Injury and Causality

The second proposal is to deal with the two interconnected issues of the separability of "injury" under the GATT system, and of "casuality", which were discussed in Chapter III above. The present U.S. interpretation under Article VI which, we can assume, will influence practice in other countries, combined with the present low thresholds, will bring into existence, if it has not already done so, a situation in which, if detectable dumping or subsidization has taken place, and the domestic producers can show some adverse development (falling prices, reduced employment, sales or profitability) in the same or related time-frame, they will be able to secure at least a determination of "threat" of injury. One way to approach this is to agree that what is at issue, in Article VI and XIX, is identifiable, separate injury which is, in itself, without regard to other injuries being suffered with the same time, "material" or "serious", and caused by the imports at issue. Under such a formulation, the notion of "substantial cause" or "principal cause" is irrelevant. The EEC regulations on contingent protection, as we have noted, are consistent with this view. U.S. legislative history is, in the main, contrary to this view, certainly with regard to Article VI (although it can be argued that the "by reason of" formulation in the U.S. provision points to "separability"). To secure agreement on the approach to "injury" set out here will be a major political endeavour, perhaps only possible in the context of a comprehensive trade negotiation aimed at genuine liberalization of the terms of access for imports, rather than merely "reform" of the rules (as was the Tokyo Round). This in turn assumes that within the EEC, the U.S., Japan and Canada a major rethinking of trade policy will have taken place.[7] In such a rethinking the bringing to bear of competition policy objectives and of the rationale of competition policy could play an important part.

Competition in the Affected Industry

A key measure of reform, or rather, rationalization, would be to introduce into all injury investigations an assessment of the state of competition in the industry seeking relief from dumped, subsidized (Article VI) or intolerable (XIX) imports and an assessment of the impact of the imports on the structure of competition within the industry; these aspects of the injury inquiry should be central, not peripheral. By "peripheral" we intend to imply that the passing references to competition policy considerations in the existing Article VI and XIX are somewhat obscured, and rarely receive attention. The Kennedy Round Anti-dumping Code listed "restrictive trade practices" as one of the factors that should be looked at in evaluating injury.[8] The Tokyo Round Code mentions "trade restrictive practices and competition between the foreign and domestic producers" as a fact to be considered in evaluating the impact of dumped imports on the domestic industry.[9] One could argue that, given this language, and the permissive character of the Code, governments need not amend the Code to carry out the changes in emphasis proposed.

It is convenient to note here that in the EEC anti-dumping provisions there is a trace of a reference to competition policy considerations. In the post Kennedy Round EEC provisions, it was specified that one of the factors to be considered in establishing whether dumped imports cause injury is "competition between the Community producers themselves"; the reference to "restrictive trade practices" in the Code was also incorporated.[10] In the post Tokyo Round