of a punitive character, such as an exclusion order, as used for certain categories of unfair trade cases by the USITC under Section 337 or the levying of a substantial duty for a significant period of time and without regard to subsequent transaction prices. This would be more effective relief to the domestic producer, and more in keeping with competition policy, than the levying of anti-dumping duty which can be avoided by adjusting transaction prices, or the accepting of a voluntary undertaking as to price, which may merely serve to increase the returns to the exporter. In sum, what we propose is that when imports, which have a serious impact on competition are found to take place by virtue of the existence of an anti-competitive practice in the exporting country, the relief should be effective, and, from the point of view of the exporter, should be a penalty on the exporter, not a reward, as is so often the case with price undertakings. This concept of a more punitive anti-dumping system, but taking into account the state of competition, is, of course, consistent with the notion of raising the threshold of injury.

The Public Interest

This leads logically to consideration of our fifth proposal, which is that for every facet or device in the system of contingency protection, there should be an overriding public interest proviso. We have already noted that there are, in effect, public interest provisions in "safeguard" legislation, "and that the U.S. national interest provisions in the U.S. "escape clause" are unusually detailed, and frequently have led to a decision not to afford import relief as recommended. The EEC and Canada also have, as we have noted, "public interest" provisions in regard to anti-dumping duty and countervailing duty. The EEC provision is written positively, that is, it requires a positive decision that action would be in the EEC interest; the Canadian provision is cast negatively, that is, the Tribunal may make a report to the effect that action may not be in the public interest.[26] In our view, there should be a public interest provision in the positive form for all contingency protection measures. However, we would doubt the utility of incorporating such a provision in a legalized format, that is, any requirement that administrative courts, such as the ITC or the Canadian Import Tribunal, should be obliged to apply a legal test of "public interest". The experience in the United States with the "escape clause" and experience in the EEC with their community interest clause suggests that the "public interest" is best left as a discretionary matter, a matter of judgement, to be assigned to the political level, where the responsibility for the assessment of the "public interest" property belongs in a democratic society, not assigned to courts or court-like bodies.

That is not to say however, that there should not be some procedural requirements surrounding the exercise of this judgement. The "escape clause" provision in the U.S. requires the President to make a public statement of his reason for the contrary course of action he chooses if the International Trade Commission reports in favour of import relief. Along the same lines, the new Canadian provisions require that the Tribunal publish any report it makes (to the Minister of Finance) that the imposition of a special duty is not in the public interest. The EEC practice, we believe, could be improved if, in the text of the regulation levying a special duty there were to be a reasoned exposition of the interest of the Community, rather than merely an assertion. Our view on this point is consistent with the broader view that it should be a more general