (like labor) that go into a product. Labor or any other factor of production has economic interchangeability, affording it multiple opportunities to contribute to a variety of outputs and thereby to earn alternative rewards. It will earn higher rewards in some uses than in others. Since its own value will vary with the use to which it is in fact put, no factor of production (singly or in combination) can supply an absolute measure of the value of the products it may help bring into being. The measure of value therefore can only be supplied by the market, which commensurates in money terms the relative values of products and of the factors that go into producing them.

Even in cases where the state has interfered with the economy, then, there is at bottom no valid alternative to a free market as the touchstone for measuring value. The Treasury has evidently proceeded upon such a premise in the communist-country cases, taking its measure of value from "non-controlled" economies where the market presumably operates more freely. But its technique seems an inartistic one. The Treasury has simply assumed that the home price in a communist country can never furnish an economically sound measure of fair value, without pausing to ask whether there may be free-market criteria by which to test the economic validity of that home-market price. It therefore has been forced to use a price drawn from an entirely separate economy. Conversely, in cases involving non-communist countries, the Treasury appears to take no account of regimes of state intervention that might render the home-market price unreliable, under free-market criteria, as a measure of value.

To serve the Act's balanced trade policy, which is to restrict imports priced below value but not those whose low price stems from a genuine economic advantage, it is critical to have as precise a measure of value as possible. The problem divides into two parts. First is the question of how the Treasury might more accurately decide whether it can validly use the home-market price (or home-economy constructed value) of a product which may be affected by state intervention. The second question is whether, in cases where it has been decided that price or cost figures from the exporting economy cannot be validly used,

195 See id. at 443-44.
196 See id. at 611-17.
197 Reliance on free-market standards of value seems to be an implicit premise of the Antidumping Act. See the statutory definitions quoted in note 178 supra.
there is a more exact alternative standard of value than the third-country price now employed by the Treasury.

2. The "Market-Basket" Technique for Validating Home-Market Prices (or Costs) by Free-Market Standards

The special problem presented by state control is how to measure values when prices are influenced by interference with free operation of the home market. I suggest that the initial inquiry in each case should be whether the home-market price in the exporting country can in the circumstances be taken as an economically appropriate measure of value.

Again, value can only be tested by free-market criteria. Whenever a home-market price appears to be influenced by state control, the Treasury should consider whether that price bears approximately the same relationships to other prices in the exporting economy as it would in a substantially free economy. One theoretically sound and reasonably simple way to do this is by charting the relationships that the price of the exported product bears to the prices of perhaps six or eight other commodities in the home market of the exporting country, and then comparing those price relationships to those found by arraying the prices of the same products in several other countries where the market is generally free and the product in question is not directly controlled. If the price ratios are roughly the same in both the exporting and the "free" markets, the home-market price of the allegedly dumped product is an economically valid one for the purposes of measuring fair value. It is valid because it approximates the price that would be generated if a free market prevailed in the exporting economy.

Thus, if shoes were allegedly being dumped from Yugoslavia and it appeared that the price of shoes in the Yugoslav home market might have been affected by state interference in the economy, the Treasury would investigate the prices in Yugoslavia of such commodities as wheat, steel, wool and bicycles, and note the ratios between those prices and the price of shoes. It would then collect the prices and figure the ratios on an identical "market basket" in (say) Italy, Austria and Greece. Adjusting for readily-identifiable disparities and allowing for an occasional aberrant relationship, the Treasury would determine whether the ratios of shoe prices to the other prices in Yugoslavia were reasonably similar to the ratios in the other countries chosen. If they were, the Yugoslav home-market price should be used to measure the fair value of the shoes, instead of a price drawn from a wholly unrelated third economy. But if by this test the Yugoslav shoe prices were mark-
edly out of line with the rest of the market-basket prices, the Treasury should conclude that state intervention has distorted the relevant economic relationships in the Yugoslav market; a standard other than home-market price may have to be employed to reckon the fair value.

An identical technique could be utilized to test the reliability of the home-market prices, for example, of petroleum products subsidized by the Italian government, or of woolens sold domestically in Great Britain at a controlled ceiling price. In any such situation, validation of the home price would indicate that the potentially distorting effects of state intervention had been "washed out," as judged by free-market criteria, in the exporting economy.

In cases where there are few or no home sales and therefore no home-market price,\(^\text{198}\) the Treasury confronts the task of computing a constructed value.\(^\text{199}\) In such cases, whenever it appears that measures of state intervention have touched upon the costs of making or selling the allegedly dumped goods, it is again desirable to enlist the market-basket approach. The Treasury would determine whether the figures on costs, expenses and profit are economically valid despite the state's interference with the home economy. Here, concededly, the investigation would be more detailed, since the Treasury would have to make a separate set of price-ratio comparisons for each element of the constructed value. Fortunately, however, the job is somewhat simplified by the statutory definition of constructed value, which does not require the Treasury to itemize the costs of labor, equipment operation and depreciation, distribution and the like; the statute specifically requires computation only of the costs of materials, of fabrication or processing, and of containers, and permits the computation of general expenses and profits on the basis of the amounts usual in the country of exportation.\(^\text{200}\) Although a question of administrative feasibility is obviously presented, it should not be impossible in particular cases to determine whether all of the components of a constructed value are free from significant distortion resulting from state economic action. If they are—again—the Treasury should use the value constructed in the exporting

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\(^{199}\) Regulations § 53.5(a). Curiously, while the premise for using constructed value may be the absence or insufficiency of home (or export) sales from which a determination of fair value can be drawn, the statutory definition of "constructed value" calls for use of general expense and profit figures as "usually reflected in sales of merchandise of the same general class ... in the usual wholesale quantities and in the ordinary course of trade ... ." Act § 206(a)(2), 72 Stat. 585 (1958), 19 U.S.C. § 165(a)(2) (1964). This anomaly does not deter use of the constructed value when there are no home sales.

economy, in preference to a third-country price taken from an entirely separate economy.

It seems to me that the technique I have outlined offers important advantages over the simplistic approach of deciding categorically whether the exporting economy is "state-controlled." In cases where the home-market price or constructed value drawn from home-economy figures can be economically validated, the proposed technique permits the use of fair-value tests that have full statutory authority, and lessens reliance on the third-country price test, for which there is no express warrant in the Act. More important, the validated home-market price or constructed value is likely to be a more precise measure of value than any third-country price. Since the validated figure is indigenous to the exporting economy, it arises from the whole distinctive complex of costs and earnings and consumption present in that economy. A third-country price could be brought into that sort of intimate communication with the exporting economy only through adjustments that by their nature and number would be impossible to calculate. But where such adjustments cannot be made, there is no way of knowing whether the third-country price is too high or too low in terms of economic values that relate to the exporting economy. The validated home-economy standard, further, avoids the possible distortion introduced by the extra exchange-rate conversion that the third-country price necessitates under current practice.\textsuperscript{201} Finally, the market-basket approach offers a technique that can be applied wherever the phenomenon of state intervention appears, in communist and non-communist countries alike.

No doubt there can be imprecisions and administrative complications under the approach I have advanced.\textsuperscript{202} I suppose an advantage of the present "controlled-economy" litmus is that it avoids bewildering the fact-finder with a multitude of complex economic data that are not amenable to resolution by familiar methods. But one may believe that the execution of a "market-basket" test would present no impossible difficulty; in any event, I do not insist that it is the only or the best

\textsuperscript{201} Currency conversions under the Antidumping Act are governed by the antidumping Regulations § 53.55, a general Customs regulation, 19 C.F.R. § 16.4 (1967), and § 522 of the Tariff Act of 1930, 31 U.S.C. § 872 (1964).

\textsuperscript{202} One potential difficulty with any price comparison (whether the product is from a communist country or not) has to do with the existence of non-standardized products. Clearly it is easier to compare the prices of wheat than of costume jewelry. The statutory definition of "such or similar merchandise" does not really face up to the problem. Act § 212(3), 19 U.S.C. § 170a(3) (1964). An ordinary case involving costume jewelry would be difficult enough; it would become more complex if a market-basket test were used to validate home prices before the price comparison was made.
validating method that could be contrived by those skilled in analytical
economics. I do urge that the Treasury, in state-intervention cases,
exploit the available free-market criteria to seek out more precise stan-
dards of fair value than it now employs.

3. Application of the Market-Basket Test

All economies, obviously, experience a certain degree of state inter-
ference, the effects of which are often imperfectly visible and in any
event are hard to trace. As a theoretical matter, then, one could perhaps
declare that every home-market price should be validated by a test like
that of the market-basket price-ratio comparison, whether or not the
product is directly influenced by state intervention in the home market.
But it would be silly, as well as unduly burdensome, to apply such a
test to the freely-priced products of generally free economies. The Act,
after all, relies fundamentally on the use of home-market prices existing
in real-world economies; a marked departure from this fundamental
plan would contravene the logic of the Act.

Price validation should be considered only when the Treasury
finds by its threshold inquiry that the price in the home market appears
(at least prima facie) to be substantially affected by state intervention.
To supply certain presumptions that aid in carrying out that inquiry,
the Treasury could adapt its present distinction between economies
that are pervasively controlled and those that are not. Then it should
apply the price-ratio comparison to validate home-market prices in ac-
cordance with the following schema:

(1) Where the exporting economy is pervasively controlled, it
should be presumed that the consequences of state intervention per-
meate the economy so thoroughly that home prices are not reliable
indicators of fair value. They should not be used unless they can be
validated by the price-ratio comparison, even where the particular
product is free from direct state influence. The need for validation is
not lessened in cases where the home price is higher than the price at
which the goods are sold to the United States (which would establish
the existence of dumping sales if the home price were used to test fair
value). The high home price may be set for purely non-economic rea-
sons; if that price is found not to be valid, a lower third-country price
used as the substitute index of value may show the exported goods to be
fairly priced, in which event they should not be restricted by a dumping
duty.

(2) Where the exporting economy is generally free, it should be
presumed that the home-market price is a reliable guide to fair value,
unless the particular product appears (prima facie) to be directly sub-
ject to state influence. In the latter situation, the need for validation by the market-basket comparison should depend upon whether free-market forces, despite the controls, permit the home price to stand at a level above the price at which the allegedly dumped goods are sold to the United States. If they do, this is all the Treasury needs to know to find dumping sales. To reach an affirmative fair-value determination, the Treasury need only find that sales at less than fair value do exist; it is not essential to make an exact calculation of the margin by which the sales to the United States are priced below fair value. Act § 201(a), 19 U.S.C. § 160(a) (1964); Regulations § 53.3(a). The dumping margin is relevant only to assessment of the duty, which is computed, after the final "dumping finding" is published (see text at note 157 supra), with respect to each shipment of the merchandise. Regulations § 53.56; text at notes 159, 160 supra. The technique outlined in the text will not necessarily yield an exact measure of the dumping margin, for which alternate valuation methods may be required in particular cases.

Whether the home-market price has to be validated under the above rules or not, there may be circumstances in which adjustments to the price should be made to compensate for the traceable effects of certain forms of state action (such as subsidies). This idea will be illustrated below in section E.

Parallel rules would govern the use of the constructed value standard. There, of course, the component elements of that value, rather than a price, would have to be validated in those cases where validation was required.

I believe this approach would give full and sound meaning to the new regulation's standard of applying an alternate fair-value measure when "the economy of the country . . . is controlled to an extent that sales . . . in that country . . . do not permit a determination of fair value" under the usual tests. The suggested procedure cuts the

203 To reach an affirmative fair-value determination, the Treasury need only find that sales at less than fair value do exist; it is not essential to make an exact calculation of the margin by which the sales to the United States are priced below fair value. Act § 201(a), 19 U.S.C. § 160(a) (1964); Regulations § 53.3(a). The dumping margin is relevant only to assessment of the duty, which is computed, after the final "dumping finding" is published (see text at note 157 supra), with respect to each shipment of the merchandise. Regulations § 53.56; text at notes 159, 160 supra. The technique outlined in the text will not necessarily yield an exact measure of the dumping margin, for which alternate valuation methods may be required in particular cases.

204 Regulations § 53.5(b). The tests and criteria I have proposed might raise questions as to their conformity to the literal provisions of the GATT provision, ad art. VI, para. 2, quoted supra note 170. My proposals do not however appear to be out of keeping with
present practice in two directions. For non-communist countries, there would no longer be an uncritical acceptance of the home-market price,\textsuperscript{205} which in particular cases might stand at an artificially low level as a result of direct state intervention. For communist countries, on the other hand, a home-market price could be taken as the measure of fair value if it is validated, and would then tend to supply a more precise measure than the third-country price heretofore utilized. Home prices might be found to be valid most frequently in those sectors of their economies that Eastern European states have been gradually freeing from direct control. Use of a home-market standard would not necessarily benefit the communist exporting country, since its home price might well be higher than that of the Western European country whose price would otherwise be employed.

4. The Alternative Standard of Fair Value

If the home-market price (or constructed value) is not found to be economically valid when tested by the price-ratio comparison, the Treasury would have to apply an alternate standard of fair value. Under its present practice, of course, it uses a third-country price. For reasons already cited, such a measure of value is likely to be inexact; it may be too high or too low, even after the customary adjustments are made, and it introduces an additional currency conversion.\textsuperscript{206} Further, there may be difficulties in obtaining accurate information from third-country producers who have no direct interest in the case.\textsuperscript{207}

It can be persuasively argued that a more exact measure could be found in an averaged world or regional price, or, better yet, in an average of home prices in several free-market economies in which the product in question is free from the effects of state interference. I shall leave this issue to be more extensively canvassed by others.\textsuperscript{208} For the

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\textsuperscript{205} Research has disclosed no case in which factors like price controls, state-run enterprises or subsidies have been mentioned as relevant. In Renault Automobiles from France, 28 Fed. Reg. 4675 (1963), home-market price was used as the measure of fair value, but the French government's ownership of Renault was not referred to. \textit{See} pp. 290-31 \textit{infra}.

\textsuperscript{206} \textit{See} notes 175, 201 \textit{supra}. The economic imprecisions of currency conversions may be lessened somewhat by the communist nations' practice of quoting export prices in hard currencies rather than in their own, but a conversion to the communist currency would still have to be made if there were to be adjustments of the third-country price to reflect differences in quality and production efficiency.

\textsuperscript{207} \textit{See} Feller, \textit{supra} note 164, at 130 n.66.

\textsuperscript{208} See the excellent discussion in Feller, \textit{id}. at 133-39.
balance of this article, I shall assume that the familiar though imprecise third-country price will be used as the alternate measure of value. A single third-country price, as distinct from an average of several, has the merit of furnishing a concrete point of reference for the purpose of adjusting for measurable differences in quality and production efficiency.209

I turn now to a consideration of the Yugoslav economy, and of the way its products have been treated and might be treated under the present "control" standard and under the suggested application of the new regulation.

C. The "Socialist Market Economy" of Yugoslavia

It should not surprise us that Yugoslavia—for centuries the cross-roads of eastern and western cultures and latterly the home of a uniquely independent form of communism—should possess a wholly distinctive economic system.210 Although its economic discourse still

209 See text at note 175 supra.

One situation that seems particularly troublesome under any approach is that in which it is suspected that the controlled exporting economy may possess a genuine comparative advantage over all other countries. The case can be imagined, for example, in which a communist country has an unusually plentiful or accessible supply of a certain natural resource, which can be extracted and exported far more cheaply than could be done by any non-controlled country. See Wilczynski, supra note 164, at 254-57. The difficulty is how to prove by reliable economic standards that this is truly the situation. The Treasury's efforts to adjust the third-country price for differences in production efficiency may founder on the unreliability of cost information in the controlled economy. If the commodity is priced reasonably in the home market, the market-basket test (which, it should be conceded, may be less useful with respect to natural resources than for other products) is likely to demonstrate that the home price is invalid as being too low. Alternative standards, such as regional or world price, would not increase the precision of the measure unless the volume exported by the communist country brought that price down to its own level. The situation seems to call for some sort of construction of value from exporting-economy figures. (A curious anomaly of the new Regulations § 53.5(b) is that it seems to require use of a third-country price, and to bypass entirely the use of any sort of "regular" constructed value test, whenever the element of control renders inappropriate the measurement of fair value by the home-market price and export price tests.) But unless those figures could themselves be validated by the market-basket comparison, there would remain no free-market guide to verify their validity. Perhaps the practical answer is that any communist country with such an economic advantage will probably sell at the higher world price, so that the question of dumping is less likely to arise.

210 Other Eastern European countries have begun, gradually and to a far lesser extent, to emulate some of the liberalizing techniques practiced in the Yugoslav system. See generally Burck, East Europe's Struggle for Economic Freedom, 75 FORTUNE, May 1967, at 125; Eastern Europe Breaks Out of Its Bonds, BUS. WEEK, Nov. 20, 1965, at 177; Bicanic, Economics of Socialism in a Developed Country, 44 FOREIGN AFFAIRS 633, 649-44 (1966); Upheaval in Czechoslovakia: Changing Climate Turns Industry Westward, 8 BUS. EUROPE, Apr. 26, 1968, at 129. After the Soviet invasion and occupation, however, the Czechoslovak government decided on October 24, 1968 "to abandon an experiment of creating workers'
sometimes creaks with Marxist jargon,²¹¹ Yugoslavia has to a remarkable extent replaced the dead hand of centralized planning and control with the supple and diffused sovereignty of the market.²¹²

The most striking feature of the Yugoslav economy is the extent to which, in the name of socialism, it is given over to a system of free (though not really private) enterprise. Autonomous firms make their own business decisions and attempt to maximize profits in a more or less competitive market environment.²¹³ Direct planning, controls and subsidies are generally being cast off.²¹⁴ The means of production, on the other hand, are "social property,"²¹⁵ and there is no effective capital councils in government-run industry. The plan was apparently canceled under Soviet pressure." N.Y. Times, Oct. 25, 1968, at 5, col. 3 (city ed.).


²¹² For information on recent Yugoslav economic history, see generally S. PEJOVIĆ, THE MARKET-PLANNED ECONOMY OF YUGOSLAVIA (1966); G. MACESICH, YUGOSLAVIA: THE THEORY AND PRACTICE OF DEVELOPMENT PLANNING (1964); A. WATERSTON, PLANNING IN YUGOSLAVIA (1963); Rusinow, LAISSEZ-FAIRE SOCIALISM IN YUGOSLAVIA, in AMERICAN UNIVERSITIES FIELD STAFF, 14 SOUTHEAST EUROPE SERIES, No. 2 (1967); W. Friedmann, FREEDOM AND PLANNING IN YUGOSLAVIA'S ECONOMIC SYSTEM, 25 SLAVIC REVIEW 630 (1966); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ECONOMIC SURVEY: YUGOSLAVIA (annual) [hereinafter cited as OECD]. Useful information is also found in three Yugoslav periodicals, all of which are available in English language editions: THE NEW YUGOSLAV LAW: BULLETIN ON LAW AND LEGISLATION (annual; articles and recent legislation); YUGOSLAV SURVEY: A RECORD OF FACTS AND INFORMATION (quarterly; political, economic, and social developments); JOURNAL OF THE YUGOSLAV FOREIGN TRADE (quarterly; international commerce).

²¹³ See Rusinow, supra note 212, at 4; Friedmann, supra note 212, at 632-33. "The working organization is an independent and autonomous organization." CONST. OF YUGOSLAVIA art. 15, para. 1 (1963), in 7 INSTITUTE OF COMPARATIVE LAW, COLLECTION OF YUGOSLAV LAWS (Eng. lang. ed. 1963).

²¹⁴ Friedmann, supra note 212, at 631-33; Rusinow, supra note 212, at 13-14; Burck, Adam Smitovic on the Sava, 75 FORTUNE, May 1967, at 128, 242; Samardžija, The Market and Social Planning in the Yugoslav Economy, 7 Q. REV. ECON. & BUS., Summer 1967, at 37. The "political factories" have continued to demand subsidies. See note 232 infra.

²¹⁵ I shall not attempt a definitive statement of the unique Yugoslav concept of "social property." One Yugoslav colleague at the Zagreb conference stated, seriously, that there were nineteen different theories of the meaning of social property. The essential idea is that there is no "legal title" (in the state or anyone else) to capital assets, to which the enterprise has only a "right of use." See Peselić, Yugoslav Laws on Foreign Investments, 2 Int'l. Lawyer 499, 506 (1968). Since no one has the right of ownership over the socially-owned means of production, neither the social-political community nor the working organization nor the working man may appropriate in any form of ownership the product of socially-organized work, or manage and dispose of socially-owned means of production and work, or arbitrarily determine the terms of distribution.

CONST. OF YUGOSLAVIA, basic principle III, para. 2 (1963). An examination of the legal incidents and liabilities connected with social property concludes with the statement that
market in the western sense. Individual enterprises, and the economy as a whole, are subject to appreciable state influence, particularly through the operation of the investment banks and (at least for the present) an elaborate system of price controls.

Our concern under the antidumping laws is primarily with the impulses that go into the pricing of products in the Yugoslav domestic market. Laying aside for the moment measures of state manipulation of prices, we may identify three key operational principles that go far to demonstrate that the process whereby Yugoslav enterprises determine their prices is substantially similar to that of privately-owned enterprises in western market-economy countries. These principles reflect conscious policies that the competitive market should largely replace planning as the mechanism for determining prices and allocating factors of production, and that profit earned in that market should be a legitimate optimizing criterion.

The first key element is the concept of worker self-management of

“enterprises in Yugoslavia cannot be considered as State-owned . . . .” Balog, Foreword to Laws of Enterprises and Institutions, 13 COLLECTION OF YUGOSLAV LAWS 3, 5 (Eng. lang. ed. 1966). It appears, however, that the state may claim the assets upon liquidation of the enterprise, and therefore may be identified as having some incidents of ownership. Pejovic, supra note 212, at 29. I was advised by Yugoslav colleagues that enterprises cannot claim sovereign immunity from suit, and that the assets are subject to execution upon judgments.

Small businesses (not officially "enterprises"), which employ up to ten persons in addition to members of the owner's family, may be privately owned in certain fields, such as crafts and catering. See Balog, supra at 5; Lehrman & Coste, Uses of Adversity, BARRON'S, May 27, 1968, at 9.

216 See Rusinow, supra note 212, at 5, 8-9, 13. "[T]here is no mechanism (except for a new law on commercial banks) by which one firm can participate in the management and distribution of income of another firm." Zupanov, The View from Zagreb, 2 COLUM. J. WORLD BUS., Jul.-Aug. 1967, at 67, 69. In the summer of 1968, however, a private bond issue was floated, the first in postwar Yugoslavia; this step might lead to the establishment of a stock exchange. See 8 BUS. EUROPE, July 19, 1968, at 226.

Yugoslavia in 1967 promulgated a series of laws designed to permit and attract foreign private investment, on the basis of joint ventures with Yugoslav enterprises in which the foreign interest cannot exceed 49%. See Peselj, supra note 215; Import of Foreign Capital into Yugoslavia, 14 J. YUGOSLAV FOREIGN TRADE NO. 2, at 5 (Eng. lang. ed. 1967). Investments have been slow in coming. See Businesses Avoid Yugoslavia, J. COMMERCE, Jan. 24, 1968, at 9; Yugoslavia's Invitation to Foreign Investors: Why Western Firms are Holding Back, 8 BUS. EUROPE, Feb. 23, 1968, at 57; Capitalism Finds Yugoslav Haven, N. Y. TIMES, Aug. 19, 1968, at 55 (city ed.).

217 See Pejovic, supra note 212, at 24; Samardzija, supra note 214, at 40-42; Friedmann, supra note 212, at 631-33. There is by no means universal agreement among Yugoslavs on these principles. See Rusinow, supra note 212, at 5-6; Bicanic, supra note 210, at 646; Anderson, Economic "Reform" in Yugoslavia, 52 CURRENT HIST. 215 (1967).

On marketing practices, see Yugoslavia Updates Marketing to Emulate Western Techniques, 8 BUS. EUROPE, Oct. 4, 1968, at 315.
enterprises. Through an elected Workers' Council, which in turn chooses an Executive Board and a director, the employees have basic control of the enterprise for which they work. The significance for our purposes is not that the blue-collar workers have supremacy over the supervisory personnel (which at best is only partly and decreasingly true), but rather that the employees as a group enjoy a fundamental independence from the state in the management of their enterprise.

Second, the worker-managers have an enormous incentive to maximize the profits of their enterprise, since they share those profits, and do so on a basis of self-determination. After taxes and other charges are covered, the employees are free to allocate the net profit between reinvestment in the enterprise and increased wages or community benefits for themselves.

Third, and most vital here, is the general autonomy of the enterprise in arriving at its investment, production, marketing and pricing decisions. Although some legal incidents of ownership of the capital can be said to be in the state, the enterprise's "right of use" conveys a practical power of autonomous business decision. One of the aims


219 See Rusinow, supra note 212, at 13, who speaks of the crystallization of two classes, a genuine working class and a class of "socialist entrepreneurs" (managers and technicians). Research by a Yugoslav economist indicates that participation in the decision-making process does not overcome the modern worker's sense of alienation from his product by the machine, nor does it give him a feeling of power. Zupanov, supra note 216, at 72.

220 See Pejovich, supra note 212, at 29, 31, 64; Bicanic, supra note 210, at 637-38. The proportion of net income subject to such worker determination was increased substantially by the 1965 reforms. Bicanic, supra, at 638; Friedmann, supra note 212, at 693. This contributed to the inflation that followed. OECD, supra note 212, at 30-31 (1966). "[T]he primary goal of each individual enterprise is to maximize the personal income of its employees." Zupanov, supra note 216, at 68.

221 With the reforms, "commerce ceased to be an apparatus for the distribution of commodities and became instead an independent economic activity earning profit." Mirkovic, Price Formation in Commerce, 8 Yugoslavia Survey 105 (Eng. lang. ed. 1967).

New investment, which was not autonomous to a high degree until the reforms of 1965, may still be affected by the state through influence in the investment banks. See pp. 218-19 infra; Rusinow, supra note 212, at 8-9, 13; Samardzija, supra note 214, at 41. Business autonomy may be impaired by the state when the enterprise suffers continuing losses; in such cases, the local governmental authorities will dissolve the workers' council and appoint a trustee with "dictatorial authority." Zupanov, supra note 216, at 70.

222 See note 215 supra.

223 See Pejovich, supra note 212, at 29-30.
of the reforms described below has been to depoliticize decision-making in the management of enterprises.\textsuperscript{224}

A substantially free and competitive market system has been evolving throughout the Yugoslav economy. This state of affairs has come to pass through a series of reforms, commencing in 1950 with initiation of the basic principle of workers' self-management of enterprises, and carrying through the 1961 and the 1965 reforms, which are still in the process of implementation. The 1965 reform particularly has sought to reinforce past efforts to increase production, stabilize prices and cure the maldistribution of productive effort, by heightening the autonomy of enterprises, exposing them to sharper domestic and foreign competition, and diminishing the role of the state.\textsuperscript{225} (Two specific aims have been to correct distortions in price relationships between underpriced products (like raw materials) and consumer goods, and to bring prices generally into line with the international market.)\textsuperscript{226} The concept of central planning has experienced a reciprocal decline. Planning now exists, according to the 1963 Constitution, primarily "in order to attain self-management and to realize the individual and common interests of the working people . . . ."\textsuperscript{227}

\textsuperscript{224} See Bicanic, \textit{supra} note 210, at 636-37; Samardzija, \textit{supra} note 214, at 40. Pejovich, \textit{supra} note 212, at 91, states that the workers' council is the only important Yugoslav socio-economic institution which is not ordinarily controlled by the Communist Party from within. The local government does, however, have some direct influence on the enterprise. \textit{Id.} at 93.

\textsuperscript{225} Bicanic, \textit{supra} note 210, at 634; Friedmann, \textit{supra} note 212, at 631-33; Pejovich, \textit{supra} note 212, at 25; Ivanovic, \textit{Successful Implementation of Short-Term Objectives of the Reform}, 14 J. YUGOSLAV FOREIGN TRADE, No. 4, at 3 (Eng. lang. ed. 1967).


Yugoslavia is also seeking ties with the European Economic Community. \textit{N. Y. Times}, Sept. 16, 1968, at 5, col. 3 (city ed.).

\textsuperscript{227} \textit{CONS. OF YUGOSLAVIA}, basic principle III para. 7 (1963). \textit{See generally} Djordjevic,
The reforms have been described as "a staggering essay in Manchester liberalism, . . . accepting the market as the master, instead of the bureaucrat."228 But an authoritative commentator has cautioned that these phenomena do not represent a return to capitalism, nor do they necessarily lead to a retreat from authoritarianism. Rather, the Yugoslav metamorphosis reflects a recognition that much of western economics is apolitical and can be harnessed in the interests of economic growth without abandoning "socialism."229

Where the enterprises possess the incentive, the independence and the power to act autonomously, the market is thrust into a central role in organizing the economy, and the sovereignty of the consumer asserts itself.230 It should follow that prices will be determined in much the same way as in any western free-market economy. Although in a broad sense prices are so formed in Yugoslavia, there are difficulties with this inference.

First, the availability of funds for new investment seems to remain subject to a certain amount of political control. Apart from reinvestment of profits, such funds are almost exclusively available from the investment banks, which therefore can function by their choice of investments as the "controllers of economic development."231 Although the 1965 reforms aimed at reducing the degree to which investment

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228 ECONOMIST, supra note 218, at 237. "They have seized upon the competitive free enterprise system as the best instrument to this end with an avidity unknown since Adam Smith's day." Rusinow, supra note 212, at 15.


Yugoslav economists, taking the Soviet Union and their own country as examples, concluded almost from the beginning that bureaucracy was the major obstacle to economic efficiency. By 1948, when Yugoslavia was expelled from the Cominform, the move to decentralize had already manifested itself. Burck, supra note 214, at 128-33. The situation is not without its irony:

There they stand, the socialist entrepreneurs (with their party cards tucked in their pockets), sounding rather like the National Association of Manufacturers in their demands for lower taxes and less government interference, so that they can get on with the business of building socialism by making profits and investing them sensibly.

Rusinow, supra, at 15. See also Zupanov, supra note 216, at 70.

230 Under the reforms, advertising revived strongly by 1957, PEJOVIĆ, supra note 212, at 30, and the use of trade-marks and licensing of patent rights re-emerged. WATERSTON, supra note 212, at 57.

231 Friedmann, supra note 212, at 634.
credits were subject to political rather than economic determination,\textsuperscript{232} the relevant governmental organizations are participants (albeit with limited voting power) in the investment banks,\textsuperscript{233} and it is believed that political influences continue to predominate.\textsuperscript{234} If in fact new investments are subject to effective governmental control, that control could affect particular product prices and the price relationships among products, by regulating entry into production lines and by affording or denying the financial means to enlarge production.\textsuperscript{235}

Second, and probably more important, the periods both before and since the reform year of 1965 have been marked by quite comprehensive use of price controls.\textsuperscript{236} The nature and incidence of such controls have varied considerably from year to year, reflecting the variety of reasons for imposing them. The chief purpose in recent years has been to curb inflation induced by overeager reinvestment and by rising incomes; a general price freeze was imposed, in fact, just before the 1965 reforms were introduced.\textsuperscript{237} A related problem continues to be that of monopoly pricing power. The Yugoslav economy may simply be too small to call forth enough producers to create an effectively competitive market in certain products,\textsuperscript{238} or monopolistic structures may hold over from the days of state organization of the economy; in either case, high prices can be charged unless controls are imposed.\textsuperscript{239}

A different reason for price fixing or price controls is to correct (or in
some cases, to maintain) uneconomic price relationships built into the earlier statist economy.\textsuperscript{240}

The various price measures of recent years have called for fixed prices (as for utility services, transportation, tobacco, housing, and some agricultural products),\textsuperscript{241} minimum guaranteed prices and other arrangements for agricultural produce,\textsuperscript{242} notification and justification to government authorities before effectuating price increases,\textsuperscript{243} fixed margins of profit or markup at the distribution level,\textsuperscript{244} and (most generally and most important for present purposes) price ceilings.\textsuperscript{245}

The 1967 Act on Formation and Social Control of Prices\textsuperscript{246} affirms the principle of autonomous determination of prices\textsuperscript{247} and sets forth the circumstances in which price controls may be imposed. Governmental organs are to utilize direct controls only where “stable relationships on the market” cannot be preserved by indirect measures affecting such matters as monetary and currency activity, credit, foreign trade and exchange, and the overall level of spending.\textsuperscript{248} The Act provides for the establishment of maximum prices, for registration of prices, for maintenance of current prices, and for setting the method of forming prices, as well as for guaranteed and minimum prices in agriculture.\textsuperscript{249} It also allows enterprises by agreement among themselves, subject to the approval of the price commission, to revise prices that have been maintained at current levels by regulation.\textsuperscript{250}

At the beginning of 1968, roughly half of all manufactured goods were subject to price controls.\textsuperscript{251} Although price control measures are

\textsuperscript{240} See Rusinow, \textit{supra} note 212, at 11. The 1947-51 Five-Year Plan had “relegated to a second plane the indispensable economic laws and militated against the interest of the producers and their organizations.” Djordjevic, \textit{supra} note 227, at 9.

\textsuperscript{241} Macesich, \textit{supra} note 212, at 65; Pejovich, \textit{supra} note 212, at 25.

\textsuperscript{242} Macesich, \textit{supra} note 212, at 65; Waterston, \textit{supra} note 212, at 59.

\textsuperscript{243} Mirkovic, \textit{supra} note 221, at 106; Pejovich, \textit{supra} note 212, at 24; Waterston, \textit{supra} note 212, at 59; Macesich, \textit{supra} note 212, at 65.

\textsuperscript{244} Mirkovic, \textit{supra} note 221, at 107; Pejovich, \textit{supra} note 212, at 24-25.

\textsuperscript{245} Mirkovic, \textit{supra} note 221, at 107; Pejovich, \textit{supra} note 212, at 24-25; Waterston, \textit{supra} note 212, at 59.


\textsuperscript{247} “Working organizations form the prices of their products and services independently according to the conditions of the market.” Act on the Formation and Social Control of Prices, \textit{id.}, art. 1, para. 1. \textit{See also} \textit{id.} art. 8. But: “[T]he Federation has an influence on the shaping of market conditions which make it possible for working organizations to form their prices independently.” \textit{Id.} art. 2, para. 1. “The prices of products and services are subject to social control.” \textit{Id.} art. 3, para. 1 (unofficial translations).

\textsuperscript{248} \textit{Id.} arts. 4, 5.

\textsuperscript{249} \textit{Id.} arts. 16, 17.

\textsuperscript{250} \textit{Id.} arts. 27-34.

\textsuperscript{251} Francis, \textit{Yugoslavia}, 74 \textit{INT'L COMMERCE}, Jan. 15, 1968, at 34.
officially regarded as temporary expedients, the on-again-off-again pattern of the recent past and the continuation of inflationary pressures indicate that they are likely to persist, particularly so long as certain fundamental paradoxes in Yugoslavia’s economic development remain unresolved.

Price controls affect the very nexus of a market economy, and inevitably lead over time to a distortion of price relationships and to a misallocation of resources by affecting the profitability of investment. In circumstances where the extensive use of price control joins with the existence of other devices by which the state guides the economy, it becomes difficult to assess the degree to which that economy is subject to state control or is characterized by market autonomy.

D. Does Yugoslavia Have a “State-Controlled Economy”?

There are two reasons for asking whether the economy of Yugoslavia is pervasively influenced by state control. The first arises from the Treasury practice of resorting to a third-country price as the measure of fair value whenever the exporting country has a “controlled economy”; I shall briefly consider the decided cases. The second stems from my proposal that, instead of automatically taking a third-country price, the Treasury use the home-market price if that price can be validated by use of the “market-basket” technique of price-ratio comparison. For the purpose of deciding whether there exists an element of state influence that would require the validation of the home-market price, I have suggested that such influence be presumed where the economy as a whole is subject to substantial state intervention, even if the product in question is free of direct control. I shall consider whether this presumption should be made in cases involving the products of Yugoslavia.

1. Treatment of Yugoslav Products under the Treasury’s “State-Control” Test

With qualifications that will be noted, the decided cases indicate that the Treasury does not treat Yugoslavia as a “controlled economy.” Of the four reported decisions, three bespeak an apparently unhesitant

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252 Act on the Formation and Social Control of Prices, supra note 246, art. 35; Mirkovic, supra note 221, at 107.
254 See Zupanov, supra note 216, at 67 (a “baffling” question).
255 Regulations § 53.5(b). See pp. 200-05 supra.
256 See pp. 210-11 supra.
readiness to apply the normal tests of fair value (home-market price, export price and constructed value), none of which would have been used if the Yugoslav economy were regarded as controlled.

In the first two Yugoslav cases the Treasury employed the normal home-market price test, making no mention of an issue as to whether the Yugoslav economy was controlled. In *Portland Cement from Yugoslavia*, the opinion noted simply that the "quantity sold in the home market was adequate to furnish a basis for comparison."\(^{257}\) Again, in *Wooden Coat Hangers from Yugoslavia*, the comparison was made with "the home market price at which identical hangers were sold in Yugoslavia."\(^{258}\) Neither decision evinced concern with the conditions under which home sales were priced.

Although no Yugoslav case has measured fair value by the price at which the product is exported to countries other than the United States, language in two opinions indicates a readiness to employ this export price test. The *Wooden Coat Hangers* decision, by mentioning that the exporter sold more of its product at home than at export, clearly implied that the export price test would have been used, under the procedure usual for non-communist countries, if the large preponderance of sales other than to the United States had been made at export rather than in the Yugoslav home market.\(^{259}\) In the interesting case of *Headboards from Yugoslavia*,\(^ {260}\) the Treasury noted the complete absence of any sales at export (as well as of home-market sales) before moving on to use a constructed value.

In the *Headboards* case, the Treasury computed the constructed value on the normal basis of the actual costs, expenses and profits of making the product in Yugoslavia, and observed: "In past cases involving other merchandise from Yugoslavia, such data were found to be consistent with that pertaining to imports from other countries."\(^ {261}\)

This picture is clouded somewhat by the perplexing decision of *Copper Sheets from Yugoslavia*.\(^ {262}\) Inconsistently with the pattern of the other Yugoslav cases, the Treasury applied the third-country price test ("home market value in Western European countries"). But it did not approach the price comparison in the same way as it has consistently done in cases involving other communist countries. First, it began its opinion by mentioning the absence of home-market sales of similar

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\(^{259}\) See Regulations § 53.4(b); prior regulations, 19 C.F.R. § 14.7(a)(2) (1967).


\(^{261}\) Id. No citation to "past cases" was given in the opinion,

copper sheets in Yugoslavia; in the other communist cases the existence of home-market sales is ignored. Second, the Treasury in the Copper Sheets case made an alternate reckoning of constructed value by the method usual in the non-communist cases: computation of costs, expenses and profit. Although the opinion declared that the alternative calculation was “not regarded as controlling,” one wonders why it was made at all if there were not some doubt about using the third-country price test.

The Copper Sheets decision is not inconsistent with the conclusion that the Treasury will use home-market price (or the price at export to countries other than the United States) in cases where there are in fact such sales in Yugoslavia. But where such sales are absent a constructed value must be used, and the question is whether to calculate it in the usual way from home-economy cost, expense and profit figures, or to construct it by reference to a third-country price in the manner observed where the exporting economy is “controlled.” The usual method of computing home-economy figures was followed in the Headboards case, but this may have been done for the reason simply that no third-country market in similar headboards existed. Where a third-country market did exist, in the Copper Sheets case, the Treasury looked first to the third-country price. That approach may reflect a view, based on the nature of the Yugoslav economy in 1964, that a value constructed from input figures found in the Yugoslav economy was a less reliable measure than a price drawn from the freer economies of Western Europe.

Even so, the Copper Sheets case treated Yugoslavia differently from other communist countries. And the other three cases go far to show that Yugoslav exports are regarded as the products of a non-controlled economy. But it remains to consider more closely the extent to which the Treasury should measure the fair value of Yugoslav products by the same tests it applies to the products of non-communist countries.

2. Sufficiency of State Control in Yugoslavia to Require Validation of Home Prices

Under its approach of deciding simply whether the entire economy was or was not controlled, and within the limits upon the utility of such an approach, the Treasury may have been warranted in treating Yugoslavia as a non-controlled country. Even at the time these cases were decided (1963 to 1965), the Yugoslav economy was governed by

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203 The opinion stated that “neither such nor similar headboards are imported [into the United States] from other countries.” 50 Fed. Reg. 8016 (1985).
the market to an extent sufficient to justify declaring it non-controlled. But it should be clear what the Treasury was deciding under that approach. To a large extent it was determining whether to use home-market prices or third-country prices as the measure of fair value for all potential imports from that country. But, if the country were treated as controlled, the third-country prices used would not be validated by any reference to the exporting economy. And if the country were treated as non-controlled, the home-market prices used would not be validated by any reference to external free markets. The Treasury's approach was a crude one because, for a country that stood near the borderline, either answer was likely to produce imprecise measures of fair value, at least with regard to particular products. The Treasury has in effect been making a rough guess, for each country, as to whether the inaccuracies of third-country prices would be less than the inaccuracies of home-market prices when applied to the full array of the country's exportable products.

Under the suggested approach, the Treasury should first consider whether the home-market price of the particular product appears to be affected by state control, in which event it usually should be validated. The distinction between generally controlled and generally free economies is retained only for the purpose of raising presumptions about the indirect influence of state control, and therefore about the need for validation. Here the purpose of the "controlled economy" distinction is different from that for which it has previously been drawn by the Treasury, and the criteria and results may accordingly differ. This observation is especially pertinent to a country like Yugoslavia, which exhibits an appreciable current practice and a greater history of state intervention in the economy. The issue is whether the regime of present control and the legacies of past control are so pervasive in their effects that home prices are likely to be distorted even where they are not directly influenced by the state. If so, Yugoslavia should be regarded as generally controlled for this purpose, and its home-market prices should not be used to measure fair value until they have been validated.

One might well argue that state interposition in Yugoslavia is not likely to distort the prices generated by the market-oriented economy that exists under present liberal policies. The autonomy of enterprises appears to parallel that of western economies. While the capital of enterprises can be viewed as being state-owned (in light of the juridical incidents of "social property"), Yugoslav enterprises are not state-managed or even subject to substantial central planning. In a sense

264 "Enterprises are independent and have the status of a legal person in the full
sufficient for present purposes, they may be said to be privately managed; the state's interest in the capital becomes immaterial. Enterprises make their own investment, production and distribution decisions, pursuing maximum profits in a competitive market. A market comprised of such sellers is capable of yielding economically valid price relationships. Further, since the profits and losses of enterprises inure to the employees, the danger of the state's absorbing losses from artificially low home prices seems absent.

But so long as the government continues to impose an extensive regime of price control, it seems to me that the Yugoslav economy cannot yet be presumed to generate economically valid price relationships to a degree sufficient to dispense with validation of home prices. This is not because of the extent of such price regulation—indeed, at present, the reach of price control in Great Britain seems more sweeping.\textsuperscript{265} The critical fact is a history of price regulation in Yugoslavia that has continued without significant respite through the entire period in which the program of worker-management and enterprise autonomy has been unfolding. There is no doubt that the continuous application of price controls has carried forward a substantial legacy of price and investment alignments established under the command economy of earlier years.\textsuperscript{266} The nation has never really had a period of free pricing, whereunder investment and production patterns could respond to market-determined price relationships. Thus, despite its generally liberalized character, the Yugoslav economy is vitally different from that of the United Kingdom, which (we may assume) evolved its present pattern through the workings of a far freer market. Although the Yugoslav government has been taking administrative measures specifically designed to correct distortions inherited from the statist economic system,\textsuperscript{267} thereby hastening the day when price controls can be removed and the economy can operate both freely and rationally, such action is after all the work of the state.

\begin{footnotesize}
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\item \textsuperscript{265} In its effort to stanch inflation and to protect the benefits of its 1967 devaluation of the pound, the United Kingdom has imposed a virtually all-embracing regime of price ceilings as well as extensive control measures of other sorts. See \textit{British Information Services, 7 British Record}, Apr. 25, 1968, at 1-2. Yugoslav price controls at present are only selective. See notes 248, 251 supra.
\item \textsuperscript{266} See Rusinow, \textit{supra} note 212, at 11; Friedmann, \textit{supra} note 212, at 632-33; Pejo\v{c}i\v{c}, \textit{supra} note 212, at 25; OECD, \textit{supra} note 212, at 8 (1966); Bicanic, \textit{supra} note 210, at 641.
\item \textsuperscript{267} OECD, \textit{supra} note 212, at 8 (1966); Friedmann, \textit{supra} note 212, at 632-33; \textit{Economist}, \textit{supra} note 218, at 238.
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It seems necessary to conclude, for the present at least, that home-market prices cannot be relied upon to serve as an economically sound index of fair value. For purposes of the presumption as to the need to validate home prices, then, Yugoslavia should be treated the same as other communist countries. Since Yugoslavia's market is far freer than those of other Eastern European countries, however, it seems likely that her home-market prices would in fact prove valid more frequently than those of the other communist nations. In any event, the situation may soon change. If the present liberalizing trends are extended into the future, and if price controls can generally be lifted (as the government is striving to do), the resulting market may well be sufficiently free to enable the Treasury to reverse the presumption.

The impact of state influence through the investment banks is hard to gauge factually and difficult to appraise for its relevance to the question of the extent to which price relationships may be distorted. Controls by the banks over the direction of new investment may not in themselves constitute any higher quantum of state interference than do the monetary and fiscal devices employed by western governments. But their importance is magnified by the absence of alternative sources of investment funds in Yugoslavia. Existing enterprises of course can reinvest their profits, but new entry into industry depends heavily upon the cooperation of the investment banks. To the extent a bank's pattern of investment reflects a state influence, and varies the pattern that a freer market would engender, it will misallocate factors of production and therefore distort price relationships. This form of state control appears therefore to reinforce that exerted by price regulation. But state influence through the investment banks appears to be of a relatively low order of magnitude. When price controls are removed it may well be proper, for purposes of the presumption about the reliability of prices, to treat Yugoslavia as an essentially free economy despite the practices of the banks.

E. Products Subjected to Direct State Control in a Generally Free Economy

When the exporting economy is essentially free, the Treasury seems invariably to measure fair value by use of the home-market price (or other "normal" test), without regard for the possible influence of the state upon the specific product or its price. Under the approach I am

268 See notes 247-48 supra; Friedmann, supra note 212, at 653.
269 Friedmann, supra note 212, at 633-34.
270 See note 205 supra.
advocating, the fact that an economy is found to be generally free gives rise to a presumption that its home-market prices will reliably measure fair value, but the presumption will be set aside if it appears that the product in question is directly influenced by measures of state intervention. I will briefly consider the ways in which the Treasury, to implement its 1968 regulation concerning state control, 271 might take account of certain forms of state intervention found in exporting economies that are generally free.

1. Price controls

When first imposed, a general freeze of all prices brings about no new distortion of existing market relationships.272 The continued use of otherwise appropriate home-market prices to measure fair value seems proper for at least a short period after imposition of the price halt. Over time, however, shifting patterns of demand and cost will render the frozen matrix of prices increasingly untrustworthy as a gauge of value. A question then arises about the extent to which home prices, before they are used as the standard of fair value, should be validated by a comparison of home-market price ratios with those found in economies where the product is not controlled.273

Selective price regulation—aimed at restraining inflation or at realigning the relative prices of different goods—will have a strong tendency to distort market relationships.274 If the controlled price is fixed it will lose a market contact with uncontrolled prices as the latter fluctuate. Where the control is in the form of a ceiling and the product is sold at the ceiling price, that price may become an abnormally low one as other prices rise in response to inflation. Selective controls could probably be regarded as non-distorting only where they are imposed upon a broad range of basic commodities and raw materials, in an effort to hold down the prices of finished goods as well. In such circumstances it may be permissible to use a controlled home-market price as the index of fair value, at least for some time after the imposition of controls, without validating that price. In other situations, selective

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271 Regulations § 53.5(b), The regulation is captioned "Merchandise from controlled economy country," but its text is subject to the interpretation, here advocated, that an evaluation should be made of the degree to which the particular product is affected by "control" in the exporting economy, whether that economy is generally "controlled" or "free." See pp. 205-12 supra.

272 The general price freeze of course carries forward any pre-existing distortions. See note 266 supra and accompanying text.

273 See pp. 207-11 supra.

274 The distorting effect (if any) of controls aimed at holding down monopoly prices probably can be discussed only in terms of specific information about particular cases.
controls will gradually render the controlled prices unreliable as precise indicators of value; the question of validation is again presented.

Where the controls take the form of price ceilings, the existence of dumping can often be accurately proven without having to validate the home price. In the common situation where the actual home price stands at the controlled ceiling level, the Treasury should accept the controlled home price without validation when that price is higher than the price at which the allegedly dumped goods are sold to the United States (that is, when the price comparison shows dumping sales). But when it stands below the price to the American importer, the controlled home price should not be used to measure fair value until it has been validated. Although this distinction may appear invidious, it is warranted on the fundamental ground that fair value should be measured as closely as possible by reference to market forces.

We may consider the case of a producer who sells in his home market at the ceiling price and exports to the United States at a lower price. From these facts we do not know how much higher a price the market would allow him to charge at home if there were no controls. But we do know that otherwise-free market forces at home enable him to maintain a price which (although confined by the ceiling) is higher than that at which he sells to the United States. To establish the existence of dumping sales, this is all the Treasury needs to know. Validation of the home price, which in the absence of controls could only be higher, is unnecessary.275

Consider now a producer who exports to the United States at a higher price than the ceiling price at which he sells in his home market. Here, because controls keep down the home price, we cannot know whether a free market would bring that price to a level higher than the price at which he is selling to the United States. The controlled home price does not reflect the operation of market forces within the price range relevant to the Treasury's price comparison. The home price consequently should not be taken as the index of fair value unless it can be shown to be valid at its controlled level.

Products that are not controlled under the selective price regulations may properly be valued at their home-market price. An exception should be made, however, where the price of an important raw material is controlled at an artificially low level, conferring a sort of a subsidy upon the finished product whose price is uncontrolled. Merchandise for which a ceiling price is established, but whose actual price has been

275 See note 203 supra.
stabilized by the market at a lower level, may be valued in the same fashion as uncontrolled products.

Where the home price is fixed (so that it cannot be lowered or raised), it would be an inappropriate measure of fair value, regardless of whether it stood at a level higher or lower than the price for export to the United States. In neither case could the Treasury gauge the extent to which it reflected market forces (except perhaps for a short time after the price was first controlled, provided it was set at its former free-market level).

2. Subsidy to Production

The allegedly dumped goods may come from an enterprise that experiences lowered overall costs, resulting from a continuing direct subsidy by the state, or from past direct subsidies such as those conferred at the time of initial investment. In other instances, the producer may receive an indirect subsidy, in the form (for example) of cheap electricity rates from the state-operated power authority. State subventions that tend to lower the home-market price should be taken into account when considering whether to measure fair value by reference to that price. Where the subsidy is traceable on a measurable per-unit basis, the home price should be appropriately adjusted to ascertain the fair value. Similarly, adjustment may enable use of the con-

276 We are concerned here, of course, with the effect of the subsidy upon the home price in the country of export, rather than with its effect upon the price at which the product may be sold to the United States. But such subsidies also raise the question whether the products of the subsidized producers, when exported to the United States, should be subjected to countervailing duties under the anti-bounty statute, 19 U.S.C. § 1303 (1964), discussed in note 16 supra. The countervailing duty is ordinarily imposed against merchandise that is directly subsidized by the government of the exporting country upon the occasion of its export. The statutory language “any bounty or grant upon the manufacture or production or export of any article or merchandise,” however, is not confined to direct export subsidies and could be applied to the more general sorts of subsidies mentioned in the text. See 38 Op. Att’y Gen. 489, 491 (1936); Ehrenhaft, supra note 164, at 55. The extent to which the Treasury may have applied the statute, in cases where there was no direct subsidy conditioned upon exportation, is difficult to discern from the decisions; two cases in which it may have done so are T.D. 53,182, 88 Treas. Dec. 16 (1953), and T.D. 50,093, 75 Treas. Dec. 304 (1940). “The absence of any reports from the Treasury Department as to the basis on which its determinations of the existence of subsidization are made, [sic] it is difficult, if not impossible, to analyze the administration of section 303.” House Ways & Means Subcomm., supra note 178, at 95. The antidumping laws, however, remain applicable. See id. at 91. Except where direct export subsidies are involved, use of the antidumping laws (which require a finding of injury) would more closely serve a balanced trade policy than use of the anti-bounty statute (which requires no injury investigation).

277 The regulations have failed to include provisions that would allow adjustments for subsidies to the production of the exported product (or for subsidies to the produc-
structured value test. Where the subsidy is not sufficiently quantifiable to allow adjustments, however, the Treasury should determine whether the home-market price is higher than the price at which the product is sold to the United States. If so, the existence of dumping sales is established by the home price without the need to validate it. Market forces have kept the home price high enough, in spite of the subsidy, to show dumping. But the home price should be validated whenever it is lower than the level of the price at export to the United States, since there is no way of telling whether it would stand below that level in the absence of subsidy. An exception to the validation requirement might be made where the subsidy has been extended to only one of several producers, and competition among them has generated a market price unaffected by the subsidy.

3. State-Induced Private Monopoly

The exporter's enjoyment of a position of monopoly should not in itself militate against use of the normal fair value tests. It is true that the capacity to exact high monopoly prices may sometimes result from state action—such as the outright legal protection of the producer against competition, or (in Yugoslavia) the refusal of state-influenced investment banks to extend the credits necessary to found competing enterprises. But monopoly of this or of any other sort carries with it one of the fundamental evils the Antidumping Act is designed to forestall—the potential "subsidization" of exports by the returns from high home-market prices. Use of the high home price to gauge value simply fulfills a principal objective of the Act. Validation is unnecessary.

4. State-Owned Enterprises

Different considerations prevail with respect to enterprises owned and operated by the exporting state. The risk of distortion is not so much that the enterprise's prices will be abnormally high, but rather that for non-economic reasons they may be set too low, presenting the possibility of loss-absorption by the state. Since the state may set them with reference to considerations other than those of the market, the prices of state enterprises should not be used to measure fair value unless they can be validated. If the state enterprise is only one of several
competing producers (as is the Renault enterprise in France), however, there may be a market-determined home price which can properly be taken as the index of fair value.\textsuperscript{279}

To maintain full faith with the premises upon which the Act rests, every value determination should be guided by the most exact available free-market criteria. Only then can there be confidence that the law will regularly admit the fairly-priced and discourage the unfairly-priced imports. The world must be dealt with as it is found; when state intervention skews the normal guidelines of value, a sophisticated adaptation of free-market standards, perhaps in the fashion suggested here, is needed to keep the value determination consonant with the purposes of the law.