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STUDY NO. 10:

Trade policy and the system of contingency protection in the perspective of competition policy. (Rodney de C. Grey for Dept. of External Affairs. February 1, 1986)

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TRADE POLICY AND THE SYSTEM OF CONTINGENCY PROTECTION IN THE PERSPECTIVE OF COMPETITION POLICY

by

Rodney de C. Grey

February 1, 1986

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Rodney de C. Grey: Trade Policy and the System of Contingency Protection in the Perspective of Competition Policy.

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CHAPTER I

INTRODUCTION

The purpose of this paper is to examine the proposition that the emerging system of "contingency protection"[1], is, in many aspects, in conflict with the objectives of competition policy. The system of "contingency protection" is the trade policy system centered on measures against "unfair" trade, and "safeguard" or "escape clause" measures, which has developed slowly since the General Agreement on Tariffs and Trade[2] was launched in 1947, and which was endorsed and sanctioned by the Multilateral Trade Negotiations of 1973-79. Competition policy purports to provide a legal regulatory system to restrain the abuse of monopoly or oligopoly power, abuse which would lessen competition; those elements of the trade policy system which are directed at so-called "unfair" methods of import competition (dumping, subsidization) invoke standards different from those of competition policy. To the extent, therefore, that some elements of trade policy legislation are directed against practices in import trade which, when occurring in domestic commerce, are dealt with under the different standards of competition policy, those elements of trade policy may confer additional protection on domestic producers. This additional protection, like protection by a tariff imposed at the frontier, imposes costs. Further, and more particularly, the contingency protection system involves or endorses actions, such as agreed increases in prices by exporters to the national market, or limitations on quantities to be supplied to the national market, which, if taken without the cover of trade policy legislation, would be recognized as anti-competitive in effect, and frequently actionable under competition law. Under the various national anti-dumping systems exporters may agree to raise prices; under so-called "voluntary" export restraint arrangements, which are "surrogates" for action under Article XIX of the General Agreement on Tariffs and Trade, exporters may agree to limit quantities exported to the domestic market. These exporters may secure economic rents from these restrictions, and protected domestic producers secure additional returns by being able to increase prices. What is required by trade policy, what is profitable under trade policy, would, under competition policy, bring substantial fines or prison sentences. This confusion or contradiction between two important branches of national economic policy brings both trade policy and competition policy into disrepute, and weakens the respect for law which the successful working of trade policy and competition policy both require.

This paper examines this issue by considering a range of trade policy measures as applied in the U.S., Canada, and the EEC in the perspective of competition policy. It attempts to describe the extent of these contradictions. However, we do not consider in any detail how and why these contradictions have developed, for the good reason that the answer to that question is relatively simple and short. In no important western country have legislators, in addressing trade policy, taken much account of the proposition that trade policy, to the extent that it addresses some of the same phenomena as competition policy,

should be consistent with competition policy. Administrators of trade policy administer that branch of economic policy without regard for competition policy objectives because the legislation almost always precludes them considering such objectives. To answer "how and why" we would have to make a detailed study, in regard to one legislature or another, of the process of trade policy legislating: what interest groups have made what proposals, what proposals have been submitted by government for enactment. Fairly obviously, any such study would show that most trade policy legislative activity focusses on what producer groups will gain by reduction or increase in what particular trade barrier.

In order to come to grips with the issues; a number of working assumptions must be stated; these are by no means uncontentious.

The Trade Policy System

First, we should define key terms. By the term "trade policy system" or "trade relations system" we mean the complex of international agreements between governments which provide an international legal framework for international trade in goods. (There has been discussion as to the possibility of extending the trade policy system to trade in services, but for the present the trade policy system is largely about goods.)[3] Part of this legal framework, while negotiated between governments, is primarily the concern of the private sector. In the U.N. system, such issues as arbitration conventions and the international convention on contracts for sales are dealt with by the U.N. Commission on International Trade Law.[4] In the ordinary daily business of trade policy officials, such matters are not considered central to trade policy, which is directed at such actions of governments as tariffs, import quotas, special duties (anti-dumping duties and countervailing duties), voluntary export restraints. In regard to such measures, governments undertake obligations to each other and governments are actively involved in the administration of the measures concerned. These points of definition are obvious enough; they are stated here because it is important that we should not take the dividing line between private international trade law and the public or government trade law area as being fixed; we should ask, for example, why it is that governments involve themselves so much in the prosecution of charges of price discrimination in import trade (dumping) rather than leaving such issues to be settled by civil suits before the courts, like alleged patent infringement.

The trade policy system includes more than the international agreements themselves; there is the corresponding domestic legislation, some of it extremely complicated. For some countries (e.g. the EEC) the legislation may be very much the same as the international agreement; this reflects, in part, the fact the legislation in European countries is drafted in less precise, less detailed manner than is now the practice in the USA and Canada. It is obvious that for there to be international agreements as to levels of tariffs for particular goods when imported into given countries there must be domestic legislation spelling out the description of goods, the rates of duty, the valuation practices, and the administrative provisions. What is more interesting is the development of very detailed legislation governing administrative procedures for the invoking of such measures as countervailing duties and anti-dumping duties. Such legislation is sanctioned by, even required by, the international agreements covering such measures; but, of course, the legislated administrative framework was developed

primarily at the national level (i.e. in the U.S.), and then taken into the international agreements (i.e. GATT codes) to provide a cover of legitimacy.

Private Rights

What is characteristic of this newer category of trade policy legislation is that it provides for an elaborate structure of private rights; such rights enable private parties to set the governmental machinery, even the inter-governmental machinery, in operation. In regard to anti-dumping and countervail, there is, in general, little scope for governments to stop the process if a private party states a well-founded complaint and follows the defined procedures, although there are differences in this regard as between the EEC and Canada, on the one hand, and the U.S., on the other.

In the EEC there is an element of discretion in that the application of a definitive anti-dumping duty does require a positive decision, or at least, an assertion, that the "interests of the community call for intervention".[5] In Canada, under the 1968 Anti-dumping Act, and in the 1984 Special Import Measures Act, there is scope for the exercise of discretion, that is, the exemption by Cabinet decision of certain products from the scope of the anti-dumping legislation.[6] Under the 1965-1984 legislation, this was used only to exempt pharmaceutical products from the protection of the anti-dumping system[7] (a case where competition policy considerations were decisive in the application of anti-dumping policy); there was also the special action taken under the executive authority to remit any tax or duty, to limit, on a geographical basis, the application of anti-dumping duties on imports of dumped wide-flange steel beams.[8] (This was an example of regional policy and competition policy considerations being brought to bear on the operation of the anti-dumping system.)

However, in the United States there is, apparently, no executive authority, no authority vested in the President, to exempt a product from the operation of the anti-dumping duty or countervailing duty; the private parties concerned, that is, the domestic producers, may proceed, subject, of course, to the detailed procedural rules, to secure the application of a duty on imports which have been found to have dumped or subsidized, or to bring about an "undertaking" by the exporters concerned to cease dumping, or to cease exporting the products at issue, to the United States or, in regard to subsidized exports, to offset the subsidy or limit the export of the goods at issue. In quite a number of recent high level discussions about the "new protectionism" proposals have been made to "roll-back" protectionist measures; it has been difficult for the economists and officials without trade policy experience to recognize that many so-called "protectionist" measures are, in the United States, a matter of private right.

"Escape clause" or GATT Article XIX (Safeguard) cases, are, as we shall consider below, another matter; in all jurisdictions the taking of "safeguard action" against imports alleged to be causing or threatening serious injury to domestic producers is a high-level political decision, not a "technical track" or low level, rule-bound decision.[9]

In summary, the "trade policy system" is the complex of international agreements governing transactions in traded goods, primarily those agreements involving obligations of governments; it is convenient to assimilate to the "system" the corresponding domestic legislation and the related structure of private rights.

A Complex System

Another characteristic of the "trade policy system", if we look only at the international agreements, is that it is a very complex system, or rather, a complex set of systems and sub-systems. It is important to understand that the post-war arrangements (and the surviving components from the pre-war period) have been built up slowly, often using or adapting long-established treaty concepts, in an ad-hoc fashion; it has become, in its rather ram-shackle and accidental fashion, an extraordinarily detailed structure. Of course, the main element in the structure is the General Agreement, which can be thought of a multilateralized, and therefore partially standardized, trade agreement drafted in fairly conventional terms. Close study of the GATT articles as compared with the provisions of the pre-war "system of treaties" will show that the two important differences between the GATT and the pre-war system are first, the formal multilateralization of obligations with regard to tariff levels (as made clear by the provisions of Article XXVIII on renegotiation of tariff levels) and second, the procedural obligations, particularly those of Article XXIII (nullification and impairment), out of which the dispute settlement mechanisms, such as they are, have developed.

When we look at the post-war arrangements, it can be argued that, in terms of institutional structure and of substantive, operational features, the International Monetary Fund and the World Bank were major innovations; by contrast the GATT was a modest codification and tidying up of the pre-war "system of treaties" which had been linked in application by the unconditional most-favoured nation clause.

Around the GATT there is a range of subordinate and more limited agreements and understandings. There are, for example, the Protocols of Accession or Association of a number of countries (for example, certain non-market economies) which cannot or will not adhere to all the GATT articles. Imports into market economy countries from non-market economies give rise to some difficult issues and some contrived measures in regard to assumed dumping or assumed subsidization. There is the Multi-Fibre Arrangement, which provides part of the system of rules for international trade in textiles and textile products; this is a sector which a number of governments continue to prefer to deal with in part outside the GATT articles. The MFA, which provides rules endorsing or regulating discriminatory limits on imports, reflects a collective decision by governments to adapt an essentially competition-limiting sectoral trade policy. There are, too, the various arrangements for tariff preferences: the General System, under the U.N., the various regional and sectoral schemes (such as the Canada-U.S. Automotive Products Agreement). Some of these schemes obviously fall short of the criteria specified for customs-unions and free-trade areas in GATT Article XXIV. There are also a variety of bilateral arrangements between GATT signatories and non-signatories, such as the agreements with the U.S.S.R., China and Mexico (these two latter countries have

said they propose to adhere to the GATT). There are also the arrangements which set out obligations regarding the international trade in particular commodities — the so-called commodity agreements. (Various GATT obligations, for example, those regarding tariffs, also apply to the commodities which are the subject of the separate commodity agreements.) The purpose of these agreements, a purpose not always fulfilled, is to increase returns to producers while increasing security of supply to consumers. In the short term, at least, these arrangements are formally anti-competitive. Most importantly, in our purposes, there are the detailed interpretative notes or agreements regarding particular GATT provisions (e.g. the so-called Anti-dumping Code). There are also the various codes and "guidelines" developed as between industrial countries in the OECD (e.g. the declaration on "national treatment").

GATT

All these together constitute the "trade relations system" or "trade policy system" at the international level. In this study we shall frequently be talking as though the GATT is "the system"; it is important to recognize that the GATT, though it is the most important part of the system, is only the commercial policy chapter of the Havana Charter. That charter was intended to launch a trade organization to function alongside the Monetary Fund and the World Bank.[10] It contained not only obligations concerning full employment and commercial policy, but also obligations concerning restrictive business practices (Chapter V of the Charter) which are considerably more precise than that more recent attempt to draft obligations in this area: the UNCTAD Set of Mutually Agreed Equitable Principles and Rules For the Control of Restrictive Business Practices.[11] It may be that if the Havana Charter had been implemented, the implicit contradictions between the obligations of Chapters IV and V would have been addressed more effectively than has transpired.

basic principles

If we consider the GATT more closely, we can extrapolate a set of principles which it embodies: unconditional most-favoured nation treatment, the reduction of trade barriers, national treatment for imports once the tariff is paid. From our perspective, the most important GATT concept is the concept that the primary regulator of trade, the primary device to limit competition between imports and domestic production, is the tariff — that is, a price mechanism — as against a quantitative control.[12] Quantitative controls, administered and negotiated on a bilateral (and thus discriminatory) basis, had been the principal trade policy device of Germany and other European countries in the pre-war period. Harry Hawkins, the key U.S. official in trade policy, put the case: "There are three counts on which quantitative restrictions are to be regarded as objectionable. . . .The first is that, because of their rigidity, quantitative restrictions are one of the most effective instruments of economic nationalism that can be devised; the second, that they involve extensive bureaucratic interferences with private enterprises; and third, that they discriminate among the foreign supplying countries. . ."[13]

most NB. princ.

In accord with this basic concept, not whole-heartedly accepted by European countries, the GATT embodied precise provisions sharply limiting the use of quantitative measures. Article XI set out a prohibition on such measures, and the limited exceptions to that prohibition.[14] The important exceptions were, first, in regard to agricultural trade (to support domestic measures

restricting the production or marketing of a domestic agricultural product) and, second, when restrictions were necessary to "Safeguard the Balance of Payments" (Article XII). It is not clear that it was envisaged that quantitative restrictions would be used under the "safeguard" provisions of Article XIX; rather that it was apparently assumed that this article provided for the withdrawal of tariff reductions in the event that "serious" injury was caused or threatened to domestic producers by increased imports of the products subject to an agreed reduction in tariff rates.[15]

A Tariff-Centered System

What the planners of the post-war commercial policy system envisaged, planned for, negotiated for, was a non-discriminatory trade policy regime of lowered tariffs, and, in the normal case, only tariffs. The GATT was not about "free-trade" but about getting rid of quotas and reducing tariffs on a non-discriminatory basis.[16] What was envisaged was a tariff-centered system; however, it is our working assumption that, in practical terms, what has developed is not tariff-centered, but rather a regime of contingency protection, of administered protection and of "managed trade".

Of course, a significant amount of world trade is subject only to tariffs as a regulating device, particularly if we include the volume of trade moving under tariff classifications that are duty-free. However, when governments have problems with import competition, they tend to deal with those problems by invoking measures other than the non-discriminatory tariff. In agriculture the difficult issues are dealt with largely by quantitative measures and by subsidization, with the important exception of the variable import levy system of the EEC, which is a sort of tariff. For textiles and textile products, there are, of course, rates of duty imposed, but the key regulator is the bilateral quota system sanctioned by the MFA; for steel, there is the elaborate structure of quotas negotiated under the impetus of the anti-dumping and countervailing duty provisions and the "escape clause"; for imports from developing countries there are the tariff quotas (which are, in practice more like quantitative measures than tariff measures) imposed consequent on the U.N. "generalized system of preferences". For imports which are alleged to be dumped or subsidized, there are the discriminatory duties imposed under the authority of the two GATT Article VI Codes, or the quantitative or other "undertakings" contemplated in those agreements. For a range of products when imported into various developed country markets — e.g. video tape recorders, automobiles, steel, — there has been a variety of measures invoked, all based on determining the quantities that will be traded. It is this phenomenon that is referred to when we say that the centre, the weight, of the trade policy system, is on contingency measures or administered protection, and that we have moved away from a tariff-centered trade policy system.[17]

The Question of Costs

The conflict between tariff protection and competition policy is obvious; for that reason smaller countries with relatively high industrial concentration ratios have often viewed tariff reductions as an instrument of competition policy.

Moreover, the costs of tariffs, in terms of the burden it imposes on users of protected products, has been the subject of considerable research,[18] the more so when economists realized that effective tariff rates were often higher than nominal rates, and developed the theory of effective protection.[19] It became generally understood that the effect of tariff rates on industrial structure, on concentration ratios, on efficiency and on the effectiveness of competition, as well as the burden of the tariff on users, could be more clearly perceived in terms of effective, rather than nominal levels.

All this being so, it would be logical to follow a similar pattern of inquiry with regard to the newer trade policy. What is the effect on the economy, in terms of efficiency, in terms of competition, in terms of industrial concentration, of the present contingency measures or administered protection system? These questions have already been fairly carefully examined — with regard to some particular anti-dumping actions and in regard to the quantitative restrictions in effect for steel, autos, textiles and textile products. In this study we shall attempt to carry the discussion somewhat further afield, and particularly, to develop some proposals for at least partially resolving the deepening contradiction between trade policy and competition policy. We can best begin the process by briefly noting, in the next chapter, what has been already said by other observers of trade policy.

The Evolution of Trade Policy

A final comment, by way of introduction, remains necessary. This study should be considered in the context of what has been the general evolution or direction of trade policy. There is more than one view as to what the evolution has been. One view, one would guess it to be the majority view, is that under the leadership of the United States the industrialized nations have been slowly but systematically reducing barriers to trade; the successive GATT negotiations resulting in agreed reductions in tariffs, and the increase in world trade, are called in evidence that this is the case. On this view, it is urged that the remedies for "unfair" trade, and the "safeguard" or "escape clause" mechanisms must be refined, because it is only if these are well designed and working effectively that it will be politically possible to negotiate further reductions in tariffs. Thus the cause of "free trade", or "freer" trade, has been harnessed to the attack on "unfair" methods of competition in importation. This view has, it seems, been the prevailing view in the U.S. Congress, as evidenced in the various hearings over the period say, from 1967 (after the Kennedy Round) to 1984 (the passage of the most recent trade legislation). It has also been the prevailing view amongst academic economists writing on trade policy in the U.S.[20] There has been a tendency to focus on the quantitative assessment of tariff reductions, and to ignore or minimize the impact of other trade-regulating devices. In particular, there has been a tendency amongst economic writers to overlook the importance of precedent in regard to the operation of the anti-dumping provisions (particularly in regard to detailed determinations as to margins of dumping) and the operation of countervailing duty (particulary in regard to findings as to what are countervailable subsidies and how they should be measured). It seems to be implied that because such measures are not easily quantifiable, they can be safely ignored.

More recently, attention has focussed on the spread of "voluntary" export restraints in situations in which even the criteria of Article XIX of the GATT could have been met. All this has given rise to an extensive literature on the "New Protectionism".

However, there has also been a minority view, to the effect that was has been happening has been not so much trade liberalization, but rather a widespread recourse to discrimination in trade policy and, in parallel, a shift from reliance on the tariff, (in the fashion of the early 1950s) to reliance on an armory of other measures, which we have lumped together under the heading of "contingency protection". It would require extensive research to establish when this view began to be expressed; certainly for a long period, certainly up to the early years of the Kennedy Round (1962-63) the prevailing view was that what had been happening was "liberalization", by and large, and that the growth of world trade could be assumed to be, in part at least, the result of this process. However, it is doubtful whether the practitioners, that is, trade policy officials and members of the trade bar, ever uncritically shared the majority view; for practitioners the stated majority view was merely part of the political presentation of the case for further trade negotiations, which were conceived as being necessary to contain protectionism.[21] A number of informed commentators have, over the years, taken the view that trade liberalization and non-discrimination were not what was happening. For example, in 1971 Mr. Bruce Clubb, then a commissioner of the U.S. Tariff Commission, expressed his "belief that there has been a widespread misunderstanding of the foreign trade policy the United States has been pursuing in recent years. We have believed that it was a liberal policy, leading toward a time of free trade. In fact, it has been a rather neutral policy; a pragmatic policy where restrictions have been removed from some goods and imposed on others, on a case by case basis. Although we like to talk only about the restrictions we remove, the evidence suggests that in trade terms these are almost equaled by the restrictions we have imposed, with the result that we are probably no nearer free trade now than we were forty years ago."[22]

Since the Tokyo Round, there has been much more attention given to the detailed and ingenious protectionism to be found in the contingency system. Criticism of the anti-dumping system, and of the anti-competitive aspects of trade policy (which we shall note in the next chapter) has played a part in this; at more general level, looking at the trade policy system in the round, as a system, a number of trade policy practioners have directed attention to the restrictive and discriminatory feature of trade policy, rather than being content with merely re-stating the long-established case for reducing tariffs. For example, in a series of articles during and since the Tokyo Round, Jan Tumlir, the late GATT director of research, drew attention to and noted the policy implications of the movement toward a non-tariff centered and protectionist trade policy system. He expressed his concern, in a series of articles, as to the implications of the decline in the "international order" related to the increase in the use of government-negotiated export restraints and to government encouraged cartelization (e.g. in steel).[23] He made a persuasive case that the major conflict between competition policy or policies and trade policy is in the official encouragement and sponsorship of cartel-like activity, including that by exporters. In quantitative terms, and, more importantly, in terms of the threat to the international order, this is of greater importance than the differences in standards as between legislation on domestic price discrimination and anti-dumping policy.

Other writers addressing various aspects of the theme that the trade policy system provides scope for protection, restrictionism, and cartelization are Malmgren, Grey, Dunkel, Curzon, Patterson, Baldwin and Bergsten.

In his important paper prepared for a conference on trade policy organized by the Washington-based Institute for International Economics in 1982, Malmgren described what has been happening as "a mood . . . of neo-mercantilism" and characterized the growth of so-called industrial policies of sectorial intervention as being "adjustment resistance policies".[24]

Grey has consistently held to the view that the developing trade policy system, particular as sanctioned by the non-tariff measures agreements of the Tokyo Round, was best understood as a system of highly detailed, discriminatory legalistic intervention and that the literature of "trade liberalization" should best be viewed as part of the rhetoric of political presentation, rather than as an accurate description of trade policy in practice, or of the motives of the players.[25] In a paper delivered in 1980 at the University of Western Ontario, Grey stated: "It does not seem to have been realized that as tariffs came down, some other devices would have to be used to meet the demands of domestic producers who could make a politically convincing case for protection. Hence the growing emphasis on "fair trade". . . . Given these developments, the commercial policy system of the United States, in particular — but also of the EEC and, in due course, of Canada — will be a system in which the central set of mechanisms for interventions will be "contingency measures" rather than tariff measures. It is not clear that such a system will provide a more open and more stable trading environment than a system relying on a structure of moderate tariffs, bound against increase. . .the new GATT now sanctions, even makes obligatory, systems centered on the concept of contingency protection."[26]

Gerard and Victoria Curzon formulated their concern about the decay in the international trade order by identifying the GATT as a "multi-tier system" rather than a one-tier system of rights and obligations that apply on equal terms and with equal force and relevance between all the signatories.[27]

Arthur Dunkel, the second and present Director General of the GATT, has repreatedly and emphatically expressed his concern over the impact of protectionist policies that ignore the GATT rules and the GATT as a forum. Dunkel has stated: "The tendency toward bilaterialism and sectoralism on trade policy is the greatest present danger both politically and economically to order and prosperity in the world economy. . .".[28]

Gardiner Patterson, the distinguished American economist and Deputy Director General of the GATT during the Tokyo Round, has identified the protectionist policies and the emphasis on discrimination of the European Community as one of the sources of disorder in the international trade system.[29]

Robert Baldwin, one of the most prominent and prolific academic writers on trade policy in the U.S., and adviser during trade negotiations to the U.S. government, has tended to emphasize the importance of tariff reductions and to assume that "liberalization" is a reality. More recently, he has expressed some skepticism as to the character of U.S. trade policy; in a paper presented at a conference convened by the National Bureau of Economic Research in 1982, he identified a number of policy changes, one of which is "the increase in the use of

non-tariff measures to regulate international trade at the same time tariffs were being significantly reduced. . . ." He went on to note that the emergence of the textile restrictions as part of the price required for tariff cutting authority required for the Kennedy and Tokyo Rounds, and the various changes in the detailed provisions on "import relief" (i.e. anti-dumping, countervail, escape clause, relief for other "unfair practices") as making protection more easily available.

Fred Bergsten, in his important article in the Maidenhead Papers comparing "voluntary" export restraints with quotas, has analyzed the economics of quantitative restrictions of various kinds and made clear how the rents of restriction are created and allocated, and how interests become vested in them; his article made clear why managed trade was important and growing.[30]

Summary

In summary, a number of observers have focussed on the complex character of the trade policy system and acknowledged that there has been more to post-World War II trade policy than negotiating tariff reductions. There are differences in emphasis: Tumlir and Grey are perhaps the most pessimistic, taking the view that there is more disorder than system; others seem to reflect a view that the emergence of "protectionism" is a relatively recent change and urge action to return to a "liberal" regime, which it is assumed did once exist.

The discussion in this paper has to be seen against the background of an assessment of how the trade policy system actually operates. In our view, to identify the contradictions between trade policy in practice and the precepts of competition policies, confused and debatable as they may be, is simply another way, but a particularly useful way, of perceiving the disorder and irrationality in the trade policy system.

CHAPTER II

THE DEBATE ABOUT ANTI-DUMPING AND COMPETITION POLICY

That there is a policy interface (to use a word of modern jargon) between competition policy and trade policy was recognized, in fairly explicit terms, by a number of academic and official commentators on trade policy in the final quarter of the last century, when the instruments of modern trade policy, aside from the tariff, were being developed. At the heart of the discussion, in the period up to and including the publication, in 1923, of the classic study by Jacob Viner,[1] was the issue of predation in dumping: whether it existed on a significant scale and whether it warranted the creation of a legislated remedy. The extensive bibliography included in Viner's study, and the further list of sources in his article for the Encyclopedia of the Social Sciences, are evidence of the very extensive debate in both Europe (including Great Britain) and in North America which seems to have begun in the 1800s and become fairly intense by the mid-1890s. It engaged the attention of a number of major economists — Alfred Marshall, A.C. Pigou, F.W. Taussig, and was the subject of, or was touched on substantially, in a number of official reports.

Predation

It is apparent from this early discussion that it was fairly generally assumed that there was at least an element of predation in any case of extended dumping, that predation was the major factor in many cases of dumping, and that this predation required a remedy other than a general increase in tariff rates. It was predation alone, and only predation, that justified the enactment of a provision for the application of a special remedy. To take an early, and most important example: the enactment of the first Canadian anti-dumping provisions, in 1904. That legislation turned on the issue of predatory dumping. In introducing the proposal, in his Budget Speech, the Canadian Minister of Finance, W.S. Fielding, stated:

> . . . the trust or combine, having obtained command and control of its own market and finding that it will have a surplus of goods, sets out to obtain command of a neighbouring market, and for the purpose of obtaining control . . . will put aside all reasonable considerations with regard to the cost or fair price of the goods. . . .

and later:

> If these trusts and combines in the high tariff countries would come under obligations . . . to supply us with these goods at the lowest prices for the next fifty years, it would probably be the part of

> wisdom for us to close up some of our industries and turn the energies of our people to other branches. But surely none of us imagine that when their high tariff trusts and combines send goods into Canada at sacrifice prices they do it for any benevolent purpose. They are not worrying about the good of the people of Canada. They send the goods here with the hope and the expectation that they will crush out the native Canadian industries.[2]

Fielding did not however, introduce any requirement that there be evidence of predation, of intent to destroy a Canadian industry, into the Canadian legislation of 1904, nor was such a requirement provided in the amendments of 1906. However, subsequent U.S. legislation did address directly the issue of predation and the intent of dumping.

The U.S. Anti-dumping Act of 1916 (which is still in force) contains (in Section 801) the proviso that dumping (as defined in that Section) is "unlawful", "Provided that such act or acts be 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 any part of trade and commerce in such articles in the United States."[3] The anti-dumping provisions of 1916 replaced, in a sense, the provisions of the Tariff Act of 1894 which made unlawful a conspiracy or combination to restrain trade; this earlier provision required, first, that there be a conspiracy, and second, that the conspiracy be formed within the territory of the U.S. and involve at least one U.S. citizen. This second proviso was, of course, an expression of the territorial principle of jurisdiction. As a remedy for dumping, the 1894 act was judged to be ineffective.[4] The 1916 legislation also includes a provision (Section 802) for a penalty duty on imports which are the subject of an agreement for "full line forcing".

The issue of predation, and of intent, implicit in the concept of predatory behavior, and explicit in the 1916 statute, was the key issue in the subsequent examination of anti-dumping legislation in Congress. The key document is the report of the Tariff Commission to the Ways and Means Committee of the House.[5] The Commission held hearings, sent an investigator to Canada, solicited information and advice from the business community, and addressed the issue of predation and intent. The Commission observed:

> In conducting private industry the prevailing motive is profit. Ordinarily, therefore, it must be extremely difficult to establish, as an essential element in the offense, a separate and destructive purpose. . . .In dumping, the intent to injure, destroy, or prevent the establishment of an industry, or to restrain or monopolize trade or commerce in the United States, is not necessarily present . . . motives other than those enumerated may, and, at times, do exist.[6]

The Commission went on to deal with the various criticisms of the 1916 Act and noted that

> . . . such importation must be made with intent to injure, destroy, or prevent the establishment of an industry in this country, or to monopolize trade and commerce in the imported articles. Evidently,

> for the most part, the language of the act makes difficult, if not impossible, the conviction of offenders and, for that reason, the enforcement of its purpose.[7]

The Commission then went on to urge the introduction of administrative remedies for dumping, rather than a criminal law procedure.

> Such amendment would not be inconsistent with the enactment of definite and authoritative instructions to the Federal Trade Commission to deal with dumping as a phase of unfair competitive methods.[8]

In retrospect, it is clear that this Report of the Tariff Commission signalled the demise of the requirement that there be evidence of predation as a condition for securing a remedy against dumping in the U.S. legal system. The Act of 1921, which was the basic anti-dumping statute of the U.S. until the post-Tokyo Round Trade Agreements Act of 1979, made no reference to predatory intent.[9]

One should note, by way of background, that this discussion in the U.S. took place in light of the decision of the U.S. Supreme Court (American Banana Co. vs. United Fruit Co.) that the Sherman Act (the basic competition legislation of the U.S.) did not cover acts done in foreign countries. It was held that not only did the Sherman Act not apply to acts done in foreign countries, even if done by U.S. nationals, even if the conspiracy at issue occurred in the U.S., provided that the acts complained of were not illegal in the countries where they were committed.[10] Application of the more modern "effects" doctrine of international law would have led, possibly, to a different result. It was this lack of application of the Sherman Act which, it appears, gave rise to the need for separate and distinct legislation addressed to the issue of unfair prices, and, as Viner notes, particularly those below the cost of production.[11]

To return to the matter of how the issue of predation was viewed in what now seems to have been the formative period of modern trade law, we should note the authoritative comments of Viner. Jacob Viner was, by origin, a Canadian, who, like many other Canadian economists of the period[12] went to the United States for graduate level study. His mentor was F.W. Taussig, the leading student of U.S. commercial policy, who became the first chairman of the U.S. Tariff Commission[13] and a prolific and important writer on U.S. commercial policy. Viner argued that "for the purposes of economic analysis" the appropriate basis for classification were, first, the motives or objectives of the dumper (which, in its 1919 report the Tariff Commission had concluded was, as a matter of law, difficult to deal with) and "according to the degree of continuity of the dumping." One of Viner's categories was "To eliminate competition in the market dumped on;"[14] Viner held this to be likely to be of "short-run or intermittant" continuity. Later, examining the key economic question of whether, in fact, predatory dumping did take place, Viner observed: "There are . . . sufficient instances of trusts and combinations, many of them international in their membership or affiliation, that are within reach of world-wide quasi-monopolistic control of their industry, to make the danger of predatory competition a real one. . . ." And, at a later point: "In every manufacturing industry a substantial fraction of the world output is produced by concerns who survive only under the shelter of high tariff protection in their

domestic markets, and are not in a position to contest foreign markets. Of the relatively more efficient concerns in any industry, there are often comparatively few who can offer effective competition in any given market; it is the competition of such concerns alone which needs to be eliminated if a producer is intent upon gaining monopoly control of that market."[15] Viner's view was not supported by every observer; for example, Viner himself quotes the observations of the Cambridge economist A.C. Pigou to the effect that "Destructive dumping into England from abroad does not take place."[16]

In summary: during this early period when there was increasing discussion of commercial policy, and particularly in the first part of the century, it was believed by at least some influential observers that there was a problem of predatory dumping, that that was an aspect of the existence of trusts or cartels based in tariff-protected markets, that this predation required a legislated remedy, but that to make a showing of intent to destroy a condition for securing the application of the remedy made the remedy unworkable. Removing (as in the U.S. legislation of 1921) or avoiding (as in the Canadian legislation of 1904) a requirement to show predatory intent opened the way for the invoking of the anti-dumping provisions in situations in which no evidence of predation could be shown, and for the elaboration of an international system (GATT Article VI and the Anti-dumping Code) which ignores the issues of predatory intent, except inferentially in Article II of the Code[17] addressed to the issue of "sporadic dumping".[18]

The apparent conflict between anti-dumping policy and competition policy has been one focus of attention in the discussion of the broader issue of the conflict between trade policy and competition policy. The lack of parallelism between legislation directed against the anti-competitive effects of price discrimination in domestic commerce, as that legislation has been administered in the U.S., Canada, the EEC, and legislation directed against allegedly injurious price discrimination in import trade, has been extensively commented upon. There is already a substantial literature which makes the case that the standards of injury or adverse impact are different in these two areas, that they address the issue of adverse impact with regard to different entities, that procedures under the two categories of legislation are different, that the effect on competition is ignored in anti-dumping law and practice, and, moreover that the anti-dumping system often brings about or sanctions measures (such as an exporter's agreement or exporters' agreement to raise prices) which are anti-competitive. We shall be re-examining, re-stating this issue below. In the balance of this chapter we shall briefly note the state of the debate as to the contradiction between competition policy and the anti-dumping provisions.

Anti-dumping vs. Anti-trust

A substantial number of U.S. trade policy practitioners, mostly members of the trade law bar, have noted the anti-competitive effect of anti-dumping measures, and a number of them, learned in both trade law and anti-trust law, have been critical of the anti-dumping system. Viner had noted the relationship between the Sherman Act and the anti-dumping provisions; most detailed studies of dumping and of the U.S. anti-dumping system have explored that relationship, and many have noted apparent contradictions in policy. For example, in a detailed and important survey article in 1958, Peter Ehrenhaft,

who later became, during the Tokyo Round, the senior official responsible in the U.S. Treasury for the administration of Treasury responsibilities under the anti-dumping and countervailing duty provisions, after examining the differences between anti-trust law and anti-dumping law, concluded that "Orderly competition is the proven stimulus to increased productivity. . . .But the two statutes (anti-dumping, countervail) here considered, as presently drafted and administered, often seem to face in a direction contrary to this country's basic economic policy. Insofar as they are so oriented, they derogate from the national interest. The relative desuetude of these provisions in recent years does not justify their retention as the potential hatchets of rear guard protectionism."[19]

Many of the key articles in this growing debate are noted in the OECD report Competition and Trade Policies/Their Interaction, issued in 1984 and in the study by Klaus Stegemann presented to the OECD Symposium on Consumer Policy and International Trade in November 1984.[20] Writers from outside the U.S., e.g. Dale, Slayton, Grey, Stegemann, have also identified the conflict in policy; however, it is certainly the case that the argument has been most fully developed by U.S. critics of U.S. anti-dumping law.

It would appear that the issue began to come to the forefront of discussion during the extensive public examination of trade policy in the U.S. leading up to the Trade Act of 1974, the mandate for U.S. negotiators in the Tokyo Round. That examination concluded the detailed study of trade policy options conducted by the Williams Committee,[21] and a number of non-governmental studies. The discussion in the period up to the end of 1974 also reflected the increased interest in anti-dumping policy generated by increased use of these provisions before and during the Kennedy Round (1963-67)and the controversy, largely conducted in the hearings before the Senate Finance Committee, as to the implications for U.S. anti-dumping system of the obligations set out in the Kennedy Round Anti-dumping Code.[22]

An important statement of the argument that anti-dumping policy was in conflict with U.S. anti-trust policy was the report of the anti-trust section of the American Bar Association in 1974.[23] The majority took the view that vigorous use of the U.S. anti-dumping provisions would be in contradiction with anti-trust policy, and that the anti-dumping laws should be administered in a manner more fully consistent with the anti-trust laws. This report was the subject of a careful analysis by a leading U.S. anti-trust lawyer, Harvey M. Applebaum. He thought that the majority view in the report "may possibly overstate and oversimplify the issue".[24] And he pointed out that "the importer can often comply relatively easily with a dumping finding where the United States is his prime market, simply by lowering the home market price. For this and other reasons, imports in many industries, have continued to be strong and vigorous despite the imposition of a dumping finding. Indeed, in cases in which imports may be injuring U.S. industry by use of practices that violate the anti-trust laws, the anti-dumping may be a comparatively ineffective weapon to employ." (Emphasis added.) As Applebaum noted, it is often the case that the option of complying with the anti-dumping finding by lowering the home market price is an option available if the U.S. market is the major market of the producer, "as is frequently applicable, for example, in cases involving imports from Canada". This important comment suggests that the costs imposed by an anti-dumping duty on the domestic economy, for a country such as the United

States, where exporters may have the realistic alternative of complying by reducing home market prices, may for that reason be lower than for a small country such as Canada, where the market is of relatively less importance to the foreign exporter.

Another U.S. trade expert, Professor Stanley Metzger, at one time Chairman of the U.S. Tariff Commission, also noted the contradiction between competition policy and anti-dumping policy in a study published in 1974 as part of the review of U.S. trade policy then going forward. He noted that: "The Anti-dumping Act imposes a duty on the importer of foreign merchandise . . . if an industry in the United States is thereby being injured. In both cases (anti-dumping and anti-trust) Congress intended to eliminate the use of price cutting tactics that impair the position of domestic sellers. The Anti-dumping Act applies, however, without regard for the competitive structure of the industry being affected by price discrimination. . . . The Anti-dumping Act . . . has been administered without regard to the anti-competitive impact of the duties imposed on lower priced imports at the behest of domestic monopolists, oligopolists, or cartels."[25]

Metzger had, in fact, taken much the same position as early as 1965, and subsequently re-stated and amplified his view that there was a major contradiction between an anti-trust approach to dumping and a "tariff approach" in his article on the Tokyo Round amendments to the Anti-dumping Code.[26] In that article he stated ". . . whatever the verdict may be as to the rest of the MTN's results — the amended Anti-dumping Code and its implementation must be judged a major backward step toward the very protectionism that the MTN was designed to prevent." And, going on to discuss the "injury test" in the Anti-dumping Code, he summed up by saying: "A test based on anti-competitive effect would not ask whether dumped imports resulted in loss of sales, lowered prices, and reduced profits to domestic competitors, but whether the imports constituted a threat to the continuation of viable competition in the relevant market. It would assume that whenever possible the domestic firms would, by increasing productive efficiency, meet lower prices while refraining from domestic price-fixing practices, rather than avoid price competition by invoking anti-dumping remedies to exclude the imports."

Quite a number of other U.S. experts, focussing on the U.S. anti-dumping provisions and the U.S. anti-trust provisions, particularly the Robinson-Patman Act, have examined critically in some detail, the considerable difference, possibly a growing difference, between the two sets of provisions as they are administered.[27] The invention of the trigger price system for steel created interest in the extent to which import relief arrangements derived from the anti-dumping provisions could have anti-competitive effects.[28]

<u>Anti-dumping as Anti-trust</u>

One important article is that by Barbara Epstein, who in 1973, before the Tokyo Round moved to the netogiating stage, argued that, given the unwillingness of the U.S. administration to launch anti-trust actions in U.S. courts against anti-competitive actions in foreign countries which enable foreign firms to compete on a discriminatory basis, the anti-dumping provisions should be best thought of as an extension of anti-trust. The key to her argument is

"that international price discrimination occurs mainly when there are restraints on trade in the exporting country, restraints which would be unlawful if practiced by American firms."[29] This is, of course, much the same as the reasoning advanced by Sir William Fielding in introducing the Canadian anti-dumping law in 1904 and advanced by Viner in 1923.[30] She went on to criticize the failure by the U.S. Tariff Commission to address injury which can be attributed directly to price discrimination, rather that merely to price competition.

Another element in recent U.S. thinking, which it is important to keep in mind in order not to lose a sense of proportion, is the view that the anti-dumping provisions and the countervailing duty provisions represent a disproportionate investment of administrative and managerial resources, given that they do not solve important trade problems. Peter Ehrenhaft, who has had experience both as a lawyer and as an administrator of anti-dumping and countervail, stated the following summary judgements (in a detailed review of Professor Lowenfeld's Public Controls on International Trade): . . . it goes a long way toward proving the theory that import relief laws have been important only in the steel sector. Other industries have invoked them, but much less frequently. What trade statistics exist strongly imply that the entirety of U.S. efforts to 'enforce' anti-dumping and countervailing duties affect but the smallest fraction of products entering the United States. The laws may have a prophylactic effect, however, by encouraging foreign producers to price goods shipped here at "fair value" and dissuading foreign governments from providing 'bounties and grants'. . . that is a proposition difficult to prove or disprove."[31]

If we summarize these U.S. views, we can say that, amongst practioners there has long been a well articulated view that anti-dumping and anti-trust laws should be better integrated, that anti-dumping law, as drafted, is directed at protecting producers from acts of foreign exporters, not at protecting competition or promoting efficiency. Epstein's view is, it seems, a minority view, of those who have expressed views, but that does not make her argument less interesting or relevant.

Supplemental Considerations

The debate between U.S. lawyers about the interface between trade policy and competition policy has been largely about anti-dumping; the legal literature on safeguard actions, and on countervail, for which there are no parallels in domestic law, is largely concerned with explaining how the system works.[32] There is, however, a growing literature, in the main written by economists, on the impact on the U.S. and the costs to U.S. consumers of negotiated export restraints, notably on textiles and textile products, and on autos. We shall be noting these arguments when we consider the issue of costs and benefits.

When we look at comments by non-American writers, we see that almost invariably they draw heavily on the voluminous U.S. literature. We noted above that at least four non-U.S. observers had discussed the conflict between anti-dumping policy and competititon policy: Dale, Grey, Slayton, Stegemann. Dale's discussion is the most comprehensive.[33] He includes in his examination the problem of "reverse dumping", that is, the form of price discrimination in

which export prices are maintained at levels higher than the domestic price, and the related issue of export cartels. His judgement is "that the present focus of anti-dumping legislation is, from an economic welfare point of view, misplaced. The diversion-of-business test applied in anti-dumping proceedings attacks free trade principles without offering any compensating advantages to domestic consumers. At the same time the historical origins of anti-dumping legislation, which are rooted in allegations of predatory behaviour, have been lost in an overriding concern with 'the mere shift in business between competitors'."[34] Dale goes on to remind us of Viner's prophetic assessment in 1955: "Maybe it (the anti-dumping system) is getting into the hands now of men who do have ideas, and these ideas may be protectionist. If such is the case, what they can do with that dumping law will make the escape clause look like small potatoes. They can, if they wish, raise the effective tariff barriers more than all the negotiation in Geneva will be able to achieve in the other direction."[35]

Grey has been sharply criticized by Professor Stegemann of Queen's University for too readily assimilating anti-dumping to anti-trust.[36] He refers to Grey's "assertion that anti-dumping legislation is an extension into the international arena of principles expressed nationally by statutes restricting price discrimination". Grey's treatment of this issue is very brief; he merely asserts that "anti-dumping legislation is in a broad sense a counterpart in commercial policy to legislation penalizing price discrimination in domestic commerce."[37] In a later study Grey noted the views discussed above of U.S. writers such as Metzger and Ehrenhaft, and stated: "Here is a major issue which will need to be examined internationally and, more importantly, nationally. . . . A thorough examination of this issue would perhaps lead in due course to additional provisions in the Anti-dumping Agreement".[38]

Professor Slayton is another Canadian writer on anti-dumping, but from a legal and procedural point of view, rather than from an economic or trade policy point of view. In his study for the Canadian Law Reform Commission Slayton argued that "The anti-dumping system is arguably irrational and inefficient. It is arguably irrational because the protection afforded Canadian industry depends, not just on injury experienced by the industry or on prices in Canada, but on prices in a foreign market; and because the protection given one Canadian industry will often be at the expense of another."[39]

Stegemann has been carrying out a detailed study of the Canadian anti-dumping system. His two most important essays are his paper in the Cornell International Law Journal, which is a case study aimed at identifying the costs a particular group of anti-dumping proceedings, and his paper on consumer interests in the implementation of anti-dumping policy, prepared for the OECD Symposium of Consumer Policy and International Trade in 1984. In the first of these two papers he demonstrated that an anti-dumping duty imposes certain costs on the country levying the duty (as is surely the case with all import duties). However, he noted one of the real difficulties that exist in carrying out empirical work in this area is that "data on alternative costs of importation, which would have applied in the absence of anti-dumping action, is not available."[40] The more recent study of consumer interests in anti-dumping policy is a useful review of the literature (largely American) and concludes by urging that the consumer interest should be taken into account by administrative tribunals assessing the impact of dumping, such as the Canadian Anti-dumping Tribunal (now the Canadian Import Tribunal).

Summary

We have reviewed in this chapter the recent literature on the interface between anti-dumping policy and competition policy. Summing up the discussion, the following points emerge.

1) A number of commentators have noted that the standards for measuring price discrimination, for assessing adverse impact, and indeed, the entities on whom the adverse impact falls, are different as between anti-dumping policy and competition policy. The conflict is most evident in Canada and the U.S., which both have detailed anti-dumping provisions (that is, more detailed than that of the EEC) and detailed provisions regarding price discrimination in domestic commerce. Most observers feel that, at the minimum, the anti-dumping system should be refined to make it more consistent with competition policy; at the maximum position are those commentators who suggest that the competition policy provisions could be adapted to deal with dumping. Virtually all commentators are of the view that "predatory" dumping is a rare, virtually non-existant phenomenon, and that therefore this original rationale for having an anti-dumping system has disappeared, if it ever really existed. They would argue that a case of predation by an exporter properly belongs to anti-trust law.[41]

2) Another approach is that dumping exists because markets are effectively separated; that dumping, even though it may not be predatory, is an undesirable result of the protection of certain producers in their national markets, or of their dominant position in the market, national or international, and of their ability to extract a monopolistic or oligopolistic price in the national market. Put more sharply, the case is made that in a number of countries producers are allowed to act in a manner inconsistent with the objectives of, say, U.S. and Canadian competition policy; that these actions cannot be effectively reached by U.S. and Canadian competition law, and that therefore the anti-dumping law should be seen as an attempt (perhaps a not very effective or well thought out attempt) to shield domestic producers from the impact of anti-competitive behavior which would be addressed directly if it occured within the domestic jurisdiction. Perhaps the most incisive statement of that view is the article by Epstein, cited above.[42] The most comprehensive statement of the majority view is that by Dale, cited above.

In the following chapters we shall be looking more closely at the key concepts in the trade policy system and looking in greater detail at the "injury" standard of the contingency protection system, and comparing it with injury concepts in competition policy; we shall look also at the safeguards or "escape clause" system, and in our final chapter we will attempt to assess the importance of the divergence between competition policy and trade policy, and set out some proposals for reform.

CHAPTER III

THE KEY CONCEPTS OF CONTINGENCY PROTECTION: INJURY AND CAUSATION

The purpose of this chapter is to set out briefly the two key concepts of the system of contingency protection injury and causation. Such an examination is necessary in order to have a basis for a more detailed discussion of the proposition that the contingency system fails to take into account competition policy considerations and positively sanctions actions (such as quantitative export restraints) which are anti-competitive. In chapter I we outlined in broad terms the proposition that the trade policy system as it now exists is centered on contingency protection rather than on tariff protection, and we reviewed briefly some important statements and opinions as to the evolution of the system. In chapter II we outlined the state of the debate about the difference between the anti-dumping system and domestic legislation on price discrimination: it is generally recognized that, when the concept of dumping was first being examined by legislatures early in the century, the proposed remedy was thought to be addressed to the problem of predatory pricing; that element disappeared with the adoption of the U.S. anti-dumping legislation in 1921 — the legislation on which the GATT provision was based. We now have, in the contingency system, a somewhat different set of concepts than those on which competition policy is based.

The key concepts to be examined in this chapter are "injury" and "causality"; the contingency protection system turns on the various interpretations of these two concepts.

Injury, and Related Concepts

The concept of injury, defined in various fashions, is the most important concept of the present-day contingency protection system. Many of the key provisions of the General Agreement (Articles VI and XIX, for example) turn on the concept of injury; the MFA (Multi-Fibre Arrangement) turns on the existence or threat of serious disturbances in the markets for textiles and textile products — so-called "market disruption" — this is, of course, an "injury" concept. It is the existence of material injury to an industry, or the likelihood that such injury will occur, that allows a GATT signatory to apply discriminatory duties (i.e. not to imports of a given product from all sources but only to the imports from specific sources) to dumped or subsidized imports; it is the determination of the existence of "serious injury" which allows a GATT signatory to restrict or to impose an additional tariff on imports causing or threatening such injury.[1]

The GATT formulations are "serious injury", as used in Article XIX, the safeguard provision or, to use U.S. language, the "escape clause"; "material

injury" in Article VI and the two Article VI agreements (the Anti-dumping Code and the Subsidies/Countervail Code)[2] and "market disruption", as used in the Multi-Fibre Arrangement (MFA). There are other GATT impact concepts, such as "adverse effects", "serious prejudice", "damage", "unnecessary damage", but they do not relate importantly to this study.[3]

The formulations in regard to the impact of imports differ in respect to the entity which is exposed to "injury". Article XIX refers to serious injury "to domestic producers". This is not necessarily the same as "industry" as used in Article VI. (The term "industry" is interpretated in the Anti-dumping Agreement and in the Subsidies/Countervail Agreement.) Article XVI speaks of serious prejudice "to the interests of any other contracting party". This is not the same, obviously, as injury "to domestic producers" or to a domestic "industry". The Subsidies/Countervail Agreement also invokes adverse effects "to the interests of other Signatories", a phrase which derives from Article XVI of the GATT.

Article XVIII, an article which deals with "Governmental Assistance to Economic Development, speaks of "unnecessary damage to the commercial or economic interests of any other contrating party" and of "damage to the trade of any contracting party". The MFA speaks of "disruptive effects in individual markets and on individual lines of production", a phraseology intended to imply that the degree of impact is something more than envisaged in Article XIX.

Serious Injury

The standard reference,[4] by Professor John Jackson, sets out the history of Article XIX, the GATT "escape clause" or safeguards clause, in some detail. In brief, there appears to be no guidance in the drafting history as to how serious is "serious" injury, as compared with the "material" injury, invoked in Article VI. Article XIX was based on the "escape clause" of the United States trade agreement with Mexico of 1943; later United States legislation, beginning with the Trade Agreements Extension Act of 1951, refers to "serious" injury. While there are many references in U.S. legislative history which make clear that "material injury", occasioned by "unfair" trade practices is something less than the "serious injury" of the escape clause (and that the causation standard, as we shall see below, is less onerous) there is no legislated definition of serious injury. The U.S. Trade Act of 1974, which contains the current United States escape clause, indicates what is involved. "The Commission shall take into account all economic factors which it considers relevant, including (but not limited to) the significant idling of production facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or under-employment within the industry". This would appear to shift the problem from defining serious to defining significant.

One expert in United States trade law has observed that "'serious injury' (requires a) considerably higher test than the 'material injury' standard under anti-dumping and countervailing duties statutes. The injury must be of grave or important proportions and an important, crippling, or mortal injury."[5] The adjectives "crippling" and "mortal" suggest that the injury must be greater than "material". But 'grave' and 'important' do not give much guidance. Moreover, in interpreting the GATT one must consider the versions in the various

official languages, all equally authentic. The French text of Article VI uses "préjudice important" for "material injury"; the French text of Article XIX uses "préjudice grave" for "serious injury".

The United Kingdom see "serious injury" in the following terms:

> 4. Since the term 'serious injury' has never been defined by the parties to the GATT no precise information can be given about the degree of injury which would necessarily justify emergency safeguard action. Each case is considered on its merits and the attached list simply indicates, on the basis of GATT practice and Community discussion of it what the relevant factors are likely to be. It must be emphasized that there has been relatively little recourse to this provision of the GATT and there is accordingly no substantial body of case history upon which to base definitive or comprehensive criteria.[6]

Like 'serious injury' the term 'material injury' has not been defined, either in Article VI, or in the Anti-dumping Code, or in the Subsidies/Countervail Agreement. Given the lack of substantive discussion of the issue in either one of the two Committees of Signatories, or an effective challenge in the Contracting Parties to some finding of material injury by a contracting party, the definition of this term has been left to national legislation and national practice.

Material Injury

The Tokyo Round negotiators, including the present writer, were aware that the word "material" would create controversy in the United States Congress. It was concluded that it would be useful to draft some language which would stand in the place of "material" and which could be incorporated in United States legislation and in the legislation of the other key trading countries. Article 6 (paras. 2 and 3) of the Subsidies/Countervail Agreement (the relevant paragraphs in the Anti-dumping Agreement are Article 3, paras. 2 and 3) provides that:

> 2. With regard to volume of subsidized imports the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing signatory. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occured, to a significant degree. No one or several of these factors can necessarily give decisive guidance.
>
> 3. The examination of the impact on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative

> effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

The word "material" was demoted to a footnote (footnote 4 to Article 2 in the Subsidies/Countervail Agreement) to the effect that the word 'injury' as used in the Agreement was to be taken to mean 'material injury' in the sense of Article VI of the GATT, where it is, of course, not defined.

During the congressional examination of the United States Trade Agreements Act in mid-1979, it became clear that the legislators proposed to not use the word "material", this was certainly no surprise to the negotiators in Geneva. However it was considered a serious issue by the Commission of the EEC; their representations were set out in the form of a public letter to Ambassador Strauss.[7] In the light of these views, the bill was redrafted to use "material" and not surprisingly, to define it. One component in the definition was that, in general, the standard of injury applied by the ITC under the Anti-dumping Act from 1975 (when the 1974 Trade Act came into effect) to July 1979, when the Trade Agreements Act was being considered, was to be the future standard for "material injury". During this period the view, held in some earlier determinations by the ITC, that any injury not trifling or immaterial (de minimis) must be injury in the sense of the U.S. legislation, was not being used; therefore, this element of the definition appeared not retrograde, although certainly not an advance.

A more precise, further definition of material injury was enacted: "In general the term 'material injury' means harm which is not inconsequential, immaterial or unimportant". As the present writer observed in 1981, "That such a weak definition would be developed in the Congress if there was pressure to use the word "material" could be and perhaps was, forseen. It may be that the Commission of the EEC, recognizing that they might in the future have to use their own anti-dumping system more vigorously than in the past, concluded that a definition of material along these lines would be advantageous."[8] In any event, determinations by the ITC since that time do not appear to have raised the threshold of "material injury" in the U.S. practice; without extensive and detailed research if it is difficult to say whether the threshold is higher in other countries.

From this brief examination of "material injury", Article VI of the GATT (and the Anti-dumping Code) would appear, in practice, to sanction action against international price discrimination in circumstances in which, were the price discrimination to occur in domestic transactions inside the national market, there might be no remedy available, because the impact would thought to be minimal.

The scope for arriving at a finding of "injury" under the Article VI Codes is further complicated by the fact that there are two different concepts of "injury". The two concepts or interpretations we may call the "overall" concept and the "separable" concept. These two versions or concepts of injury are related to the various concepts of "causality" to be discussed below.

The difficulty arises principally in regard to United States legislation and practice, if only because the U.S. system is fairly transparent; however, we should not assume there is not the same issue in other more opaque systems. "Injury" (to an industry) as a concept may be used to mean some particular, identifiable and measurable adverse consequence to an industry (or to "producers") from some outside event. The word is used, in this sense, in a phrase such as — "He injured a pedestrian", or "He did him an injury" — "The automobile veered onto the pavement and injured two shoppers". In this sort of every-day use, the general health of the injured party is not at issue; all that is at issue is the injury caused by some exterior event. This is the word "injury" being used in the "separable" sense. However, in United States trade law and in legislative history the word "injury" may stand for the ill-health or lack of well-being of an industry or of producers caused cumulatively by a variety of factors. The United States escape clause uses "injury" in this sense.

The difficulty caused by two concepts of "injury" became obvious in the negotiations of the Anti-dumping Code during the Kennedy Round in 1966-67. That agreement stated that "a determination of injury shall be made only when the authorities are satisfied that the dumped imports are demonstratively the principal cause of material injury . . . the authorities shall weigh, on the one hand, the effect of the dumping, and on the other hand, all other factors taken together which may be adversely affecting the industry. This drafting was primarily intended (by the EEC of Six, and the U.K.) to restrict the United States in its use of anti-dumping duties. On one interpretation, it involved the use of the word injury in the "overall" sense. U.S. negotiators did not anticipate the serious difficulties this drafting would create in the Congress, particularly in the Senate Finance Committee. The issue was summarized by Senator Russel Long, then Chairman of the Senate Finance Committee:

> The Tariff Commission concluded that the Code's criteria for injury are susceptible to two meanings. One interpretation is that if the importation of dumped goods considered alone does not cause material injury, there can nevertheless be a determination of material injury if the aggregate of the effect of all injurious factors results in material injury, and dumping is the principal causal factor. The second interpretation, and the one which the Tariff Commission majority believed that the negotiators intended, is that dumping duties are sanctioned only in those cases in which the dumped goods are themselves the cause of material injury, and such injury is greater than the injury traceable to all other causal factors.[9]

The first interpretation offered by the Tariff Commission would have made the Code less liberal, more restrictive, than Article VI. If Article VI means that anti-dumping duties are to be used only when the dumping is itself the cause of injury which is material, which this writer believes is the correct reading, and the only correct reading of Article VI, then, under the first interpretation of the Code by the Tariff Commission, anti-dumping duties might be sanctioned when Article VI standards, such as they are, were not met. On the second interpretation, Article VI standards might be met but, because factors other than dumping were having an causing injurious which were in total, greater than the impact of dumping, the Code would not sanction the use of anti-dumping duties. This latter would be an odd result: the less healthy an industry, the more other factors are also "injuring" the industry, the less likely that it

could secure a remedy against dumping. The second interpretation would thus have made the Code more liberal than Article VI, that is, it would have limited the rights of importing countries under the GATT to take restrictive action.[10]

EEC Practice

The practice under EEC legislation is stated by authoritative observers to be consistent with the concept of "separatibility" and the concept that the separate injury caused by dumping (or subsidization) must be found, by itself, to be material. Joseph Cunane (a senior official of the EEC Commission anti-dumping unit) and Clive Stanbrook, a U.K. lawyer practicing before the Commission, address this issue in their standard work: "The new standard of causality . . . simply requires the total injury caused should be divided up into the portion caused by dumping or subsidization and that caused by other factors. If the portion of the the total injury caused by dumping or subsidization is, taken by itself, material then protective measures may be taken.[11] (Emphasis added.) Under the EEC "escape clause" it is also clear that the EEC uses a "separable" concept of injury, for example, in tableware and pottery use, the EEC determined that "the injury caused by cheap imports . . . cannot in isolation, be regarded as material injury".[12]

Canadian Practice

The Canadian position, under the 1968 Anti-dumping Act and the Special Import Measures Act, is the same as the present EEC position. The 1968 legislation departed from the "principal cause" language of the Kennedy Round Code; the position was made clear by the principal draftsmen of the Canadian legislation before the House of Commons Committee on Finance, Trade, and Economic Affairs in their hearings on the draft legislation, and subsequently in a published exposition.[13] A failure to recognize that injury should be treated as a "separate" concept led one American observer to complain that Canada was not adhering to the Kennedy Round Code, and to argue that the Tokyo Round deletion of "principal cause" was a serious weakening of the Code provisions — that it would allow more restrictive action to be taken. This line of criticism overlooks the fact that under the U.S. interpretation, the degree of injury caused solely by dumping or subsidization might, in itself, be less than material, yet be found to be actionable because the dumping or subsidization was the "principal cause" of "overall injury" found to be material.[14]

This examination of the "injury" concept has, of necessity, been drawn largely from material concerning the U.S. system. This is for two reasons. The first is that the injury concept, both in regard to GATT Article VI measures and in regard to escape clause or safeguard action (Article XIX), as it appears in the GATT, is largely due to the impact on the international regime of the pre-existing or proposed U.S. legislative schemes; the second reason is that, given the predominant position of the United States in world trade, it is likely that the legislative usage and conceptual approach of U.S. trade law innovators will continue to dominate GATT drafting, as it did most recently in the working out of the various Tokyo Round agreements. The examination has been in some detail because it is only by understanding the injury concept that one can make a useful comparison with analogous concepts in competition law.

Causality

We have referred above to the fact that the two concepts of injury are bound up with differing concepts of causality.

There is no guidance in the GATT history as to what "cause" means in the various Articles, such as XVI, VI, XIX. It is necessary to look at national practice and at legislative intent. If "injury" is caused in the "overall" sense, then acute problems arise in defining the "causal" relationship. It can be argued, of course, and this writer has argued, that the GATT usage is simple and straightforward: the GATT causality concept is of events at issue ("imports" in XIX or VI) which, because of the prices and quantities in which they appear, are the cause of "serious" or "material" injury; it is for this reason that these Articles are silent on what is to be done about other events which may be impacting, injuriously or non-injuriously, on the industry or producers in question.

Causality language was agreed in the Tokyo Round for the Subsidies/Countervailing Agreement and for the Anti-dumping Agreement, replacing the "principal cause" language which had been used in the Kennedy Round Anti-dumping Code.[15] It is perhaps most helpful to let the two U.S. negotiators of the Tokyo Round Subsidies/Countervail Agreement state the issue. Rivers and Greenwald state:

> GATT Article VI is silent on the exact nature of the "causal link" required between a subsidy paid on exports and the "material injury" to a domestic injury. The Anti-dumping Code, however, had an express requirement that dumped imports be "demonstrably the principal cause" of "major injury" to a domestic injury. This standard was not only difficult to satisfy, but it had the perverse result of being more difficult to meet for those industries most vulnerable to unfair import competition. If, for example, an industry was unusually susceptible to the efforts of general downturn in the economy, it would be impossible, should such a downturn occur, to demonstrate that the effects of unfair import competition were the principal cause of the injury to the industry. The effects of the downturn invariably would outweigh the effects of such competition. At the same time, such an industry would be less able to bear the additional impact of the subsidized competition than another industry that was better insulated from the effects of the downturn. Both EC and Canadian negotiators agreed with the United States that the "principal cause" formulation of the Anti-dumping Code presented an impossible standard and should not be incorporated in the subsidies/countervailing measures Code.
>
> The language finally agreed upon provided that: (i) it must be demonstrated that the subsidized imports are, <u>through the effects of the subsidy</u>, causing injury within the meaning of this Agreement. (Emphasis added.)
>
> This was a Canadian formula. It was very close to the causality test in the U.S. anti-dumping law and so gave the U.S. negotiators the ability they needed to pattern U.S. implementation of the causality test of the subsidy/countervailing measures Code on the existing

provisions of the U.S. anti-dumping law. In the Trade Act of 1974, the Congress had been very clear about what sort of causality it thought appropriate for situations of "unfair" (e.g. dumped or subsidized) competition. In the dumping law, the Senate Finance Committee noted:

> Moreover, the law does not contemplate that injury from less-than-fair-value imports be weighed against other factors which may be contributing to injury to an industry. The words "by reason of" express a causation link but do not mean that dumped imports must be a (or the) principal cause of injury caused by all factors contributing to overal injury to an industry.
>
> The negotiating result in the subsidy/countervailing measures agreement came reasonably close to this target.[16]

This exposition is not without ambiguity as to whether "injury" is to be used in the "separable" or "over all" sense. There are important ambiguities in the legislative history as well. For example, in the Report of the House Committee on Ways and Means looking at causation under the "escape clause" and causation under the anti-dumping and countervailing duty provisions states: ". . . the Committee does not view overall injury caused by unfair competition, such as dumping, to require as strong a causation link to unfairly competitive imports as would be required for determining the existence of injury under fair trade conditions."[17] And Senator Heinz, speaking of the Trade Agreements Act, which remarks were endorsed by Senator Ribicoff, stated: "In determining injury caused by subsidized imports, the Commission shall not weigh against the effects of the subsidized imports other factors which may at the same time also be injuring the domestic industry. Subsidized imports need not be a principal cause, a major cause or a substantial cause of injury to an industry when other factors may also be contributing to injury to an industry."[18]

Thus in the legislative history, a weak causal link between dumping and the condition of the domestic producers of a like product has been virtually established in U.S. law implementing GATT Article VI. A standard text on U.S. trade law states:

> The law retains the <u>by reason of</u> causal factor previously applied in injury determinations . . . the <u>by reason of</u> standard requires the least possible causal link between the subsidy and material injury. The Senate Finance Committee report under the Trade Act of 1974 discussed the fact the words <u>by reason of</u> express a causal link that does not mean that the dumped imports must be <u>a</u> or <u>the</u> major cause, or <u>a</u> or <u>the</u> substantial cause of injury.[19]

As for the causal link in the "escape clause": the Trade Act of 1974 changed the formulation. The International Trade Commission, by that Act, must determine "whether an article is being imported into the United States in such increased quantities as to be a <u>substantial cause</u> of serious injury . . . to the domestic industry". This provision was examined by the International Trade Commission in its report on <u>Wrapper Tobacco</u>:[20]

The term "substantial cause" is new to the criteria which must be met in order for industry in the United States to be eligible for import relief. As our negative determination in this investigation turns upon the meaning of this term, a thorough examination of the meaning of the phrase is appropriate.

The requirement that increased imports be "a substantial cause" of actual or threatened serious injury represents a relaxation of the analogous "major cause" standard employed in Section 301 (b) (1) of the Trade Expansion Act of 1962 (TEA) the predecessor provision to Section 201 (b) (1).

Although neither the TEA nor its legislative history expressly defined the term "major cause", the term was generally interpreted by many - although never expressly by the Commission - to mean a cause greater than all other causes combined. In practice it and the other criteria of the TEA proved to be a difficult standard to satisfy, as illustrated by the fact that a majority of the Commission found the criteria satisfied in only 3 of the 26 industry cases completed under that act.

The new "substantial cause" criterion of Section 201 (b) (1) provides that a dual test be met. The Trade Act, in Section 201 (b) (4), defines "substantial cause" to mean "a cause which is important and not less than any other". Thus, imports must constitute both an "important" cause of the serious injury and be "not less than any other" cause. The two terms are not synonymous. An "important" cause is not necessarily a cause "not less than any other". And vice versa, a cause "not less than any other" is not necessarily "important". Increased imports must be both an "important" cause and "not less than any cause" of the serious injury.

What is an "important" cause? The legislative histories of Section 201 and of the related provision concerning eligibility for worker adjustment assistance, Section 222 of the Trade Act, provide help. The legislative history of Section 222 tells us that an "important" cause need not be "major cause", but that it must be "significantly" more than a "de minimis" cause. The legislative history of Section 201 indicates that where increased imports are just one cause of many causes of equal weight, it would be unlikely that they would constitute an "important" cause, but where imports are one of two factors of equal weight, they would constitute an "important" cause.

What is a cause "not less than any other" cause? The legislative history of Section 201 provides an answer. The test is satisfied if imports are a more important cause of injury than any other cause. The test is also satisfied if imports are one of several equal causes of injury and on one cause is more important than imports. But the test is not satisfied if there is a cause of injury more important than imports.

These issues are raised again in Certain Motor Vehicles.[21] The issue had been raised before the Commission as to whether or not what a number of

Commissioners found to be a cause of such serious injury as was being suffered by the United States industry which was greater than the increase in imports — a decline in demand — was itself the result of a series of separate, and therefore smaller causes (e.g. higher gasoline costs, higher interest charges, the decline in income of the unemployed).

This ITC determination precipitated a considerable discussion as to whether the current U.S. escape clause legislation is more onerous than GATT Article XIX. For example, in the material prepared for a conference in 1981 on trade law, the notes prepared for the panel on the escape clause assert that "the statutory standard of causation, linking increased imports with the serious injury to the domestic industry, is considerbly higher than that required by Article XIX of the GATT."[22] This assertion is based on the assumption that Article XIX can be read as requiring only that an overall condition of "serious injury" to an industry need be shown and that imports (meeting the other criteria of para 1 of XIX) can be shown to be one of the causes of that overall condition of injury. In the same discussion, Bill Alberger, then Chairman of the ITC, examined the broad issue of whether the approach of the U.S. escape clause was too legalistic and considered various alternative approaches to determining injury.[23] Peter Ehrenhaft observed that the U.S. legislation "includes requirements that increased imports be a cause of injury no less than any other cause — no such quantification is required by the GATT"; in his view Certain Motor Vehicles raised a number of key issues. First, "how to deal with problems of cyclical industry during (a) downturn". In Certain Motor Vehicles the ITC decided that the decline in demand was a greater cause of the (overall) serious injury than were imports. A concept of injury as "separable" would have enabled the Commission to treat as a separate matter the injury caused by the cyclical downturn, and as another matter the injury caused by imports: was that injury by itself "serious"?

Criticism of the Commission's findings in Certain Motor Vehicles (and perhaps (most importantly) the fact that the administration reacted by negotiating a "voluntary" limit by Japan on exports to the U.S. apparently had some impact on ITC thinking. Precise comparisons in escape clause cases are not often possible, because each case is unique. However, in the case involving Heavy-duty Motorcycles (usually referred to as Harley Davidson)[24] and in the Speciality Steel case[25] the ITC found threat of injury caused by imports, despite the decline of the industry's position due to reduced demand. The Chairman (Mr. Eckes) in the Harley Davidson case said: "There is no basis in concluding that the current recession is the principal cause of injury. Industry under import assault or threatened by such an assault should not be denied relief simply because the assult happens to coincide with an economic slowdown". This is, in a practical sense, repealing the position of the ITC in the Motor Vehicles case.[26]

It should be clear from this exposition that the "separable" concept of injury, if applied with a rigorous causality test, such as it could seem is called for by the GATT articles, might lead, in some cases, to positive injury determinations where, under an "overall" concept, there might be negative determinations. As for anti-dumping and countervail, if current U.S. law is read as being addressed to "overall" injury, and with its current causality language, then there are bound to be positive determinations which will be inconsistent with a "separable" reading of Article VI and the two Tokyo Round agreements.

This exposition leaves aside what in competition policy is considered more important than injury to producers — that is, injury to competition. We have already noted that many commentators, including many who argue that U.S. trade law involves an "overall" concept of injury, believe that the anti-dumping provisions should not focus on what is clearly only a "diversion of business" test.

CHAPTER IV

THE ISSUE OF "STANDARDS"

One of the recurrent themes in the literature which addresses the issue of the differences between, or conflict between competition legislation and trade policy legislation is that different "standards" are applied in regard to price discrimination in domestic commerce and to price discrimination in international transactions.

The purpose of this chapter is to examine this issue; our comment should be read in the light of what we have said, in Chapter III, about "injury" and "causality" in the contingency protection system.

Two Systems

A review of competition legislation related to price discrimination and a parallel review of trade policy legislation on price discrimination (that is, the Antidumping Code and various national legislative schemes) suggests that to talk of a difference in "standards" is perhaps misleading. What is at issue is the difference between two systems which have evolved separately. Some of the differences arise from the fact that one system deals with economic agents within the domestic jurisdiction, and with evidence existing within that jurisdiction, while the other deals with the impact of actions by a group of economic agents some of whom (the exporters) are outside the territorial jurisdiction, and with regard to the actions of which the evidence is wholly or partly outside the jurisdiction.

It is largely for this reason, it appears, that the anti-dumping system has developed as an administrative remedy, not as a criminal law matter. With the relative desuetude of the 1916 Anti-dumping Act in the U.S. (which provided for fines, imprisonment, and suits for treble damages) anti-dumping systems have developed as administrative remedies.[1] One reason for this development was the difficulty of establishing intent: it become obvious that, as a practical matter, intent would have to be inferred from objective tests, and that those tests would become, in effect, per se offences. But, being a criminal statute, the strictest construction was required. Thus anti-dumping systems developed, not on the U.S. 1916 model, but on the Canadian 1904 model of an administrative remedy, a special duty which could be imposed within a system of regulations which left a good deal of scope to administering officials.

The difference between a criminal law approach (the Robinson-Patman Act and the Canadian Combines Investigation Act) and an administrative remedy approach involves two quite different philosophies of intervention. In the criminal law approach, the purpose of the law is largely prevention or

deterrence. In the administrative remedy approach, the objective is to shield the domestic producer from the impact of discrimination by bringing about a price adjustment (either by an undertaking to raise prices, or by the levying of a duty which can be avoided by the exporter by raising the export price or decreasing the home market price).

If anti-dumping procedures were applied to domestic price discrimination would there be more cases successfully prosecuted? Conversely, if we adopted competition law provisions (that is, a criminal law technique, in the anti-dumping system (that is, if anti-dumping law were to be modelled on the U.S. 1916 law) might we not have a more restrictive trade policy system? Much would depend on what defences were acceptable against a charge of injurious dumping.

One result of the fact the anti-dumping system is a system of administered remedies is that there is no penalty imposed on the person receiving the immediate benefit of discrimination — that is, the importer of the dumped goods — except that he must pay any provisional duty (and assuming that, if there is a positive anti-dumping determination the exporter either gives an undertaking or otherwise eliminates the dumping margin). There is no sense, however, in which the importer of dumped goods is guilty of any offence, nor is there any right to civil action against him by the injured domestic producer. From the point of view of the economic agents, the anti-dumping law may seem less punitive than the domestic price discrimination provision, but less easy to defend against, once an action is commenced.

Much of this difference in structure derives from the fact the principal discriminating agent (the exporter) is some measure outside the jurisdiction of the national authorities; the only effective remedial course is to apply some measure within the jurisdiction or competence of the importing country (a duty on imports, a limitation on imports, or an exclusion order). This is not to say that if the anti-dumping law were to revert to the criminal law model it would be impossible to devise sanctions which would threaten to reach individuals outside the territorial jurisdiction; such a system of sanctions could be intellectually justified by an application of the "effects" doctrine. Such as approach is followed by the U.S. in the application of the export control provisions, in that sanctions are imposed on individuals outside the U.S. who are alleged to have committed such offenses as breaches of re-export undertakings.

Injury to Whom? To What?

Another, a much commented on difference, is in regard to injury. There are two questions here: Injury to whom? and Injury to what? The anti-dumping systems are, on their face, directed at protection of the domestic competitors of the discriminating foreign seller, that is, "primary-line" injury, in U.S. competition law. That being the case, it is likely that a mere "diversion-of-business" test will be all that is required to satisfy the injury requirement under the anti-dumping law; it is a matter of argument as to what extent this is different from the test of primary line injury cases under U.S. competition legislation. It is difficult to make a comparison in Canada, because of the relative lack of examples of successful price discrimination cases.[2] A number of writers have examined the issue in the U.S., particularly after the Supreme

Court decision of 1967 (the Utah Pie case) to the effect that in primary line cases "predatory behaviour was not a prerequisite for a finding of primary line injury. . .the test applied was of injury to competitors rather than competition. . .".[3] Subsequent to this case the White House Task Force on Antitrust Policy and the Department of Justice studied the question of what should be considered to be primary line injury. The Task Force (Neal Report) proposed two criteria: 1) whether the price at issue is less than long-run average cost and 2) this discrimination threatened to destroy a competitor "whose survival is significant to the maintainance of competition. . .".[4] The U.S. Department of Justice, which has favoured abolition of the Robinson-Patman Act, proposed a more rigorous test, one which is close to the concept that predatory pricing is pricing at less than average variable cost.[5] If this test were taken into law and practice, domestic price discrimination law would be even more differentiated from anti-dumping law, which, in constructed cost cases, looks to full average cost.

With regard to the EEC system it is difficult to make a comparison with Canada or the U.S.; the EEC administers the anti-dumping system (Member States no longer have national systems) but in the competition policy area the Commission deals only with matters which could affect the trade between member states. In the EEC, competition policy under Articles 85 and 86 of the Rome Treaty is essentially an instrument to create a free market within the community. For issues arising and affecting only commerce within a member state, member state provisions apply. Thus EEC competition policy has dealt with some important situations in which there was an unacceptable difference in the price of a product in one state and another. Some of these have been situations in which the producers in one member state have maintained a higher price in their domestic market, not sold more cheaply abroad — i.e. in other member states. In these cases the Commission approach is to try to ensure that there is no impediment to parallel re-imports into the producing country. A case in point is the order by the European Court, at the request of the Commission, that Italy should ensure that Italian cars sold at lower prices outside Italy, if re-imported into Italy by non-recognized dealers, should not be subject to more severe registration requirements.[6] This is, in a sense, an intra-community anti-dumping law, but applied to ensure lower prices in Italy rather than to protect producers elsewhere. Another type of situation is where a multinational firm tries to prevent one of its subsidiaries in one member state from selling goods in that state which are destined for export to another member state. A case in point is the decision by the European Court of Justice that Ford of Germany must be prepared to sell right hand drive vehicles (obviously, for export to the U.K.) in the German market, although Ford of Germany made such vehicles for export to Ford of U.K. Again, this is relying on parallel imports to deal with a problem of price discrimination as between two national markets in the EEC.[7]

Another type of case is that involving abuse of a dominant position by a producer in one member state directed against a producer in another member state. A case in point is the decision by the Commission to impose a substantial fine on the Dutch firm Akzo Chemic against a small British firm. Akzo is said to have given the British firm one week to get out of the plastics market or Akzo would drive the U.K. firm out of its established position in the market for flour additives. The technique involved would be price discrimination, including sales below costs. Here the Commission used competition policy to prevent injury to competition; in this case the Commission has, as it were, taken an intra-

community anti-dumping action, designed to protect the injured firm.[8] Another type of case involves restrictive practices of foreign exporters to the community and their distributors in the community; a case in point is the commission action against a Japanese electronic company and its distributors in Britain and Germany who agreed not to re-export to France, thus raising French prices.[9] Another type of case involves a foreign exporter and a European competitor agreeing on an exclusive dealing arrangement which raises prices; a case in point is the Commission action against the Japanese machine tool company, Fanuc, and the German firm Siemens, who had agreed to give each other exclusive dealing rights. This raised prices of numerical controlled and computerized machine tools by limiting competition in Europe between the two firms. This was a case of what could be called "reverse dumping", that is extracting a higher price in export markets than in the home market (Japan).[10] In 1980 Dale, surveying the EEC record in regard to intra-community trade, observed that ". . . the apparent tendency to associate non-cost justified discrimination with unfairness suggests that, in relation to dominant firms, Article 86 may provide the basis for an intra-community anti-dumping law . . .".[11]

If we look at European national legislation, there are considerable differences in approach. The U.K., for example, has no legislation analogous to the Robinson-Patman Act nor to the price discrimination provisions of the Canadian Combines Investigation Act. What is at issue in the U.K. system is whether a particular restrictive practice found to exist is considered to be against the public interest. Just as in the United States, where small retailers, particularly in the grocery trade, were one of the main groups pressing for legislation on price discrimination, resulting in the Robinson-Patman Act, in the U.K. it is the small independent retailers who have been most concerned with price discrimination. They have complained of the discriminatory pricing practices said to be forced on manufacturers by the large chain stores. This issue was examined in detail by the U.K. Monopolies and Mergers Commission in 1981. The Commission concluded that ". . . neither the reference practice nor any particular form it may take, generally or invariably operates against the public interest, we do not think that an overall measure of prohibition or regulation is necessary or desirable."[12] The report went on to point out that under the various components of the legislative scheme (the Fair Trading Act of 1973, the Restrictive Trade Practice Act of 1976, the Competition Act of 1980) there was scope for the laying of complaints about specific pricing practices and that the Office of Fair Trading was staffed to inquire into such complaints. This is clearly a radically different system of inquiry than the EEC anti-dumping system (which has replaced the U.K. national system). If the anti-dumping system were adapted to this model, with its emphasis on the public interest, which provides scope for the exercise of considerable discretion, the present internationally sanctioned system would have to be completely revised.

The French legislation addressed to discriminatory pricing in domestic commerce (which is now being revised) starts from the implicit assumption that such discrimination is harmful to competition, particularly harmful to small businesses, and therefore treats such discrimination as is not cost-justified as prohibited. A recent case involved subsidiaries of two major steel companies, who competed with independent steel producers by selling below cost.[13] The French legislation does not appear to require a formal inquiry into injury, but as a practical matter La Commission de la concurrence, which reports to the Minister of Finance, is not likely to recommend action unless the price discrimination has had a substantive impact on competitors.

In summary, it could be fair to conclude that the wide variety of types of competition legislation make it difficult to make a simple comparison, on this point, between the anti-dumping system, which is relatively standardized, and competition policy in practice. It is accurate to say that the anti-dumping system, broadly speaking, protects competitors (so-called "primary-line injury" under the U.S. Robinson-Patman Act) and that explicit concern for the impact on competition has virtually ceased to be a factor; however, it is not clear that all competition policy is rigorously directed at the protection of competition, rather than the mere shielding of competitors from the impact of discrimination. Indeed, much of the criticism of the U.S. legislative scheme is on this account.

What is absent from the anti-dumping system is the notion of "second line", "third line" or "fourth line" injury — that is, injury to customers of first line buyers, injury to customers of customers, and customers of customers of customers.[14] This U.S. formulation is intended to make feasible, in a precise manner, the inquiry into the impact on competition. Most observers have considered this to be a major difference between the U.S. anti-trust system and the U.S. anti-dumping system; indeed this is very much the main point of the critical attack on the U.S. anti-dumping system. As our short comments on other systems above suggest, it is more difficult to make this sort of precise comparison in regard to the other less-articulated, and less-used systems. Be that as it may, these differences in standards will have to be addressed in even the most moderate attempt to make the two types of legislation less contradictory.

Cause of Injury

If one turns from "injury" to "casuality", it is also difficult to make a precise comparison. One reason is that, as we have noted above, there is more than one concept of casuality in trade policy legislation, in the context of whether injury is thought to be "separate" or "overall".

Given the rareness of Canadian prices discrimination cases, and the range of different procedural approaches to assessing the impact on competition in European competition law systems, as a practical matter, the only illuminating comparison to be made is with U.S. competition law. Here there are some parallels in the anti-dumping provisions and the "escape clause". For example, if a complainant makes a prima facie case of price discrimination, the discriminating supplier may be able to rebut by arguing that the adverse effect on its competitors is due to factors other than the price discrimination.[15] This is much the same as the approach in the Tokyo Round Codes on Anti-dumping and Countervail; it is an approach which is, in this writer's view, consistent with GATT Article VI and Article XIX.[16]

An interesting feature of the U.S. anti-trust system, from the point of view of trade policy, is the concept of aid from other markets. This was spelled out in the Humble Oil & Refining Co. case.[17]

> Injury (in primary - line injury cases) is not an effect of discimination directly. Rather it is the result of a low price which a discimination in price allowed the defendant to charge. High prices provide for the predatory defendant the profit margins with which to lower other

prices and under cut competitors. The existence of a differences is essential to the injury. The injury is an effect of the discrimination.

This is obviously very much the philosophy of the anti-dumping system; in the anti-dumping system it is assumed the high home market price makes possible the lower export price, and it therefore follows that the alleged dumping can be terminated, and anti-dumping duties avoided by reducing home market prices (as Canadian firms dumping in the United States, their principal market, may choose to do). The logic of the anti-dumping system, as originally expounded by Viner, is very much in accord with the concept that it is the high prices charged in the home market which make possible the dumping in the export market, that the high domestic prices are made possible by high tariffs or other restrictive measures, or by the exercise of market power.

Extent of Discrimination

Another area where "standards" as between anti-dumping and anti-trust appear to differ is in the calculation of the margin of discrimination or margin of dumping. There are two important components here: rules regarding quantities, and rules regarding selling below cost. In anti-dumping systems, there are usually rules (highly detailed ones in the U.S. and Canadian systems) for determining when a discount for quantity is, or is not, a disguised price discrimination. The Canadian rules contain two elements: first, the discount is determined by reference to the largest quantity sold in the home market: "if the quantity sold to the importer is larger than the largest quantity sold for home consumption, (those sales that) are in the largest quantity sold for home consumption", and second: the "normal value" found by reference to such sales may be reduced if the administering officials are "satisfied that a quantity discount is warranted on the basis of savings specifically attributable to the quantities of the goods involved."[18] This is, in U.S. anti-trust terms, accepting a quantity discount if it is cost-justified, and takes into account the fact the sales for export may well be in larger quantities than any domestic sales. (A similar reverse test is applied, in the Canadian system, when the quantity of sold for export is less than the smallest quantity sold in the home market.)

In the Canadian domestic price discrimination provision, the test is whether the discounts are made available "to all competing purchases who buy the same quantity or volume",[19] and need not be cost-justified.

In the EEC anti-dumping system, the issue of quantities being sold for export being greater than the largest quantity sold in the domestic market is dealt with in a fashion analogues to the Canadian system. The exporter can get a larger quantity discount accepted if he can show "that the difference is due to savings directly attributable to savings in the cost of producing the larger quantities".[20]

In the U.S. anti-dumping system the regulation on quantities is carefully drawn; in the event that the discount for quantity is for a quantity greater than that sold in the home market (which means in regard to sales equal to at least 20 per cent of sales in the domestic market, and for a period of six months prior to the date of the dumping complaint) then the exporter must "demonstrate that

the discounts are warranted on the basis of savings which are specifically attributables to the production and delivery of the different quantities involved".[21] In fact, allowances for discounts for quantities greater than quantities sold in the home market are rarely granted.

In the U.S. system for domestic price discrimination, a broadly similar rule of cost justification applies. But Kintner observes: "Quantity discount schedules must be developed with care if they are to be protected by the cost justification defence".[22]

Broadly speaking, we can conclude that with regard to quantities, there is, in a formal sense, little significant difference in standards between the two types of legislation; in both systems, cost-justification is the test, and in both systems it is difficult to establish that the cost-justification exists.

Sales Below "Cost"

Turning now to the component in the system which is perhaps the most controversial: that is, the question of sales-below-cost. This is, of course, the issue of what prices should be held to be predatory, an issue examined again and again in the literature about domestic price discrimination.

In the United States, the provisions in the anti-dumping system about prices at less than cost are set out in great detail; it is not necessary here to discuss the evolution of these provisions in detail, but to describe them as they now are, after the conclusion of the Tokyo Round (including the revisions of the Anti-dumping Code) and the passage of the 1974 Trade Act and the 1979 Trade Agreements Act.

To begin with the Code provisions:[23] Article 2, para 1 provides that

> (a) For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Here, the key phrase for our purposes is "in the ordinary course of trade". The U.S. view, reflected in the provisions, is that sales at less than full cost for a prolonged period are not "in the ordinary course of trade".

Para 4 of Article 2 of the Code provides that

> (d) When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount of

> administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

The U.S. legislation deals with the situation of when an exporter's price for sales in his domestic market is less than his cost of production "over an extended period of time and in substantial quantities". Section 773(b) of the Tariff Act provides that

> Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate. to countries other than the United States. have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administrative authority determines that sales made at less than cost of production (1) have been made over an extended period of time and in substantial quantities, and (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade, such sales shall be disregarded in the determination of foreign market value. Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than the cost of production, are determined to be inadequate as a basis for the determination of foreign market value under subsection (a), the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

"Constructed value" is then defined, in Section 773(e) of the Tariff Act.

> . . . the constructed value of imported merchandise shall be the sum of (A) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the oridnary course of business; (B) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, except that (i) the amount for general expenses shall not be less than 10 per cent of the cost as defined in subparagraph (A), and (ii) the amount for profit shall not be less than 8 per cent of the sum of such general expenses and cost; and (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

Three features stand out: (1) what is at issue is full average cost, not variable costs, (2) general expenses are to be calculated at not less than 10 per cent or the cost of materials and fabrication, and (3) there is a minimum for the amount to be added for profits.

The working out of this set of criteria varies from industry to industry. For one of the most important for which the anti-dumping system (and the countervailing duty system has been invoked — steel, Prof. Kawahito has analyzed the impact, and his analysis should be quoted at length:

> The price level of steel products, like that of other products, often falls below short-run full cost during recessions when the reduced use of capacity pushes up the average cost of steel making through increased fixed charges per ton of output, and price hikes to counter the cost increases are very difficult to make. A recession may take more than a few years, as during the period following the 1973-4 oil crisis. If "extended period of time" is interpreted as one year or less and "cost" as full accounting cost, many foreign producers in such recessionary periods would be judged to be dumping in the U.S. market, even if their export price exceeds home-market price. Thus, foreign producers who wish to continue exporting to the United States may be forced to raise both their home-market and export prices in periods of slack demand.
>
> Such "counter-cyclical" pricing is not sanctioned by any school of macroeconomics. . . . steel firms in the United States often engage in price discounting during periods of slack demand. It is irrational for the United States to expect foreign producers to adopt a pricing policy which is neither approved by economic theories nor practiced by American business firms.

And later:

> The requirement of an 8 per cent profit in the calculation of constructed value, which originated in the Anti-dumping Act of 1921, fails to recognize contemporary international differences in the corporate financial structure. In Japan as well as a few European countries, the debt-equity ratio of major steel firms is as high as 80:20. If interest charges are included in the "cost", an 8 per cent markup over cost in such instances could lead to a return on equity of 50 per cent or more, depending on other related variables. . .
>
> Thus, although an 8 per cent markup may represent a measure of fair profit in the United States, it would amount to exorbitant profits in some of major steel-producing nations. . . . by the standards of the U.S. steel industry, an 8 per cent return on sales in recessionary periods is rare; in the case of 1977, the return from steel operations was negative for major American steel firms.

He points out the implications for buyers in the United States:

> The unique cost criterion of the United States discriminates against American steel-using industries, such as automobile, appliance, and

machinery. If literally interpreted, the requirement of an 8 per cent profit margin in the calculation of constructed value means that to avoid penalties of dumping foreign producers must charge at least 9 per cent higher fob prices to American customers than to domestic buyers when their domestic prices are one per cent below cost; if a foreign producer's cost of a steel product if $400 per ton and his home price $396, U.S. buyers must pay at least $432. or $36 more than foreign buyers, exclusive of freight and other export charges. Thus, steel-using industries will be handicapped in their international competition.[24]

Aside from the question of whether the system described is in conformity with the GATT, or the Code, one may note that it is in considerable contrast with the U.S. provisions regarding price discrimination in the domestic market: here the debate has been as to whether the prices which should be regarded as predatory (or actionable) should be those prices which are below full average cost, below long-term marginal cost, or below short-term marginal cost.[25] To argue in these terms — that is, to argue about predation by relating prices to costs — is to assume that to relate predation to intent is not feasible. The courts have given some support to the proposition that sales below short-term marginal costs are clearly predatory.

In Canada, the Combines Investigation Act provides that it is a criminal offence to engage "in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect".[26] The first conviction under this provision was obtained in the action against Hoffman LaRoche Ltd.; in this case the issue did not arise as to whether the prices charged were below what level of costs, because the company gave the product free.[27] The Canadian legislation, as was made clear in this case, is directed at a policy of predation: "the Crown must prove . . . that the accused was engaged in a policy of selling articles at unreasonably low prices. The selling, therefore, must be as a result of a conscious decision to do so by responsible company employers and something more than the adoption of a temporary expedient to meet an aggressive move by a competitor".

It should be noted that in Canadian discussion, a difference is perceived between price differentiation and price discrimination and predation; these issues were examined in some detail in a variety of reports (notably by the Economic Council of Canada) and are addressed at several points in the governmental proposals for reform.[28] For our purpose it is interesting to note that it is suggested there be authority to prohibit prices "below reasonably anticipated long-run average costs of production and distribution". It was also suggested that in the predatory pricing provision the word "unreasonably" should be replaced with "abnormally". What would be the impact of such a change is not clear.

If we turn to the anti-dumping system, the Canadian system follows the U.S. system fairly closely except that (a) the time period at issue, in regard to the period during which sales, for purpose of comparison in the home market, must be made, is sixty days — rather than the six months required in the U.S. provisions, and (b) there are no minimum prescribed for administative and other costs, nor for profits.[29] These provisions are frequently invoked in relation to

capital goods, because for such goods there are often no domestic sales with which to make a comparison. Not surprisingly, manufacturers of such goods are not always willing to provide all their pricing data to Canadian officials, and accordingly, in so-called "cost of production" cases recourse may be had to the setting of arbitrary figures for normal values. This is intended, in part, as a technique to force firms to provide data, but the tactic has not always been successful. The same problem arises in the United States system, of course; Kawahito discusses the implications in his review of steel dumping cases:

> Application of the cost criterion may result in erroneous rulings by the investigating agency, because determination of foreign producers' cost is far more difficult than determination of their home market price. . .
>
> the "best information available" may turn out to be the information provided by the petitioner and other domestic industry sources when the investigating agency is not aware of the existence of better data which are publicly available. It may be recalled that, for the October 1977 preliminary ruling on the Gilmore case involving Japanese carbon steel plates, the Treasury Department relied on estimates supplied by the petitioner (the cost ratio between carbon steel plates and all steel products) and Japanese financial reports translated by the U.S. Steel Corporation.

It should be clear from these comments that, in Canada and the U.S., the anti-dumping system, like the price discrimination system, has developed in roughly, but only roughly, similar fashion. In both systems, discrimination in pricing is at issue; in both systems, selling below a defined level of costs is at issue. But the difference, the key difference, is in deciding on the level of costs at issue. One should consider therefore, whether the existing difference in the two systems is reasonable, given that one system is directed at domestic sales, at sales within the national territory, where the effect of the discrimination on the buyer who pays the higher price from the same seller, as well as the impact on other sellers, must be taken into account, and the other system is directed import sales, and where the impact on the buyer discriminated against is not at issue.

Injury to "Industry"

An assessment of the relevance of this key difference in the standards between the two systems must depend, in part, on another key element: that is, what is the entity or party on which the impact of discrimination falls. What we are referring to is not the question of "first-line", or "second-line" injury but an issue which has received less attention: that is, the concept in the anti-dumping system that it is the industry[30] (or rather, a major part of it) which must show injury (except for the special provisions for regional markets) but in domestic price discrimination cases it is any firm that can show that another firm is discriminating against it. We need not go into the problems which arise in any domestic price discrimination case of determining what is the market being served, which firms are competing in that market: these are all rather obvious questions which flow from the fact that any individual retail merchant can launch a proceeding under the Robinson-Patman Act or the Canadian Combines

Investigation Act. However, under the Anti-dumping Code, under U.S. and Canadian law, dumping is considered as actionable only at the industry level. Industry was defined, during the Kennedy Round negotiation. fairly carefully: the outcome was described by one participant in the negotiations in the following terms:

> "Article 4 is concerned with the definition of "industry" . . .
>
> First, there is the question of what share or proportion of the producers (of the "like" products) shall be considered to be an industry. Paragraph (a) states that it shall be those "whose collective output . . . constitutes a major proportion of the total". The modifying word "major" was one of the matters settled towards the end of the Geneva negotiations. Some delegations (e.g., Britain) would have preferred a stronger word; others (e.g.. Canada) would have preferred a weaker one, because their representatives thought such a weaker word might enable anti-dumping action to be taken in circumstances that perhaps exist only in their countries.
>
> Let us suppose, for example, that three-quarters of the production in Canada of, say, men's shoes is from three large U.S.-controlled firms selling established brands of shoes heavily advertised by their parent firms in U.S. consumer magazines circulating in Canada. Suppose the other quarter of total production of men's shoes — assumed for the purposes of this discussion to be identical in quality, style, and range of sizes — is made by, say, fifteen small Canadian-controlled firms producing unbranded or private-brand merchandise. Suppose, then, that there is dumping of unbranded men's shoes. It might well be that the larger firms selling branded, internationally advertised lines would be virtually unaffected and that the whole weight of the dumping would fall on the smaller Canadian-controlled firms.
>
> The possibility of this sort of situation developing led the Canadians to oppose the use of any modifying phrase that would have required that injury had to be looked at in terms of. say. more than half the industry in volume of production.
>
> The reaction of U.S. officials to this sort of argument was to assert that what would be at issue in such a case would be two products — branded, advertised shoes are not "like" shoes that are physically identical but not branded or advertised.
>
> . . . the conclusion of the discussion in Geneva about "major proportion" was that this appears to mean a substantial proportion and, in practice, but not invariably or necessarily, more than half the production of the goods in question."[31]

In all anti-dumping cases (except regional market cases)[32] one of the questions which has to be considered is: what is the extent, in geographical terms, of the dumping alleged to be taking place; and then, what is the impact on the industry (defined as explained above).

This is clearly, a major difference in the "standards" of the two systems of legislation. To understand its significance, we should ask, would any of the roster of U.S. price discrimination cases, under the Robinson Patman Act, be actionable under a system modelled on the anti-dumping system? The answer is clearly very few, if any. Conversely, what sort of anti-dumping system would we have if it was actionable at the firm rather than at the industry level? In practical terms, it may well be that when importers enter a market it is usually on a sufficient scale to have an impact on a significant number of the domestic producers; however, there are likely to be situations in which the imports are fairly localized — say, the California market or the Canadian west coast market or the UK market. Under an anti-dumping law modelled on the domestic price discrimination provisions, these might be actionable; under the present anti-dumping system they are actionable only if it can be established that there is a segmented, regionally separate market which is not to any significant extent supplied by other domestic producers; this is the effect of the Code provision on regional markets. We should be skeptical of loose talk of "harmonization" of the anti-dumping system and the domestic price discrimination provisions if "harmonization" were harmonized on the competition law model, on this point. Of course, the obvious policy conclusion is that both systems of law should focus on the issue of injury to competition.

Remedies

A final heading under the issue of "standards" is "remedies". In considering two systems of legislation it is relevant to consider what penalties or remedies are involved — because the penalty or remedy affects the whole character of the system. Here there are radical differences. Under the domestic price discrimination provisions, speaking broadly, there can be imprisonment or fines for a criminal offense, damages (treble-damages in the U.S.) under the civil provisions. Under the anti-dumping law, the importer may have to pay the provisional duty, but once a determination is made (i.e. an injury determination) he can adjust to the situation by having the exporter adjust home market prices, or raise his export price, or both — or, if he has decided to settle the case before the injury determination, giving an undertaking as regards the price of the imports at issue. Frequently, what may be required is merely a careful re-consideration of pricing and invoicing patterns and policies so as to minimize the apparent margin of dumping. This facility to adjust to a positive injury determination appears to be somewhat more feasible in the U.S. and Canadian systems, because of the fact that dumping in these two systems is calculated on a transaction basis; the importer/exporter can therefore adjust his pricing (and invoicing) transaction by transaction. In the EEC system, it is more likely that if the exporter has not accepted to give an "undertaking" — the more usual course — then there is likely to be an anti-dumping duty collected which the importer can reclaim (on the basis of showing that for particular transactions the dumping margin has been eliminated) only by following a complicated and time consuming procedure of application through the national (i.e. member state) customs regime. There is thus a penalty in terms of funds tied up in duty paid, and in terms of interest foregone.

But the injured domestic producer has no right, in the anti-dumping system, to sue for damages, nor are dumpers liable for imprisonment or fines.[33]

Undertakings

Increasingly, one suspects, anti-dumping cases are being dealt with by the exporters offering "undertakings" — that is, agreeing either not to export, or not to dump; most frequently, these undertakings involve a price commitment, that is, a commitment by the exporters concerned not to sell below a price which the administration concludes is a non-dumped price.[34] In the U.S. and Canadian systems, and no doubt in the EEC systems, the complaining domestic producers will have been consulted, and their consent, tacit or explicit, to the agreement, may be sought. Here we have a complete negation of competition policy "standards".

If a domestic producer, or group of producers, were to conspire with exporters to set exporters' prices, or if exporters were to agree among themselves to set minimum prices, there would clearly involve offenses under most competition law schemes (not withstanding the fact that under the Webb-Pomerene Act in the U.S., and possibly in practice in other jurisdictions, such agreements may not necessarily attract sanctions in the exporting country concerned). The concept of undertakings (in the GATT codes, in the U.S. and Canadian legislation, in EEC practice) for anti-dumping (and countervail cases) is parallel to the use of "export restraints" as surrogates for Article XIX safeguards action. But, through the intermediary of the bureaucracy, these competition limiting arrangements can be negotiated at the instance of private parties. Leaving aside the question of the impact of such arrangements on competition in the exporting country, it would appear that the system involves (as does Article XIX "surrogates") rewarding the producers which agrees to limit competition by letting them collect the rent of restriction.

An alternative approach would be to not permit anti-dumping cases/and subsidization/countervail cases) to be terminated by "undertakings" but to insist on the levying of a duty for a reasonable length of time after dumping (or subsidization) has been found to be occuring; this might seem to be highly protectionist, but clearly it is no more so than is the present practice of accepting "undertakings" to raise prices; it would merely re-allocate the rent of restriction and preclude rewarding dumpers by allowing them to conspire to collect a higher price. Such an approach (which was, in fact, the approach of the Canadian Anti-dumping Law of 1968, which made no provision for "undertakings") would be justified by a more rigorous inquiry as to the economic position of the dumper. This is the logic of the Epstein article, cited above, and of other commentators who have pointed to the failure of the trade policy system, since the collapse of the Havana Charter, to seriously address the issue of the impact of restrictive business practices on international trade.

When we consider the use of "undertakings" in the contingency protection system, we see the most dramatic conflict with competition poicy; there is not merely a difference of "standards", but rather of trade policy explicitly encouraging anti-competitive action to offset, one assumes, what is frequently the abuse of market power by foreign producers.

Analogues

In summary, we can see that there are two different systems of law of which have evolved rather separately. The two systems are only very rough analogues, one of another, and it is only in a broad sense that one can speak of anti-dumping law being a counterpart of domestic legislation on price discrimination. When we look at the constitutent elements, that is, when we compare the "standards" of the two systems, we have to ask the questions which Gary Horlick, at one time Deputy Assistant Secretary in the U.S. Department of Commerce, formulated after considering the development of the steel dispute between the U.S. and the EEC. Writing in 1983, Horlick put the issues as follows:

> The American anti-dumping law dates back to 1921 when the international trading system was much less open and integrated than it is today. Does it still make sense to apply very different rules to international as opposed to domestic price discrimination? If so, why? What difference, in economic and administrative terms, does the interposition of a border make to one's view of price discrimination? I suggest that some fundamental changes in anti-dumping law may be needed to take into full account the increased integration of the world economy.[35]

We shall revert to these issues in our final chapter, which is addressed to the issue of reform.

CHAPTER V

THE "SAFEGUARDS" ISSUE AND "CARTELIZATION"

One of the most contested, most debated issues in trade policy before, during and after the Tokyo Round has been possible reform of the "safeguards" system, of the provisions of Article XIX of the GATT. The title of that Article is "Emergency Action on Imports of Particular Products" and it was intended to correspond, broadly, with the "escape clause" of U.S. trade legislation.

Background to the Safeguards System

In the "system of treaties" linked by unconditioned most-favoured-nation clauses, prior to the multilateralization of these trade agreements by the GATT, prior to the multilateralization in the GATT of tariff-level undertakings, there was no practical necessity for an "escape clause". In the "system of treaties", obligations with regard to particular tariff rates were essentially bilateral; one country might undertake to another to reduce its tariff rates on imports of specified products from the other country; the obligation to extend those rates to imports of the same products from a third country was embodied in clauses conveying the right to unconditional most-favoured-nation treatment in regard to tariffs. But if it was proposed to raise the rate specified, it was necessary only to negotiate with the country to whom the original concession had been made. Third countries had no rights to the specified rate, other than their unconditional most-favoured-nation rights. But the GATT involved the multilateralization of tariff obligations, as the provisions in Article XXVIII for the re-negotiation of tariff rates makes clear. Hence it was necessary in developing the GATT as a multilateral, standardized treaty to provide for some right to raise rates of duty in the short term, when imports provided intolerable competition for local producers. As a practical matter, too, the GATT was drafted to take into account the existing fabric of trade treaties; the U.S. had an "escape clause" in its existing trade agreement with Mexico, and this served as a basis for a generalized escape clause in the Havana Charter (Article 40) and then in the General Agreement (based on Chapter IV of the Havana Charter).[1]

The rationale of the "escape clause", as understood in the early years of the GATT, was that it was a provision which would enable a signatory to raise a rate of duty temporarily, a rate which had been reduced in a negotiation, if new circumstances developed, or if the negotiators had not foreseen what might happen, and that such a provision would enable governments to more easily agree to reduce tariffs. An "escape clause", it was thought, would provide a necessary element of assurance and flexibility. Harry Hawkins, a U.S. trade negotiator, described the logic of Article XIX: ". . . the clause must allow the country to take remedial action unilaterally, without having to secure the consent of any other country. The article gives this right. On the other hand, there is need for

some restraint against unnecessary or unnecessarily drastic action. This check is provided by the requirement for negotiation and by the fact that the right of compensatory withdrawals of concessions by other countries gives them bargaining position. It is likely that, as a result of the consultations, the action proposed will often be more drastic than that finally taken. The cost to the export interests of the country proposing to act under the clause will become clearly evident in the course of the consultations .... As the article is drawn ... the determination of compensating measures is left in the hands of the countries concerned."[2]

The early optimism of Hawkins and the other draftsmen at the London, Havana and Geneva Conferences with regard to Article XIX was misplaced. In the period from 1947 to, say, the end of the Tokyo Round, the obligations of Article XIX were ignored, and ignored on a substantial scale, and they continue to be ignored. It is not our purpose here to re-iterate the complicated and confused history of how countries signatory to the General Agreement contrived and conspired to so frequently ignore this key provision of the system, but for the purposes of our examination of the interface between trade policy and competition policy we may try to summarize a number of the main developments.

First: It is fair to say that the dramatic changes in the location of industrial production which have occurred in the last two decades (e.g. textiles, garments, steel, autos, electronic equipment) were not foreseen by the draftsmen at Havana in 1947. As a recent UNCTAD study observed: "... the draftsmen of Article XIX were primarily concerned with facilitating through the existence of an "escape clause", the negotiation of tariff reductions and the removal of quantitative import restrictions, essentially in trade between developed countries. They took for granted the existing economic structure of a centre of industrialized countries and a periphery of others supplying them with their imports of food and raw materials. They did not take into account the possibility of structural changes affecting major industries, in both world demand and world supply."[3] If the 1947 draftsmen, who were, when all is said and done, trying to facilitate the reduction of tariff barriers erected in the 1920s and 1930s, had envisaged the profound changes in the conditions of international competition which have taken place since the late 1950s (when Japan effectively re-entered world markets), they might well have drafted Article XIX in a more detailed more comprehensive fashion; clearly they would have had to address the issue of structural adjustment.

Second: Many producers are unwilling to face the possibility of compensatory withdrawal of concessions as the price to be paid for restricting imports which compete with their products; these producers have used their political leverage to escape from this obligation of Article XIX. The most obvious example is the U.S. textile and garment industries; these two groups of producers persuaded the Administration (of President Kennedy) to work for an internationally-approved regime of bilateral restraints (primarily VER's) as the price for these industries accepting the dramatic tariff cutting proposals of the President's Trade Expansion Act, of 1962.[4] Thus, in a sense, the price of the Kennedy Round tariff reductions was the Cotton Textile Arrangement (the predecessor of the MFA) which constituted a sort of sanction or cover for bilaterally negotiated restraints on cotton textiles and cotton textile products. The textile and garment industries were not prepared to submit themselves to

the discipline of the escape clause in U.S. domestic legislation, nor to the international discipline of Article XIX which might have required the U.S. to offer compensatory tariff reductions to pay for restrictions on imports from Japan and Hong Kong, which were the "low-cost" suppliers of textiles and textile products at that time. It is this sort of perverse result of well-meaning efforts at trade liberalization which Bruce Clubb tried to identify in the speech cited above.[5]

Third: Two countries which took the lead in encouraging, even sponsoring, Japanese accession to the GATT, that is, the United States and Canada, opted to accord Japan full GATT treatment (after the conclusion of the tariff negotiations for Japanese accession in 1955) and, in particular, to accord to Japan the same rights of non-discrimination and compensation, with regard to emergency restrictions on imports under Article XIX, as were accorded other GATT signatories.[6] On the other hand, European countries, broadly speaking, and a number of developing countries as well, were not prepared to accept Japan as a trading partner with the same rights as other countries which had bilateral most-favoured-nation rights or GATT rights. They were not prepared to accept Japan as a trading partner on the same basis as others, essentially for two reasons: first, they assumed that Japanese competition would be of the kind sometimes encountered before World War II — massive supplies of very low-priced immitations of western manufactures, which might be highly disruptive in domestic markets. Many countries had had problems of such competition with Japan in the 1930s (e.g. Canada, in the period 1930-35). Second, there was some doubt that the Japanese would give practical effect to their commercial treaty obligations, in terms of increased imports of manufactured goods.

Thus when Japan negotiated for entry into the GATT system (1953-55) a number of countries invoked the GATT provisions (Article XXXV) which authorize individual GATT signatories to deny GATT rights, on a bilateral basis, to a new GATT signatory. Those countries wished to retain the right to discriminate against Japan in any situation in which imports from Japan caused problems in their markets.[7] Within a very few years, this caution appeared to be justified by the appearance of what were held to be "disruptive" imports of cotton textiles from Japan. European countries concentrated, not on securing reductions in Japanese import barriers, but in keeping intact their discriminatory quotas on imports from Japan, and securing their rights to maintain such quotas. They then "sold off" their disinvocation of GATT Article XXXV by negotiating bilateral agreements under which they retained the right to discriminate against imports from Japan, despite the unconditional m.f.n. provisions of GATT Article I. These rights to discriminate against Japan, for the most part, continue to exist, and are obviously an element in negotiations about imports of particular products from Japan which the European countries concerned wish to have restrained or restricted.[8]

However, the difference between the European approach to trade with Japan, and the U.S./Canadian approach, should not be exaggerated. The Europeans retained, formally, and in practice, the right to discriminate against Japan; the U.S. and Canada abandoned the formal right to discriminate but they quickly (by 1959) turned to the development of the system of "voluntary export restrictions" by Japan, initially for cotton textiles, but, in the case of Canada, for other products as well.[9]

In summary, these appear to be the three principal reasons why Article XIX has been ignored: the dramatic changes in the location of industry, not foreseen by the GATT draftsmen; the unwillingness of domestic producers to pay compensation; and the pervasiveness of the view that it was entirely appropriate to discriminate against Japan.

The Safeguards System, Competition Policy and Consumer Interests

What, in summary, has been the effect of the operation of these three factors, or influences? In operational terms, the most important result has been the putting in place of a highly detailed, highly structured, system of "surrogate" measures — that is, surrogates or substitutes for Article XIX measures. This structure of surrogate measures — essentially "voluntary export agreements", "orderly marketing agreements" and "industry-to-industry understandings" — developed slowly. That countries signatory to the GATT would insist on "surrogate" measures, in many cases, rather than invoking Article XIX rights, and accepting Article XIX obligations, became evident only after the "Review Session" of the GATT in 1955, and the negotiations at that time for the accession of Japan to the GATT. Prior to that period, many GATT signatories claimed justification for various import restrictions on the basis of their balance-of-payments difficulties (as contemplated in GATT Article XII). Indeed, the Contracting Parties devoted considerable time and energy to working out a set of transitional measures under which a country no longer able to shelter its restrictions under the balance of payment provisions could nonetheless maintain restrictions temporarily, subject to certain conditions. These transitional arrangements were designed to take account of the fact that vested interests are created by a restriction on a particular category of imports, and accordingly, governments may face political difficulties, often at constituency or electoral district level, in removing such a restriction.[10] It was only as these residual restrictions had to be abandoned that Article XIX became of practical importance.

The first area of trade which was taken out of the GATT Article XIX discipline was, of course, agriculture. Countries restricting imports of agricultural products either invoked paragraph 2(c) of GATT, which permitted restrictions on imports of agricultural products necessary to the operation of domestic agricultural programs; or, as in the case of Switzerland[11], chose not to accept GATT obligations with respect to agriculture; or, as in the case of the United States,[12] secured a waiver of their GATT obligations with respect to a range of agricultural products; or merely ignored their GATT obligations when some particular problem of import competition arose. (There were, of course, some occasions when countries did invoke Article XIX in regard to imports of agricultural products.)[13] The early breakdown of the GATT system, or its non-operation or ineffectiveness, with regard to this key sector of trade must have substantially reduced the legitimacy of the GATT system in the minds of ministers, of their bureaucratic advisors, and of the producer groups demanding protection. It is tempting to argue that the decisive action was the request by the United States for a waiver of its GATT obligations not to apply import quotas on a wide range of agricultural products; the U.S. was the main advocate of the GATT system, and had used considerable diplomatic bargaining power to launch the GATT (for example, Article VII of the U.S.-U.K. lend-lease Agreement). The decision, in effect, to withdraw the U.S. import regime with respect to agriculture from the GATT rules can be seen as a decision which

robbed the GATT system of its legitimacy as a set of binding rules. To argue this proposition in detail would require a careful examination of the agricultural import regimes of other major trading countries, for example, the U.K. and France; however, it is clear that the U.S. waiver had an important "demonstration effect".

In none of these early developments were competition policy considerations or consumer interests significantly evident; what was almost invariably involved was a negotiation between a domestic interest group, usually localized and therefore politically effective, and a government. This is not to say that competition policy and consumer interests were never considered, rather, that such considerations were not overtly evident.

It is also tempting to argue that it was, in part, the "demonstration effect" of agricultural regimes which led to the regime of discriminatory import quotas and discriminatory export restraints in regard to trade in textiles and textile products. Prior to the articulation of the "textile system" in the "Short-Term Arrangement" regarding cotton textiles[14] there were in place a number of discriminatory restrictions on cotton textiles (notably, those maintained by GATT signatories which had invoked Article XXXV of the GATT vis-à-vis Japan, and those maintained "inconsistent with the provision of the GATT")[15] and there were "export restraints" applied by Japan (for example, in regard to cotton textile exports to the U.S.[16] and Canada. There were also the difficulties created by the U.S. export subsidies on cotton textiles related to the maintenance by the U.S. of a price for domestic raw cotton higher than the world price; this had caused considerable difficulties for Canada, where domestic producers of cotton textiles were encountering competition from United States exports). The "Short-Term Arrangement" inaugurated the system of "organized non-compliance" with the obligations of Article XIX.[17] As we have noted, the development of an international agreement providing a legal cover, of a sort, for the negotiation of export restraints and for import restrictions was part of the price for the launching of the Kennedy Round trade negotiations of 1963-67; as we have also noted, the producer groups in the United States had sufficient political clout to force the "freer-trade" group in the Kennedy administration to put the Arrangement in place before agreeing not to oppose the passage of the Trade Expansion Act.

We will search in vain, in the history of these developments, for any invocation of the interests of consumers or of the concerns of competition policy; the debate was essentially in terms of how much had to be conceded to producer groups. This has been a feature not only of "surrogate" actions but of actions in which government have chosen to exercise their rights under Article XIX.

At a later stage (with regard to restraints on exports of steel products), the anti-trust aspects of "surrogate" measures became a matter of debate and of legal action in the U.S. As the various court cases proceeded, the claim by the plantiffs (the Consumers' Union et al) that there had been a violation of the Sherman Act was dismissed; however, in obiter dicta the district court observed that "very serious questions can and should be raised as to the legality of the arrangements under the (Sherman) Act".[18] Subsequently, the anti-trust aspects of the complaint having been set aside, the cases were decided in regard to the issue of whether there was Presidential authority to conclude such agreements

with foreign producer groups or governments; this issue need not concern us here. However, the question of whether there could be an anti-trust violation when "voluntary" export restraints were negotiated remained; in regard to steel these were dealt with, retroactively, in Section 607 of the Trade Act of 1974, which section declared that "no person shall be liable" under "the Federal Trade Commission Act or the Anti-trust Acts" for having negotiated a "voluntary limitation on exports of steel or steel products to the United States".[19] Subsequently, this issue was reviewed by the Attorney General when the U.S. Administration contemplated seeking restraints by Japan on exports of automobiles to the U.S.[20] It appears to be the position in U.S. law that only if a foreign government imposes or makes mandatory a restraint on exports can it be assumed that there will be no violation of the U.S. anti-trust provisions (the "foreign compulsion" doctrine). But what this history of this decade in U.S. trade policy makes clear is that anti-trust policy is seen to bear on Article XIX policy only in a negative sense; the concern of the authorities has been to ensure that actions taken outside the scope of the "escape clause" — that is, "surrogate" actions, do not involve technical violations of the anti-trust provisions. It is not clear that at the political level, that is, in the Congress, in the Executive Office of the President (which includes the Office of the Trade Representative), there is any systematic consideration given to the anti-trust policy implications of any import limiting measure which is a surrogate for Article XIX action. We say "systematic" because we cannot know what matters are discussed at Cabinet level, although one would like to assume that competition policy considerations and consumer interests were factors in the decision to not ask the Japanese to extend their formal restraint on automobile exports.

We do know that the cost to consumers (that is, the additonal "cash cost") was a factor in the consideration of whether or not to accept the ITC's proposals to restrict imports of footwear.[21] Indeed, the U.S. "escape clause", by its specific provisions, does involve consideration of competition policy aspects and of the costs to consumers.

Section 202 of the Trade Act of 1974 makes it mandatory that the President, in deciding whether to grant import relief, as recommended by the International Trade Commission, take into account "(4) the effect of import relief on consumers (including the price and availability of the imported article and the like or directly competitive article produced in the United States) and on competition in the domestic markets for such articles".[22] We cannot know precisely what weight is given by the Administration to these factors, although it is evident that the cost to consumers has been an important consideration in a number of recent cases.[23]

Under the Canadian domestic law provisions regarding Article XIX action, there is no stated public interest proviso nor any reference to the interests of consumers or to the state of competition. (There is, as we have noted, a negative public interest clause in the revised Canadian anti-dumping and countervailing duty provisions.)[24] However, the Canadian legislation delegating authority to the executive to take Article XIX action is cast in a discretionary form — that is, the executive "may" impose a duty or "may" impose a limitation on the importation of the goods at issue, but is not required by law to do so, nor does the law specify what considerations are to be taken into account.[25] One is not entitled to assume that competition policy considerations would be ignored in the taking of a decision by Cabinet to impose a duty or quota, particularly as the

Minister responsible for competition policy, like other Cabinet Ministers, is free to state his point of view in Cabinet Committee and in full Cabinet.

It should be noted that the Canadian system follows, broadly speaking, the same organizational format as the U.S. system in that the formal inquiry by the administrative tribunal (in the U.S., the International Trade Commission, in Canada, the new Canadian Import Tribunal) is restricted to determining whether or not the imports cause or threaten injury to domestic producers. The consideration of other factors, such as the potential increase in consumer costs and the impact on competition, are reserved to the political level, where the consideration of factors, particularly in the Canadian case, is not subject to public scrutiny.

The reason why we have paid particular attention to the legal "escape clause" provisions in Canada and the United States is that, in these two countries it is clear that the negotiation of industry-to-industry arrangements to limit exports, or the negotiation of government (of the importing country) to industry (in the exporting country) raises questions of possible breaches of competition law. In the U.S. this issue has, as we have noted, been examined in fairly precise terms, by the courts and by the senior law officers of the Administation. In Canada, this issue does not appear to have been addressed publicly but it can be assumed that officials involved in negotiating Article XIX measures, or "surrogates" are aware of the limitations imposed on them by the Combines Act. However, it is important, for our purposes, to note that, although in the U.S. the President is required, in an escape clause action, to positively consider the impact on consumers and the effect on competition of any proposed measure, it appears to be only in a negative sense that competition policy bears on the use of "surrogate" measures. That is to say that, once outside the formal "escape clause"/Article XIX nexus, the concern has been not to create an offence under the anti-trust provisions.

The European Situation

The extent to which competition policy considerations are taken into account in the EEC in Article XIX actions is not entirely clear, largely because there have not been many formal EEC Article XIX actions. The 1981 U.K. White Paper on Trade Policy gave some guidance to U.K. producers on what would be serious injury under Article XIX, but there was no reference to the impact on consumers or on the structure of competition. This is not surprising, given that Article XIX speaks only of the impact on producers. The U.K. authorities commented: "It must be emphasized that there has been relatively little recourse to this provision of the GATT and there is accordingly no substantial body of case history upon which to base definitive or comprehensive criteria."[26] Taking an example of an EEC "safeguard" action, that concerning pottery imported from South Korea or Taiwan in 1982, there is no reference to conditions of competition within the EC in the text of the Regulation authorizing a restriction on imports.[27]

The reason the EEC and the member states, make less use of Article XIX, and possibly more use of "surrogates", is that a number of import competition problems are dealt with by negotiation and agreement between the industry in the EEC member state and the industry in the exporting country

(which may be contrary to competition policy), or they are dealt with under the terms of a bilateral agreement providing for "safeguards" at the member state level or by unilateral action which the exporting country chooses not to challenge under the GATT.

An example of the last category is the limitation alleged to be applied by France to imports of automobiles from Japan (to a limit of 3% of the French market); it is understood that this limitation is enforced by the zealous applications of "technical standards" to potential imports. This particular example serves to make clear an important point of general import: "surrogate" measures, possibly highly discriminatory, may be implemented despite the GATT provisions if the exporting country does not challenge them; as a practical matter, third countries are not always eager to make an issue of such measures.

We should note that it was an important objective in the U.S. approach to the reform or interpretation of Article XIX in the Tokyo Round that all Article XIX surrogate measures should be brought under the same organized multilateral scrutiny as it was proposed would apply to formal Article XIX measures.

An example of an industry-to-industry measure is the understanding between British automobile producers and Japanese automobile producers to the effect that imports from Japan will not exceed 11 per cent of the U.K. market (by number of vehicles). These arrangements are a matter of common knowledge in the automobile trade and have been frequently noted in the press. In Japan the arrangement has been administered by agreement essentially between Nissan and Toyota, and considerable lobbying would, one may assume, be required for any new producer to secure a piece of the U.K. quota.

This particular arrangement is only part of a restrictive regime which appears to be highly anti-competitive and which must impose significant costs on consumers. There is little doubt that U.K. car prices are significantly higher than prices for similar vehicles in the rest of the EEC; the report of the House of Lords Select Committee on the European Communities stated that prices for cars in the U.K., net of tax, were 23% higher than in Belgium, 15% higher than in Germany, 12% higher than in France, and 7% higher than in Ireland. These higher prices have been achieved as a result of market dominance, by advertizing and by control of dealer networks, and have been enforced by attempts to enforce limitations on sales of right-hand drive vehicles (or re-export) to Britain by EEC dealers in automobiles outside the U.K. This measure was reinforced, it was understood, by the unwillingness of U.K. dealers to implement after-sales warranties on vehicles purchased outside the U.K.[28]

The ability of U.K. vehicle producers to maintain higher prices was supported by the fact that, given the higher price level, foreign suppliers were content to make high profits, and to not compete unduly on a price basis; in the case of Japan the motive for what was (and is) essentially a market sharing arrangement is evident; guaranteed access to the U.K. vehicle market is highly profitable.[29]

The Commission has, however, been concerned with the bilateral, industry-to-industry arrangements fixing prices or quantities which govern foreign exporters in their exports to the EEC or to a member state. From one

point of view, such private arrangements, particularly if encouraged, if only tacitly, by the government of a member state, undermine the authority of the Commission over commercial policy; clearly it would be more appropriate for these matters to be negotiated by the Commission on behalf of the member state, or for Article XIX action to be taken. Moreover, the Commission is aware that such arrangements may well raise serious problems under Article 85 and 86 of the Rome Treaty — the basis for EEC competition policy. As far back as 1972, the Commission gave notice (in the Official Journal) that they were aware that Japanese firms might take export limitation or price fixing actions in concert with European industry; these could raise problems under the two competition policy articles.[30] Subsequently, the Commission held that agreements between French and Japanese ball-bearing manufacturers to fix prices, and that an agreement between French and Taiwanese mushroom packers to fix prices, and which had not been notified to the Commission, constituted infractions of Article 85. In the second case, fines were imposed on the French firms concerned.[31] These are examples of competition policy being brought to bear on what were "surogates" for Article XIX action.

It should be noted that, with regard to imports from the U.S. and Canada, the EEC industrialists have no choice but to invoke GATT mechanisms when dealing with problems of troublesome imports; U.S. or Canadian businessmen cannot, as a practical matter, discuss limitations of their exports to the EEC with EEC businessmen. Hence, the EEC looks to the anti-dumping provisions or, in the absence of dumping, to Article XIX action. An example of the latter was the Article XIX action taken by the EEC in 1980 on behalf of the U.K. against imports of synthetic fibre carpet yarn from the U.S. and Canada. Bilateral discussion of that issue turned primarily on the threat of compensatory withdrawals by the United States; it is doubtful that the U.S. was persuaded that the injury being suffered by the U.K. synthetic fibres industry was caused by imports from the U.S. and Canada given that there was no comprehensive report which exporters could examine since there was (and is) no EEC equivalent to the USITC.

Another community development which raises issues from a competition policy point of view is the use of "crisis cartels". Essentially what is involved is the reduction of production by means of the allocation quotas, the setting of domestic prices, and a related administered reduction in imports and the setting of prices for imports. This is essentially how the ECSC has dealt with the crisis of excess capacity, in Europe and elsewhere in the steel industry. In this arrangement, under Article 58 of the ECSC treaty, ceilings were placed on production in the various member states and imports brought under control by whatever technique was available; or steel imports were restricted by deploying a sort of "basic price" anti-dumping system (under Article 8 of the Kennedy Round Code). Without getting into the complicated jurisprudence of EEC (and ECSC) "crisis cartels",[32] it is sufficient to note that in this European approach trade policy measures have been incidental or secondary to measures designed to limit domestic production and to ensure that the industries in the various member states do not expand at the expense of their competitors in other member states.

Trade measures, however implemented, are seen as supplementary to domestic measures, in much the same fashion as measures restricting imports of agricultural products may be justified under GATT Article XI. Competition

policy, in this context, is brought to bear when constructing the domestic cartel, and in considering whether the particular measures required to make the cartel effective can be justified. On a number of occasions (as discussed in detail in the compilation published by the Université de Liège cited) it has been concluded that particular proposed measures could not be accepted under EEC competition legislation; the position has been summed up in the following terms: "La Commission est disposée à reconnaître que, dans certaines conditions, des accords entre entreprises en vue de réduire des surcapacités structurelles peuvent être autorisés au titre de l'article 85 no. 3 (of the Treaty of Rome) mais uniquement dans la mesure où les entreprises ne fixent pas en même temps, par accord ou pratique concertée, ni les prix ni les quotas de production ou de livraison."[33]

It is perhaps too early to say how this system of domestic production, investment and delivery controls, plus controls on imports, has worked in regard to steel.[34] However, from a competition policy point of view, the issue is the appropriateness of the domestic cartel, and the details; the competition policy aspects of the trade policy measures, if no more severe than justified by the application of the domestic measures, are presumably subsumed in the competition policy assessment of the domestic measures. From the trade policy point of view, the issue will be whether or not the exporter is being asked to bear an unreasonable share of the burden of adjustment. A doctrinaire "free-trade" answer to that question would invariably be "yes"; but much will depend on the details. In trade policy, as in competition policy, much depends on the details of the measure applied. For example, it is now generally accepted that the main result of the restriction negotiated by the EEC on exports by Japan of video-tape recorders (VTRs) after the French authorities applied a measure of administrative harassment ("Poitiers") was that the higher price realized by Japanese exporters as a result of the restriction on competition in the European market will help finance the research necessary for the next generation of VTRs to be produced in Japan. Awareness of this unintended result, unintended, at least, by France, has led to the proposal (advanced by Philips) to apply a tariff on imports rather than an export restraint. The rent of this restriction will thus go to the EEC Commission, rather than to Japanese VTR exporters.

The issue of domestic cartelization of industry within the EEC is perhaps outside the scope of this study; in any event, it has been addressed by Tumlir in sufficiently emphatic terms: "There has occurred in Europe a surprising revival of the belief in the efficacy of cartels as instruments for solving the problems of adjustment and overcapacity. . . . Three things are surprising . . . There has been a relatively sudden change in political vocabulary, in effect a resumption of the speech patterns of the 1930s, featuring in particular an overuse of the word "rationalization" (used in its incantatory quality, no corresponding plan having been specified). The second surprising point is that some of the cartels have enjoyed more, and more open, official support than any of the cartels of the 1930s, and that they seemed to be conceived from the beginning as international cartels. Finally, there is the fact that although the cartelization-rationalization movement of the interwar period was a disastrous failure, nobody refers to that experience, not even by a hint. It is as if it had never occured."[35]

Concluding Comments

The question of domestic adjustment and cartelization will fill any space available; let us try to sum up what we can say about the interface between "safeguards" policy and competition policy. It appears that four rather negative points should be made.

- First: the Havana Charter/GATT system with regard to the use of Article XIX — the "escape clause" — has virtually collapsed. Rather than institute non-discriminatory import restricting measures many countries have recourse to various "surrogate" measures. These measures frequently involve either exporters, or their government, agreeing to limit exports, that is, to take a measure which is, on the face of it, in contradiction with competition policy considerations and with the stated rationale of the post-war trade policy system embodied in the GATT. Nothing is more important in trade policy than that governments should try to give up this use of measures outside the GATT framework of rules.

- Second: the issues with regard to Article XIX are whether or nor discrimination, the hall-mark of "surrogate" measures, should or should not be taken into Article XIX,[36] and the instituting of more effective international scrutiny of escape clause actions, including scrutiny of "surrogate" measures that is looking at Article XIX in terms of trade policy.

- From a competition policy point of view, the issue is why competition policy considerations are not more fully reflected in the safeguard system (Article XIX plus surrogates). It is only in the United States that the legislation on Article XIX measures refers explicitly (though only briefly) to the state of competition.

- There would be nothing illogical in the application of competition policy considerations in the use of safeguards. All that is at issue is political will, coupled with a recognition that imports are competition, with all the economic benefits that competition entails, and that restricting that competition involves the same sort of costs as restricting competition in the domestic market.

Letter of 18 February 1981, from the Attorney General.

Honourable William E. Brock
United States Trade Representative
Washington, D.C. 20506

Dear Mr. Ambassador:

This is in reply to your letter of February 6 seeking confirmation or clarification of past advice and opinions expressed by this Department on the President's authority to negotiate or otherwise seek restraints on imports of automobiles. In addition, you ask our advice on how best to avoid difficulties with United States law in this context.

Antitrust is an important concern when contemplating import restraints. Generally speaking, an agreement among foreign private companies to reduce the numbers of automobiles they export to this country would most likely violate United States antitrust law. However, we believe that if such an agreement were formally mandated by a foreign government, the formal mandate would provide a defense to any subsequent antitrust challenge. In such litigation, the degree of foreign governmental involvement would be a key issue. Thus, if the foreign government should compel the precise agreement through the use of appropriate legal powers, i.e., by the imposition of export controls or other binding measures, a strong "governmental action" defense would be available.*

> * In some circumstances, antitrust immunity for voluntary, private action restraining exports to the United States arguably may be implied when the President is authorized under Section 201 of the Trade Act of 1974 to negotiate "orderly marketing agreements" with foreign governments. No such authority currently exists with respect to automobiles; thus Section 201 provides no basis for such an argument at the present time. Moreover, this "implied immunity" argument is not settled law and proceeding under it would thus entail risk in any event.

The antitrust risks that would be raised by concerted, voluntary, private behavior by foreign producers have led us to conclude that in any negotiations between our government and a foreign government in which our government seeks a reduction in imports from that country, United States negotiators should emphasize the need for the foreign government to provide protection to its companies from actions under United States antitrust laws by ordering, directing, or compelling any agreement restraining exports to the United States in terms as specific as possible.*

> * It should be emphasized that while antitrust prosecution by the United States itself of import restraints achieved through government-to-government negotiation is unlikely, private antitrust actions could nonetheless be instituted.

If United States negotiators urge only mandatory foreign governmental action, we believe that they would run no substantial risk of antitrust liability, even if the foreign government fails to implement a government-to-government agreement by mandatory, legally binding measures. Nevertheless, it should be noted that any private antitrust suit challenging import restraints in such circumstances might involve United States government negotiators in depositions in which the circumstances of the agreement would be examined. As with any private case, the complaint could be drafted in such fashion as to allow far-ranging discovery and might even include allegations of liability on the part of government negotiators.

In order to minimize the likelihood of such allegations, we believe that any negotiations seeking import restraints should be kept on a government-to-government level, and direct dealings with foreign manufacturers, either individually or as a group, avoided, similarly, in preparing for such discussions, United States negotiators are best advised to avoid contacts that could be characterized as facilitating or serving as a conduit for a private arrangement between American firms and their foreign competitors.

In summary, this Department believes that although the President has inherent legal authority to negotiate directly with foreign governments to seek import restraints, where such negotiations are implemented through voluntary private behavior serious antitrust risks arise. Foreign or United States governmental "approval," "urging," or "guidance" of such behavior cannot safely be relied on as a defense; if the foreign government does not provide adequate protection by mandating the restraints in a legally binding manner, private antitrust suits could jeopardize the effective implementation of any agreements that are negotiated.

I hope this letter has been helpful.

Sincerely yours,

William French Smith
Attorney General

CHAPTER VI

THE QUESTION OF COSTS

In this chapter we address the issue of who benefits from the restraints on trade sanctioned by the system of contingency protection, what are the various costs of such protection, and on whom they are imposed. There is an extensive literature on this aspect of the debate over trade policy, beginning with the insights of Adam Smith. Rather more recently, in parallel with the development of the system of contingent protection, there have appeared a significant number of studies, focussing on surrogates for action under Article XIX, which make clear that such restrictive arrangements as the various bilaterally negotiated restraints on textile and textile product exports impose significant costs on users in the importing country, that the benefits to competing producers in the importing country are purchased at a high price — when calculated on a per job basis, and that adjustment assistance rather than import relief is likely to be less costly, though more visible. We note below the more important of these recent studies, and then address, in qualitative rather than quantitative terms, the issue of the costs of the anti-competitive impact of the devices endorsed by the contingency protection system, and, going beyond the purely economic calculus, the issue of the impact on political structure of the emerging system.

The term "impact on political structures" is intended to direct attention to the difference, in terms of the operation of the democratic political process, between a "tariff-centered" system and a system in which the emphasis is on the exercise of administrative discretion, on litigation, on the imposition of discriminatory quantitative controls and the negotiation of undertakings by foreign producers, or their governments, as to prices or quantities. This aspect of the system of contingency protection has not received great attention from the numerous economists who have been calculating costs and benefits of alternative commercial policy devices.

It is not, as a practical matter, necessary to review or recapitulate all the statements which have been made about the costs of protection and about the various ways in which costs and benefits are distributed; we concentrate on a few important studies that have been occasioned by, or at least coincided with, the development of the present day system.

It is a central proposition of the economic theory of international trade since the publication of The Wealth of Nations that measures of protection impose costs; these costs can be identified, in the first instance, in terms of the higher prices that consumers must pay for the protected article, and, in the second instance, the losses in efficiency due to the diversion of resources to production of the protected goods. This reduction in efficiency affects the production of other categories of goods, including production for export.

There is no basis for assuming that professional commercial policy bureaucrats are unaware of these considerations; it is a mistaken view, which seems implicit in much recent writing, that officials responsible for tariff policy or for the negotiation of such trade arrangements as the MFA are unaware that these arrangements impose costs. Indeed, because they are occupied, on a career basis, on a full-time basis, with such matters, they may be expected to be more aware than others of the costs involved, the minor benefits achieved, the extent to which the pace of adjustment of the economy is slowed, and the manner in which the political process is corrupted by the development of vested interests, both sectorial and bureaucratic, in protection.

The "Cash Cost"

We have already mentioned that one of the pioneer studies directed at the assessment of costs of a protective system was J.H. Young's essay for the Canadian inquiry in the mid-50's into the economic prospects of the country.[1] Young attempted to estimate the "cash cost" of the Canadian tariff, the tariff being the main commercial policy device used by Canada at that time — prior to the evolution of the textile trade system. Young's method was to make a statistical calculation, based on detailed data from various sources, official and otherwise, of the actual differences as between Canadian prices and U.S. prices for products protected by the Canadian tariff. Young's conclusion was that:

> The cash cost of the Canadian tariff, omitting government expenditure and making no allowance for the effect of the tariff on distribution costs, amounts to $0.6 billion or about 3.5% to 4.5% of gross private expenditure net of indirect taxes. The inclusion of government expenditure and retail distribution would raise the estimate considerably, and it is likely that a comprehensive estimate of this kind made for 1956 would be of the order of $1 billion.[2]

Young also noted that in a system of preferential tariffs, part of the extra amount paid by consumers accrues, not to Canadian producers, but to producers outside Canada the exports of which enjoy margins of tariff preference. "Since the estimate is concerned with the overall cash cost of the Canadian tariff, no distinction has been made between that part of the extra amount paid by Canadian consumers which accrues to domestic producers, and that part which accrues to producers outside Canada."[3]

It should be noted that Young's study was an important example of the empirical approach to assessing the impact of protection; it was for that reason welcomed by a number of economists who recognized the distinction between assertions based on a mathematical or geometrical demonstration of the cost of protection and a demonstration based on the accumulation of comparative price data. This distinction continues to be important, because while considerable quantitative and empiric work has been done in regard to tariffs, examination of the costs of other techniques of protection have emphasized mathematical demonstration derived from theoretical assumptions, sometimes in regard to situations in which empirical data were easily available.

Young's study of the "cash cost" of the Canadian tariff provided a point of departure for several key papers on tariff policy by Professor Harry Johnson;

he pointed out that Young's method was the same as that used in 1927-29 by a committee of inquiry in Australia (the "Brigden Committee") and that there were a number of theoretical objections to this method. He went on to observe: "... the total gains from international trade and the cost of protection are likely to be relatively small in the large advanced industrial countries, owing to their relatively flexible economic structures ... they are likely to be appreciably larger, relative to maximum potential national income, in the smaller and less developed countries ..."[4]

Following Young's study, there were a number of studies which tried to measure the impact of tariff reductions on incomes and employment and on imports and exports. A number of these were carried out by American economists, particularly in regard to the Kennedy Round and later the Tokyo Round tariff reductions. Perhaps the most extensive was the study carried out under the auspices of the Brookings Institution during the Tokyo Round.[5] This study attempted to assess adjustment costs related to tariff reductions against the benefits of lower tariffs, in terms of cheaper imports and increased exports; the broad conclusion was that, over time, the benefits of tariff reductions would exceed the costs of adjustment by fifty to one hundred times. This was another way of making clear that protection imposes costs on the protecting country.[6] Cline later summed up his views, formed after an extensive effort at calculating costs and benefits of protection on the basis of all available statistical data:

> The costs of protection are especially high for consumers. In the late 1970s American consumers paid an estimated $58,000 annually per job saved by protection of specialty steel, television sets, and footwear....European (EEC) consumers paid approximately $11 billion yearly for the protection of European farm products ... and American consumers pay an estimated $12 billion yearly for the protection of textiles and apparel. The 'static' costs of protection to the nation as a whole are lower than these consumer costs because part of the consumer loss is a transfer to domestic producers in the form of higher profits. But the nation's net economic costs from protection are nevertheless substantial, especially when dynamic effects are included.[7]

The methodology of the studies which gave rise to these conclusions is not directly transferrable to the task of assessing the costs of the contingency system, because of the significant operational differences between a tariff system, on the one hand, and special (i.e., anti-dumping or countervailing) duties, undertakings, and the various quota regimes, VER's, OMA's on the other.

In an anti-dumping case, for example, there may be no duty collected; the exporter may adjust to the anti-dumping action by giving an undertaking to raise prices or by adjusting home market prices, or quite likely, by careful re-adjustment of his domestic and export invoicing practices. Depending on the details of how he may choose to adjust to the levying of an anti-dumping duty, or the threat of a duty, and depending too on the price elasticity of the demand for the products at issue, the exporter may be able to impose additional costs on the importing country without there being any increase in governmental revenue. The first order increase in costs is composed of the higher prices for imports and the higher prices which may be charged for like products produced domestically; the second order costs are the decrease in efficiency and the misallocation of resources in the importing country.

In a countervailing duty case, the exporter may adjust by his government entering into an undertaking to eliminate the effects of the subsidy in prices for export, or by limiting the quantity to be exported; in complex cases the countervailing duty (or anti-dumping duty) proceedings may be terminated because the exporting countries concerned have negotiated export restraints (This has been the case for a range of steel products imported into the U.S.). In such a situation, the rent or profit of the restraint is likely to accrue primarily to exporters; the importing country faces additional costs without being able to take any revenue from the hypothetical duties; moreover, there are the costs involved in misallocation of resources and efficiency losses. The amount of rent arising because of the restraint, and the actual reduction in imports over the level of imports that would have occurred in the absence of a countervailing (or anti-dumping) proceeding depends on the elasticities of supply and demand for the product at issue, and also on the relative bargaining strength of exporters and importers. If exporters are small and numerous and importers are fewer and more powerful, importers may be able to acquire some of the rent of the restriction.

In quantitative methods of restriction, such as those imposed pursuant to GATT Article XIX, or as surrogates for GATT Article XIX, or under the MFA, the allocations of costs and profits will vary according to the design of the quota system. There are many varieties of quota system: we can take two hypothetical cases, at the two extremes, by way of illustration.

At one extreme is a global import quota administered by the importing country, which issues licenses to import fixed quantities to importers of record, the quantities allocated to each being related to the quantities imported by the individual importer in some representative historical period. The importers can shop around amongst various exporters in the various competing exporting countries; the importers have maximum bargaining power and can appropriate the rent of the restraint.[8] Much the same result will apply in a system in which the importing countries institute quotas assigned to individual exporting countries; if the right to import is given to individual importers who can bargain with numerous exporters, it is likely that the importers will appropriate the rent of the restraint. The only fashion in which the rent can be appropriated by the importing country (i.e., by the government) is to auction the rights to import under quota; such a system would also reduce sharply the scope for influence and favoritism in the allocation of quotas. Possibly for that reason governments have not adopted such quota auctioning techniques.

At the other extreme is a system of bilateral export quotas administered by the exporting country in which non-used quotas may be transferred by quota holders (e.g. as in Hong Kong). In such a system it is likely that all the rent of the restraint accrues to exporters.

In between these two extremes there are a multitude of variations, but these two examples should make clear how one could analyze a given quota system in terms how the rent of the restraint is allocated.

What has been discussed above is <u>who collects the rent</u>. The question of how large are these rents is another issue. In any given case that will depend on how restrictive is the quota system, that is, by how much does it reduce imports below the levels that would prevail in the absence of a quota, and therefore on

elasticities of supply and demand. Much work has gone into calculating such costs but there are considerable difficulties in securing reliable data and in reaching precise results.

For textiles, the various attempts to calculate the magnitude of costs imposed on consumers in certain industrialized importing countries, as against the adjustment that would be faced in the absence of restriction, was reviewed by Martin Wolf in 1982.[9] One of the more factual inquiries has been conducted in regard to textile policy in Canada. This is a study for the World Bank carried out by Glenday, Jenkins and Evans in 1980[10] analyzing the impact of tariffs and quotas on textile imports for a specific area of Canada (Sherbrooke, Province of Quebec). In the version of this study published by the North-South Institute, the authors state:

> The economic benefits of delaying the layoff of an average vulnerable job in the Sherbrooke region is at most 36 per cent of a worker's present wage. With 1978 yearly wages estimated at about $11,200, the benefits of maintaining this job over 5 years equals approximately $20,000 in present value terms. The economic cost of protecting such a job in the clothing sector for 5 years by way of trade restrictions amounts to approximately $30,400 in present value terms. Protecting employment by imposing trade restrictions therefore means a net loss to the economy of some $10,400 per job. Any financial assistance to forestall layoffs over and above existing trade protection would only deepen this net economic loss. However, in the absence of such trade protection, government financial aid to ailing firms is likely to be much less economically inefficient.[11]

More recently, the cost of textile import quotas for the U.S. was examined in a study published by the Bureau of Economics of the Federal Trade Commission, by Tarr and Morkre. This study concludes that:

> the gross social cost to the U.S. economy of the import quotas consists of the sum of the rent and consumption distortion effects. In 1980 the gross social cost was between $308 million and $488 million, which represents the gross benefit to the U.S. of eliminating the quotas. The annual cost to U.S. consumers was estimated to range between $318 million and $420 million. Against these estimated benefits of removing the quotas, there is a cost of cancelling the quotas that stems from the cost of transitional unemployment . . . we estimate this cost is between $17 million and $61 million . . . per dollar of unemployment costs U.S. consumers would gain at least $7 if the quotas were eliminated.[12]

We draw attention to these studies without agreeing that the orders of magnitude are correct; in our view these studies relating to the costs of textile restraints rest essentially on one data source: that is, the market prices for textile and apparel quotas being transferred between Hong Kong exporters. This approach was developed by Jenkins in his earlier 1980 Study for the North-South Institute[13] and by Brian Hindley in a paper prepared for an informal meeting of Tokyo Round negotiators, academics and senior officials at Streza in 1978,[14] and further developed by Tarr and Morkre in 1984.[15] This assumes that the various prices realized for transferable quotas in Hong Kong indicate the value of all

Hong Kong quotas. This is not necessarily a correct assumption. Only a smaller marginal supply of quotas are sold in Hong Kong; in such a situation the market price may not be a reliable indicator of the price of quotas if all quotas were transferred (or auctioned by the authorities). Surely this is the case for all "marginal" markets. Thus the London sugar market price for sugar does not indicate what would be the price for sugar if all sugar was so sold; most sugar, like most Hong Kong export quotas, changes hands under other arrangements.[16]

For this reason, these estimates may be somewhat overstated; what is clear is that if quotas are imposed in addition to relatively high tariff rates the costs of such protectionism are likely to be substantial.

Another approach, more in keeping with Young's empirical work, noted above, would be to compare prices for categories of products in exporting countries with the prices for the same products in various importing countries. What this may show is that the cost of restrictive quotas, such as are widespread in the textile and apparel sectors, varies from one importing country to another, depending on the extent of competition between domestic producers and the vigour of competition, or lack of it, in the distribution sector. In North America there is relatively vigorous competition in the wholesale and retail distribution systems, and many large retailers do their own wholesaling, particularly with regard to apparel. In Europe it would appear that there is less competition in distribution and that importers have the benefit of nationally administered import quotas. High profits on imports may cross-subsidize domestic products, given that importers have an interest in allocating to domestic producers sufficient business as to persuade them not to press for more restrictive quotas, which would reduce importers' profits.[17]

None of these observations as to the need for empirical data on prices for restricted imports takes away from the fact that the price of protection by bilateral quotas is unduly high, unduly, that is, when measured against worker adjustment costs or against potential adjustment assistance.

The same issues were examined, in relation to "export restraints", by the U.S. International Trade Commission in 1982.[18] In this study the differences in terms of the distribution of rents as between restrained exporters who are "price-takers" and those who are "price searchers" are examined; this refines the argument stated above.[19]

Another product area which has been subject to quotas and export restraints is non-rubber footwear; there have been several attempts to assess the impact of these measures. In the USITC study cited above, the effectiveness of the orderly marketing arrangements are examined; it is noted that "the quantitative restraints were largely offset by increases in the imports from non-restraining countries".[20] It is calculated that for the 3 year period 1977-79 the OMA's reduced imports into the U.S. by approximately 88 million pairs, about 8.5 per cent of total imports, and created about 15,000 jobs each year in the three-year period. This was accompanied by a reduction of demand, stated to be running as high as 9,573,229 pairs in 1979, and an increase in price, in that year, of $1.07 per pair.

The effect of restraints on footwear was also examined in detail in connection with the Canadian Article XIX action on that product. In a study

prepared for the Canadian Import Tribunal by a team from the Institute for Research on Public Policy, under the direction of A.R. Moroz, the following conclusions were reached as to the effect of removal of the Canadian import quota during the years 1978-83:

> The retail price of imports would be lower by 7.59 per cent and . . . consumption of imports (would increase) by 8.69 per cent; the price of domestic footwear would be the same but domestic footwear production would be marginally lower by 1.52 per cent; employment in the domestic footwear industry could be marginally lower by 1.27 per cent; and total Canadian footwear consumption would be higher by 1.67 per cent.

The study goes on to emphasize the "relative ineffectiveness" of the quota in protecting domestic footwear and employment, and notes that the depreciation of the Canadian dollar "is the single most important reason for the moderate impact of the quota on import quantities and prices".[21] In terms of welfare costs and benefits, which is nearer to our focus here, the study asserts that for 1978-83, at rates per year, the following would have been the effect of removing the quota:

> Consumers would be better off and consumer surplus would increase by $38.44 million; quota holders would lose $35.83 million . . . ; overall, the economy gains a static welfare benefit of $1.67 million . . . individual workers laid-off . . . would actually experience income gains, averaging 81,578 dollars . . . in the process of labour market adjustment; the adjustment costs borne by the economy as a whole as a result of worker lay-offs would be positive in the amount of $0.394 million . . . but quite small relative to the gains in consumer surplus which amount to $7.33 million . . . [22]

The reason why it is asserted that workers would experience income gains is that workers who are re-employed in other industries are paid higher wages.[23] Without necessarily agreeing with these calculations, it is clear that the impact of this particular quota was, in the main, to enrich quota holders.

The USITC[24] has also investigated the impact of export restraint arrangements on steel; the study related to the VER's by Japan and the European Community in the period 1969-75, and is not related to the later trigger price mechanism (TPM) and the later anti-dumping and countervailing duty actions which led, in turn, to quantitative arrangements with the European Community, nor to the "escape clause" actions which led in turn to the negotiation of so-called steel "surge control" mechanisms — and the tightening of a variety of contingency protection measures.[25] The ITC analysis shows that the early VER's for this industry had considerable impact; for one year (1970) the reduction in imports was almost 33 per cent, domestic prices would have been 3.8 per cent lower in the absence of the VER's, but there was relatively little effect on domestic production. "On the average, the VER's saved 19,117 jobs per year."[26] (The ITC summary of the results of VER's (VRA's) for steel, a fairly typical case of the use of this device, is reproduced as an Annex to this chapter.) What the ITC study does not do is consider the impact of the VER's on industrial structure, on concentration in an already relatively concentrated industry, nor the impact on steel-using industries. All these would be necessary if one were to be able to

have a more adequate estimate of costs and benefits; these aspects were outside the terms of reference for the ITC study, and one could argue that the question of the impact on concentration and the conditions of competition would not be clearly within the ITC mandate.

The same ITC study looked at the OMA's on colour television. The impact on domestic employment, on prices, on imports are estimated, in much the same fashion as for steel and non-rubber footwear. One particularly interesting impact of the OMA's on colour television is noted:

> During the OMA period, five additional foreign firms built colour television assembly facilities in the United States and produced sets here. There were only four such firms in the United States prior to the implementation of the OMA's. Therefore, it is likely that the OMA's accelerated foreign investments in the U.S. colour television receiver industry.[27]

The creation of a motive for foreigners to invest, and thus get inside the protective barriers, is a not uncommon feature of the managed trade and contingency protection system. Another example would be the decision by Volkswagen to build a plant in the congressional district of the congressman (Congressman Dent of Pennsylvania) who had launched an anti-dumping proceeding against imported automobiles; in due course the case was dismissed.[28]

The U.S. Federal Trade Commission has been active in trying to identify the costs of protection for U.S. industries, and active in filing briefs before the USITC (and the U.S. Court of International Trade) in import relief cases. The Bureau of Economics has published two studies, both by Morkre and Tarr (as cited above). The 1980 study examined the case of CB (citizen band) radios, an "escape clause" action, colour televisions, sugar, non-rubber footwear, and textiles and textile products. Given the different mandate of the FTC — different, that is, than the ITC remit — the focus is on costs and benefits, not just the assessment of whether the assumed benefits did appear. The principal conclusion is as follows (with regard to the combined effects of tariffs and quantitative measures):

> The empirical results support the theoretically predicted differences between tariffs and quantitative restraints. Tariffs were imposed in the CB radio and sugar industries; these two losses to the economy (called inefficiency costs) are less than 25 per cent of the costs to consumers. The remainder of consumers costs go to the U.S. Treasury as tariff revenue and to domestic producers. In non-rubber footwear however, a quantitative restraint in the form of an OMA was imposed with the result that over 50 per cent of consumers' losses are lost to the economy as well. The difference is foreigners expropriate the scarcity rents that, with a tariff, would otherwise go to the U.S. Treasury.
>
> The overwhelming result of these case studies is . . . that the costs of protection invariably exceed the benefits. In some cases, witness footwear and CB's, the costs are 25 or more times the benefits. To those familiar with similar studies in particular industries, these results should not be surprising.[29]

As noted above, this report of 1980 was supplanted, in part, by a later study by the same two authors in 1984, which reworked the arguments in more detail, and, in regard to textiles, used Hong Kong quota transfer prices as essential data.

The same issue of costs is touched on frequently in the briefs on various countervailing duties proceedings, anti-dumping proceedings and "escape clause" proceedings by the Federal Trade Commission to the International Trade Commission (and the U.S. Court of International Trade). These briefs necessarily have to address the questions at issue in terms of U.S. legislation on these matters, which does not explicitly include considerations of competition policy. Accordingly, these briefs address such questions as to whether the material or serious injury being suffered is caused by the dumped or subsidized imports, or the imports identified by petitioners in an 'escape clause' action, or whether the subsidies at issue are properly countervailable.[30] In one anti-dumping case the Anti-trust Division of the Department of Justice appeared before the ITC and drew attention to the degree of concentration in the U.S. domestic industry, and then went on to argue that there was "no reasonable indication of a sufficient causal link between . . . imports and any material injury suffered by the domestic . . . industry".[31] The Department's brief asserts the right to express a view on the case, in the following terms:

> . . . because of its special responsibility . . . for preserving competition, for preventing undue interference with competition, and for promoting the welfare of consumers against excessive costs arising from unduly restricted markets . . .
>
> The Justice Department is interested in this investigation because of the concentrated structure of the domestic industry and the anti-competitive effects which would result from an unwarranted "choking-off" of the import competition. . . . The Justice Department is concerned that the dumping laws not be used without sufficient basis by domestic producers to thwart attempts by foreign producers to enter the U.S. market, especially, where the market is highly concentrated.[32]

In summary, the U.S. authorities concerned with competition policy (the Federal Trade Commission and the Department of Justice) find it difficult to bring forward competition policy considerations in contingency protection cases before the USITC, for the reason that the legislation does not allow such considerations to be taken into account (except for Section 337 cases). Moreover, the most active group of officials concerned, the FTC Bureau of Economics, has focussed primarily on the calculation of costs, including the costs of the tariff, and has not brought to the front the issues of the impact of restricting imports on industrial concentration and the conditions of competition.[33] The Canadian competition authorities appear to be likewise inhibited in anti-dumping and countervailing duty cases, although it remains to be seen whether the new public interest provisions in the revised Canadian legislation on import policy will encourage the Canadian Import Tribunal to hear and to take into account the views of the competition policy authorities and of user groups; it appears that the new legislation is cast in sufficiently broad terms to enable the Import Tribunal to look at whatever facts and factors they may consider relevant to the public interest, not excluding conditions of competition.

If we were to look beyond the rather narrow analytical concept of price effects, production and employment effects on which most observers have concentrated, we would quickly conclude that the most important cost being imposed by the contingency protection system is the negative impact on competition in importing countries, in exporting countries as well, the slowing down of the rate of adjustment to changes in the location of industry, and beyond that, but no less important, the impact on the political structure of an increasingly bureaucratized system of trade regulation, with the increasing scope such a system gives to the covert exercise of special interests.

"Managed" trade, "administered" trade, discriminatory trade regulation, requires managers and administrators to make decisions as to quantities to be traded (under VER's and OMA's), decisions on the details of "undertakings" (under the anti-dumping provisions), and to negotiate these matters in detail with domestic producers, with foreign producers and with foreign governments. This bureaucratization inevitably involves the operation of special interests. There are many opportunities for favouring one group or one interest against another and for conferring benefits in return for benefits within the political process. These developments are inevitably somewhat opaque, even to practioners, but are nonetheless real and their effects on political habits are long-enduring. It was one of the major advantages of a tariff-centered system that tariff rates conferred benefits on industries openly, to producers of specified goods, and at costs which could, with some ingenuity, be calculated. It did not allocate valuable rights to import to particular individuals or concerns, rights which individuals or concerns are almost invariably willing to secure by themselves transferring benefits to administrators and/or to their political masters.

In the private sector, the tariff system required far less managerial time and far less legal advice and lobbying. These activities are far from costless, particularly when one takes account of the alternative uses for these scarce resources.

The impact on the vigour of competition of the rise of managed trade regimes — which could be argued is at least a partial return to the trade policy system of the 1930s — has been focussed on by Tumlir; he has emphasized, too, the impact on the "international order" of the evolution of protectionist practices. The "costs" involved in this sort of policy development are difficult to measure but they are real, and oppressive. Tumlir has emphasized that the "new protectionism" is essentially a "new political phenomenon" and he draws attention to the extent to which in Europe there has been rather more enthusiasm for approaching industrial adjustment issues by "cartilization" than there has been in North America.[34]

If we try to draw together what can be said at this point about the "costs" of contingency protection, from the point of view of competition policy, we might construct a catalogue of categories of costs. What is clear is that not all of these have been assessed, but that, in the longer-run, the costs may be very high indeed.

1. One category of "costs" arises when one government prevails on the authorities of another country to compel exporters to restrict exports. This in practice creates an export cartel. In many jurisdictions such a cartel would be actionable under competition law, that is, it would be assumed to have such

deleterious effects on competition as to be actionable. This was made explicit as regards U.S. anti-trust law when the U.S. required the Japanese authorities to mandate a restriction on automobile exports to the U.S.[35] Absent formal action under the U.S. escape clause, a restriction on exports to the U.S. can escape U.S. anti-trust only if the restrictive action is mandated by the foreign government. The issue is not as clear-cut in other jurisdictions (e.g. EEC and Canada); it is not clear why the Canadian competition authorities, for example, have not more closely scrutinized the variety of restrictive export arrangements which the Canadian authorities have negotiated, not all of which have had a mandatory character in the exporting countries concerned.

In economic terms, much the same should be said of "undertakings" under the anti-dumping system and the countervailing duty system. As we have already noted, the result of an anti-dumping proceeding, frequently in the EEC, less frequently in the U.S. and Canada (less frequently in Canada because "undertakings" have been permitted only under the recent revised import legislation)[36] is an agreement to limit exports or to raise export prices to the importing country concerned. Absent the legal cover of the anti-dumping provisions, such undertakings would be open to scrutiny by competition policy authorities, and no doubt actionable.[37] The magnitude of "costs" involved is affected by the fact that under the anti-dumping provisions selling below full average costs, plus an allowance for profit, is considered to be dumping. (Moreover, the U.S. system, as we have noted, provides minima for the calculation of such costs and profits.)

2. The second category of "costs" arises from the impact on industrial structure, on industrial concentration, from agreements to limit exports. Tumlir has noted the European interest in more explicit cartel-like solutions to problems of adjustment; what we refer to here is the broader issue that trade limiting arrangements, competition limiting arrangements, necessarily affect the structure of industry by reducing competitive pressures. The impact on the steel, textile, apparel, shipbuilding, television and automobile industries, for example, of the various arrangements to limit trade may, in the longer-run, impose greater costs on the various economies than have been measured in the studies noted above. We might ask, for example, what is the effect on the U.K. economy, on the French economy, on the Italian economy, of the sharp restrictions (implemented by various techniques) on the imports of Japanese automobiles. (The arrangements on autos between the U.K. manufacturers and the Japanese manufacturers under which the Japanese manufacturers limit their exports of automobiles would presumably be actionable in the U.S., or Canada, under competition law.) There is clearly a whole area of inquiry here; we need studies, on an industry basis, of the impact of "managed" trade, from a competition policy point of view; however, absent such inquiries, it remains clear enough that many such arrangements are in sharp conflict with competition policy and that they necessarily impose long-term burdens of maladjustment.[38]

3. The third "cost" in terms of the impact on political processes is the increased bureaucratization of trade policy inherent in the contingency protection system. All practitioners, because they are involved in the process, know that despite the log-rolling, despite the adherence to the interests of narrow producer groups necessarily at play in a tariff-centered system, such a system of legislated protection is less open to the covert play of special influence than is the system of contingent protection. There are "costs", these

are burdens imposed, which may lie beyond the scope of responsibility of competition policy authorities, but surely an awareness of these long-run political costs should inform trade policy and practice and the interface with competition policy considerations.

(From USITC 1256, June 1982.)

Effects on imports.--During the 6-year period, the estimated reduction each year in the volume of steel imports attributable to the VRA's was large, ranging from 6.5 percent in 1973 to 32.8 percent of the actual imports in 1970. Over the whole period, the VRA's were estimated to have reduced imports by 19.04 million net tons, which were valued at $6.10 billion in 1974 dollars. As a result of the upgrading of the product mix of steel exports by the restraining countries, the VRA's were relatively less effective in restraining the value of imports. Other factors also influenced imports during the years under the VRA's, including exchange rate fluctuations, domestic price controls, and changes in world demand for steel.

Effects on domestic prices and demand.--The imposition of the VRA's resulted in increases in the annual average producer price of steel mill products, estimated to range from $2.84 per net ton in 1973 to $11.83 per net ton in 1970. For the 6-year period, the average price of steel mill products would have been an estimated 3.8 percent lower if the VRA's had not been imposed. In addition to the VRA's, steel prices were also influenced by world and U.S. market conditions, increased energy and other production costs, and domestic price controls. Because prices were higher under the VRA's than they otherwise would have been, the quantity of steel demanded was reduced from what it would have been. The estimated effects of the VRA's on the quantity demanded ranged from a decrease of 0.59 million net tons in 1973 to a decrease of 2.82 million net tons in 1970. In total, the VRA's were estimated to have lowered the quantity demanded, because of the price increases, by 11 million net tons over the 6-year period.

Effects on domestic production and employment.--Although the VRA's reduced the volume of steel imports considerably, they had a relatively small effect on domestic production. For instance, although domestic production increased by 21 percent in 1973 compared with the 1972 production level, only 1.1 percent, or 250,000 net tons, of the 1973 increase was attributed to the VRA's according to the statistical model of the steel industry. Most of the fluctuation in production during the period was attributable to fluctuations in world market conditions. Estimated increases in steel production attributable to VRA's ranged from 0.14 million net tons in 1969 to 4.79 million tons in 1971. In total, the VRA's increased domestic production an estimated 9.7 million net tons over the 6-year period. The estimated increase was valued at $2.79 billion in 1974 dollars. The actual cumulative increase in production over the period was 33.3 million net tons. About 29 percent was accounted for by the VRA's.

This study also investigated the effects of the VRA's on total domestic employment, including that in the steel and related industries, using input-output coefficients to convert production changes to employment changes. The estimated annual effects on domestic employment ranged from an increase of 1,657 man-years in 1969 to an increase of 55,223 man-years in 1971. On the average, the VRA's saved 19,117 jobs per year in the 6-year period.

CHAPTER VII

SOME PROPOSALS FOR REFORM

The purpose of this final chapter is to set out, for discussion, some proposals for reform of the contingency protection system so as to more fully take into account the objectives and rationale of competition policy.

The proposals are addressed in the main to the anti-dumping system and to the "safeguard" system of GATT Article XIX, and to surrogate measures and related quasi-cartilization of trade. Much of what is said about the anti-dumping system can be applied to the countervailing duty system. We have not treated that device in any detail in this study, although the observations on injury and causality are, of course, relevant. It should be kept in mind that there is no equivalent in domestic law to countervailing duty — that is, there is no procedure for injured parties to seek a remedy against subsidy in their own country. Only the EEC has attempted an overt-discipline on subsidies. In considering how a deal with the problems identified in the previous chapters, we shall have to deal with elements that are integral to all these components of the system.

Incremental Change

It should be emphasized that these proposals are evolutionary and incremental rather than revolutionary; they will require some re-thinking of the bases of policies, at both the administrative and legislative levels. It is not realistic to think of dramatic changes being legislated overnight. We should beware of formulating proposals for reform in a simplistic fashion, such as comprehensive "harmonization" of trade policy with competition policy. Competition policy is no more understood at the broad political level than is trade policy, perhaps less so, and once one moves from the narrow circle of practitioners and academics making their careers out of competition policy, there would appear not to be, in any country, a very broadly based community of informed support. Moreover, within the competition policy community, if we can call it that, there are sharp and evolving divisions of opinion as to the utility, from an economic or legal point of view, of various legal enactments embodying national competition policy — as the continuing debate in the U.S. about anti-trust in general and Robinson-Patman in particular makes clear,[1] and, of course, there are major differences between the various competition policies.

More particularly, there is a significant current of opinion to the effect that legislation against domestic price discrimination as such is illogical, or at

least unworkable. For example Robert Bork, former Solicitor General of the U.S., and now a judge, has condemned U.S. legislation on price discrimination: ". . . it is impossible to say that price discrimination in general is bad. In fact, in general, it seems to be desirable. And we have seen that the Robinson-Patman Act bears precious little relationship to real discrimination, except by its inability to recognize cost difference, it creates discrimination. Moreover, if Robinson-Patman could recognize discrimination, the law's test are not addressed to output effects, the sole issue discrimination presents. . . .That there now exists no reliable means, and certainly no means suitable for use in litigation, to identify price discrimination is in itself a conclusive agrument against adapting a law dealing with the practice."[2] In fact, Bork's thesis goes beyond merely writing-off the Robinson-Patman Act; his general thesis is that antitrust policy has adversely affected the consumer interest by protecting inefficient and uncompetitive small businesses. Bork's root and branch condemnation is in part related to the highly legalistic character of the U.S. (and Canadian) anti-trust systems; one could argue that his criticism makes, by implications, a case for a system based on ad hoc inquiry, rather along the lines of the UK system, for assessing each alleged case of discrimination or of this or that abuse of market dominance in terms of a carefully defined "public interest", taking account of the interest of users and consumers and of the national interest in maintaining healthy competition.

In competition policy, whatever may be in general, and at a rather abstract level, agreed about objectives, there seems little agreement as to modalities. From the point of view of the trade policy community, competition policy does not always appear to be very sharply defined nor coherent; nor is it evident that legislatures have hitherto been significantly concerned that competition policy objectives be reflected in the formulation or implementation of trade policy. This is merely a re-iteration of the point made earlier that the reason why competition policy is ignored in so much of trade policy administration is that that is the way the law is written. The scope for the consideration of competition policy in the administration of trade policy has been made virtually negligible by legislatures, particularly when one takes account of legislative history.

The Question of "Thresholds"

The first proposal for discussion is that, in general terms, the anti-dumping provisions and the countervailing duty provisions (and the safeguard provisions) should operate only when the quantities involved are relatively substantial and the impact relatively substantial; to so modify the system would in itself take account of the fact that actions under the contingency protection system necessarily impose a burden on the country taking the action, and may be anti-competitive in effect, and therefore should be avoided unless the situation calls unambiguously for such intervention. A simple but substantial raising of the thresholds would by itself help achieve this purpose; it is important to realize, however, that raising the threshold for intervention would justify, and perhaps require, a more punitive set of sanctions.

By "raising the thresholds" we mean the following:

First, it is necessary to to ensure that "injury" in trade policy legislation is more rigorously defined; this will require legislation in most

jurisdictions. At the international level, the two principal GATT "injury" provisions, Articles VI & XIX, might well be articulated in more detail. Leaving aside the question of "injury to whom?" and leaving aside the question, for the purpose of this discussion, of whether it is a "diversion of business" concept or a broader concept of "injury to competition", the issue should be addressed of more clearly identifying the various degrees of injury at issue. It is consistent with the GATT as now written to hold that there is an implicit and meaningful progression in the "injury" provisions. It is consistent with the GATT to accept that price differentiation, subsidization, and competition from new sources is so pervasive in international trade that action to limit these manifestations should be taken only as a last resort.

At one extreme there is that degree of impact which is "negligible", which does not warrant any intervention, which is not actionable. It is for consideration whether such a level could be defined across-the-board, for all products, or whether as a practical matter it must differ for different products; the only point to be made here is that, if it is accepted that anti-dumping and countervailing duty actions, and Article XIX actions, impose substantial burdens on the national economy, that they can have anti-competitive effects, and that therefore these provisions should be used rarely and carefully, it would be useful to define "negligible" at a level higher than "de minimis".

To take a recent anti-dumping case: the Canadian competition authorities argued in regard to the dumping of refined sugar from the U.S., that when dumped imports were equal to 2.2% of domestic production, in one period, and 2.9% for another period, such a level of import was "insignificant" and could cause only de minimis injury, not "material" injury.[3] This line of argument was, unfortunately, not supported by reference to determinations in other Canadian anti-dumping cases, or by reference to determinations in the U.S. or the EEC. In its "statement of reasons" the Tribunal stated that U.S. imports "represented five percent of the market" and implied that this was "substantial".[4] To quote this particular case is only to make clear that it will be difficult to get agreement, in general terms, as to a particular level of imports in relation to the total domestic market, or in relation to domestic production, below which level imports would be considered as negligible. However, it is clear that merely by establishing a higher threshold or thresholds for the initiation of investigation of complaint, the scope of the anti-dumping and countervailing duty systems would be reduced.

Further along in the progression is that degree of adverse impact which is "material". Nothing in the GATT wording or in the history of drafting suggests that "material" begins where "negligible" ends, although such a logical approach commends itself to protectionists. We do not propose to review the extensive debate or detailed history of the issue in the U.S., where, for a time the Tariff Commission took the view that all injury which was not de minimis was actionable, a view which was later abandoned. However, it is important that, in the absence of any GATT (or Code) provision defining "material", Congress has legislated a definition:

> In general, the term "material injury" means harm which is not inconsequential, immaterial or unimportant.[5]

This language has not been held to be inconsistent with the Codes; given the scope for precedents and practices under the two GATT Codes to be internationalized (that is, given the possibility of producers seeking definitions, precedents and standards in the practices of other countries), this U.S. definition is a definition which could bring about acceptance of a merely "more than de minimis" standard. In our view, it should be agreed that there is injury which is more than negligible but which does not warrant action; there should be an agreed gap between that point where "negligible", "immaterial", "insignificant", "unimportant" terminates and "material" begins.

Further along in the progression of adverse impact, there is that degree of impact which is "serious" and which under GATT Article XIX can justifiy the withdrawal of a tariff concession. We have examined the rationale of that Article above; all we wish to state here is that it is implicit in the GATT that the withdrawal of a negotiated concession, on which investors and governments elsewhere have based decisions, can be justified only by a degree of impact considerably greater than that which has to be determined to exist to warrant action against "unfair" imports. This implicit logic of the GATT injury provisions should be made explicit; it should be a subject for consideration in the review of XIX actions which will no doubt take place in the next multilateral negotiation under the GATT. We shall be considering procedural proposals below.

Further along the progression, and moving outside the formal GATT structure, is that degree of impact which, it appears, countries are agreed justifies restrictive action without the disciplinary features of Article XIX: the obligation on the importing country to act in a non-discriminatory fashion and the right of the exporting country to make compensatory withdrawals. That is the logic of the Multi-Fibre Agreement. As a practical matter, it is not at all clear that many past and present MFA actions could not have been handled under Article XIX; the issue is that countries wishing to take restrictive action prefer to do so on a discriminatory basis and without having to pay compensation. In accepting the MFA approach, it was accepted that commercial policy decisions should be made essentially on the basis of power, by the ability to coerce. This is just what the GATT was intended to limit.

This is, in fact, the political logic of the present state of contingency protection; it is to be doubted that the protests of the competition policy community will, in the short term at least, bring about a different political perception. To revert to the example of steel; is certainly arguable that, although the problems in world steel trade are of a scope beyond what the GATT draftsmen thought would arise, the issues in the trade in steel could nonetheless have been addressed under Article XIX;[6] countries and companies have preferred to rely in the main on Article VI measures, and on the threat of Article VI measures, because they are discriminatory and because such measures do not create any obligation to pay compensation.

In summary, the first proposal is to raise the threshold of "injury" in each provision of the GATT contingency system.

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

provisions these references do not appear; however, in a guide to the EEC provisions issued by the Commission in 1980, it is stated that "Community interest may cover a wide range of factors but the most important are the interests of consumers and processors of the imported product and the need to have regard to the competitive situation within the Community market."[11] Clearly, these references to competition policy concerns are minimal; however there are a number of cases in which experts in Brussels asert that such concerns have been important or decisive.[12]

It will be difficult to draft language to bring about the proposed changes in emphasis unless clearly there is a manifest political will to bring about a change in emphasis. Consideration of Section 337 of the U.S. Tariff Act administered by the USITC suggests what the problems will be. Section 337 specifies that relief is available in regard to "unfair methods of competition and unfair acts in the importation . . . the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated. . ." (emphasis added). If some such provision were incorporated in the contingency protection provisions, we might envisage that an inefficient industry (that is, one which is unable to compete with imports primarily because it is inefficient) or a monopoly or oligopoly should not get relief. This would, one might hope, mitigate the present excesses of the injury standard, which Dale has rightly described as a simple "diversion of business standard". If so this would be a major, highly controversial change in U.S. legislation; nothing in the U.S. legislative history of the Article VI provisions suggests that such a change could be comtemplated in the present highly protectionist mood of the Congress. It is clear too that, as a practical matter, it is only if the U.S. is prepared to make such a change, and to give the necessary leadership, that there is any possibility of such a radical change being made in the thrust of the system.

Section 337 of the U.S. Tariff Act speaks of two alternatives: imports which injure an efficient industry or imports which "restrain or monopolize trade and commerce in the United States". On the surface this second alternative looks like a formulation directed at predation, or at the effects of behaviour which resembles predation, whatever may be the intent of the exporter. This separate or alternative test provides useful language; clearly, from a competition policy point of view there is a major difference between dumped or subsidized or increased imports which destroy competition and those which do not. But the two phrases we have cited are governed by the operational phrase "effect or tendency". Section 337 deals with acts which have a "tendency to substantially injure" or "to restrain trade. . .". "Tendency" is a weak word, and the evolution of this section has been influenced by the fact that is, in practice, largely but not solely, directed to alleged patent infringement by importations. That being the case, the standards of domestic patent infringement law are imported into 337; for example, in one case the commission noted that "A domestic company infringing a patent cannot defend by saying that the patent owner is economically strong, so that infringement of the patent should be over looked".[13] Moreover, the concept of "substantial injury" does not involve a high threshold of pain or of evidence. "The question or degree of harm to be proved by a preponderance of the evidence in order to substantiate a reason to believe that the imported infringing luggage containers constitutes the effect or tendency to destroy or substantially injure the domestic industry can hardly be defined with precision. The requisite harm is clearly more than de minimis... It

is a probability or prima facie showing based on a preponderance of the evidence available. . .".[14]

As for the question of the test of whether an industry is "efficiently and economically operated' is a useful test, one U.S. expert has commended:

> In the absence of any determination in which the Commission found the domestic industry to be inefficient or not economically operated, it is difficult to surmise which factors would be considered. . . .[15]

As for the "restraint" of trade provisions — the alternative to "injury" to the industry in Section 337, the USITC has held that this provision marches with Section 1 of the Sherman Act, that is, it makes unlawful unreasonable restraints of trade.[16] Without going into a complete exposition of the scope, and the somewhat confused history, it is useful to recall that in Steel Tubes, it was alleged that respondents" lowered prices, to "unreasonable low levels and even below respondents costs"; the administrative law judge found that "predatory intent may be inferred when a firm prices its products below its average variable cost over a long run if there is no rational explanation for such behaviour. Injury to competition was inferred from such predatory behaviour because it forced other competitors faced with such prices to either sell out at a loss themselves or maintain prices at levels that would result in lost sales."[17] This is very much like the "Areeda-Turner" test.[18]

We might conclude therefore, that, in order to introduce into the GATT injury provisions some additional factors, that is, an assessment of the state of efficiency and the level of competition in the domestic industry, and an assessment of what will be the impact on competition in the domestic industry, we could look at the language of Section 337 of the U.S. Tariff Act. However 337 standards have clearly not always been exigent and it would be necessary to avoid words like "tendency".

Competition in Exporting Countries

Another avenue or approach to reform of the contingency system would be to include within the scope of the inquiry by the administrative authorities, when they face a request for import relief, the state of competition within the industry making the exports at issue. Such an approach would be a reversion to the logic of anti-dumping systems when they were devised early in this century; it would be in accord with Epstein's article, which argued that the anti-dumping law should be considered as a sort of anti-trust law, attempting to shelter domestic industry from the effect of restrictive practices in other jurisdictions, practices which could not be reached by domestic anti-trust law.[19] There is more merit in this than competition policy enthusiasts have been prepared to admit.

Specifically, administrative bodies such as the EEC Commission, the USITC, the Canadian Import Tribunal, could be directed to take some account of the degree of competition and the existence of restrictive practices within the industry carrying out the alleged dumping (receiving the subsidy) or making the exports at issue under a XIX action, and particularly whether the industry is

protected in its domestic market by unreasonable high import barriers, of whatever kind.

An examination of the problems alleged to be caused by the dumping of capital goods, an issue that has received some attention in Canada, may illustrate what is at issue here.

When the Kennedy Round Anti-dumping Code was being developed, Canadian producers of certain categories of capital equipment pointed out that the markets of a number of countries where there were producers who competed with them in the Canadian market were completely closed to Canadian exports of such equipment. In those markets the principal purchasers were government-controlled utilities who applied infinite preferences for domestic producers. These same producers could then compete against Canadian producers in the Canadian market, or, rather, in those provinces where there were no equivalent domestic procurement preferences. They might do so by dumping or by receiving subsidies, frequently in the form of concessionary financing. At that time there was no prospect of a direct attack by negotiation on the restrictions on trade implemented by procurement policies, and accordingly the Kennedy Round Anti-dumping Code, and subsequently the Canadian legislation, were drafted so as to make it more feasible to deal with such dumping, alleged to be injurious, under the anti-dumping system. The main provisions to this end were to provide that dumping was the <u>sale</u> of goods for export to Canada at a dumping price, rather than the <u>import</u> of goods at a dumping price, as in the pre-existing legislation; this did <u>not</u> mean that any duty could be levied before importation, but merely that dumping could be held to occur before importation. This seemed consistent with economic logic and with GATT Article VI, which speaks of goods "introduced into the commerce of another country". It was considered by the draftsmen that a sale of a capital item which might not clear customs until three years later had nonetheless "entered into commerce" and "injury", if any, was likely to occur before importation. Thus the scheme of the 1968 Act was to define dumping in a manner more nearly reflecting commercial reality, and get around the difficulty facing capital goods producers who, previously, could seek relief only after the competitive goods had been imported. Further, the key concept of "sale" was defined to include an "agreement to sell"[20] and "credit dumping", that is dumping by means of concessionary financing, was covered by the regulations on "normal value" and export price".[21]

These provisions were relevant to several significant Canadian cases (e.g. the Turbines Case, Generators Case and the Ansaldo Case).[22] These cases were the subject of some detailed analysis in Professor Stegemann's article addressed to the burden of the dumping duty, but he did not address the sort of issue raised by Epstein,[23] in this case, the relevance of the restrictions on foreign (i.e., Canadian) competition in the domestic market of the competing exporters. The Tribunal observed that ". . .producers not only in Japan . . . but also in most of western Europe benefit from having home markets which (with the exception of Sweden) are apparently closed to foreign competition". The particular problem which the domestic producers believe they face in the Canadian market is that a number of provincial utilities do not give preference to domestic producers comparable to preferences given to producers in western Europe and Japan; the Canadian producers therefore have sought relief from import competition by recourse to the anti-dumping provisions.

This issue was extensively discussed in the informal bilateral meetings between Canadian representatives and the representatives of other countries, particularly those representing the UK, during the Kennedy Round negotiations which resulted in the Anti-dumping Code. In those meetings the senior UK official expressed the view that the appropriate technique for dealing with problems of import competition in regard to such products as turbines and generators was not by the use of the anti-dumping system but by procurement rules. That was and is the pattern by which this industry is protected and subsidized in most of the industrialized countries, except for certain Canadian provinces and the privately controlled power utilities in the United States.

The issue of how to open the market of the other industrialized countries, the producers of which competed in part of the Canadian market only over the tariff, was addressed in the Tokyo Round. In the various discussions around the negotiation of the Procurement Code there was detailed examination of the scope for adding to the list of entities to be covered by the proposed code those publicly owned or controlled electricity generator and distribution entities which would be potential markets for Canadian producers. By the same token, it was clear that the relevant Canadian entities would also have to be included. There were detailed discussions to that end with the Canadian provincial authorities, at a senior level, particularly those which were known to give effective preferences to Canadian producers.[24] Until a very late stage of the negotiation the representatives of the EEC Commission expressed the view that it could not be ruled out that such entities as Électricité de France could be included under the Code. However, from an early stage of the negotiations of the Procurement Code the Canadian representatives were aware, from bilateral discussions in Paris, that it was unlikely that Électricité de France would be covered by the Procurement Code, and in the event there proved to be no scope for opening the foreign procurement market to Canadian exports of turbines and generators.

The sectors of production covered by absolute domestic product procurement preferences are only one example, but a very clear cut one, of the restrictive practices which may be found to exist, perhaps for many products in many countries. Our proposal here is that the Tribunal or Commission investigating the impact of alleged dumped, subsidized or intolerable imports should take into account not only the state of competition within the domestic market, but also within the market of the exporter. It could be argued that this would involve an undesirable extension of jurisdiction; but this might be no more an extension of jurisdiction than is the detailed inquiry by officials of the importing country into pricing practices in the determination of "normal value" (that is, the exporter's price in his domestic market) in an anti-dumping action. This involves not only compiling evidence in a foreign jurisdiction but very often the investigation on the spot, in the factory, of pricing practices (by inspection of invoices etc.) by agents of the administrative authority of the importing country. (Officials from anti-dumping administration do carry out detailed investigations in foreign countries, and on the premises of the exporters; in some jurisdictions the government of the importing country may insist that an official of that government be present.)

This proposal is intended, as already noted, to take into account the fact that dumping is a function of the separation of markets: by tariffs, by transport costs, by procurement preferences, by market power and by restrictive

practices. It is also intended to take into account the fact that sudden and unforseen surges of imports which may give rise to demands for Article XIX action or for a "VER" may sometimes be related, in part at least, to the deployment of some protective or restrictive measure in the exporting country concerned. For example, it is most likely that part of the alleged disturbances in textile and textile products markets may be due to such restrictive devices as "exchange link" mechanisms.[25] This particular aspect of the textile problem does not seem to have been adequately studied; academic investigation has concentrated on the import barriers maintained by importing industrialized countries and little attention has been given to the trade policy practices of the exporting countries.

It is critical that, in deciding to confer "contingent protection" on particular producers, to know whether or not the import competition issue is the result of the working of comparative advantage or of some restrictive practice which gives the exporter an opportunity to make excess profits in the domestic market and therefore the ability to compete more strongly abroad.

Recognizing The Burden of Costs

In making such a proposal it is not intended to overlook the important consideration that imposing a measure of contingent protection imposes costs. In a sense, the smaller economies, if they choose to take action to protect their producers from the impact of export practices made possible by restrictive business practices tolerated in other jurisdictions, are imposing on themselves a burden of additional costs of protection. We take the point made by Professor Stegemann as being obvious: protection imposes costs. Moreover, the smaller trading countries have had imposed on them the cost represented of damage to competition in the importing country due to "unfair" methods of competition — the sort of cost which competition policy measures seek to avoid — as well as the costs due to the denial of export opportunities for their producers by the restrictive practices in the other country concerned. That there are other types of cost involved in the sort of situation that was addressed in _Turbines, Generators_ and _Ansaldo_ seems to have been inadequately assessed.

The sort of remedy to be considered, in the light of the proposal outlined here, must, it seems to us, depend on the circumstances of each individual case. Let us take a hypothetical and extreme case. Let us suppose that the domestic industry is "efficiently and economically operated" — to use the language of Section 337, and that inquiry into that aspect has been rigorous, that the level of tariff protection is moderate, that the industry does not benefit from restrictive product standards or domestic product procurement preferences, and that the export industry is, in contrast, a monopoly or obligopoly, or that it benefits from infinite protection against imports (as with an absolute procurement preference), or that the industry is being heavily subsidized, by such devices as subsidized export financing.

Suppose that the imports at issue are then dumped, in an economic sense, by a substantial margin, or that the export price is substantially subsidized, to the extent that the domestic producer can compete only by selling below variable costs, and thus that there is, in a competition policy sense, damage to competition. In such a situation the most equitable remedy might be

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

requirement in the contingency system that an adequate statement of the facts and a reasoned exposition of reasons for action proposed be made public; our position is broadly similar to that set out by Corbet in his paper presented to the OECD Symposium on "Consumer Policy and International Trade", Corbet's argument is that there is a broad public interest in a democratic society in making public the rationale of proposed protectionist actions.[27]

It follows from our first four proposals that we would favour a definition of the "public interest" in this context which would include the effect on the structure of competition of any proposed measure, and the effect on consumers. The U.S. "interest" clause is formulated somewhat along these lines.[28] It would be important to provide that reliable estimates be made of the costs of providing the relief recommended, of not providing it, and of alternative courses of action; the concept of "costs" should be comprehensively defined to include the costs of not acting, and to include the costs imposed by virtue of anti-competition practices in the exporting country.

Domestic Procedures

Following up the question of procedures, we should also consider whether, if we broaden the scope of enquiry to include the various aspects of competition, as suggested above, it becomes more clearly necessary that such inquiries be assigned to administrative tribunals with established procedures for public hearings and for dealing in an organized way with all interested parties, including those interested in competition policy aspects.

This proposal might be though of as being directed at the EEC, which still follows the practice of handling these matters "in house", as Canada did before implementing the Kennedy Round anti-dumping code, and as Canada has done until the recent reform of the system in regard to the majority of "safeguard" actions. However, under the impact of the Japanese Ballbearings case the procedures of the EEC Commission were altered to take into account more fully the rights of interested parties, and it would be argued that, as a practical matter, interested parties are as well served by the current EEC Commission procedures as are parties in either Canada or the U.S., where there are independent bodies to enquire into "injury". This may be the case, but the broadening of the scope of import relief inquiries will impose a very substantial burden on the agencies concerned; moreover, it is evident that such broadened inquiries, combined with a policy of publishing detailed and reasoned statements supporting proposed actions, including particularly, the results of meaningful, not perfunctionary, inquiry into the state of competition within the domestic industry and within the exporting country, will dictate that the inquiry function be handled by quasi-independent-agencies. (The problem will also arise to whether the same agency should be responsible for such matters as measuring the margin of dumping or the extent of subsidization; these functions are handled in one agency in the EEC. In the U.S. and Canada the reasons for separating the inquiry into injury from the inquiry into the margin of dumping are largely historical; they are questions of bureaucratic "turf" rather than anything else.)

Measuring Discrimination

A partial integration of competition policy with the contingency protection system, in the fashion outlined above, also raises the technical issue of measuring price discrimination. Most of the literature which has identified the difference in "standards" between contingent protection (most importantly, in anti-dumping actions) has focussed on the differences in the the concept of "injury". Anti-dumping policy has enshrined a "diversion of business" approach, looking solely on the impact on competitors; competition policy, it is suggested, is directed more at the impact of practices at issue on competition. Our proposals above would, if fully implemented, bring competition policy concepts more fully into the contingency protection system. But there remains the issue of defining when price discrimination in actionable, and how to measure it. As we have already noted the scheme of competition policy legislation defining price discrimination in one country, e.g. Canada, is not identical with the scheme in others, e.g. U.S.; in yet other countries e.g. UK, EEC, price discrimination tends to be dealt with under provisions of a more broad and general character, Articles 85 and 86 of the Treaty of Rome; in yet other countries, e.g. France, the definition of discriminatory pricing is much nearer the concept in the anti-dumping system, that is, it is not addressed to such price discrimination as is harmful to competition or which represents the abuse of a dominant position, but at all price discrimination which is not cost-justified.[29] Given these kinds of differences, there are two possible approaches, one more ambitious than the other. The first would be to work to an international agreement, possibly in the OECD, that there should be one agreed set of standards for determining what differences in prices constitute discrimination, to be applied by all industrialized (OECD) countries, and that such rules would apply in regard to domestic price discrimination and to discrimination in import trade. In this context, it is of some relevance that under the auspices of the GATT Anti-dumping Practices Committee there has been detailed discussion of the elements that go into the calculation of the dumping margin; this has brought about a certain impetus toward uniformity as between jurisdictions. Somewhat the same process has been going toward with regard to the identification of countervailable subsidies and the measurement of such subsidies.

It is obvious that a highly unified system such as this would be in apparent contradiction with the fact that most countries allow firms to discriminate when pricing for export, subject, of course, to the requirements of their tax regimes as to transfer pricing.

Moreover, such an ambitious approach could easily get bogged down in negotiations; it is all too easy to launch a negotiation which never reaches a firm conclusion, or which merely arrives at a wisely worded normative statement, more exhortation than obligation.

A less radical approval would be to seek accord that within each jurisdiction that there be only a single set of standards regarding price discrimination.

Aside from dealing with the issue of quantities, and with cost justification, a single set of rules defining price discrimination would have to deal with the question of "unreasonably low" prices, that is, with predatory prices. Is it feasible to agree, at least at the national level, that, if the standard

in regard to domestic price discrimination is selling, for example, below variable cost, then that should be the standard applied in determining the margin of dumping in constructed value cases; actionable dumping would thus be selling below variable cost — not, as it is now, selling below full cost plus an allowance for profits. Without arguing the merit of either standard, it is clear that domestic legislation would seem less contradictory and more coherent if it used one measure of discrimination instead of two.

Of course, the case for a different measure in regard to dumping than in regard to domestic price discrimination law is the Epstein argument: that anti-dumping provisions are an attempt to shield domestic producers from the impact of restrictive practices in other jurisdictions. On that basis, it would reasonable to conclude that seeking uniformity in the measurement of price discrimination would be less important than would be the broadening of the basis of inquiry to include the state of competition in the domestic industry, the impact on the structure of competition of the imports at issue, and the conditions of competition in the exporting industry. On balance, that seems to be the most important sense in which competition policy objectives can legitimately be brought to bear in the operation of the anti-dumping system. This conclusion is supported by review of the submissions of the U.S. Justice Department to the U.S. International Trade Commission on anti-dumping cases and of the Canadian competition authorities to the Canadian Anti-dumping Tribunal (e.g. Sugar); almost invariably the burden of these submissions is that the impact on competition in the importing country should be given more weight than the anti-dumping authorities feel they have the authority to do.

A final word on procedures, nationally and internationally. If we share the view that there is a specific consumer interest; and, more important, a broad public interest, in detailed public scrutiny of proposed protective measures,[30] then the trend to increased publication of statements of facts and of the rationale regarding all findings and determinations should be encouraged. In this context, the United States sets an example which others could emulate; even the Canadians, who have adopted some U.S. practices, do not publish reasoned statements of proposed actions as comprehensive as those published in the U.S.

Surveillance in the GATT

At the international level, it is to be hoped that the two Committees of Signatories set up under the two GATT Article VI codes can become effective as surveillance bodies. At present, their meetings consist largely of the presentation of poorly documented complaints, of facile and predictable defenses, and of exchanges of gossip. Not very much in the eighteen-year history of the GATT Anti-dumping Practices Committee would encourage one to think that a great deal will be achieved in that body with regard to "injury". Possibly if the competition policy considerations are included in the terms of reference of inquiry into dumping and subsidization, more particularly if the conditions of competition in the exporting country become a focus of meaningful inquiry, there will be an incentive to make these committees into more energetic watchdogs. There is, of course, a real weakness in the system, which it will be difficult to correct: that is, that small countries, which may wish to mount an attack on some action by the EEC or the U.S. which rely heavily on the use of contingency protection devices, find it more difficult than the larger countries

to muster the very considerable technical manpower required to prosecute a case. The larger countries can easily find officials learned in the law and eager to go to Geneva to defend their position. Despite that reservation, it is up to the smaller countries, which are being anti-dumped and countervailed, to develop the modalities of effective international surveillance.

Cartelization

We turn to what, in policy terms, is a much more important problem, where it is simple enough to offer prescriptions for reform, but where there is little prospect of effective action being taken, certainly not at the international level. That is the question of what to do about the increased use of quantitative measures (including the failure to bring trade in agriculture within any set of coherent, rational rules) the increased cartilization of key areas of trade, and the increased resort to power rather than to rules, which has accompanied increased cartelization, which has helped cause cartelization, and which cartelization fosters. To put the issue in more conventional GATT terms, what can we do to improve or strengthen Article XIX (the safeguard clause) and what can we do about Article XIX surrogates - VERs, OMAs, and measures under the aegis of the MFA?

Quantitatively, though anti-dumping and countervail actions are numerous, it is the resort to cartelization and to the quantitative "management" of trade which is the more important issue,[31] and accordingly, it is legitimate to ask whether competition policy concepts can make a contribution, and how. It is convenient to divide our comments, our proposals, into two parts — those that relate to the national sytem, and those which relate to the international system within which it is assumed national systems will operate.

The general view in the trade policy community is that more can be expected by reform of the safeguard complex at the national level than at the international level.[32] One proposal for reform, parallel with our proposals above, is that the three-faceted inquiry into the competition policy aspects should be included in all domestic safeguard actions (and surrogate XIX actions, such as textile quotas). Thus the Canadian Textile and Clothing Board might be directed to bring to the forefront of their inquiries into any given textile or apparel product the state of competition in the industry in Canada, the impact on competition of the imports of issue, and what sort of trade regime applies in the exporting countries. Are the products subsidized? Is there an exchange link system? Do specialized Canadian textile products have access to that market, and over what tariffs?[33] This is not to say that the Board now ignores the first two of there issues, but rather that they should be given more stress. Similarity, the Canadian Import Tribunal, when it is conducting an investigation under Canada's safeguard provisions (under the new Special Import Measures Act) should include in the scope of its inquiry the three-pronged competition policy issues, and in its reporting on such matters. And it should deal with these issues in some detail. It is a matter of drafting whether this be attached to a "public interest" provision or specifically spelled out. The U.S. escape clause provision, though considerably more advanced and elaborated than those of other countries is, it seems to us, defective in that the inquiry by the ITC is restricted to the question of whether or not "serious injury" is caused or threatened by imports (in the particular sense that those terms are used in the U.S. legislation, as noted in

Chapter III above). The other broad range of "public interest" criteria are dealt only at the second stage, when the President is required to decide what he does with the ITC proposals for import relief.

In parallel with the proposal that competition policy considerations should be to the forefront of Article XIX domestic procedures is the proposal to make an adjustment criterion part of the scope of inquiry. The question to be asked, before considering import relief, is: How does the domestic industry propose to adjust to import competition? There is, too, the related notion that assistance for adjustment should as a matter of course be available as an alternative to import relief on the U.S. model. It we assume that subvention is likely to be less costly and less trade diverting, and less self-perpetuating than import relief, then it is important that provisions for adjustment assistance, either to rationalize production or to exit the industry, must be available as a formal alternative. In this aspect the U.S. system is much in advance of other "safeguard" arrangements.

A Self-Denying Ordinance?

But these are modest proposals. What is of overwhelming importance, one is tempted to say, the only thing that matters, is that governments adopt a self-denying ordinance with regard to Article XIX surrogates. We will be rid of discriminatory textile restriction, steel cartels, limitations on trade in autos, video tape recorders, and so on, only if governments, as part of domestic economic policy, decide they should draw back from the use of these extra-GATT devices. This will not happen quickly, and will not happen as a result of international pressure, nor of international negotiation. It will happen only as governments come to realize that their economies cannot afford the costs, in terms of the burdens of protection and in terms of the increased rigidity of the economy resulting from "managed" trade.

The case has been made that for steel, for example, legitimate demands for changes in terms of access could have been dealt with by the use of Article XIX, rather than (for imports into the U.S.) of Article VI. Had that route been chosen by the U.S. rather than opting for quotas outside the system (the first set of steel arrangements with Japan), and if European countries had been prepared to abandon discrimination against Japan, and rely on GATT Article XIX, the adjustment of the steel industries in importing countries might have been greater, and the burden on steel users less than has been the case. One could, of course, make a case that steel, given the problem of structural over-capacity on top of the typical cycle of a large-scale capital-intensive industry, and given the appearance of new centres of production and resulting rapid changes in the pattern of world trade, is the sort of trade problem which the draftsmen of Article XIX really did not envisage; that may be, but that is not to say that Article XIX could not have been adequate if governments had chosen to live by the rules.

This is not perhaps the place to conduct a full discussion of the problems of the "safeguard" system. However, it is important to keep in mind that there are modest reforms possible which might go a long way to restoring the authority of the international rules. The most promising reform is that advocated by the U.S. in the Tokyo Round, and urged since: that all XIX actions

and all surrogates for XIX action be brought under one and the same system of surveillance. If such scrutiny were to be coupled with obligation that importing countries taking restrictive action must positively demonstrate that there is "injury", rather than leaving the burden on the exporting country to show that there is no injury (which is the present GATT dogma),[34] then a useful measure of discipline would have been added to the existing system.

Summary

We have proposed above a considerable tightening-up of the contingency protection system because, in our view, it is now providing the mechanism for more restrictive action than the economies of importing countries, and their political systems, can afford. At the same time, the notion that more punitive action should be taken when it is judged that the impact on the structure of competition in the importing country warrants such action, and/or when the conditions of competition in the exporting country warrant such action, would make relief to domestic producers in such cases more certain and substantial. Such a reform will, of course, place a burden on competition policy advocates and bureaucrats in that they will have to be more confident as to what sort of anti-competitive pricing and practices should be actionable.

A Final Comment

There is little in the above set of proposals that could appear on the agenda of the next round of trade negotiations — in the main because the negotiations are being launched to hold back protectionism rather than work out better rules for emerging problems. Nor has the ground been well prepared — there is little in the way of consensus, nationally or internationally. What measure of agreement does exist on the headings in the tentative agenda has been secured by the threats of protectionist actions by Congress, and has been given unwillingly and without conviction. Accordingly, it would be rash to think that the reform of contingency protection itemized above can be implemented soon is an early starter. But our examination of the modalities of the new protectionism might serve to convince governments that now is not the time to think of extending the contingency system to new areas of trade, that is, to the trade in services.

APPENDIX

OTHER COMPONENTS OF THE TRADE POLICY SYSTEM

In the main body of the text we have examined the principal devices deployed in the system of contingency protection: anti-dumping provisions, and countervailing duty provisions, Article XIX actions and surrogates for Article XIX action, and we have been concerned to see in what ways they conflict with the broad principles of competition policy, and why the rationale of competition policy is largely ignored in the formulation and use of these techniques of intervention. Most discussions of trade policy from the view-point of competition policy have focussed rather narrowly on the particular issue of price discrimination, which is, as we have noted, addressed quite differently under the various national anti-dumping provisions (and under the GATT Anti-dumping Code) than under the various national laws regarding price discrimination and the abuse of market power in domestic commerce. This may not be the most important issue, only the most evident issue, when the broad range of trade policy is looked at from a competition policy view-point. We have suggested in Chapter V that the absence of explicit requirements to take competition policy considerations into account in Article XIX situations, coupled with the widespread recourse to surrogate measures, which avoid the discipline of Article XIX, such as it is, are a more serious issue from the point of view in competition policy.

In looking at trade policy in this study, we have put aside consideration of the customs tariff, for obvious reasons. It is clear that the tariff, employed as a device for reducing the competition of the foreign exporter with the domestic producer, is an anti-competitive device. That is its function. However, the tariff, considered as a technique of market intervention, does not endorse or license practices which are anti-competitive, as do techniques central to the contingency protection system. The most important examples are bilaterally agreed "export restraints" used in lieu of Article XIX, and "undertakings" in the anti-dumping and countervailing duty systems. However, the competitive impact of a system of tariff rates, applied on a non-discriminatory basis, may be to limit the only competition that may be offered to a domestic oligopoly. Thus in Canada, where industrial concentration ratios have been high (i.e. there has been, for many manufacturing industries, little domestic competition) the notion of reducing the tariff on specific products to increase competition has been an important policy concept.[1] What we are attempting to do in this study is to point to the strongly anti-competitive effects of the particular measures endorsed by the contingency protection system rather than simply damning all protection as anti-competitive, valid as such an approach may be.[2]

Our purpose in this appendix is to note, briefly, the anti-competitive implications of some of the other techniques of intervention which are from time to time deployed in trade policy; they may be, in total, less important than the

central devices of the contingent protection system, but they can be critical for particular firms or industries. These devices are: (a) domestic product preferences in government procurement, (b) the use of product "standards" or "norms" to restrict imports, (c) the payment of selective subsidies, (d) the use of the patent system to unduly restrict trade, (e) the use of copyright law (as it applies to industrial designs) to restrict trade. These are not more than short notes on each of these topics; each one could be, if it were to be dealt with comprehensively, the subject of detailed study.

Procurement Policy As An Instrument of Trade Policy

Given the very great importance of the state, or state-controlled agencies or corporations, as a purchaser for many particular categories of products — e.g. communications equipment, electricity generating, transmission and distribution equipment, transportation equipment (particularly railway and urban mass transit equipment) and of course, the whole range of goods for defence purposes (including many categories of so-called high technology-products) — the deployment of a preference (which in some cases is absolute) for domestically-produced goods may be one of the more important areas in which trade policy should be scrutinized in terms of competition policy. For the first time in the development of the post-war multilateralized system an agreement designed to limit the scope of such domestic product preferences was worked out in the Tokyo Round,[3] after many years of preparatory discussion in the OECD.

Negotiations to extend the coverage of the Agreement are now under way, it is understood; it may be that some extension of the "coverage" — that is, the governmental entities to which it applies — will make this agreement important in economic terms; however, for the present all one can say is that, while admirably drafted, the agreement does not have great economic effect because its coverage is so limited. "Coverage", in this agreement, is defined by the list of specific departments of government or government-contracted agencies or corporations which the various signatories agree are to be directed to carry out their purchasing policy according to the detailed procedural rules of the Agreement. The "coverage" is limited, in this agreement, because the purchases of state and provincial authorities, in federal states, are excluded, because not all central government agencies are included — which has the effect of excluding a number of product categories, and because defence goods are excluded.

One of the difficulties in constructing an agreement on procurement arises from the fact that certain activities are carried out, in some countries, by the state, in others, by the private sector, in still others, by agencies of subordinate governments, that is at the state or provincial level. This was one reason why it proved impossible to include communications equipment, transportation equipment or electricity generating, transmission and distribution equipment in the code; the exclusion of these products is, of course, not set out in product terms but in terms of the entities which are the principal purchasers.

It should not be assumed, therefore, that from a competition policy point of view the Tokyo Round agreement on government procurement significantly reduced the anti-competitive effects of procurement policy.

The anti-competitive effects of procurement policy can be thought of as arising in three different but related ways. First, there is the use of a tariff-like preference, over and above the laid-down, duty-paid price of imported goods, accorded to domestic, producers over foreign producers.[4] This gives an additional or oligopolistic return to domestic producers; it is anti-competitive, as is a tariff, in that it tends to restrict foreign competition.

Second, there is the practice of giving absolute preferences to domestic producers. This has, obviously, an even greater impact on the structure of competition than a fixed-rate preference; where there are a limited number of domestic producers such a procurement practice provides a strong incentive for collusive tendering by those producers.[5] (Some governments have recognized that the only way to secure lower prices and ensure less collusion between suppliers is to open the market to foreign suppliers, and indeed, this may be one of the unintended results of privalization of certain activities, such as telecommunications.)[6] Just how anti-competitive a policy of restricting supply to domestic producers may be in practice depends on the details of how firms are chosen for selective tendering; it is conceivable that a procurement policy with an absolute preference for domestic goods may be deployed to strengthen smaller firms and improve the structure of competition in the domestic market.

The potential of using procurement policy selectively to support research and development efforts or to develop domestic capability in a given sector is often attested. An interesting example is the decision taken by the Canadian authorities, it is understood, to award consulting engineering contracts for major resource projects (so-called "mega-projects") which involve government participation, only to Canadian-controlled consulting engineering firms, in preference to the Canadian subsidiary of a major foreign-controlled engineering firm. A detailed study of procurement practices from a competition policy point of view would involve the examination of a number of such cases.

Third, and perhaps, logically, only a variation on the second category, is the impact of purchasing for defence purposes. This is an area of procurement that lies outside any possible multilateral arrangement and in which foreign firms are admitted only on a highly-regulated, highly negotiated, usually government-to-government basis. It might seem that competition policy practitioners should ignore this area of procurement but, of course, there will be precisely the same anti-competitive effects from a highly restrictive purchasing policy in this sector as in other sectors. The production of specialized goods for defence is not, of course, entirely separate from other types of production; a policy of directing contracts, frequently on a "cost-plus" basis, to domestic producers, must have an impact on the structure of competition over a fairly wide range of products. Procurement policy, in this sector, can be used to subsidize research and development; it has long been argued by the EEC that U.S. high-technology firms are subsidized to a substantial degree by defence procurement programs, and that these have the effect of subsidizing U.S. exports of related products outside the defence sector.[7]

Product Standards

In this brief account it is not possible to make a detailed review of how product standards may be deployed to give protection to domestic producers, and

of the attempt, in the Tokyo Round, to begin to introduce some trade policy discipline in regard to the use of standards.

It had become accepted in the trade policy community, by the time the Tokyo Round got organized in early 1975, that there were potential trade policy problems related to systems of product standards; there was a general awareness that, perhaps in all countries, there were occasions in which product standards were manipulated to confer protection on domestic producers over and above the tariff. This was thought to be most common in the area of food and drug standards; there were known to be cases of standards being applied with extraordinary zeal in regard to food production technologies in other countries. There was also a concern in the electrical, electronics, telecommunications and other high technology sectors that national or regional standards might be developed with the incidental effect of limiting or imposing an additional cost on foreign competitors. Accordingly, in the Tokyo Round trade policy negotiators developed an Agreement on Technical Barriers to Trade.[8]

As the Preamble to this Agreement asserts, the purpose is to ensure that "technical regulations and standards do not create unnecessary obstacles to international trade"; to this end the Agreement lays great emphasis on "international standards and certification systems". (Emphasis added.) The working of this code, which some observers have seen as being a vehicle facilitating the international acceptance of U.S. standards, appears not to have been the subject of detailed scrutiny by competition policy authorities within national administrations.[9] Our purpose here is simply to assert that if competition policy bureaucrats believe that they should have an input to the trade policy process (and that, for example, there should be some harmonization of rules defining price discrimination in domestic commerce and with regard to imports) they should also scrutinize the increasingly important area of product standards in regard to its anti-competitive effects in domestic markets and in international trade. The fact that standards bureaucrats and competition policy bureaucrats exist, in most national administrations, in relative isolation, within their particular spheres of administrative, statutory, competence, and that, accordingly, competition policy officials find it easier to develop exchanges of views with competition policy officials in other countries, and that standard-setting officials talk more easily and frequently to standard-setting officials in other countries than to officials concerned with trade policy or competition policy in their own country, does not take away from the validity of this statement.

Subsidy Policies

We could make a parallel observation with regard to subsidy policy (whether subsidies are paid directly, as positive expenditures, or through the tax system as tax expenditures). The relevance of competition policy has long been explicitly recognized in regard to tariff policy;[10] more recently, as we have noted, competition policy bureaucrats have noted that the anti-dumping system deals with a phenomenon, price discrimination, which is a legitimate concern of competition policy. But it does not seem to be the case that within any national administration, competition policy is brought to bear in any substantial way on subsidy policy. If we consider the most recent study of the impact of subsidies

on trade policy, the work by Hufbauer and Erb, there is only the briefest of references to competition policy considerations.[11]

Given that subsidies are now one of the major techniques of intervention, that subsidies are part of the "new protectionism", one could argue that competition policy should be brought to bear in this area of trade policy. Moreover, there is the important point that, although there is mechanism to offset certain foreign subsidies (the countervailing duty provisions), there is no equivalent mechanism in regard to domestic commerce (except within the EEC, where particular member state subsidies may be prohibited). In the U.S. and Canada, there is no legal mechanism which an agrieved producer in one state or province can invoke against a producer in another state or province who has received a subsidy. The broad issue of subsidization and trade policy has been left in a most confused state by the Tokyo Round agreement.

Patents

The designing, working and the manipulation of the patent system has been frequently a concern of competition policy. A patent confers a monopoly, and accordingly there has been an extensive debate about how that monopoly should be limited without destroying the incentive to technical progress which, it is held, is the objective of a system designed to reward invention. Without attempting to contribute to the extensive literature on patents, we may look at some illustrative examples of situations in which trade policy considerations, the working of the patent system, and competition policy considerations were involved.

One of the more important examples is the Canadian Radio Patents case. It was alleged by the U.S. Department of Justice that certain producers of radios and television receivers in the U.S. and outside the U.S. were using a patent-pooling device to restrict imports into Canada. The production of radios (and television receivers) depended on access to a great number of patents; the producers in Canada, some of which were subsidiaries of U.S. firms, assigned these patents to a firm, Canadian Radio Patents Ltd., which was prepared to grant comprehensive licences to producers and to importers for these patents. However, given that the Patent Act provided that it is an abuse of the patent to serve the market for the patented article by imports,[12] these licences were granted to foreign producers in regard to exports to Canada only for those categories of equipment which it was judged by the company could not be economically manufactured in Canada. This was believed to preclude certain imports from the United States, to the detriment of those U.S. firms which wished to serve the Canadian market from their U.S. production, rather than from the production of a subsidiary in Canada. The patent pool also effectively kept out a range of Japanese television sets, until such time as the last relevant patent expired.

Action by the Anti-trust Division of the U.S. Department of Justice, and subsequently, private suits, under the Clayton Act, were instituted. Within the Canadian bureaucracy, there were at least three different views. In the trade policy community, there had been no knowledge that this private sector trade barrier was in place; trade policy officials had not been concerned with the Canadian patent system, which was regarded as a policy device essentially

outside the trade policy area. Their attitude was consistent with the GATT, which provides, in Article XX, that "nothing in this agreement shall be construed to prevent the adoption or enforcement . . . of measures . . . (d) necessary to secure compliance with . . . the protection of patents." In the competition policy community, there was some reluctance to take issue with the U.S. position; the Canadian competition policy authorities had not found it possible or perhaps desirable to proceed against the radio patents pool (if they were aware of its existence) but they generally held to the view that U.S. anti-trust actions which were directed at anti-competitive actions in Canada (such as the Alcoa case and the Dupont-ICI case)[13] had had desirable results, in terms of reducing industrial concentration in Canada.[14]

The foreign policy community (more precisely, the officials of the Department of External Affairs) took the view that this was an unacceptable extension of U.S. jurisdiction extraterritorially. This view was adopted by Ministers, and in due course the issue was discussed in a meeting in Ottawa of the Canada-U.S. Joint Cabinet Committee on Economic Affairs, in early 1959. Following this discussion, an understanding was reached on the modalities of consultation between the U.S. and Canadian authorities on anti-trust actions with potential extraterritorial implications.[15] As was virtually inevitable, given that the issue was being addressed in terms of foreign policy and the Canadian concern with U.S. assertion of extraterritorial jurisdiction, both competition policy considerations and trade policy considerations were virtually ignored.[16] Trade policy officials were, it may be assumed, not disposed to upset the operations of the patent pool because it made unnecessary any "voluntary export restraint" by Japan on television sets. (When the relevant patents expired, the Canadian producers asked the Canadian government to negotiate such an "export restraint" arrangement; the subsequent history of trade with Japan in this product belongs to a discussion of Article XIX "surrogates".)

Another, and current, issue for Canada is the question of compulsory licensing of patents for drugs in Canada. The decision to provide for the compulsory licensing of patents for drugs (and, of course the payment of a prescribed royalty) in Canada arose out of a series of enquiries into the operation of the drug manufacturing firms in Canada, many of which were and are the subsidiaries of foreign firms. It was believed that drug prices in Canada were high and that the pharmaceutical industry was an oligopoly which extracted oligopoly profits from sales in Canada.[17] This was a case in which trade policy devices were brought into play to support competition policy.

Primarily on the initiative of the then Minister of Finance (Mr. Walter Gordon) a series of measures were introduced to reduce, or to attempt to reduce, the extent to which devices of governmental intervention in the market buttressed the pharmaceutical oligopoly. Tariff rates on a number of pharmaceutical products were reduced in order to facilitate importation; the federal manufacturers' sales tax on pharmaceutical products was removed, to encourage reductions in prices in the knowledge that the tax was usually incorporated in the wholesale price and therefore became part of the base to which retail "mark-ups" were applied; the protection of the anti-dumping provisions was removed, by regulation, in order to facilitate dumping by the Canadian firms of imports from parent companies and by independent importers, and to reduce the scope for harassment by the Canadian producers of their competitors who relied on imports; and finally, a regime of compulsory licensing

of pharmaceutical patents was introduced. This would, it was hoped, encourage the production of generic substitutes for various prescription drugs.

It has been, subsequently, alleged that these measures reduced the profits of the established Canadian producers and that independent research into pharmaceuticals in Canada was thereby discouraged. The U.S. controlled firms involved have, more recently, persuaded some members of Congress and some elements in the U.S. Administration that this compulsory licensing of pharmaceutical patents is an "unfair" practice, and it has, it is understood, been added to the agenda of U.S. complaints about Canadian policies. The issue is still open; in response to U.S. pressure, and in response to pressure from U.S. controlled subsidiaries in Canada, a commission of enquiry has been established, under Professor Harry Eastman of the University of Toronto, to make a detailed study and report.[18]

Meanwhile, the Canadian tax authorities have alleged that U.S. controlled subsidiaries in Canada have reduced their repored Canadian profits, and paid less tax in Canada, by paying their parent firms inflated transfer prices.[19] (Transfer pricing is, of course, a legitimate concern of tax authorities; in the U.S. the prices paid by and to U.S. firms and their foreign subsidiaries are scrutinized under the Internal Revenue Code.[20] In Canada transfer pricing of affiliates of foreign firms, including the pricing of exports of Canadian controlled firms, is also scrutinized under Section 17 of the Income Tax Act.)

The issue of Canadian compulsory licensing of pharmaceutical patents is still not settled; it is an interesting example of how trade policy, competition policy, patent policy and tax administration are involved in a single policy issue.

A somewhat similar issue is raised by the Mexican policy with regard to pharmaceuticals; that policy has been designed to encourage the manufacture in Mexico by Mexican-controlled firms of pharmaceuticals developed by foreign companies. It is reported that the U.S. Administration has made signature of a bilateral trade agreement conditional on changes in the Mexican pharmaceutical policy. A somewhat similar issue has arisen in the EEC; Italy has no patents for pharmaceuticals and, accordingly, importers into other member states of Italian drugs may be sued for patent infringement.[21]

For large markets, such as the U.S., the technique of compulsory licensing of patents has implications largely in terms of competition within the market. For smaller countries, compulsory licensing has implications for trade policy. It has long been established, of course, that compulsory licensing, subject to the payment of appropriate royalties, is the compromise between those who believe that a patent system is indispensable and those who believe it merely confers monopoly.[22]

An important current case about patents is the curent U.S.-EEC dispute involving Dupont of the U.S. and Akzo N.V., a Dutch firm. Dupont filed a petition with the USITC (under Section 337 of the Tariff Act) alleging patent infringement by Akzo. The ITC imposed a prohibition on Akzo's product (aramid fibre). Akzo asserts that this ban is illegal in that it does not take into account legal proceedings in Richmond, Virginia, in which Akzo claims Dupont has infringed a U.S. patent registered by Akzo. (Whether the ITC order will continue in effect is a matter for the President; he has the discretion to confirm or set

aside such an order by the ITC, and in this case he must make a decision by January 25, 1986). Meanwhile Akzo appealed to the courts of the Netherlands that Dupont was infringing a Dutch patent for one of the process chemicals required to make the product (aramid fibre). The Dutch lower court ruled in favour of Akzo in February 1985, and more recently the appeals court confirmed the decision. The matter is, at the time of writing, being discussed between the EEC Commission and the U.S. authorities. This is an example of where, for the firms concerned, the patent system is trade policy.[23]

One could hazard a guess that patents will increasingly be used to protect markets as between industrialized countries in high-technology sectors. The Akzo-Dupont case cited above concern the most technologically advanced artificial fibres. Another high technology case involves an action before the USITC (under Section 337 of the Tariff Act) in which a U.S. producer of floppy-disk drives is alleging patent infringement by a number of Japanese firms. The initial finding by the ITC was that the Japanese firms should post substantial bonds with customs while the inquiry proceeded. Like the Canadian Radio Patents example, this an area where patents can provide infinite protection, although for a limited period (long enough for rapidly evolving high-technology products).

We wish to do no more, in this brief comment, than to point out that trade policy and competition policy should both be concerned with the detailed operations of the patent regime. In most countries the administration, at the bureaucratic level, of competition policy and patent policy tend to operate in separate compartments, in part because administrations derive their authority from specialized statutes which confer authority and responsibility uniquely on them.[24]

Copyright

Turning to the related area of copyright, the most important current issue is the question of whether computer software should be protected by patents or by copyright. For this key product it is either patents or copyright which are trade policy; the tariff is virtually irrelevant. The protection of artistic works, literary works etc., is, of course the usual area of operation of the copyright system; however in the United Kingdom, the existence of a copyright in drawings of industrial products may be invoked to protect the manufacture of the product so described. In other countries the implicit copyright in an engineering drawing does not extend to three dimensional objects based on such drawings. In the U.K. however, it is a principle of the present copyright provision that copyright extends to the objects based on the drawn design, although the copy may have been made by examination of the object, and not by reference to the drawing. This feature of the copyright law has, in practical terms, been important mainly in regard to the manufacture of spare parts for automobiles; it is a feature of the automotive industry that independent manufacturers make and sell copies of parts of automobiles, often at lower prices than parts made by or sold by the automobile manufacturers themselves or their supplies of original equipment. It is only in the U.K., among major industrialized countries, that such practices can constitute a breach of copyright; in effect, under this regime copyright gives protection to articles which could not be patented or the designs of which could not be registered.

Two recent cases illustrate how these provisions operate. In one case an automobile manufacturer (British Leyland) sued a parts manufacturer for making and selling copies of BL parts. BL had licenced other manufacturers to do so, but had not licenced the particular firm concerned. The defendant argued that BL was abusing a dominant position, in terms of Article 85 and 86 of the Treaty of Rome. The court rejected this and found for BL citing the provisions of copyright.[25] A different case, again involving automobile parts, concerns Ford Motor Company Ltd.; this case is different than the BL case because what was at issue was the policy of Ford of not granting licences to manufacture or sell replacement body parts for Ford vehicles (there was also the issue of parts the designs of which could be "registered designs"). In the case of Ford, the situation was investigated by the Office of Fair Trading to determine whether, in the view of the Director General, Ford's practices were "anti-competitive". The Director General expressed his opinion that they were anti-competitive, and recommended a reference to the U.K. Monopolies and Mergers Commission.[26] The purpose of such a reference is to establish whether or not an anti-competitive practice is contrary to the public interest. In its report the Commission argued for changes in the U.K. law to reduce the duration of protection under copyright for the parts at issue.[27] Ford continued its court actions against various parts producers for alleged breach of copyright; meanwhile, the Commission of the Communities thereupon opened proceedings designed to force Ford to grant licenses to independent suppliers against payments of royalties. The proceedings were halted when Ford agreed.[28]

These provisions do not concern only domestic commerce. U.K. producers have, as would be the case with patents, used these rights to combat imports. In this context it is important to keep in mind that the protection they invoke under the copyright act arises from the existence of a drawing of the design of the part or product at issue; the drawing need not have been made in the U.K.[29] We do not wish to comment on current cases in which U.K. producers are suing or threatening to sue importers; these are either the subject of private discussion or are before the courts; some of these involve imports and the disposition therefore is a legitimate concern of trade policy, and should be a concern of competition policy.

The U.K. authorities have recognized that these copyright provisions give protection, in domestic commerce and in trade, going beyond that available in other countries. In the Green Paper on reform of the copyright law, essentially a discussion document, it was proposed to remove protection from "purely functional designs", "Whatever that may be", as The Economist noted.[30] There the matter rests.

Summary

In this appendix we have noted a variety of policy devices: procurement, product standards, patents, subsidy policies, copyright and so forth. The object has been primarily to make the point that these are areas where trade policy and competition policy are both involved. We have shown that what is, in effect trade policy, is often implemented by the use of devices outside the confines of trade policy and by bureaucrats (or by courts) applying their own versions of trade policy, often in contradiction with trade policy. And frequently they pay even less regard to the logic of competition policy than they do to concepts of trade policy.

FOOTNOTES TO CHAPTER I

1 The term "contingency protection", intended to include all measures of protection against import competition other than protection by a scheduled rate of duty, but emphasizing the increasing role of the anti-dumping and countervailing duty provisions, and of "safeguard" actions, was, it appears, first used in this sense shortly after the conclusion of the Tokyo Round in 1979 by the author of this paper (Financial Post, Toronto, November 24, 1979). Other writers (e.g. Finger) have used the term "administered protection" to cover some but not all of the same range of measures. See J.M. Finger, H. Keith Hall and Douglas R. Nelson: "The Political Economy of Administered Protection" American Economic Review, June 1982. Others have used a broader term: the "new protectionism"; see Douglas R. Nelson: The Political Structure of the New Protectionism, World Bank Staff Working Paper No. 471, The World Bank, 1981.

2 For the text of the General Agreement on Tariffs and Trade, see Contracting Parties to the GATT: Basic Instruments and Selected Documents Volume IV: Text of the General Agreement 1969, Geneva, March 1969. Many countries have also published the Agreement in their national treaty series, for example, in the U.K., H.M.S.O. Cmd. 9413, Review of the General Agreement on Tariffs and Trade, April 1955. The earlier text of the Agreement, prior to the changes negotiated in 1955, and subsequently incorporated in the Agreement, may be found in United Nations: General Agreement on Tariffs and Trade, Volume 1, Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.N., Lake Success, New York, 1947 (text in English and French). For Canada, the original text is Treaty Series, 1947, No. 27, which also contains the Exchanges of Notes with the United States and with the United Kingdom regarding changes in the existing bilateral agreements. For the U.K. the original agreement is Cmd. 8048 of 1950. For the relationship between the GATT and the more comprehensive Havana Charter (Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, London, October 1946 and Final Act and Related Documents, United Nations Conference on Trade and Employment, Held at Havana, Cuba From November 21, 1947 to March 24, 1948, Interim Commission for the International Trade Organization, Lake Success, New York, April 1948, see generally John H. Jackson: World Trade and the Law of GATT, Bobbs-Merrill, 1969 (hereafter Jackson: GATT) and GATT: Analytical Index, Third Revision - March 1970.

3 We say "largely" because the trade policy system includes some provisions concerning services, e.g. Article IV of the GATT, which relates to cinema screen quotas; the trade policy system also addresses such issues as tariff rates on engineering and architectural drawings, which represent professional services. The line between services and goods is not easy to draw. See Jagdish Bhagwati: "Splintering and Disembodiment of Services and Developing Nations", 7 The World Economy, June 1984, No. 2.

4 See, for example, U.N. General Assembly, UNCITRAL, Fourteenth Session, 1981: Current Activities of International Organizations Related to the Harmonization and Unification of Trade Law.

5 See Council Regulation (EEC) No. 2176/84, Official Journal of the European Communities, (O.J.) 30.7.84, No. L201/12, Article 12(1), for the regulations regarding "protection against dumped or subsidized imports"; for an example of the manner in which the "interests of the community" are invoked, see "Re a Definitive Anti-dumping Duty on Certain Acrylic Fibres Originating in the United States of America", 1981 C.M.L.R., 90, p. 96, para 34: "In these circumstances, protection of the community's interests call for the definitive collection..."

6 Canada, Anti-dumping Act, 1968-69, c. 10, Section 7; Special Import Measures Act, 1984, Section 14.

7 Department of National Revenue/Customs and Excise, Memorandum D41-1, June 30, 1972, Section 24.

8 Duties were remitted on imports into particular regions, under the Financial Administration Act, in February 1978.

9 See Finger, et.al., op. cit.

10 See Havana Charter (footnote 2 above); the GATT broadly corresponds with Chapter IV of the Havana Charter: "Commercial Policy". For a detailed guide to the differences between the Havana Charter provisions and the GATT, see GATT Analytical Index.

11 United Nations Conference on Trade and Development, United Nations, New York, TD/RBP/Conf./10/Rev./.

12 For a discussion of why tariffs were preferred to quantitative controls, see Harry C. Hawkins: Commercial Treaties and Agreements /Principles and Practice, New York, Rinehart & Co. 1951; especially Chapter XV "Quantitative Restrictions". Hawkins was the senior State Department official through the 1930's and WWII dealing with trade agreements, and implementing the Reciprocal Trade Agreements Program of Cordell Hull; he played a key role in developing the U.S. approach to commercial policy in the period. He was, for example, Keynes' interlocutor when Keynes discussed the post-war trade arrangements in Washington. See R.F. Harrod: The Life of John Maynard Keynes, London, Macmillan, 1951, p. 513 and subsequently.

13 Hawkins, op. cit., p. 159.

14 At page 17 of GATT: BISD, Volume IV: Text of the General Agreement, 1969.

15 For an authoritative discussion on this issue, see Hawkins, op. cit. 106-107.

16 See GATT, at page 1 (declaratory preface).

17 See Rodney de C. Grey: "Some Commercial Policy Problems Ahead", Toronto, The Conference Board of Canada, September 26, 1979. "...It is certainly not clear that the new system, or better, the strengthened, re-designed, highly articulated, regulatory system, will be less restrictive of

imports onto the United States than was the pre-Kennedy Round system, which relied in the main on tariffs and not too extensively on the other devices which now play such a central role." (at page 15)

18 A key study attempting to quantify the costs of tariff protection was J.H. Young's study for the Canadian Royal Commission on Canada's Economic Prospects (Gordon Commission) in 1957: Canadian Commercial Policy; it is discussed in Chapter VI.

19 The modern interest in this concept was launched by Clarence Barber's 1955 article: "Canadian Tariff Policy" in XXI Canadian Journal of Economics and Political Science, No. 4, November; subsequently a literature on the theme of effective protection developed: see Herbert G. Grubel and Harry G. Johnson (eds.), Effective Tariff Protection, Geneva, GATT and the Graduate Institute of International Studies, 1971.

20 These writings are so numerous, and so repetitive, that it is not useful to provide a detailed citation.

21 This is the so-called "bicycle theory" of trade policy, to the effect that one must always be preparing for a new negotiation, or conducting one, in order to contain protectionism. It is a view often expressed in the United States, but given less credibility in Europe.. The view is asserted as an act of faith, there having been no persuasive investigation of its validity. It is a view which has a great deal of appeal to the members of the "trade negotiations community" — members of trade associations, economists and lawyers whose advice is for hire, officials who conduct negotiations — all of whose careers depend on the prospect of negotiations. This theory is, of course, being argued in support of the conduct of yet another round of negotiations.

22 Bruce E. Clubb: "United States Foreign Trade Policy in Historical Perspective"; Remarks to the American Iron and Steel Institute, United Steel Workers of America, Washington, 3 February 1971.

23 Tumlir's numerous writings on these themes are reflected the two GATT research studies of which he was one of the authors: Richard Blackhurst, Nicolas Marian and Jan Tumlir: Trade Liberalization, Protectionism and Interdependence, GATT, 1977, and (same authors): Adjustment, Trade and Growth in Developed and Developing Countries, GATT, 1978. Tumlir's personal views are most easily accessible in: "The Protectionist Threat to International Order", XXXIV, International Journal, No. 1, 1978-79; "The Contribution of Economics to International Disorder", Harry G. Johnson Memorial Lecture, No. 2, Trade Policy Research Centre, London, 1981 (reprinted in 3 The World Economy, No. 4, 1980; "Salvation Through Cartels? On the Revival of a Myth" 1 The World Economy, 1978, No. 4; "International Economic Order — Can the Trend be Reversed?" 5 The World Economy, No. 1, 1982; "Need for an Open Multilateral Trading System", 6 The World Economy, No. 4, 1983, and in "The New Protectionism, Cartels and the International Order", in Ryan Ammacher, Gottfried Haberler and Thomas D. Willelt, (eds.); Challenges to a Liberal Economic Order, Washington, American Enterprise Institute, 1979.

24 Harald B. Malmgrem: "Threats to the Multilateral System" in William Cline (ed.): Trade Policy in the 1980's, Washington, Institute for International Economics, 1983, p. 191.

25 See Rodney de C. Grey, op. cit.; United States Trade Legislation: Some Implications for the Trade and Trade Relations of Developing Countries, UNCTAD/MTN/207, UNCTAD, Geneva, 1980, Injury, Damage, Disruption, UNCTAD/MTN/217, UNCTAD, Geneva, 1981; "GATT after the Tokyo Round" in Quinn and Slayton (eds.): Non-Tariff Barriers After the Tokyo Round, Montreal, Institute for Research in Public Policy, 1982; United States Trade Policy Legislation, A Canada View, Montreal, I.R.P.P. 1982; "A Note on U.S. Trade Practices" in Cline (ed.): op. cit., at pp. 243-58.

26 Grey: "GATT After The Tokyo Round", see note 25 above.

27 Gerard Curzon and Victoria Curzon: "The Multi-Tier GATT System" in The New Economic Nationalism, A Battelle Conference, ed. Otto Hieronymi, London, Macmillan, 1980.

28 Arthur Dunkel: Address to "Octasiaatishes Liebesmohl", Hamburg, 5 March, 1982, GATT Press Release 1312.

29 Gardiner Patterson: "The European Community as a Threat to the System" , Cline (ed.) op. cit., pp. 223-42.

30 Fred W. Bergsten: "On the Non-Equivalence of Import Quotas and 'Voluntary' Export Restraints" in Toward a New World Trade Policy: the Maidenhead Papers (ed. Bergsten), Lexington Books, 1978.

FOOTNOTES TO CHAPTER II

1 Jacob Viner: Dumping/A Problem in International Trade, University of Chicago Press, 1923; reprinted 1966, Kelley, New York; with Viner A Memorandum on Dumping, League of Nations, 1926, and "Dumping", Encyclopedia of the Social Sciences.

2 Debates, Canada House of Commons, 1904, Volume III, 5737-8, quoted in United States Tariff Commission: Information Concerning Dumping and Unfair Competition in the United States and Canada's Anti-dumping Law, Washington, Government Printing Office, 1919, printed for the use of the Committee on Ways and Means, House of Representatives.

3 Revenue Act, (64th Congress) September 8, 1916; see U.S. Tariff Commission, op. cit., p. 42; see Viner, op. cit., p. 240-41.

4 See Kaye, Plaia and Hertzberg: International Trade Practice, Shepherd's/McGraw Hill, 1981, 22-2.

5 U.S. Tariff Commission: op. cit.

6 Id., p. 20.

7 Id., p. 33.

8 Loc. cit.; Section 5 of the Act creating the Federal Trade Commission, passed in 1914, declared, in Section 5, "that unfair methods of competition in commerce are hereby declared unlawful." op. cit., p. 42.

9 For a modern comment, see Kaye, et.al.: op. cit., 22-4.

10 Viner, op. cit., p. 240; Kaye, et.al., op. cit., 22-2.

11 Viner, op. cit., p. 239; this issue will be examined below.

12 O.D. Skelton is another example.

13 John M. Dobson: Two Centuries of Tariffs/The Background and Emergence of the U.S. International Trade Commission, USITC, 1976, p. 139, for bibliographic references to Taussig.

14 Viner, op. cit., p. 23.

15 Id., p. 121.

16 A.C. Pigou: Protective and Preferential Import Duties, London, 1906, quoted in Viner op. cit., p. 120.

17 To be examined below. For current text of the Anti-dumping Code, see Contracting Parties to the General Agreement on Tariffs and Trade: Basic Instruments and Selected Documents, Twenty-sixth Supplement (26S BISD), Geneva, March 1980, pp. 171-188, "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade" (Anti-dumping Code).

18 We should not overlook the fact that a vestigal remnant of the concept of predation in importation remains, in U.S. trade law, in Section 337 of the Tariff Act.

19 Peter D. Ehrenhaft: "Protection Against International Price Discrimination: United States Countervailing and Anti-dumping Duties" 58 Columbia Law Journal, No. 1, January 1958.

20 OECD: Competition and Trade Policies/Their Interaction, Paris, 1984; Klaus Stegemann: "The Consideration of Consumer Interests in the Implementation of Anti-dumping Policy", September 1984, photocopy.

21 Report to the President of the Commission on International Trade and Investment, Washington, July 1971.

22 For a short summary of this controversy, see Department of the Treasury: "Anti-dumping Duties" in United States International Economic Policy in an Interdependent World, (Papers submitted to the William Commission) Washington, July 1971) at page 397, and John Jackson: Legal Problems of International Economic Relations, West Publishing, 1977, at page 740-753, including the important article by Senator Russell Long: "United States Law and the International Anti-dumping Code", originally published in 3 International Lawyer, 1969.

23 American Bar Association: "Report of the Ad Hoc Sub-Committee on Anti-trust and Anti-dumping" 43 Antitrust Law Journal, No. 3, 1974.

24 Harvey M. Applebaum: "The Andi-dumping Law — Impact on the Competitive Process", 43 Antitrust Law Journal, 606.

25 Stanley Metzger: Lowering Non-tariff Barriers, Washington, the Brookings Institution, 1974.

26 Stanley Metzger: "The Amended Anti-dumping Code and the Trade Agreements Act of 1979" in Quinn & Slayton (eds): op. cit. 153-169.

27 See, for example, Harvey M. Applebaum: "Antitrust Implications of Import Relief Proceedings" in Applebaum and Victor (eds.): Basics of Anti-dumping and Other Import Relief Laws/Multilateral Trade Negotiations Update, Practising Law Institute, 1979; Peter D. Ehrenhaft: "What the Anti-dumping and Countervailing Duty Provisions of the Trade Agreements Act (can) (will) (should) mean for U.S. Trade Policy: 11 Law and Policy in International Business, 1979; A. Paul Victor: "Anti-dumping and Anti-trust: Can the Inconsistencies Be Resolved?" 15 International Law and Politics, 1983; Donald I. Baker: "The Interface Between the United States Anti-trust Laws and the International Trade Laws Regulating Import Compilation", paper prepared for World Trade Institute, 1983, photocopy.

28 See for example, J.N. Nolan-Haley: "The Trigger Price Mechanism: Protecting Competition or Competitors?" 13 New York University Journal of International Law and Politics, 1980; Gary Komarow: "Effective Enforcement of U.S. Anti-dumping Laws: The Development and Legal Implications of Trigger Pricing", 10 Law and Policy in International Business, 1978, (see p. 995 for discussion of Sherman Act implications of TPM).

29 Barbara Epstein: "The Illusory Conflict Between Anti-dumping and Anti-trust" 18 Antitrust Bulletin, 1974.

30 See Chapter I, above.

31 Peter D. Ehrenhaft: Review article in 16 Law and Policy in International Business, No. 1, 1984.

32 See, as the most recent example: John H. Jackson et al (eds): International Trade Policy: The Lawyer's Perspective, New York, Matthew Berder, 1985.

33 Richard Dale: Anti-dumping Law in a Liberal Trade Order, London, MacMillan, for The Trade Policy Research Centre, 1980; see Chapter 3, "Price Discrimination and the Law, pp. 44-70.

34 Dale, op. cit., p. 61. The quoted phrase is from the judgement of a U.S. court of appeals judgment: Anhueser Busch v. FTC; see note 8 in Dale, op. cit., p. 66.

35 Dale, op. cit., p. 61 and note 69 at p. 69; the quotations from Viner is from the record of the 1955 Congressional hearings on foreign economic policy.

36 Stegemann: op. cit., p. 21, and note 19.

37 Rodney de C. Grey: The Development of the Canadian Anti-dumping System, Montreal, Private Planning Association, 1973, p. 2.

38 Rodney de C. Grey: U.S. Trade Policy Legislation, p. 36.

39 Philip Slayton: The Anti-dumping Tribunal/A Study of Administrative Procedure in the Anti-dumping Tribunal, Ottawa, Law Reform Commission, 1979, p. 65.

40 Klaus Stegemann: "The Net National Burden of Canadian Anti-dumping Policy: Turbines and Generators" 15 Cornell International Law Journal, 1982, p. 347.

41 More recently, there are anti-dumping cases in which the margins appear to be so great, and the quantities so large, that it would be inappropriate to rule out predation; one example is the alleged dumping by Japanese firms of 64K D-RAM ("memory chips"). The U.S. firm concerned has filed an anti-dumping action and an anti-trust action. See Michael W. Miller: "Precipitous Decline of Memory Chip Firm Shades U.S. Industry" Wall Street Journal, Jan. 20, 1986; USITC 1735:64K, Dynamic Random Access Memory Components from Japan (731-TA-270), August 1985.

42 Epstein's view is, in general, supported in an article in the American Enterprise Institute's symposium on trade policy: see Jacob S. Dreyer: "Countervailing Use of Monopoly Power" in Ryan C. Amacher et. al (eds.); op. cit., at p. 317-347; see also Thomas R. Howell: "Foreign Cartels and American Competitiveness", Jackson et al (eds): op. cit.

FOOTNOTES TO CHAPTER III

1 The issue of whether or not Article XIX allows a signatory to restrict imports on a discriminatory (or "selective") basis, or whether it is obliged, by the most-favoured nation obligations of Article I of the GATT, to similarly restrict imports from all sources, is a matter under discussion between GATT signatories. It is not an issue which concerns us in this chapter; however, the writer is convinced that to permit "selectivity" in Article XIX cases would be a retrograde step.

2 26S BISD.

3 A detailed study of these GATT provisions is Rodney de C. Grey: Injury, Damage, Disruption, UNCTAD/MTN/217, UNCTAD, Geneva, October 1981.

4 What can be taken as the standard reference (in English) is John H. Jackson: Legal Problems of International Economic Relations, (Cases, Materials and Text), West Publishing Co., St. Paul, 1977 (hereafter Jackson: Legal Problems), pp. 617-689.

5 Patrick F.J. Macrory: A Brief Description of the Escape Clause, notes prepared for Panel I of the National Institute on Critical Issues of International Trade Law: The Realities of Implementing the Tokyo Round Results, Washington, April 1981, at page 9.

6 Cmmd 8247, Department of Trade: Trade Policy, London, HMSO, May 1981.

7 For text of the letter, see Grey: U.S. Trade Policy Legislation, Note 28, p. 63.

8 Grey: Injury, Damage, Disruption, p. 7.

9 Russel B. Long, "United States Law and the International Anti-dumping Code, 3 International Lawyer, 1969, cited in Jackson, Legal Problems, p. 742-743.

10 The writer was one of the negotiators of the Code, and believes that neither of the two interpretations is accurate; for a more detailed exposition, see Rodney de C. Grey: The Development of the Canadian Anti-dumping System, Montreal, Private Planning Association, 1973, p. 44-46. The Tariff Commission report discussed by Senator Long is U.S. Tariff Commission: Report of the U.S. Tariff Commission to Senate Committee on Finance on S.Con. Res. 38, included in International Anti-dumping Code, Hearing Before the Committee on Finance, Senate, 90th Congress, June 27, 1968.

11 Joseph Cunane and Clive Stanbrook: Dumping and Subsidies/The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community, Brussels, European Business Publications, 1983, p. 63.

12 O.J. No. L 369/27 Regulation No. 3528/82, Dec. 29, 1982.

13 Rodney de C. Grey: Evidence before the Standing Committee of the House of Commons on Finance, Trade and Economic Affairs, 1968; The Development of the Canadian Anti-dumping System, p. 44-45.

14 Stanley Metzger: op. cit.

15 For countervail: Article 6, para. 4. For anti-dumping Article 3, para. 4. For a discussion of the scope of the principal cause formulation, see Stanley Metzger: "Import Restricting Measures Taken by the United States/Causation of Injury in Anti-dumping Proceedings" in Paul Demaret, (ed.), Aides et Mesures de Sauvegarde en Droit Internationale Économique: University of Liege, October 1979 and Stanley Metzger: Compliance with International Obligations: U.S. and Canada Injury Determinations Under the Anti-dumping Code 1971-75, Occasional Paper 31, Ottawa, Carleton University, 1976.

16 Rivers and Greenwald: op. cit., p. 1483-1485. The negotiators had before them a detailed exposition of why the "principal cause" language could lead to perverse results, and why the Canadian Government had decided to use the Article VI approach, rather than the Code language in the reform of Canadian legislation in 1969. See Rodney de C. Grey: The Development of the

Canadian Anti-dumping Systems, Montreal, Private Planning Association of Canada, 1973, p. 44-46.

17 Report no. 96-317.

18 Congressional Record - Senate: S10311, July 10, 1979.

19 Kay, Plaia, Hertzberg: International Trade Practice, Shepard's/McGraw Hill, Colorado Springs, 1981, at 18-19; see also Bart S. Fisher: "The Anti-dumping Law of the United States: A Legal and Economic Analysis" 5 Law and Policy in International Business 85, 1973, for a similar evaluation (cited Jackson: Legal Problems, 711).

20 USITC Publication 746, TA-201-3 (1975).

21 USITC Publication 1110, TA-201-44 (1980).

22 "The Escape Clause, Market Disruption and Voluntary Restraints" - "The Focus of the Panel", National Institute on Critical Issues of International Trade Law, Washington, 1981.

23 Bill Alberger: "Some Comments on the Escape Clause in Light of the Automobiles Decision".

24 USITC Publication 1342, TA-20 (1983).

25 USITC Publication, TA-201-48 (1983).

26 For a useful discussion: Josiah Hatch III: "The Harley-Davidson Case: Escaping the Escape Clause" 16 Law and Policy in International Business, No. 1, 1984, 325-349; in this article "injury" is assumed to be "overall" and much of the analysis turns on that assumption.

FOOTNOTES TO CHAPTER IV

1 This evolution is comprehensively discussed in Viner, op. cit.

2 For a discussion of price discrimination issue under the Combines Act in Canada, see Bruce Dunlop: "Price Discrimination, Predatory Pricing, and Systematic Delivered Prices" in J. Robert, S. Pritchard et. al. (eds.) Canadian Competition Policy: Essays in Law and Economics. Toronto, Butterworths, 1979.

3 Dale, op. cit., p. 47; but see Kenneth G. Elzinga and Thomas R. Hogarty: "Utah Pie and the Consequences of Robinson-Patman", 2 Journal of Law and Economics, 1978.

4 Neal Report: p. 13, 901, cited Dale, op. cit., p. 47, footnote 12, at p. 66.

5 The so-called Areeda-Turner doctrine.

6 O.J. 1985, C178/5.

7 European Court of Justice Case No. 229R and 228/82R.

8 European Report, 17 Dec. 85.

9 Times (London), Dec. 17, 1979.

10 Business Brief, Dec. 21, 1986, No. 1186.

11 Dale, op. cit., pp. 48-51, and see also H.W. de Jong: "Unfair and Discriminatory Pricing under Article 86 of the EEC Treaty", European Competition Law Review, 1980, 296, and N.J. Forward, "Recent Developments in Relation to Pricing in EEC Competition Law". (Paper prepared for London Conference on Competition Law.)

12 UK Monopolies and Mergers Commission: Discounts to Retailers, London, HMSO, May 1981. HC 311.

13 Section 37, La loi d'orientation du commerce et de l'artisanat, Dec. 17, 1973 (le "loi Royer") as amplified in le Circulaire Scrivener, 1978; for a discussion of proposed revisions, see "Un nouveau projet de loi sur la concurrence", Le Monde, 9 May, 1985. For Sacilor/usinor case, see Le Monde, 5 Sept., 1985.

14 Kintner, op. cit., chapter 5.

15 Kintner, op. cit., pp. 121-123; note his comment at 122 on Samuel H. Moss.

16 Article 3 of the Anti-dumping Code, Article 6 of the Subsidies/Countervail Code, 26 BISP.

17 Cited Kintner, op. cit., p. 121; Kintner here discusses the various relevant cases in some detail.

18 The reference here is to the regulations under the 1968 Anti-dumping Act; Memorandum D41-1, June 30, 1972, p. 3.

19 Zaid, op. cit., p. 196.

20 Cunane and Stanbrook: op. cit., p. 41.

21 19 U.S. CFR, Part 153, p. 14.

22 Kintner, op. cit., p. 191.

23 26S BISD, p. 172.

24 These extracts are from Kiyoshi Kawahito: "Steel and the U.S. Anti-dumping Statutes", 16 Journal of World Trade Law, March-April 1982, pp. 152-164.

25 Without citing all the extensive literature on this issue, we note the well known article by Phillip Areeda and Donald R. Turner: "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act", 88 Harvard Law Review 1975 (the Areeda-Turner doctrine that only sales below short run marginal costs should be considered predatory) and the discussion of the various theories of cost in Richard A. Posner: Antitrust Law/An Economic Perspective, University of Chicago Press, 1976, 184-196: Posner's definition of predatory pricing is "pricing at a level calculated to exclude from the market an equally or more efficient competitor".

26 Combines Investigation Act, 34 (1) (c).

27 Zaid, op. cit., 196, and 109 DLR (3d) 5-59, and 119 DLR (3d) 279285.

28 Consumer and Corporate Affairs: Proposals for a New Competition Policy for Canada, Second Stage, March 1977, pp. 55-59, 67-67.

29 Special Import Measures Act, Section 19.

30 Anti-dumping Code, Article 4, para. 1.

31 Rodney de C. Grey: The Development of the Canadian Anti-dumping System, pp. 46-47.

32 In this context, regional market cases are not a major issue; for a discussion of the relevant GATT provisions, see Grey, op. cit., pp. 48-49, and Grey: U.S. Trade Policy Legislation, pp. 47-51.

33 There are of course, penalties for fraud in connection with anti-dumping proceedings, such as false invoicing, but this is not at issue in this context.

34 "Undertakings" are provided for in the Tokyo round Subsidies/Countervail Code in Article 4, paras. 5 to 8; in the Anti-dumping Code in Article 7; these are heavily negotiated provisions. In the Canadian legislation (SIMA) in Section 49 to 54; in the U.S. legislation in Section 734 of the Tariff Act, as enacted in Section 101 of the Trade Agreements Act of 1979.

35 Gary N. Horlick: "American Trade Law and the Steel Pact Between Brussels and Washington", 6 The World Economy, September 1983, p. 361.

FOOTNOTES TO CHAPTER V

1 For an explanation of the marginal differences between the Havana Charter provisions and GATT Article XIX, see GATT: Analytical Index, Third Revision 1970, p. 106.

2 Hawkins, op. cit., p. 106.

3 UNCTAD/Trade and Development Board, 28th Session, 1984, TD/B/978: Protectionism and Structural Adjustment. An Improved and More Efficient Safeguard System (A note by the Secretariat), p. 20.

4 It should be recalled that that Act empowered the President to agree to tariff-free entry for a wide range of goods under the so-called "dominant supplier" provision; this was intended to provide a wide range of "free trade" if the U.K. entered the Common Market and to provide an incentive for the U.K. and the Six to agree; when the U.K. candicacy was vetoed by France, this provision in the TEA was rendered virtually null and void, and the scope for tariff reductions thereby much reduced. But at the drafting stage, the Kennedy Round Trade Bill was very ambitious, and therefore powerful domestic interests likely to be opposed had to be placated.

5 See Clubb, op. cit.

6 Prior to the accession by Japan to the GATT, a number of countries negotiated bilateral understandings, which turned on Japan's m.f.n. tariff rights and obligations, and on the right to take restrictive action against imports of particular products. For Canada, as an example, there was an exchange of notes covering such matters; under that arrangement, Canada had taken action against one category of imports from Japan — knitted gloves. The restriction, a minimum value-for-duty — was applied on a formally non-discriminatory basis, although only imports from Japan were affected.

7 "The question of safeguards" with regard to imports from Japan is referred to in paragraph 9 of the report of the GATT Working Party which examined the issue of Japanese participation in the work of the signatories to the GATT. See 2S BISD, January, 1954, p. 115. The issue of countries invoking Article XXXV in order to retain the right to discriminate against Japan — that is to not give Japan full Article XIX rights, is dealt with in the report of the Working Party which, in 1961, examined the operation of the GATT with regard to Japan: See 10S BISD, at p. 69. This examination paralled the development of the agreed "arrangements" to restrict imports of cotton textiles. See 10S BISD, p. 18, for "Cotton Textiles: Arrangement Regarding International Trade/drawn up on 21 July 1961".

8 For perhaps the most important and most carefully negotiated agreement between Japan and a European country, of the kind noted above, see the U.K.-Japan Agreement of 1962: HMSO, Japan No. 2 (1962) Treaty of Commerce, etc., Cmd. 1874, 1962, and HMSO, Board of Trade, Government Statements on the Anglo-Japanese Commercial Treaty, Cmd. 1875, 1962; see especially First Protocol of the Treaty for agreement regarding action to be taken in regard to disruptive imports, and paragraph 14 of Statement for reference to U.K. disinvoking Article XXXV, and mutual waiver of GATT rights regarding non-discrimination. For a discussion of this issue, see Rodney de C. Grey: "Some Aspects of Japan's Impact on Trade and Trade Relations", a paper prepared for the Nissan Institute of Japanese Studies, St. Anthony's College, Oxford, 1982; to be published in a revised version.

9 We are not aware of any detailed study of this issue, but it appears that the Canadians had recourse to negotiating with Japan for export restraints on non-textile items for some products for which the U.S. had in place a more

restrictive import regime on an m.f.n. basis; for example, for stainless steel cutlery, a product that the Japanese "restrained" at the request of Canada. the U.S. had a tariff quota system, imposed consequent to an "escape clause" action in 1958, that was sufficiently restrictive as to make a special restraint by Japan on exports to the U.S. unnecessary. See USITC 1229: The Effectiveness of Escape Clause Relief in Promoting Adjustment to Import Competition, Inv. 332-115 March 1982, Chapter Seven.

10 The procedures developed by the C.P.'s were referred to as the "hard-core" waiver procedure: referring, that is, to the "hard-core" restrictions; see 3S BISD, p. 38. "Decision of 5 March 1955. Problems Raised for Contracting Parties in Eliminating Import Restrictions Maintained During a Period of Balance of Payments Difficulties.

11 GATT, 7S BISD, Declaration of 22 November 1958, Provisional Accession of Switzerland, paragraph 1(b).

12 GATT, 3S BISD, p. 32. Decision of 5 March 1955, Waiver Granted to the United States, etc.

13 For example, Canada has invoked Article XIX in regard to imports of a number of horticultural and agricultural problems. These almost always involved imports from the U.S., and frequently gave rise to prolonged negotiations about compensation, and, in one case, to retaliatory import restrictions by the U.S. For a detailed discussion of that case, the so-called "cattle war" of 1973, see Robert E. Hudec: "Retaliation Against 'Unreasonable' Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment" 59 Minnesota Law Review 1975, 461-539, especially p. 535-539: "A Preview of Section 301: The Cattle War".

14 See footnote 6, above.

15 GATT: 11S BISD, p. 26, paragraph 1.

16 Agreement with Japan of May 16, 1956. (See reference below to Consumers Union vs Kissinger.)

17 A phrase frequently used by Jan Tumlir; emphasis added.

18 The most useful decision to consult is United States Court of Appeals for the District of Columbia Circuit, Consumers Union vs Kissinger, decided October 11, 1974. See especially the Appendix, at page 28 for a history of restraints on exports to the U.S.

19 Trade Act of 1974, Public Law 93-610, 93rd Congress, H.R. 10710, January 3, 1975, section 607, at page 96.

20 Footnote 35 to Chapter VI; the text of letter by the U.S. Attorney General is attached as an Annex to this chapter.

21 See Art Pine: "U.S. Shoe Makers Bid For Import Curbs Presents Reagan With Dangerous Choices", Wall Street Journal, August 21, 1985.

22 U.S. Trade Act, 1974, Section 202, (c) (4), at page 38.

23 For a discussion of the role of the U.S. Justice Department Anti-Trust Division is intervention in U.S. "escape clause" hearings before the ITC, and its role in the inter-agency formulation of advice to the President with regard to IT "escape clause" recommendations, see Joel Davidow. "U.S. Competition Laws and Non-Tariff Barriers" in Commission Droit et Vie des Affaires, Université de Liège: Aides et Mesures de Sauvegard en Droit International Économique, 1979, at p. 224-225.

24 Canada, Special Import Measures Act (SIMA) Section 45(1).

25 Canada, SIMA, Sections 103 and 104.

26 Department of Trade, Trade Policy, 1981; cited footnote 6, Chapter III.

27 (EEC) No. 3528/82 of 23 December 1982.

28 House of Lords Select Committee on the European Communities, 27th Report, 83-84: The Distribution, Servicing and Pricing of Motor Vehicles, HMSO, 1984; see footnote 6 to Chapter IV.

29 See the discussion in Chapter IV regarding the role of "parallel" iports within the EEC.

30 J.O. No. C111/13, 21 Oct. 1972.

31 J.O. No. L343/19, 21 Dec. 1974, J.O. No. L 29/26, 3 Feb. 1975.

32 To examine the various proposals for "crisis cartels" in the EEC, and the scope for such cartels under the Treaty of Rome (and under the Treaty of Paris establishing the ECSC) is too detailed an issue to be discussed here. See generally Commission Droit et Vie des Affaires de l'Université de Liège: Aides et Mesures de Sauvegarde en Droit International Économique, Liège, 1979, especially René Joliet: "Cartelization, Dirigisme et Crise dans la Communauté Européenne" which examines in some detail the development of the jurisprudence of "crisis cartels" in German law, in the EEC Treaty, and in the treaty establishing the ECSC. See also "Kind Hearts and Cartels" The Economist, Nov. 13, 1982, for discussion of the proposed cartels for synthetic fibres and petrochemicals.

33 Joliet, op. cit., p. 32.

34 For a comprehensive discussion of U.S. and EEC steel trade policies, see: Kent Jones: Impasse and Crisis in Steel Trade Policy, London, T.P.R.C., 1983.

35 Tumlir: "The New Protectionism. . .", see footnote 24, Chapter I.

36 One may hope that the Leutwiler report, which comes down clearly in favour of maintaining the existing rule of non-discrimination in the application of Article XIX measures, will be the last word in the long and damaging debate

on this issue. See GATT: Trade Policies For a Better Future, Geneva. March 1985, p. 43. See also the supplementary paper by Dr. I.G. Patel, a member of the group chaired by Dr. Leutwiler, on "The Adjustment Problem".

FOOTNOTES TO CHAPTER VI

1 J.A. Young. Canadian Commercial Policy, Ottawa, Royal Commission on Canada's Economic Prospects, (The Gordon Commission), November 1957.

2 Young. Op. cit., p. 73.

3 Young. Op. cit., p. 72.

4 Harry G. Johnson. "The Costs of Protection and Self-Sufficiency" in Aspects of the Theory of Tariffs, London, Allen and Unwin, 1971, p. 236.

5 William R. Cline, et.al. Trade Negotiations in the Tokyo Round: A Quantitative Assessment, Washington: The Brookings Institution.

6 Cline et.al., op. cit., pp. 232-33.

7 William R. Cline in William R. Cline, ed. Trade Policy in the 1980s, Washington, Institute for International Economics, 1983, p. 10.

8 The same reasoning applies to a preferential system involving preferential tariff quotas under which the right to import at the preferential rate is assigned to importers; thus under certain tariff preference schemes for developing countries the profit or rent of the preference is appropriated by importers in industrialized countries rather than by developing countries; such results are not accidental.

9 Martin Wolf. "Managed Trade in Practice: Implications of the Textile Arrangements", in Cline (ed.), op. cit.

10 Graham Glenday, Glenn P. Jenkins and John C. Evans. Worker Adjustment to Liberal Trade: Costs and Assistance Policies, World Bank Staff Working Paper, No. 926, Washington, World Bank, 1980. See also the later paper by the same authors: Worker Adjustment Policies/An Alternative to Protectionism, Ottawa, The North-South Institute, 1982.

11 Glenday, Jenkins and Evans. Worker Adjustment Policies, p. 6.

12 David G. Tarr and Morris E. Morkre. Aggregate Costs to the United States of Tariffs and Quotas on Imports, Bureau of Economics Staff Report to the Federal Trade Commission, Washington, December 1984, p. 122. This study contains a careful bibliography, organized by chapters. See also the earlier study by the same authors: Effects of Restrictions on United States Imports: Five Case Studies and Theory, June 1980.

13 Glen P. Jenkins. Costs and Consequences of the New Protectionism: The Case of Canada's Clothing Sector, Ottawa. North-South Institute, 1980.

14 Published as "Voluntary Export Restraints and the GATT's Main Escape Clause", 3 The World Economy, No. 3, November 1980.

15 Tarr and Morkre. Op. cit., p. 103 -- et. seq.

16 This issue is discussed by Wolf, op. cit.. p. 471 who rejects the argument stated here but notes that "If future access to quota rights depends on current use, however, the above argument holds over the long term. It is then possible for a profit-maximizing firm to hold on to quota rights even though in the short term more money can be made by selling them and reducing exports. In this area quota premiums show the long-run rather than the short-run effect on prices." It is the case that in Hong Kong exporters have been required to use their quotas in order to have future quota rights; however. all decisions about quotas — whether to use or sell — are shifting short-run decisions, and it is therefore not clear that quota transfer prices indicate even long-run costs.

17 Apparel prices, that is, prices for mass-distribution items such as jeans or cotton shirts, have usually been higher in Western Europe than in North America, and consumption per head significantly lower. Thus in 1979-81, Hong Kong jeans were typically sold at retail in Canada for C$17.-$20.00; in the U.K. they were typically sold at £17-£25, a substantially higher price. Account should also be taken of the widespread availability of products at substantial discounts or sale prices, as high as 30% or 50% off marked prices; in the U.K. sale discounts average about 10% off marked price. These figures are taken from random observation; clearly it would be useful to have the results of a systematic comparative survey of import prices.

18 USITC. Economic Effects of Export Restraints, USITC 1256, June 1982.

19 USITC. Op. cit., Appendix A, pp. 28-40; see also the paper by C. Fred Bergsen, "On the Non-Equivalence of Import Quotas and 'Voluntary' Export Restraints", in Toward a New International Economic Order: Selected Papers of C. Fred Bergsten, 1972-74, Lexington, Massachusetts, 1975. The extensive references in Bergsten's paper provide a bibliography of earlier material on VER's and quota systems. Bergsten suggests that the appropriation of the rent of restraint by exporters could be regarded as "compensation" for "volunteering" to restraint exports — that is, as compensation in the sense of Article XIX. This was the approach followed by Canada in the 1960s.

20 USITC, op. cit.. p. 25.

21 A.R. Moroz et al. A Quantitative Assessment of the Costs and Benefits of the Footwear Import Quota, Ottawa. Institute for Research on Public Policy, photocopy, p. 78.

22 A.R. Moroz, et al. Op. cit., p. 80.

23 The "cost of dislocation" of workers is examined in more detail in the associated study by J. Alan. Cost of Dislocation: An Investigation to the Nature and Magnitude of Labour Adjustment Problems in the Canadian Footwear Industry. Appendix B to that study indicates how the "monetary value of leisure time" is included in the calculation of worker income after lay-off. This does not appear to take into account the proposition that the marginal utility of leisure, when there is an over-supply of leisure, i.e. unemployment, is negative.

24 USITC, op. cit.

25 USITC 1553, July 24, 1984 and Memorandum of the President to the United States Trade Representative, September 24, 1984, 49 Federal Register, No. 184, September 20, 1984.

26 USITC. Economic Effects of Export Restraints (cited footnote 18), p. 11.

27 USITC. Op. cit., p. viii.

28 See Noel Hemmendinger: "Shifting Sands: An Examination of the Philosophical Basis of U.S. Trade Laws" in Jackson et.al. (eds.) International Trade Policy/The Lawyer's Perspective, Matthew Bender, 1985, at 2.02.

29 Morkre and Tarr. 1980, p. 196.

30 A recent and substantial example of such an FTC brief is Non-rubber Footwear, Investigation No. TA-201-55/ Prehearing Brief by the Federal Trade Commission, April 1985, before the USITC.

31 Statement of the United States Department of Justice, Investigation 731-TA-38 Preliminary, before the USITC, March 9, 1981.

32 Department of Justice, op. cit., p. 3.

33 J.F. Bellis has noted one EEC anti-dumping case in which the community authorities did not levy a duty because of the anti-competitive practices of the EEC industry. J.F. Bellis, "La Règlementation Anti-dumping de la Communauté Économique Européenne", 15 Cahiers de Droit Européen, 1979, Nos. 5-6, Note 66 at p. 516.

34 Tumlir. "The New Protectionism, Cartels and International Trade", photocopy, p. 3.

35 See the letter of the U.S. Attorney General of 18 February 1981 to USTR: reproduced as an Annex to Chapter VI.

36 Canada, Special Import Measures Act; 1984, Section 2, Sections 49-54.

37 Such considerations may have been involved in the decision by the Canadian authorities, in drafting the Anti-dumping Act of 1968, to not provide for "undertakings".

38 Two recent studies which look at the effect of VER's (but not other aspects of contingent protection) on a single economy are Vincent Cable and Martin Weale: "Economic Costs of Sectoral Protection in Britain" 6 The World Economy, No. 4, Dec. 1983, 421-438; David Greenaway and Brian Hindley: What Britain Pays for Voluntary Export Restraints, London, Trade Policy Research Centre, 1985.

FOOTNOTES TO CHAPTER VII

1 For current comment on discussion in the U.S. on anti-trust, see Ann Reilly: "Reagan Turns a Cold Eye on Antitrust", Fortune, October 14, 1985; A. Pasztor: "U.S. Seeking to Alter Laws on Antitrust", Wall Street Journal (Europe), September 30, 1985.

2 Robert H. Bork. The Antitrust Paradox/A Policy at War with Itself, Basic Books, New York. 1978, pp. 398-399.

3 Submission of the Director of Investigation and Research, Combines Investigation Act, In the Matter of Inquiry under Section 16.... Refined Sugar from the U.S.A., (Inquiry No. ADT-8-84).

4 Anti-dumping Tribunal, ADT-8-84, Statement of Reasons, July 23, 1984.

5 U.S. Trade Agreement Act of 1979, Section 101/Section 7 711, (7)(A). For a more detailed discussion see R. de C. Grey, U.S. Trade Policy Legislation, pp. 43-46, and Chapter III, supra.

6 Noel Hemmendenger, in "Shifting Sands: An Examination of the Philosophical Basis for U.S. Trade Laws" in Jackson et.al (eds.): International Trade Policy, takes that textiles, steel and automobiles could have dealt with under the "escape clause".

7 It is from this perspective that this writer has consistently argued that the next multilateral trade negotiation, if it is to be directed at liberalization, must be preceded by the building of a consensus for liberalization at the national level, requiring the deployment of such methods of consensus building as the Williams Commission in the U.S. (as for the Tokyo Round) and, at the international level, devices such as the Rey Committee of the OECD which preceded the Tokyo Round. It also involves an effort by the academic community concerned with trade policy to look critically that is, empirically at the contingency system, and to refuse to merely re-iterate the official rhetoric of "liberalization".

8 Article 3, para b.

9 Article 3, footnote 2 to paragraph 3, 26S BISD, p. 174.

10 Regulation 459/68, 5 April 1968, Article 4. paragraphs 2 and 3.

11 Guide to the European Communities' Anti-dumping and Countervailing Legislation, DGI, Brussels, September 1980, paragraph 12 at page 5.

12 J.H.V. Bourgeois, in "EC Anti-dumping Enforcement - Selected Second-Generation Issues", in a paper to be published in the 1985 Annual Proceedings of the Fordham Corporate Law Institute, cites Certain sodium carbonate, O.J. 1980 L48/1.

13 USITC. Compendium of Section 337 Decisions, at 104-1-12.

14 USITC. Op. cit., 104-1-5.

15 Michael Hertzderg. "The Economics of a Patent Based 337 Case", ITC Patent Practice, (ed. W. Herrington, 1979) at F-31, cited USITC, op. cit., 103-2-1.

16 USITC. Op. cit., 105-2.

17 Welded Stainless Steel Pipes and Tubes, USITC Publication 863, 1978, summarization Kaye, Plaia, Hertzberg: International Trade Policy, 5-29.

18 Phillip Areeda and Donald R. Turner. Op. cit.

19 Barbara Epstein. Op. cit.

20 Canada. Anti-dumping Act, (2) 1. (m).

21 Department of National Revenue, Memorandum D41-1, June 30, 1972, 11A and 19A.

22 For Turbines Case, ADT-4-76 (July 27, 1976)
For Generators Case, ADT-11-79 (Feb. 29, 1980)
For Ansaldo Case, ADT-8-83 (July 14, 1983)

23 Klaus Stegemann. "The Net National Burden of Canadian Anti-dumping Policy: Turbines and Generators", 15 Cornell International Law Journal.

24 This issue is touched or in the report edited by Prof. Klaus Stegemann: Report of the Policy Forum on Special Import Measures Legislation, John Deutsch Institute for the Study of Economic Policy, Queen's University, Kingston n.d., especially in the paper by Robert Martin: "The Capital Goods Sector Bias of the Special Import Measures Act". At p. 34 it is stated that the main reason for excluding the sectors of energy, transportation, and telecommunications from the Code is that "...the Code is pitched at the first level of obligated...'shall' obligations, which means that only those entities which are susceptible to direct central government control have been included". In this writer's view, this is not an accurate resumé of the evolution of the Procurement Code, in that a number of negotiating governments were prepared to consider how agencies not under central government control could nonetheless be governed by first order obligations; the real issue was that a number of governments did not wish to expose their producers to international competition. The subsequent discussion between the U.S. and Japan about the communications

sector in Japan is evidence of the determination of governments to maintain domestic product preferences, over and above the tariff, in this area. Mr. Martin is correct, however, in noting that dumping might continue even if the procurement market was liberalized, but it might be less extensive.

25 By an "exchange link" mechanism we mean provisions in an exchange control system that allow an exporter to import a quantity of goods in proportion to the foreign exchange he has earned. If the goods to be imported are, say, luxury products under strict import limitation, prices in the domestic market may be much higher than world prices. Thus the exporter makes his profit in the related import transaction, not on the export sale; he has a motive for exporting at any price which will move the goods. Detailed examination of foreign exchange control administration may be required to reveal the existence of such practices.

26 Special Import Measures Act, Section 45(1).

27 Hugh Corbet. Public Scrutiny of Protections: Trade Policy and the Investigative Branch of Government, Paris, OECD, 1984.

28 Rodney de C. Grey. U.S. Trade Policy Legislation, p. 24, for a discussion of this feature of the "escape clause".

29 Monopolies and Mergers Commission. Discounts to Retailers, London, HMSO, 1981, HC 311, at page 89, and see detailed reference to Loi Royer.

30 Corbet. Op. cit.

31 In this approach we follow the late Jan Tumlir, director of research for the GATT; see his publications cited in Chapter 1, and in the Selected Bibliography.

32 This is difficult to document, but it is a logical inference from such papers as the UNCTAD Secretariat Study TD/B/978: An Improved and More Efficient Safeguard System, January, 1984.

33 The enthusiasts for "fair labour standards" would also want the Board to inquire into labour conditions in the country concerned. Does it apply the various ILO conventions, for example. There is a growing literature on this issue, which we have not cited because it falls outside our terms of reference.

34 This is the so-called "Hatters' Fur" precedent.

FOOTNOTES TO APPENDIX

1 Over the period, say, since the end of World War II the Canadian competition authorities have made a number of recommendations that particular tariff rates be reduced, because of the absence of sufficient domestic competition. While the authorities have not used the delegated power to reduce

tariffs for such purposes, the proposals of the competition policy authorities have, apparently, been implemented under cover of the various rounds of multilateral tariff negotiations; almost invariably the reductions proposed have taken place as part of wider tariff-reducing exercises. Further, during the period of voluntary wage and price restraint, the Prices and Incomes Commission chaired by Dr. J.H. Young had occasion to threaten to reduce tariffs in order to bring about a roll-back in price increases not justified by cost increases.

2 To illustrate the more conventional, more doctrinaire view, the following appears in a standard U.S. text on industrial concentration: "For the competitive approach to have any real chance of success the government must cease or alter those of its activities that lead to greater concentration and the suppression of competition. It need only stop doing some of the things it is now doing and do others in a different manner. First, the government should cease trying to protect American industries from foreign competition, particularly those that have long outlined their infant industry status". Such a formulation, which fails to take into account the fact that in a democratic society the public demands efficiency and therefore competition, but also protection, serves to obscure the current issue of whether the contingency system is particularly anti-competitive in operation. See John M. Blair: Economic Concentration/ Structure, Behaviour and Public Policy, New York Harcourt Brace, 1972, p. 609.

3 GATT, 26S BISD, "Agreement on Government-Procurement", p. 33-55.

4 For federal states there may be preferences at the state or provincial level for state or provincial producers; such preferences may be implemented as a matter of administrative policy or they may be set out in public regulations governing the purchasing entities. For a review of provincial government purchasing practices in Canada, see Alan Wm. Wolff and W. Clark McFadden II, Discrimination Against Foreign Suppliers in Canadian Government Procurement /A Paper Prepared for the American Iron and Steel Institute, privately printed, Washington 1980, p. 30-41. For a short description of the practice in the German Lander, see Report to the Congress by the Comptroller General of the United States: Governmental Buy-National Practices of the United States and Other Countries — An Assessment, Washington, 1976, p. 46-49. In the United States, some state legislation which imposes "Buy-American" policies may go beyond the procurement exception to GATT Article III (which states that "national treatment" may be accorded to goods which governments purchase for their own use). One such state enactment was struck down by the courts on the basis that it conflicted with the GATT provision. See Baldwin-Lima-Hamilton Corp. case in Jackson Legal Materials, p. 612, Bethlehem Steel Corp case, loc. cit., 174, and K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Com. etc. 72 American Journal of International Law, 1978, 415.

5 This issue was examined in OECD, Report of the Committee of Experts on Restrictive Business Practices: Collusive Tendering, Paris, 1976.

6 The various U.K. electricity distribution boards, and the U.K. post office telephone authorities (before privatization of British Telecom) have, on occasion, threatened to open bidding to foreign suppliers if U.K. firms continued to submit bids which the authorities considered unreasonably high. More

recently, the U.K. government agency regulating telecommunications has attempted to impose "voluntary" domestic purchasing quotas on British Telecom. now privatized. It is reported that BT has refused to accept this direction. See The Economist, July 27, 1985, p. 61.

7 For a discussion of defense procurement from a competition policy point of view, see Blair: op. cit., 609-610.

8 GATT, 26S BISD, 8-32.

9 See the useful article by Professor D. Cohen of the Faculty of Law of the University of British Columbia: "The Intersection of Consumer Protective Law and International Trade: Implications for Canadian Regulators", May 1983 (photocopy). The footnote references in Cohen's paper provide an extensive bibliography to the economic and legal literature on the "standards" issue in trade policy. For Cohen's comments on the "export" of U.S. standards, see page 24.

10 See, for example, H.C. Eastman and S. Stykoet: The Tariff and Competition in Canada, Macmillan of Canada, Toronto, 1964.

11 Gary Clyde Hufbauer and Joanna Shelton Erb: Subsidies in International Trade, Washington, Institute for International Economics, 1984, at p. 5, referring to a 1983 paper by Avinan Dixit.

12 Patent Act, Section 67.

13 For Alcon, see A.D. Neale and D.C. Goyder: The Anti-trust Laws of the USA, Cambridge V.P., third edition. p. 105 and following; for Dupont ICI, see United States vs ICI, ibid., p. 364 and following.

14 The writer shares this view.

15 This was the "Fulton-Rogers" understanding. This was later supplanted by the "Basford-Mitchell" understanding.

16 This brief resumé is based on this writer's involvement; he was one of the two note takers at the meeting referred to of the Joint Cabinet Committee.

17 The most important of the enquiries was that conducted by a House of Commons Committee; there were also numerous inquiries by officials.

18 Report not yet available.

19 "Canada Says Drug Firms Transferred Profits Abroad", Wall Street Journal, June 28, 1985.

20 The U.S. legislation on Domestic International Sales Corporations, (DISC) and subsequently on Foreign International Sales Corporations, allowing U.S. companies to take profits abroad rather in the United States, for export activities, is a different, but related issue.

21 "Mexico to Change Drug Law to Spur U.S. Trade Pact", Wall Street Journal, April 4, 1985. "EEC allows patent drug import ban" Times (London) Dec. 19, 1985.

22 These issues are explored in Blair, op. cit. at page 611; he notes the recommendations of the Patent Congress of 1873, in favour of compulsory licensing, and quotes Fritz Machlup's testimony to the U.S. Senate Committee on the Judiciary in 1962, which was considering legislation to amend the anti-trust laws with respect to drugs.

23 "Dupont Loses Round to Akzo in Patent Battle", Wall Street Journal, Jan. 2, 1986; Laura Ran: "Netherlands dispute with U.S. looms over fibre trade" Financial Times (London), Jan. 10, 1986.

24 A subordinate issue, or an issue of a different kind, is raised by the practice of the United States in handling private complaints of patent infringement (and trademark infringement) by importation by a procedure different from the disposition of such issues in domestic commerce. The domestic courts (District Courts) handle cases of patent infringement in domestic commerce; however, complaints in regard to imports are handled by the International Trade Commission, where hearings are held by administrative law judges, under Section 337 and 337a of the Tariff Act. While the ITC applies the same tests as would a domestic court in regard to determining the validity of a U.S. patent, the framework of law regarding infringement, and the procedures, is more favourable to the plaintiff under the ITC. The question of whether it is appropriate, given the "national treatment" obligations of Article III of the GATT, to maintain such different rules and procedures, was the subject of a Canadian complaint under the GATT conciliation procedures (Article XXIII): the Wallbank case. The panel report, which rejected the Canadian complaint, is GATT L/5333 of June 11, 1982; the Canadian statement setting out the disagreement with this report is C/W 1396, 14 Oct. 1982; the U.S. reply is C/W/400 2 Nov. 1982. We shall, in the final chapter, note that Section 337 uses some language, which, if given its full connotation, would make import competition policy considerations, in some measure, into trade policy. For Section 337 cases (which are largely alleged patent infringements) see USITC, Office of the Administrative Law Judges: Compendium of Section 337 Decisions and the extensive discussion in Kaye, Plaia and Hertzberg, op. cit., Part II.

25 See Financial Times (London), FT Commercial Law Reports. July 3, 1984 British Leyland vs Armstrong, Court of Appeal.

26 U.K., Office of Fair Trading, Report by the Director General, 21 March 1984.

27 U.K. Monopolies and Mergers Commission: Ford Motor Company Limited Cmnd. 9437, February 1985.

28 Kenneth Gooding: "EEC may compel Ford to grant body panel licenses" Financial Times (London), Nov. 21, 1985; John Griffiths: "Brussels halt action as Ford agrees to body panel licenses", Financial Times, Dec. 18, 1985.

29 See Iain C. Baillie: "Design Copyright in the U.K."; Les Nouvelles, March 1982, for a general discussion of these U.K. provisions.

30 Reform of the Law Relating to Copyright, Cmnd 8302, July 1981. "Copyright/Very Green Paper" The Economist, July 18, 1981.

SELECTED BIBLIOGRAPHY

Ablondi, Italo H. "Overview of Remarks — Injury Determinations in Anti-dumping and Countervailing Duty Proceedings", Washington, D.C.: National Institute on Critical Issues of International Trade Law, 1981.

Alberger, Bill. "Some Comments on the Escape Clause in Light of the Automobiles Decision", Washington, D.C.: National Institute on Critical Issues of International Trade Law, 1981.

Alberger, Bill and Yerxa, Rufus. "The Concept of Injury in United States Trade Law -- The Role of the U.S. International Trade Commission", paper read at University of Liège Seminar (XXXIIième Séminaire de la Commission Droit et Vie des Affaires), 18-20 October 1979, and published in Aides et mesures de sauvegarde en droit international économique (Paris: Éditions du Moniteur).

Anon. "Effective Enforcement of U.S. Anti-Dumping Laws: The Development and Legal Implications of Trigger Pricing", Note, 10 Law and Policy in International Business, 1978, 969.

Allan, John D. "Dumping and the Canadian Steel Industry", Canada-United States Law Journal, 2 (1979): 39-51.

Amacher, Ryan C., Hakerler, Gottfried, Willett, Thomas D., Challenges to a Liberal International Economic Order, Washington, American Enterprise Institute, 1979.

American Bar Association. "Report of the Ad Hoc Sub-committee on Antitrust and Anti-dumping", Antitrust Law Journal, 43, No. 3, 1974.

Anon. 'Anti-dumping Duties', in United States International Economic Policy in an Interdependent World, Williams Report (Washington: U.S. Government Printing Office) United States Department of the Treasury, 1971, p. 405.

Anon. Symposium: 'Section 337 of the Trade Act of 1974', Georgia Journal of International and Comparative Law, Athens, Georgia, Spring 1978.

Applebaum, Harvey M. "Antitrust Implications of Import Relief Proceedings" in Applebaum & Victor: Basics of Anti-dumping and Other Import Relief Laws/Multilateral Trade Negotiations Update, Practising Law Institute, Nov/Dec. 1979, pp. 171-192.

-----. "The Anti-dumping Laws -- Impact on the Competitive Process, "Antitrust Law Journal, 43: 590-607.

Areeda, Phillip and Turner, Donald F. "Predatory Pricing and Related Practices under Section 2 of the Sherman Act", Harvard Law Review, 88 (1975): 697-733.

Bael, Ivo Van. "Ten Years of EEC Anti-dumping Enforcement", Journal of World Trade Law 13 (September/October 1979): 395-408.

-----. "The EEC Anti-dumping Rules -- A Practical Approach," International Lawyer, 12: 523-546.

Bergsten, Fred W. "On the Non-Equivalence of Import Quotas and 'Voluntary' Export Restraints" in Bergsten (ed.): Toward a New World Trade Policy: The Maidenhead Papers, Lexington Books, Lexington, Massachusetts, 197 .

Baker, Donald I. "The Interface Between the United States Antitrust Laws and International Trade Laws Regulating Import Competition", photocopy, 1983.

Baldwin, Robert E. "The Changing Nature of U.S. Trade Policy Since World War II", NBER 1982.

Barcelo, John J. III. "Anti-dumping Laws as Barriers to Trade - The United States and the International Anti-dumping Code, "Cornell Law Review, (check) April 1972, 57: 491-560.

-----. "The Anti-dumping Law: Repeal It or Revise It," Anti-dumping Law: Policy and Implementation, Michigan Yearbook of International Legal Studies, Vol. I, Ann Arbor: The University of Michigan Press, pp. 53-93.

-----. "Subsidies, Countervailing Duties and Anti-dumping After the Tokyo Round", Cornell International Law Journal, 13: 257-288.

Bellis, Jean-François and Bael, Ivo Van. "Instruments of Trade Protection in the European Community: A Review of Current Practice", UNDP/UNCTAD Interregional Project/MTN.

Bellis, Jean-François. "New Community Protection Against Dumping and Subsidies," European Law Review, 5 (1980): 145-147.

-----. "La Règlementation anti-dumping de la Communauté Économique européenne", 15 Cahiers de Droit Européenne, Nos. 5-6, 1979.

Bork, Robert H. The Antitrust Paradox/A Policy at War with Itself, Basic Books, New York, 1978.

Bourgeois, J.H. "EC Anti-dumping Enforcement - Selected Second Generation Issues" (Photocopy; to be published in 1985 Annual Proceedings, Fordham Corporate Law Institute)

Bowen, Debra L. "Trigger Prices: A Shot in the Dark?", Virginia Journal of International Law, 18 (1978): 771-805.

Brandt, Harold and Zeither, Wilhelm A. "Unfair Import Trade Practice Jurisdiction: The Applicability of Section 337 and the Countervailing Duty and Anti-dumping Laws", Law and Policy in International Business, 12 (1980): 95-116.

Cable, Vincent and Martin Weale: "Economic Costs of Sectoral Protection in Britain" 6 The World Economy, No. 4. Dec. 1983. 421-435.

Caine, Wesley K. "A Case for Repealing the Anti-dumping Provisions of the Tariff Act of 1930", Law and Policy in International Business, 13 (1981): 681-726.

Cosgrove, Charles H. "Technical Analysis of the Subsidies and Countervailing Measures Agreement", Law and Policy in International Business, 11 (1979): 1497-1526.

Cunane, Joseph and Stanbrook, Clive. Dumping and Subsidies, EBP, London and Brussels, 1983.

Dale, Richard. Anti-Dumping Law in a Liberal Trade Order, London, MacMillan for the TPRC; Chap. 2: "Welfare Implications of Dumping" 3. "Price Discrimination and the Law".

Davidow, Joel. "U.S. Competition Law, Non-Tariff Barriers to Trade and the Role of the Antitrust Division", paper read at University of Liège Seminar, XXXIIième Séminaire de la Commission Droit et Vie des Affaires, pp. 18-20, October 1979.

-----. "U.S. Antitrust, Free Trade, and Non-Marked Economies", JWTL 12, No. 6, Nov./Dec. 1978.

-----. "Cartels, Competition Laws and the Regulation of International Trade", International Law and Politics 15, 1983.

Dickey, William L. "A Guide for Pricing Commodities to Enter the Commerce of the United States", Law and Policy in International Business, 11 (1979): 491-555.

Dreyer, Jacob S.: "Countervailing Foreign Use of Monopoly Power" in Ryan C. Amacher et. al (eds): above.

Dunlop, Bruce (1979) "Price Discrimination, Predatory Pricing and Systematic Delivered Prices," J. Robert S. Prichard et. al., editors, Canadian Competition Policy: Essays in Law and Economics (Toronto: Butterworths).

Ehrenhaft, Peter D. "What the Anti-dumping and Countervailing Duty Provisions of the Trade Agreements Act /Can/ /Will/ /Should/ Mean for U.S. Trade Policy", Law and Policy in International Business, 11 (1979): 1377-78.

-----. Review of Anreas F. Lowerfelf: Public Controls on International Trade, New York, Bender, 1983, 2nd ed., in Law & Policy in International Trade 16, No. 1, 1984, at 351.

Elzinga, Kenneth G. and Hogarty, Thomas F. "Utah Pie and the Consequences of Robinson-Patman", Journal of Law and Economics, 21, 1979, 427-434.

Epstein, Barbara. "The Illusory Conflict Between Anti-dumping and Antitrust, "Antitrust Bulletin, 18 (1973): 1-22.

Finger, J.M., KeatHall, H. and Nelson, Douglas R. "The Political Economy of Administered Projection", AER, June 1982.

Fisher, Bart S. 'The Anti-dumping Law of the United States: a Legal and Economic Analysis', Law and Policy in International Business, Washington, 5, No. 1, 1973.

Fox, Eleanor M. "The New American Competition Policy-From Anti-trust to Pro-Efficiency, ECLR, 1981, p. 439.

Greenway, David and Brian Hindley: What Britain Pays for Voluntary Export Restraint, London, Trade Policy Research Centre, 1985.

Grey, Rodney de C. The Development of the Canadian Anti-dumping System, Montreal: Private Planning Association of Canada, 1973.

-----. U.S. Trade Policy Legislation/A Canadian View, Montreal, I.R.P.P., 1982.

Hatch, Josiah III. "The Harley-Davidson Case: Escaping the Escape Clause", Law & Policy in International Business 16, No. 1, 1984, p. 325.

Hawkins, Harry C. Commercial Treaties and Agreements/Principles and Practice, New York, Rinehart, 1951.

Hemmindinger, Noel: "Shifting Sands" An Examination of the Philosophical Basis of U.S. Trade Laws" in Jackson, Cunningham etc.: ABA 1985.

Horlick, Gary N. "America Trade Law and the Steel Pact between Washington & Brussels", The World Economy 6, No. 3, Sept. 1983.

-----. "Current Issues in Countervailing Duty Law/The Trade Agreements Act of 1979 - Four Years Later", mimeo., Sept. 26/83.

Howell, Thomas R.: "Foreign Cartels and American Competitiveness" in Jackson, Cunningham etc. ABA 1985.

Hufbauer, Gary Clyde and Erb, Joanna Shelton. Subsidies in International Trade, Washington, Institute in International Economics, 1984.

Herrington, Wayne W. "U.S. International Trade Commission: Imported Articles Made by Patented Processes", JWTL 14, No. 6, Nov./Dec. 1980.

Jackson, John H. World Trade and the Law of the GATT, Indianapolis: Bobbs-merril, 1969.

Jackson, John H., Richard O. Cunningham, Claude G. B. Fordheim: International Trade Policy: A Lawyer's Perspective (Committee on International Trade Section of International Law and Practice, American Bar Association) N.Y. Matthew Binder, 1985 ("ABA 1985").

-----. 'Responses to Foreign "Unfair" Actions', in Jackson (ed.), Legal Problems of International Economic Relations, St. Paul, Minnesota: West Publishing, 1977.

Johnson, Harry G.: "The Costs of Protection and Self-Sufficiency", reprinted in Johnson: Aspects of the Theory of Tariffs, London, George Allen and Unwin, 1971.

-----. "The Cost of Protection and the Scientific Tariff" reprinted in Johnson: Aspects of the Theory of Tariffs, London, George Allen and Uncoin, 1971.

Jonge, H.W. De. 'The Significance of Dumping in International Trade', JWTL, March/April 1968.

-----. "Unfair and Discriminatory Pricing Under Article 86 EEC Treaty", ECLR, 1980, p. 297.

Kawahito, Kiyoshi. The Japanese Steel Industry: With an Analysis of the US Steel Import Problem, Irvington: Special Studies in International Economics and Development, 1972.

-----. "Steel and the U.S. Anti-dumping Status", JWTL 16, No. 2, March - April 1982.

Kaye, Harvey; Plaia, Paul Jr. and Hertzberg, Michael A. International Trade Practice, Shepard's/McGraw Hill, 1981.

Kaye, Harvey and Plaia, Paul Jr. "The Relationship of Countervailing Duty and Anti-dumping Law to Section 337 Jurisdiction of the US International Trade Commission", International Trade Law Journal, Baltimore, Vol. 2, Nos. 1-2, 1977.

Kintner, Earl W. A Robinson-Patman Premier/A Guide to the Law Against Price Discrimination, 2nd Edition, MacMillan, New York & London, 1979.

Kohn, J.A. "The Anti-Dumping Act: Its Administration and Place in American Trade Policy", Michigan Law Review, 60 (1962): 407.

Komarow, Gary. . "Effective Enforcement of U.S. Antidumping Laws: The Development and Legal Implications of Trigger Pricing", Law and Policy in International Business 10, No. 3, 1970.

Lorenzen, Shelley A. "Technical Analysis of the Anti-dumping Agreement and the Trade Agreements Act", Law and Policy in International Business, 11 (1979): 1429.

Lowenfeld, Andreas F. "Fair or Unfair Trade: Does it Matter?," Cornell International Law Journal, 13 (1980): 205-219.

Madder, M. Stuart. "The Threat of Material Injury Standard in Countervailing Duty Enforment", 16 Law and Policy in International Business, No. 2, 1984, pp. 373-416.

Malmgren, Harold B. "Threats to the Multilateral System", (prelim. June 22, 1982).

Martin, Robert. "The Capital Sector Bias of the Special Import Measures Act", Report of the Policy Forum on Special Import Measures Legislation, Ed. Klaus Stegemann, Kingston, Ontario: John Deutsch Memorial Institute, 1984.

Martin, R.J. "Background and Main Elements of the Special Import Measures Act", Report of the Policy on Special Import Measures Legislation, Ed. Klaus Stegemann, Kingston, Ontario: John Deutsch Memorial Institute, 1984.

Marks, Matthew J. 'Remedies to "Unfair" Trade: American Action against Steel Imports', The World Economy 1, London, January 1978.

Metzger, Stanley D. Lowering Non-tariff Barriers, Washington, D.C.: The Brookings Institution, Chapter Four "Anti-dumping and Countervailing Duties".

-----. "The Amended Anti-dumping Code and the Trade Agreements Act of 1979", in Non-Tariff Barriers After the Tokyo Round, eds. John Quinn and Philip Slayton, Montreal: The Institute for Research on Public Policy.

-----. "Import Restricting Measures Taken by the United States: Causation of Injury in Anti-dumping Proceedings", paper read at University of Liège, XXXIIième Séminaire de la Commission Droit et Vie des Affaires, 18-20 October 1979.

-----. Compliance with International Obligations: U.S. and Canadian Injury Determination Under the Antidumping Code, 1974-75. Occasional Paper 31, Ottawa: Carleton University, Norman Paterson School of International Affairs, 1976.

Neale, A.D. and Goyder, D.G. A Study of Competition Enforced by Law/The Antitrust Laws of the U.S.A., Third Edition, Cambridge University Press.

Nelson, Donald R. The Political Structure of the New Protectionism, World Bank Staff Working Paper No. 471, 1981.

Nolan-Haley, Jacqueline M. "The Trigger Price Mechanism: Protecting Competition or Competitors?", New York University Journal of International Law and Politics, 13 (1980): 1-25.

O'Cleireacain, Seames. "Toward a Code on Subsidies and Countervailing Duties", The World Economy 1, No. 4.

Paugh, Jon. "Antitrust Principles and U.S. Trade Laws: A Review of Current Areas of Conflict", Law and Policy in International Business, 12 (1980): 545-610.

Posner, R. Antitrust Law: an Economic Perspective, Chicago: University of Chicago Press, 1976.

Quinn, J. and Slayton, P. (eds.). Non-Tariff Barriers after the Tokyo Round, IRPP, Montreal, 1980.

Rehm, John B. "The Soundness of the Escape Clause as It Now Stands", Washington, D.C.: National Institute on Critical Issues of International Trade Law, 1981.

Rosen M. Stuart/Charles H. Bayar "Comparing Causes of Injury under the Escape Clause" in Jackson, Cunningham etc. ABA 1985.

Rowe, Frederick M., Jacobs, Frances G. and Jackson, Mark R. (eds.). Enterprise Law of the 80's/European and American Perspective on Competition and Industrial Organization, Section on Antitrust Law of the ABA, 1980.

Rivers, R. and Greenwald, J. "The Negotiation of a Code On Subsidies and Countervailing Duty Measures: Bridging Fundamental Policy Differences", Law and Policy International Business, 1979.

Slayton, Philip. "The Canadian Legal Response to Steel Dumping", Canada-United States Law Journal, 2: 81-100.

-----. The Anti-dumping Tribunal, Ottawa: Supply and Services.

-----. "The Canadian Anti-dumping System", 2 Canadian Business Law Journal, No. 4, June 1978.

Shaw, Nancy A. "The Trigger Price Mechanism: An Efficacious Enforcement of the Anti-dumping Laws?", Journal of Corporation Law, 5 (1980): 351-376.

Stegemann, Klaus. "The Efficiency Rationale of Anti-dumping Policy and Other Measures of Contingency Protection", John Quinn and Philip Slayton (editors) Non-Tariff Barriers After the Tokyo Round, Montreal: Institute for Research on Public Policy, pp. 21-69.

-----. "The Net National Burden of Canadian Anti-dumping Policy: Turbines and Generators", Cornell International Law Journal, 15: 293-351.

-----. "Special Import Measures Legislation: Deterring Dumping of Capital Goods", Canadian Public Policy, 8: 573-585.

-----. Report of the Policy Forum on Special Import Measures Legislation, Kingston, Ontario: John Deutsch Memorial Institute.

Tumlir, Jan. "The Protectional Threat to International Order", 34 International Journal, 1978-79, pp. 53-63.

-----. "The New Protectionism, Controls and the International Order", (mimeo) in Ryan Ammacher et.al (eds): Challenges to a Liberal International Economic Order.

-----. "International Economic Order. Can the Trend be Reversed?", 5 The World Economy, No. 1, March 1982.

-----. "The Contribution of Economics to International Disorder", 3 The World Economy, No. 4, January, 1981.

-----. "Salvation Through Cartels? On the Renewal a Myth", 1 The World Economy, 1978, No.4.

-----. "Need for an Open Multilateral Trading System", 6 The World Economy, No. 4, December 1983.

Victor, A. Paul. "Anti-dumping and Antitrust: Can the Inconsistencies be Resolved?" New York University Journal of International Law and Politics, 15 (1983): 339-50.

Viner, Jacob. Dumping, A Problem in International Trade, "Reprints of Economic Classics" — New York: Kelley, 1966. Includes Viner's Memorandum on Dumping (League of Nations, 1926) and "Dumping", Encyclopedia of Social Sciences.

Walter, Ingo. 'Protection of Industries in Trouble -- the Case of Iron and Steel', The World Economy, May 1979.

Wasserman, Jack Gumpert. "Injury From Dumping: The Problem of the 'Regional Industry' ", Georgia Journal of International and Comparative Law, 9 (1970): 469-94.

U.S. GOVERNMENT

Tariff Commission, Report to the Senate Finance Committee, 90th Congress, 1968.

Commission on International Trade and Investment Policy, United States International Economic Policy in an Interdependent World, 1971.

Tariff Commission, Information Concerning Dumping and Unfair Competition in the United States and Canada's Anti-Dumping Law, 1919.

Report of the White House Task Force on Antitrust Policy, (Neal Report), 1969.

U.S. Federal Trade Commission, Comment by the Federal Trade Commission's Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics on Countervailing Duty Investigations before the United States Department of Commerce, In the Matter of Certain Steel Products from Belgium, Brazil, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Romania, South Africa, Spain, and the United Kingdom, May 1982.

Morkre, Morris E. and Tarr, David G. The Effects of Restrictions on United States Imports: Five Case Studies and Theory, Staff Report of the Bureau of Economics to the Federal Trade Commission, June 1980.

U.S. Federal Trade Commission, Comment by the Federal Trade Commission on Anti-dumping Investigations before the United States Department of Commerce, In the Matter of Certain Steel Products from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Romania, South Africa, Spain, and the United Kingdom, 1982.

U.S. Department of Justice, Submission to the U.S.I.T.C. in the Anti-Dumping Investigation of Truck Trailer-Axles-and-Brake Assemblies from Hungary, 1981.

Antitrust Division of the Department of Justice to United States Tariff Commission: In the Matter of Sheet Glass from West Germany, France and Italy, 1971.

In the Matter of the Importation of Large Power Transformers from France, Italy, Japan, Switzerland and the UK, 1972.

In the Matter of the Importation of Northern Bleached Hardwood Kraft Pulp from Canada, 1972.

In the Matter of the Importation of Primary Lead Metal from Canada, 1973.

In the Matter of Certain Wire Nails from Canada, 1978.

U.S. Federal Trade Commission, Comment by the Federal Trade Commission on the Countervailing Duty Investigations before the United States International Trade Commission, In the Matter of Certain Steel Products from Belgium, Brazil, the Federal Republic of Germany, France, Italy, Luxembourg, The Netherlands, and the United Kingdom, August 1982.

CASES

Anheuser--Busch v. FTC, Federal Reporter, Second Series, 289 E. 2d., 83 7th Circ., 1961.

FTC v. Morton Salt, Supreme Court Reports, 334 US 37, 1948.

Utah Pie v. Continental Baking, Supreme Court Reports, 386 US 685.

OTHER GOVERNMENTS

UK/The Monopolies and Merger Commission:
Discounts to Retailers
H. of C. 13 May 1981
HC 311 (HMSO)

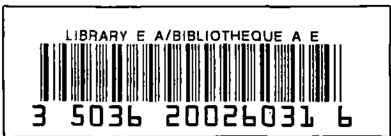
UK/Monopolies and Mergers Commission:
Ford Motor Company Limited
Cmd. 9437 February 1985

Canada. Minutes of Proceedings and Evidence of the Sub-Committee on Import Policy, Standing Committee on Finance, Trade and Economic Affairs, House of Commons, First Session, Thirty-second Parliament, Nos. 1-31, Ottawa: Supply and Services, 1981-82.

Canada. Department of Finance, Proposals on Import Policy, a discussion paper proposing changes to Canadian import legislation, Ottawa: Supply and Services, 1980.

Canada. Department of Consumer and Corporate Affairs, Proposals for A New Competition Policy for Canada: Second Stage, Ottawa: Supply and Services, 1977.

Canada. Director of Investigation and Research, Combines Investigation Act, "Submission in the Matter of an Inquiry under Section 16 of the Anti-dumping Act Respecting: Refined Sugar originating in or exported from the United States of America, ADT-8-84", mimeo, August 1984.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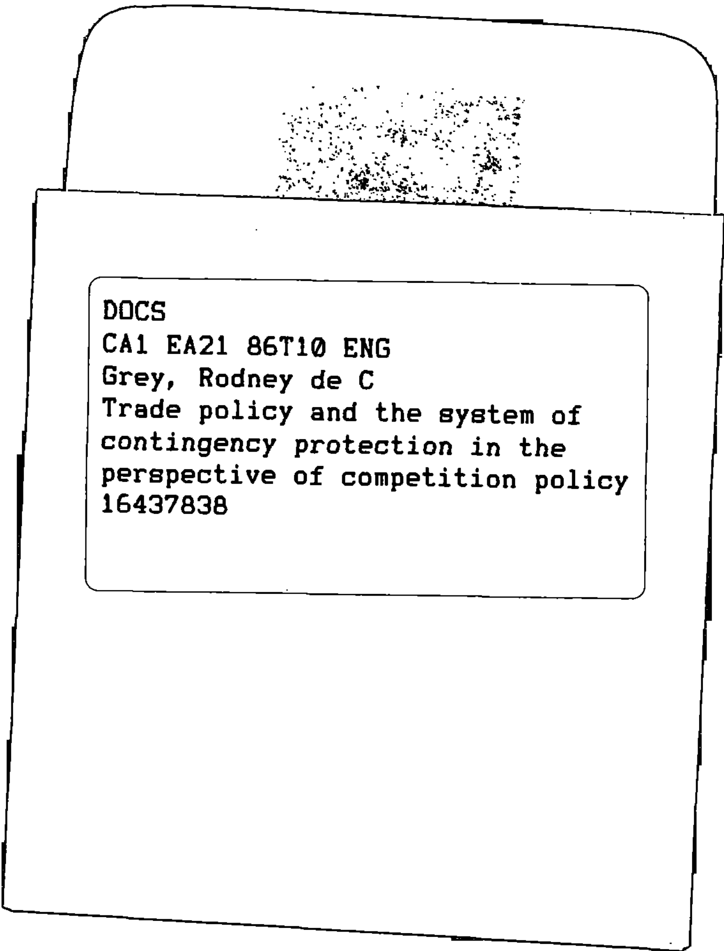
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