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THE ANTIDUMPING ACT OF 1921
AND
THE INTERNATIONAL ANTIDUMPING CODE

CONSISTENT OR NOT?
A CRITIQUE BY THE STAFF

JULY 5, 1968

COMMITTEE ON FINANCE
UNITED STATES SENATE
RUSSELL B. LONG, *Chairman*

Prepared by the staff for the use of the Committee on Finance

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SUMMARY

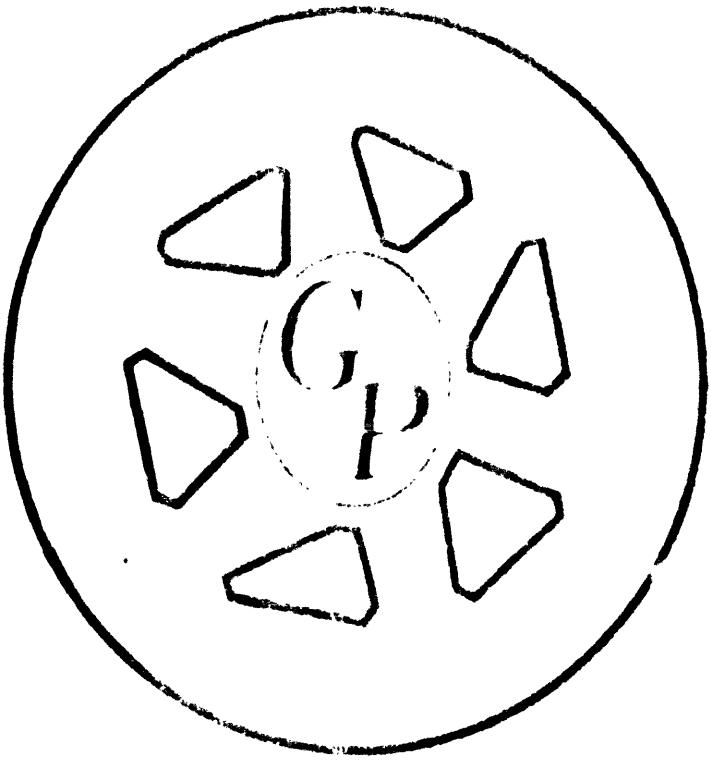
Serious questions have been raised concerning the lack of consistency between the International Antidumping Code, negotiated at Geneva during the final stages of the Kennedy round, and certain U.S. statutes (particularly the Antidumping Act of 1921) dealing with the "dumping" of foreign merchandise in the U.S. market.

The Committee on Finance held a full day's hearing on this matter on June 27, 1968. On the basis of the record established at the hearing and other materials relevent to this subject, the staff has prepared this paper describing the issues and pointing out that—

1. The International Antidumping Code does contain substantial areas of inconsistency with domestic law;

2. The Code's provisions tend to weaken, seriously, the effectiveness of the existing remedies against the unfair trade practice known as dumping; and

3. The implementation of the Code should be preceded by enabling legislation.



THE ANTIDUMPING ACT OF 1921 AND THE INTERNATIONAL ANTIDUMPING CODE—CONSISTENT OR NOT?

This memorandum deals with the unfair trade practice of "dumping." It—

(1) outlines the administrative procedures under the Antidumping Act of 1921;

(2) summarizes events preceding the International Antidumping Code;

(3) describes issues raised by the Code; and

(4) compares a number of important features in domestic law with their counterparts in the Code. It also comments on the legal status of the Code.

Dumping.—"Dumping," in a foreign trade sense, occurs when a foreign producer sells his merchandise in this country at a price less than that which he charges purchasers in his home market, or a third country market, and a U.S. industry suffers injury because of that price discrimination.

The Antidumping Act of 1921 is one of a body of U.S. laws designed to combat unfair trade practices. Unlike other laws, which generally impose fines or jail sentences for violations, the Antidumping Act operates directly against the offending goods by assessing on them a "special dumping duty."

I. Administrative Procedures Under the Antidumping Act of 1921

Under the law, the Treasury Department is charged with the task of determining whether imported goods are being sold "at less than fair value"—that is, at a lower price in the United States than the same goods are sold for in foreign markets. If the Treasury determines there are no such sales, the case is closed. On the other hand, if it makes a determination that foreign goods are being sold (or are likely to be sold) in the United States at a discriminatory price, it must then refer the case to the Tariff Commission.

The Tariff Commission is responsible for determining whether a domestic industry is being injured by reason of the sales at less than fair value. If it makes a negative determination the case is closed. But, if it finds that an industry "is being or is likely to be injured, or is prevented from being established" because of these sales, it makes an injury determination.

On the basis of these two affirmative determinations, the Secretary of the Treasury, through the Bureau of Customs, must assess a special dumping duty on the merchandise which continues to be dumped. This duty is an amount equal to the difference between the home market price and the dumped price.

II. The International Antidumping Code

Purposes.—On June 30, 1967, the International Antidumping Code was signed at Geneva during the Kennedy round of tariff negotiations by the United States and 17 foreign nations.[1] Its purposes, according to the Special Trade Representative, are threefold:

(1) To make injury an international prerequisite to assessment of dumping duties;

(2) To "define and flesh out some of the key concepts" used in antidumping actions;

(3) To reach agreement on a set of open and fair procedures to protect those against whom a complaint of dumping is brought.

Apparently, however, the impetus for the Code stemmed from criticisms by other countries—particularly the Europeans—of the U.S. Antidumping Act, rather than from the concern of U.S. exporters that they were being adversely affected by foreign antidumping laws.

Issues.—Serious questions have been raised as to whether the Code is consistent with domestic law, particularly the Antidumping Act of 1921—in which case it may be argued that it can be put into force by the United States without enabling legislation—or whether it is inconsistent with domestic law and should not be implemented until enabling legislation has been approved by Congress.

An additional issue is whether the negotiators were authorized by Congress to enter into the antidumping agreement. However, since the Code has been negotiated, and has been placed into effect through the Treasury Department's new regulations, the staff does not treat with this at this time as a legal obstacle.

Background.—Until recently, trade negotiations typically had been confined to areas where Congress had delegated authority to the President in advance to modify (1) the level of U.S. tariffs, and (2) other barriers of a nontariff nature. In June of last year, however, U.S. negotiators entered into two trade agreements with respect to which no advance authority had been delegated. One of these concerned the American selling price method of valuing certain products for tariff purposes. The other related to the Antidumping Act of 1921. It is clear from the record that Congress did not delegate any authority under the Trade Expansion Act of 1962 to modify the U.S. Antidumping Act of 1921. The report of the Committee on Finance accompanying that act leaves no doubt about this. It states:

> Other laws not intended to be affected include the Antidumping Act and section 303 of the Tariff Act of 1930 which relates to countervailing duties. (S. Rept. 2059, 87th Cong., 2d sess., p. 19.)

Testimony during hearings on the Trade Expansion Act before the Committee on Ways and Means of the House also indicates an administration understanding that the Antidumping Act was outside the scope of authority requested by that legislation.

Notwithstanding this legislative history, when it became known in 1965 that negotiation of an International Antidumping Code was

[1] The U.S. negotiators signed this Code "definitively and without reservation." Other countries, however, including Canada, EEC countries, and the United Kingdom agreed to present the Code to their parliaments for approval.

being contemplated, the Committee on Finance and the Senate responded by approving Senate Concurrent Resolution 100 expressing the sense of the Congress that no agreement requiring the modification of any tariff or other import restriction should be entered into except pursuant to authority delegated in advance by the Congress.

Executive branch position.—The executive branch arguments regarding the negotiation of the Code and the legal questions it raises are as follows:

(1) The authority to negotiate the agreement comes from the Constitution, not the Trade Expansion Act, although the Special Trade Representative was appointed to direct the negotiation under section 241 of the Trade Expansion Act.

(2) The negotiated code is consistent with the Antidumping Act of 1921 and requires no modification of that act. Therefore, Senate Concurrent Resolution 100, which was not acted on by the House, was not violated by the negotiation. Moreover, since no modification of the act is required, the Code can be placed into effect without congressional approval of any sort.

(3) The Code and the act are to be read "as to be consistent, insofar as possible," but in the last analysis the courts will decide whether or not a conflict exists.

(4) The Code "probably does limit the discretion of the Tariff Commission in applying certain of the concepts," primarily those relating to the definition of an industry and the degree of injury required to justify relief.

Tariff Commission Report.—Shortly after the International Antidumping Code was concluded, Senate Concurrent Resolution 38 was introduced in the Senate to express the sense that the Code is inconsistent with the act; that it should be submitted to the Senate for its advice and consent; and that it should not become effective in this country until Congress enacts legislation to implement it. The Tariff Commission was requested to comment on the resolution. It did so in a report received by the committee on March 8, 1968. By a three to two majority the Tariff Commission found several significant differences between the Code and the law.

The majority report (Commissioners Sutton, Culliton, and Clubb) took the position that the Code could not alter domestic law. It stated:

> It is well settled that the Constitution does not vest in the President plenary power to alter domestic law. The Code, no matter what are the obligations undertaken by the United States thereunder internationally, cannot, standing alone without legislative implementation, alter the provisions of the Antidumping Act or of other U.S. statutes. As matters presently stand, we believe that the jurisdiction and authority of the Commission to act with respect to dumping of imported articles is derived wholly from the Antidumping Act and 19 U.S.C. 1337.

They concluded that the Tariff Commission does not contemplate making any changes in its Rules of Practice and Procedures, but noted that the Treasury Department is changing its Customs Regulations to bring them into conformity with the Code.

The minority report (Commissioners Metzger, and Thunberg) observed that "the executive branch has been and is of the view that the provisions of the Code and the act are not inconsistent with, and in conflict with, each other." With respect to Treasury's functions under the Code—the determination of sales at less than fair value and of injury (determinations of injury is a statutory function of the Tariff Commission, not the Treasury)—these Commissioners expressed their "understanding that the Treasury Department takes the position that none of these provisions requires implementation in such a way as to be in conflict with any provision of law administered by it." Commissioners Metzger and Thunberg chose not to proffer any opinion on the issues raised by Senate Concurrent Resolution 38, but instead chose to await the particular facts and circumstances involved in each injury determination before considering whether the provisions of the Code would lead to identical or differing results.

In their minority views, these two Commissioners stated the view that in the consideration of future antidumping cases, any question of consistency between the Code and the act should be resolved by applying:

> * * * the principles of American law to the task of interpretation of the Act as it affects the facts of the investigation, including those principles relating to interpreting the act so as to avoid inconsistency between it and the international obligations of the United States.[1]

III. Major Differences Between International Antidumping Code and the Antidumping Act of 1921

The major areas in which the Code differs from the act concern: (1) the definition of an "industry" affected by dumped imports; (2) the degree of "injury" required to invoke the statute; (3) the consideration of injury by the Treasury Department; (4) the revocation of a determination of sales at less than their fair value; and (5) the acceptance of price undertakings or the cessation of shipments at dumped prices.

Definition of an Industry.—The act contains no definition of an industry. It is a matter left to the judgment of the Tariff Commission in connection with its injury investigation. The Code provisions relating to this definition are considerably more restrictive than the act in two important respects:

(a) *Like products.*—

The Act	The Code
The act states that dumping duties must be applied if "an industry in the United States is being or is likely to be injured * * *" by dumped merchandise.	The Code defines the domestic industry as domestic producers as a whole of "like products" (art. 4 (a)) and defines like products as those which are identical with, or have characteristics closely resembling those of, the dumped product (art. 2(b)).

[1] The staff questions this rule of construction. A more proper rule of construction, in the staff's opinion, is described on p. 10.

The Tariff Commission advises that the "like product" concept of an industry, required by the Code, narrows their discretion as to what industry can be harmed by dumped imports—it permits imports to be compared to only one domestic industry, that which produces the "like product." On the other hand, under the act, the Commission has unrestricted discretion to weigh the effect of dumped imports on one or more different industries if it feels they may be affected by the dumped goods. For example, in the past it has considered whether imports of narrow glass panes injured three separate domestic industries—the flat glass industry, the jalousie glass louvre industry and the jalousie window industry. In another investigation, it considered the effects of imports of nephaline syenite on the domestic feldspar industry. Under the Code, if apples were being dumped and were processed into applesauce there could be no relief for injury to applesauce producers because applesauce is not a "like product." The act, on the other hand, would permit a determination of injury to the applesauce industry. None of these comparisons would be permitted by the Code.

Confining the Tariff Commission investigative function as it does, dumping duties which have been assessed, could not be imposed under the Code. In the staff's opinion changing the results of a case by international agreement is tantamount to changing the law itself. If it has that effect the agreement is inconsistent with the law and should not be placed into effect until the law is modified to authorize it.

(b) *Competitive market area.*—

THE ACT	THE CODE
The Commission shall determine whether an industry in the United States is being, or is likely to be injured, by the dumped imports.	"In exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry. If, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined" (art. 4 (a) (ii)).

The conditions specified by the Code for segmenting an industry are so restrictive that, in the judgment of the Tariff Commission, four out of five of its recent affirmative determinations of injury might not have been made if it had been required to apply the Code's provisions. One of these cases related to an industry composed of producers in and adjacent to the competitive market area in which the imports were dumped. The other three cases concerned producers adjacent to the competitive market area. In still other cases, the Commission has found that injury to a part of an industry is necessarily an injury to the whole industry.

By limiting the concept of a competitive market (as the Code does) to producers within such a market who sell all or almost all of their production of the product in question in that market (a circumstance which reportedly rarely exists), the Tariff Commission would be denied the flexibility it has under the act to determine from the facts and circumstances whether dumped imports concentrated in an area around a seaport can injure any domestic industry. This inflexibility will prevent dumping duties from being assessed in situations where they have been assessed.

As the staff has already observed, changing the results of a case by international agreement is tantamount to changing the law itself and enabling legislation should precede the implementation of the agreement.

Injury determination.—In the past, the Tariff Commission has determined that injury which is more than *de minimis* is sufficient to justify relief under the Antidumping Act.

The Code, however, purports to require a far greater degree of injury to a domestic industry before a dumping duty may be assessed. It directs the Tariff Commission (an arm of the Congress) to weigh, on the one hand, the effects of the dumping, and on the other hand, all other factors taken together which may be adversely affecting the industry.

The Act	The Code
The act requires that the Commission shall determine whether an industry in the United States is being, or is likely to be, injured * * * by reason of the importation of such merchandise * * *	The Code states that before dumping duties can be imposed it must be found that the dumped merchandise is demonstrably the principal cause of material injury or threat of material injury to a domestic industry (art. 3(a)) and that the authorities shall weigh, on the one hand, the effect of the dumping and, on the other hand, all the other factors taken together which may be adversely affecting the industry (art. 3(a)).

During the Finance Committee hearing on this matter, lawyers for the administration took the position that the term "demonstrably the principal cause of material injury" of the Code was designed to result in the same interpretation—a determination of injury when dumped imports caused injury to a domestic industry in any degree greater than *de minimis*—that the Tariff Commission had given in the past. Yet, when pressed for a definite answer to the question of whether the Tariff Commission could make the same determination

for the same case under the Code as it had under the act, the lawyer replied in the negative.

The chairman observed that the weighing factor in the Code (a technique which does not appear in the act),

> * * * suggests that picture of pure woman standing there blindfolded with a scale in her hands and on one side of the scale there is what can be said for dumping and on the other side what can be said for all other causes. If the scale is heavier on this side than it is on the other, then this is the side on which justice must go * * *

The administration lawyer responded that this weighing factor was a procedural provision which in his opinion did not change the substantive meaning of the notion of principal cause. He suggested it was a leftover from an earlier draft in the negotiation process.

It is difficult for the staff to conclude that this is merely procedural, or that it was left over. The Code is cast in terms far too precise to permit such an interpretation and the restrictive nature of the weighing factor conforms to the pattern throughout the Code of narrowing the range of discretion of the Tariff Commission. This pattern was conceded by the administration spokesmen. The more effectively its discretion is limited by the Code, the fewer will be its affirmative findings of injury.

Simultaneous Investigations of Injury; Revocation of Determinations of Sales at Less Than Fair Value.—

The Act	The Code
No provision.	Upon initiation of an investigation and thereafter, the evidence of both dumping and injury should be considered simultaneously. In any event, the evidence of both dumping and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, * * * an application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case (art. 5 (b), (c)).

The Antidumping Act does not authorize the revocation of a determination of sales at less than fair value. In practice the Treasury Department automatically refers the case to the Tariff Commission after it has made such a determination and thereafter its responsibility in the matter ceases. The Customs Simplification Act of 1954 in terms certain amended the Antidumping Act to remove the injury determination from the Treasury jurisdiction and place it upon the Tariff Commission.

There are only two ways the simultaneous investigations required by the Code can occur, and in the opinion of staff, both are contrary

to the act. First, the Tariff Commission might be expected to commence an investigation of injury at the same time Treasury initiates an investigation of sales at less than fair value. However, this would conflict with the provision of the act which confers jurisdiction on the Tariff Commission only after the Treasury Department has made a finding of sales at less than fair value. Alternatively, the Treasury Department might be expected to undertake a determination of the injury question during its investigation of the price matter. However, this would be contrary to the objective of the Customs Simplification Act which removed the injury factor from Treasury's jurisdiction. As a matter of procedure, regulations just issued by the Treasury Department to implement the Code follow this latter route. These regulations require evidence of injury to be submitted at the time a dumping complaint is filed, and despite the fact that no criteria are set forth governing what constitutes evidence of injury, the regulations also permit the Secretary to return a complaint if in his judgment it does not conform to his requirements.

During the hearing the committee was advised that Treasury would not make any evaluation of injury. The evidence of injury required by their regulations was described as necessary to prevent frivolous complaints and thereby save taxpayers' money.

The staff observes that the Code, by authorizing Treasury to revoke a finding of sales at less than fair value after the injury investigation is commenced by the Tariff Commission, could well result in greater cost to the taxpayers by requiring the Commission to undertake fruitless investigations of injury. For example, if it appears that the Tariff Commission is about to make an affirmative finding of injury, the foreign merchant might rush to Treasury with assurances of price revisions and thereby cause the Treasury to revoke its finding of sales at less than fair value and close the case after much of the costs of the injury investigation has been incurred by the Commission.

More importantly, if Treasury does evaluate the evidence of injury (and it seems that it must in making a decision to proceed with the case) then the Tariff Commission will be denied jurisdiction to investigate injury except in those cases Treasury passes through its own injury screen. And, if Treasury applies the Code's concept of injury as its revised regulations suggest it is doing, few cases will reach the Tariff Commission.

The legislative history of the injury provisions in the present law convinces the staff that the practice of the Treasury and the requirements of the Code do not comport either with the intent of Congress or with the language of the law.

Price undertakings.—

The Act	The Code
No provision.	"Antidumping proceedings may be terminated without imposition of antidumping duties or provisional measures, upon receipt of a voluntary undertaking by the exporters to revise their prices * * * or to cease to export to the area in question at dumped prices * * *" (art. 7).

The Antidumping Act, by its terms, does not specify that a dumping case can be closed because the foreign exporter has agreed either to alter his prices (in order to avoid a finding of sales at less than fair value) or to cease shipments of the offending goods to this country. However, the Treasury Department, by its regulations since 1965 (and by practice even earlier) has disposed of cases on these grounds. The Code commits the United States to these Treasury Department practices.

The Tariff Commission advised the committee that under present Treasury practices "the average importer can sell goods at less than fair value in the United States for approximately 2 years with impunity insofar as the effectiveness of the act is concerned." Moreover, acceptance of such assurances only with respect to a specified market area would allow dumping to be repeated in other parts of the country. Finally, the Tariff Commission reports that "none of the unfair trade statutes cited in this report specifically provide a mechanism for the violator of the statute concerned to avoid the remedial or penal actions directed to be taken thereunder by his agreement to conform to the law after he is caught. The Code in this respect does not appear to conform with any of the statutes."

In the opinion of the staff, "forgiveness of dumping", where a foreign producer agrees to raise his price (to prevent a finding of sales at less than fair value), or gives assurances of no further sales at dumped prices, is not a proper function for the Treasury Department in administering the Antidumping Act. If there are sales at less than fair value, Treasury should make a finding to that effect and refer the case to the Tariff Commission for an injury investigation. If there is no injury, then the finding of sales at less than fair value is meaningless and assurances of price adjustments (or to cease the shipments at the lower price) serve to require American consumers to pay more for the foreign goods than they would otherwise have to. On the other hand, acceptance of the price undertaking by the Treasury prevents the Tariff Commission from undertaking an injury investigation, and in this respect it not only becomes equivalent to an injury determination by the Treasury Department, but also constitutes a loophole for sporadic dumping of foreign goods into this country. This would particularly be true of assurances with respect to regional marketing areas.

The staff understands the Treasury Department's role in dumping proceedings is merely to make the arithmetical calculation of price. Any exercise by it partaking of an injury determination, or precluding an injury determination when there have been sales at less than fair value, is an infringement of the statutory responsibility of the Tariff Commission.

For these same reasons the staff believes that terminations of investigations by the Treasury Department, because in its judgment the amounts involved are not more than insignificant, are functions which it should not perform under the act.

IV. Legal Status of the Code

Statutory Construction.—A rule of construction has been advanced to the effect that the domestic law should be interpreted in such a way as to avoid conflict with the international obligations of the United States. Under this rule of construction, it is stated that if a statute can be interpreted either in a manner consistent with an

international obligation or in a manner inconsistent with it, a court will interpret it in favor of consistency. Applying this rule of construction to the International Antidumping Code and the relevant U.S. statutes including the Antidumping Act of 1921, as amended, it is said that such statutes should be interpreted to avoid inconsistency with the Code.

The staff questions whether this rule is properly applicable where the international obligation in question postdates the existing statutes by 46 years, or more. In the authority cited in favor of this proposition, the facts would suggest that it is not applicable in such a case. The Restatement of the Law of Foreign Relations illustrates the application of the rule in terms of a statute followed by an international agreement which in turn is followed by reenactment of the identical statute. The statute being construed in this illustration was enacted in the light of the preexisting international agreement and was properly construed so as not to conflict with it. Other cases also support this construction in like situations where the international agreement was already in existence at the time the statute being construed was enacted.

A more appropriate rule of construction would interpret a new international obligation in such a way as to avoid conflict with an existing statute. The objective of statutory construction should be to try to fit a new statute or a new international obligation into the framework or pattern of existing law. When a new statute is passed, or a new international agreement is entered into, unless it expressly overrules an existing statute or agreement, it can be presumed that Congress (or the Executive) understood the existing rules and did not intend for the new document to change them. It should be presumed that the President would not knowingly exceed his authority in negotiating new undertakings, but would seek implementing legislation if he did so. Therefore, the new document, whether it is an act of Congress or an international obligation, should be interpreted to conform to the framework or pattern of existing law.

Moreover, in comparing the new document with the existing pattern the effect of the new document on decided cases should not be ignored. These cases play a significant role in giving the statutory law a recognizable meaning. Certainly this is true of the Antidumping Act of 1921. This act is cast in broad and undefined terms, and, without the history built up through 46 years of operation, a different interpretation could be placed on it without raising any question of conflict between it and an international obligation.

Blindly applying the rule that a statute be interpreted so as to avoid conflict with an international agreement (as some suggest) would enable the contracting parties to an agreement, in effect, to apply their interpretation to an act of Congress contrary to the express or implied intent of the Congress. The staff believes that a rule of construction having this effect must yield to a rule that a statute must be construed so as to carry out the intent of Congress. If the absence of amendments implies that Congress is satisfied with the statute, then an international obligation subsequently undertaken which would change the results under the statute must be found to be inconsistent with the statute, and the international obligation cannot be carried out until Congress conforms the statute.

The Constitution states that (1) the Constitution, (2) laws made in pursuance thereof, and (3) treaties made under the authority of the United States, shall be the supreme law of the land. The International Antidumping Code is not a law made pursuant to the Constitution nor is it a treaty. No one has argued that it is. Thus, it does not stand as an equal to an act of Congress and should not be interpreted under any rule of construction as if it were equal or superior to statutory law, nor should it be construed to lead to a result contrary to the result achieved under the statutory law.

Need for Enabling Legislation.—Even if the International Antidumping Code had been negotiated as a treaty, in the opinion of the staff it could not be implemented in the absence of enabling legislation. This is so because of our constitutional system of checks and balances which vests in Congress the sole authority to impose tariffs and to regulate foreign commerce and confers on the President the sole authority over foreign affairs. The Antidumping Act of 1921, as well as being an act to regulate foreign commerce, is also a tariff act. Its basic purpose is to remedy unfair pricing of imports into the United States by imposing a special dumping tariff. Dealing as it does with the constitutional authority of Congress and with the President's authority over foreign affairs, the International Antidumping Code involves an area where neither Congress nor the President has sufficient power to act independently of the other. Thus, while the President may enter into an agreement relating to the Antidumping Act, he may not place it into effect without the participation of Congress. The statute must first be amended to reflect a change in the tariff-imposing features of the Antidumping Act.

While it is true that the President has authority to instruct the Treasury Department, an agency of the executive branch, with respect to the duties and functions entrusted to it under the Antidumping Act of 1921, he has no such authority with respect to the duties and functions entrusted to the Tariff Commission under that act. The more important functions dealt with by the International Antidumping Code that are in question—the scope of an industry and the degree of injury required to invoke a dumping duty—are functions entrusted to the Tariff Commission and the Tariff Commission's determinations as to these matters are final without regard to the attitude of the executive branch. The Tariff Commission's report to this committee outlining the many inconsistencies between the Code and the domestic status attest to this independence from the executive branch. In the opinion of the staff, because of the unique position of the Tariff Commission as an arm of the Congress, the ordinary rules which bind the executive departments to positions taken by the President in international agreements do not apply.

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