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# The International Regulation of Dumping: Protection Made Too Easy

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THE INTERNATIONAL REGULATION OF DUMPING:  
PROTECTION MADE TOO EASY

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## **Abstract**

In many ways, the international regulation of dumping looks like a model of successful multilateral rule making. Yet the systemic justification of anti-dumping measures is dubious, and international rule making has perversely served to expand the scope for regulatory protection. The multilaterally agreed rules have made protection too easy, as compared to the standards that are used to regulate predatory behaviour under domestic competition laws and as compared to the standards stipulated for safeguard measures under Article XIX of the GATT. This paper also explores the reasons why the deregulation of dumping will be difficult.

## Contents

1. Introduction
2. The GATT does NOT Condemn Dumping
  - 2.1 Article VI of the General Agreement and the Anti-Dumping Code are Intended to Constrain the Use of Anti-Dumping Measures
  - 2.2 International Rule Making has Perversely Served to Expand the Scope for Regulatory Protection
  - 2.3 Anti-Dumping Policies Protect the Interests of Select Producers at the Expense of Other Domestic Producers and Consumers
  - 2.4 The Systemic Justification of Anti-Dumping Measures is Dubious
3. Anti-Dumping Policies Make Protection Too Easy
  - 3.1 Protection is Obtained Much More Easily under Anti-Dumping Law than it could be under Domestic Competition Law
  - 3.2 Protection is Obtained Much More Easily under Anti-Dumping Law than it could be under Article XIX Safeguard Provisions
  - 3.3 Protection under Anti-Dumping Law is Camouflaged by a Smoke Screen of Value-Charged Language and Regulatory Gadgetry
  - 3.4 Anti-Dumping Protection is Made to Look Reasonable with Reference to Inappropriate Standards
4. Deregulation will be Difficult
  - 4.1 Principles of Domestic Competition Law and Internationally Agreed Safeguard Procedures Should Replace Current Anti-Dumping Law
  - 4.2 Domestic Support for Reform is Essential but it Must be Supplemented by International Agreement
  - 4.3 The Use of Anti-Dumping Regulation could Shrink because of its Futility and Countervailing Forces
5. Conclusions

Notes

References

## 1. Introduction

In many ways, the international regulation of dumping looks like a model of successful multilateral rule making. The anti-dumping policies of all contracting parties of the GATT are based, in principle, on Article VI of the General Agreement [GATT, 1952]. More specific rules to regulate the use of anti-dumping measures were codified during the Kennedy Round of multilateral trade negotiations in an agreement on implementation of Article VI that has become known as the GATT Anti-Dumping Code [GATT, 1968]. The Code, which was re-negotiated and amended during the Tokyo Round [GATT, 1980], has been formally adopted by 25 signatories. Most of these now have anti-dumping laws or regulations that are generally consistent with the Code. The Code also created a Committee on Anti-Dumping Practices composed of representatives of each of the signatories plus 28 parties with observer status. The Committee continuously monitors the anti-dumping legislation and procedures of signatories, receives and circulates their mandatory reports on all preliminary and final anti-dumping actions, and implements the specific consultation and dispute settlement mechanism established under the Code [GATT, 1990, pp. 435-439].

Thus, there exists a comprehensive multilaterally agreed system of international regulation and surveillance. Furthermore, the regulation of dumping is taking place "inside" the GATT framework to an extent that is unsurpassed by any other area of international trade regulation. While it is true that the Committee on Anti-Dumping Practices has had to deal almost continuously with disputes about doubtful anti-dumping practices, such disputes usually occur on the fringes when parties try to stretch the rules or take advantage of a loophole. The core of the regulated anti-dumping

activities is solidly "legal" in the sense that the vast majority of anti-dumping actions is consistent with the multilaterally agreed rules and/or their current interpretation by the principal users of anti-dumping measures. Yet, it must be recognized that comprehensive regulation, legality and GATT conformity of anti-dumping policies do not add up to international trade liberalization. On the contrary, for the principal users of anti-dumping measures the multilaterally approved regulation of dumping has become a preferred tool of regulatory protectionism, and the incidence of this protectionism is still spreading because the multilaterally approved rules have made protection too easy.

## **2. The GATT does NOT Condemn Dumping**

### **2.1 Article VI of the General Agreement and the Anti-Dumping Code are Intended to Constrain the Use of Anti-Dumping Measures**

Article VI of the General Agreement reflects the influence of conflicting views and interests. In its opening provision, the "contracting parties recognize that dumping ... is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry" [GATT, 1952, Article VI, section 1], but the remainder of the article is concerned primarily with restricting the circumstances under which anti-dumping duties (or countervailing duties) may be imposed. The use of strong normative language is consistent with the views of a minority of legal scholars who hold that dumping is bad in itself, because it is "unfair" in the sense of being morally wrong [Hudec, 1979, pp. 206-208]. Yet, it is quite clear from the context of Article VI and its subsequent interpretation that the GATT

does not establish an obligation for contracting parties to counteract dumping if such dumping causes material injury to producers in the importing country [Jackson, 1969, pp. 402 and 412]. What Article VI does establish is a right for contracting parties to levy anti-dumping duties in certain narrowly defined circumstances, and this right has to be viewed as an exception to the fundamental principles of trade liberalization that were established by the GATT.

It must be remembered that in its origin the GATT was an agreement on tariffs and on the negotiation of tariff reductions [Dam, 1970, chapters 2 and 3]. Article I of the General Agreement stipulates the principle of "General Most-Favoured-Nation Treatment" and Article II requires that the contracting parties "bind" their tariff rates at mutually agreed levels. The tariff rate for a bound item may not be raised above the level of binding. Furthermore, a contracting party making a tariff concession is committed, except as otherwise specifically provided, not to increase or introduce other duties or charges that would tend to undercut the binding of agreed tariff rates. The right to impose anti-dumping duties is a regulated exception from the general provisions of Article II. Any contracting party is entitled to apply anti-dumping duties (and countervailing duties) as long as such duties are "applied consistently with the provisions of Article VI" [GATT, 1952, Article II, paragraph 2(b)].

Thus, the provisions of Article VI of the General Agreement were intended to regulate the use of anti-dumping measures. Because Article VI alone was not specific enough, it had to be supplemented by the Anti-Dumping Code [Dam, 1970, pp. 172-177]. An ostensible purpose of devising a code was to prevent potential "abuse" of anti-dumping measures. This meant that the negotiating parties had to define the limits of bona fide use. Therefore,



the Anti-Dumping Code provides more precise definitions of critical concepts than are contained in Article VI; it emphasizes the triple requirement of determination of dumping, of material injury and of a causal link between dumping and injury; it includes detailed procedural rules; and it limits the scope and duration of anti-dumping remedies [GATT, 1980; Articles 1-11]. In addition, the Code provides for an international surveillance and dispute settlement mechanism, as mentioned previously.

## 2.2 International Rule Making has Perversely Served to Expand the Scope for Regulatory Protection

International disputes over anti-dumping measures taken by signatories to the Code are disputes about alleged violations of the existing multilaterally agreed rules. For the officials involved, the foremost task always is to preserve the integrity of the system by preventing abuse or by making the rules consistent with international practice. Thus, the parties might agree to refine existing rules, or new rules might be added. The soundness in principle of the international regulation of dumping, i.e., the consistency of multilaterally approved anti-dumping policies with the objectives of international trade liberalization, is not in dispute at meetings where this regulation is carried into effect. Yet it can be argued with good reasons that international rule making itself and the use of anti-dumping measures in accordance with the internationally agreed rules have created barriers that are more detrimental to trade liberalization than are the occasional violations of these rules. Anti-dumping measures, by design, protect domestic producers against certain forms of import competition. Such protection is deemed to be "justified" by the existence of internationally agreed rules. If the rules are overly generous, or misconceived from the

start, international regulation results in the opposite of trade liberalization: regulatory protection.

Generous rule making for anti-dumping measures began with Article VI of the General Agreement which, without much questioning, was designed to accommodate the existing anti-dumping law of the United States [Dam, 1970, p. 172; Barcelo, 1990, pp. 20-22]. The U.S. law and practice came to be viewed as a non-tariff barrier by other parties. The Kennedy Round Code addressed those concerns as it stemmed from a desire to achieve "a significant liberalization of world trade" [GATT, 1968, preamble]. However, the "codification had the perverse, but not necessarily unforeseen result that all signatories to the negotiated code thereby acquired rights to use all the varied procedural devices or administrative techniques that had been drafted into the code at the request of one or another negotiator. Thus each signatory could, and some did, enact antidumping provisions that could be deployed to be more restrictive of trade than the systems in effect before the negotiation" [Grey, 1983, p. 248]. A decade later, a similarly perverse result was also evident in the outcome of the negotiations on a Subsidies and Countervailing Duties Code and the revised Anti-Dumping Code, which were judged to be such important elements in the Tokyo Round package of trade liberalization [Grey, *ibid.*; Barcelo, 1990, pp. 26-29].<sup>1</sup>

Major innovations concerning the international rules for the use of anti-dumping measures are typically brought about by agreement among the four principal users: the United States, the European Community, Canada and Australia. One of these, and usually one of the first two, initiates an innovative anti-dumping practice that allows more protection for its producers; the move may be challenged in the Committee on Anti-Dumping Practices or the new practice might be emulated right away. There is a

ratchet effect when the four principal users of anti-dumping measures reach agreement that a new practice should be permitted. The "legal" instruments of regulatory protection are thus harmonized on a higher plateau. An instructive example of this process is the history of the cost-based alternative definition of dumping that evolved in the 1970s [Dale, 1980, pp. 199-203; Koulen, 1989, pp. 367-368]. A recent prominent example is the use of innovative "anti-circumvention" devices that was pioneered by the E.C. and was quickly emulated by the United States [Koulen, 1989, pp. 371-373; Vermulst and Waer, 1990]. This is an area where the codification ratchet is likely to be advanced by a notch or two during the Uruguay Round [Messerlin, 1990, pp. 118-124; Vermulst and Waer, 1990, pp. 1169-1177].

It does not seem to happen very often that an innovation designed to increase protection is blocked by the four principal users of anti-dumping measures. The only important example that comes to mind is the 1970s scheme for steel imports that was known as the Trigger Price Mechanism in the United States, as the Basic Price System in Europe, and as the Reference Price System in Canada [Shaw, 1980]. This innovation was abandoned by agreement among major users because it became apparent that the system was unworkable, or at least it was less elegant than its replacement: a net of Voluntary Export Restraint agreements for steel shipments to the United States and the European Community [Benyon and Bourgeois, 1984]. There is no evidence that countries other than the principal users have had much influence on the development of the multilaterally agreed rules for the use of anti-dumping measures. Thus, the rules reflect the interests of domestic forces in these jurisdictions, though the domestic interests are tempered by some mutual restraint because the principal users of anti-dumping actions also tend to be at the "receiving end" and typically for the same industries.<sup>2</sup>

Innovations in anti-dumping practices that the principal users have conceded to each other tend to be diffused quickly because domestic producers in each jurisdiction appeal to their "rights under the GATT", and domestic law makers and administrative authorities respond by moving towards making maximum use of import restrictions permissible under the internationally agreed rules or interpretations. Thus, international law that was intended as a ceiling tends to become a floor for the policies of the participating jurisdictions. When the United States, the E.C. and Canada adjusted their anti-dumping laws after the GATT Anti-Dumping Code had been revised by the Tokyo Round negotiations, the thrust of the adjustment was to increase protection for domestic producers; the implementation of more precisely defined constraints in the Code appeared to be secondary.<sup>3</sup> At the same time, the United States, Canada and the E.C. responded to the prolonged world-wide recession by increasing the frequency of use of anti-dumping measures. It also became apparent that opportunities for harassment and procedural protectionism had not necessarily been reduced by refinements in the rules [Caine, 1981; Thomas 1981; Piontek, 1987; Hindley, 1988]. In recent years, one can observe a geographic diffusion of regulatory protectionism based on the internationally agreed rules, as countries such as Brasil, Mexico and New Zealand, that had previously used anti-dumping measures only sporadically, seem to have decided to join the four principal users in playing their game [GATT, 1989, pp. 359-361; 1990, p. 439].

As the use of anti-dumping measures became more prevalent, a growing number of legal scholars and economists began to wonder whether, and why, anti-dumping protection was different from other forms of protection, and whether the observed rules for anti-dumping protection could be reconciled with the general objectives of trade liberalization.

### 2.3 Anti-Dumping Policies Protect the Interests of Select Producers at the Expense of Other Domestic Producers and Consumers

Anti-dumping measures are designed to protect the interests of domestic producers of like goods against certain forms of aggressive import competition. This protection, however, hurts other groups, such as domestic consumers or "downstream" producers who pay higher prices for imports and for import-competing domestic goods. Therefore, the importing country as a whole may well be worse off as a result of anti-dumping protection [Stegemann, 1982a; 1982b]. Yet the social welfare of the intervening country as a whole is almost never considered when anti-dumping measures are taken, because the interests of the protected producers are paramount, in law or in practice [Stegemann, 1985; Finger, 1989].

Anti-dumping protection is different from traditional trade restrictions, i.e., tariffs and import quotas, that have been reduced and bound at multilaterally agreed rates or were removed entirely via the GATT process of trade liberalization. An important difference is that anti-dumping protection is provided selectively, on a case-by-case basis. The case-by-case implementation of anti-dumping measures depends on rules and procedures and some administrative discretion for the determination of margins of dumping and of injury caused by dumping, as well as for the appropriate remedies and their duration. This is why the literature has used terms such as "administered" protection, "regulatory" protection or "contingent" protection to distinguish anti-dumping measures and similar import control devices from fixed import tariffs [Finger, Hall and Nelson, 1982; Grey, 1983]. However, if one considers the effects on domestic producers and consumers, rather than the specific procedures employed for implementation, it turns out that anti-dumping protection is quite similar to

other forms of non-traditional protection that have become more prominent since the mid 1970s. These are the so-called "grey area" measures including "voluntary export restraint" agreements, "orderly marketing" arrangements and "industry-to-industry" understandings. All of these grey area measures have in common with anti-dumping protection that they tend to be aimed selectively at restraining the most aggressive sources of import competition; these devices tend to be used repeatedly and often simultaneously to protect a relatively small number of sensitive industries; levels of protection often are substantially higher than those provided by GATT-bound tariff rates; protection often is provided by mutually agreed ("constructive") means that enable exporters to collect scarcity rents for their remaining exports. Also, grey area measures, like anti-dumping protection, tend to cause "chilling effects" on trade because these protective devices are generally triggered by growing imports and because of high litigation or lobbying costs and uncertain outcomes when the administrative machinery is set in motion.

If the effects are so similar, why are anti-dumping measures classified as "legitimate" forms of protection if carried out in correspondence with multilaterally approved rules, whereas those other measures are not recognized by the GATT or are tolerated only on its fringes, as in the case of the Multi-Fibre Arrangement? To some, the answer may seem obvious, or they pretend that it is: The GATT, without using these terms, distinguishes between "fair" trade and "unfair" trade; anti-dumping (and anti-subsidy measures) are designed to restrict unfair trade; therefore, they are legitimate; the so-called grey area measures are illegitimate because they restrict fair trade and/or because they do not follow multilaterally approved rules. But the basis of this distinction between fair and unfair trade is by no means self-evident. Therefore, one has to ask where the distinction came

from and what its function was or is in the system of trade liberalization organized under the GATT.

#### 2.4 The Systemic Justification of Anti-Dumping Measures is Dubious

Few economists would still defend a distinction between fair and unfair international trade that would imply a defence of existing anti-dumping policies; few would wish to defend the existence of anti-dumping policies, even in principle [Hindley, 1990]. Jagdish Bhagwati is one author who has consistently expressed the view that the regulation of dumping is an essential ingredient of a multilateral trading system such as the GATT [Bhagwati 1983, pp. 731-733; 1988, pp. 33-35; 1989, pp. 24-25]. Bhagwati makes two "systemic" arguments in support of anti-dumping and anti-subsidy provisions. One is based on a "cosmopolitan" theory of free trade that requires "adherence to free trade everywhere" to achieve an efficient allocation of resources: "The trade regime that one constructs must then rule out artificial comparative advantage arising from interventions such as subsidies and protection. It must equally frown upon dumping, insofar as it is a technique used successfully to secure an otherwise untenable foothold in world markets" [Bhagwati, 1988, p. 34]. Bhagwati's second systemic argument is based on political expediency. While the importation of abnormally "cheap" goods would be to a country's advantage, cheapness based on "artificial" means is considered "unfair" and this perception imperils political support for free trade: "Would one be wise to receive stolen property simply because it is cheaper, or would one rather vote to prohibit such transactions because of their systemic consequences?" [ibid., p. 35].

As regards Bhagwati's first argument, there is no evidence that the GATT system was conceived to achieve a world of perfectly competitive equilibrium

prices that Bhagwati is using as a standard when he "frowns" upon dumping (which in his definition includes only international price discrimination), and there is not even a suggestion that anti-dumping policies are designed (or could be designed) to achieve an efficient allocation of resources based on that standard. Furthermore, in oligopolistic markets, a system that permits dumping might get closer to an efficient allocation than a system that prohibits dumping [see subsection 3.1 below].

Bhagwati's argument concerning political expediency is valid, as far as it goes. The distinction between fair and unfair trade has been an important factor in the political debate on trade policy in some countries, and especially in the United States. Therefore, some form of regulation of allegedly unfair imports may have been an inevitable political prerequisite for the reduction of other trade barriers, and the existence of anti-dumping procedures may have been an essential part of a domestic "pressure-diverting policy management system" that enabled the United States to take the leadership in international trade liberalization [Destler, 1986, pp. 30-36]. But it is not good enough to postulate that, for systemic reasons, the world trading order ought to permit "the appropriate use of countervailing duties and anti-dumping actions to maintain fair, competitive trade" [Bhagwati, 1988, p. 35]. Indeed, Bhagwati now recognizes the real-world effects of anti-dumping and anti-subsidy policies [ibid., pp. 48-53] and has concluded that the "important question... is how we can prevent these 'fair trade' processes from turning, via capture by protectionist forces, into de facto instruments of protection as they have in recent times" [Bhagwati, 1989, p. 25]. Capture by protectionist forces implies that the rules of the system of regulation are fundamentally in conflict with the objective of trade liberalization. Thus, there now is a systemic reason for fundamental reform



of the multilaterally agreed rules or for the abolition of anti-dumping protection, even if one believes that originally the regulation of dumping was based on a valid distinction between fair and unfair trade [Palmer, 1989].

The political expediency argument in defence of the observed GATT approved anti-dumping policies can be heard also in another version: The rule-makers realize that domestic political pressures for protection can be too great to be resisted in all circumstances. In order to preserve the formal integrity of the system, the parties permit each other the relatively generous use of a "pressure valve" that has been labelled anti-dumping policy. Thus, the de facto justification of anti-dumping measures is based on the systemic need for an escape clause rather than on the need for regulation of allegedly unfair trade practices. The GATT has a specific escape clause or "safeguard" provision in Article XIX which the parties could use, under certain conditions, to satisfy irresistible domestic demands for temporary protection. But Article XIX makes requirements that for various reasons limit its appeal, and this is considered an important explanation for the growing use of grey area measures that are formally outside the GATT [Hamilton and Whalley, 1990, pp. 83-84]. Parties desiring safeguard protection can substitute anti-dumping measures for Article XIX safeguard actions when the mutually agreed rules for anti-dumping actions permit protection to be provided on easier conditions than Article XIX would require [Barcelo, 1990, p. 2; Schott, 1990, pp. 18-25]. On systemic grounds, this substitution is preferred to a proliferation of grey area measures or "special deals" like the Multi-Fibre Arrangement because protective actions that can be handled as anti-dumping measures lie formally inside the GATT system. Yet the de facto substitution of anti-dumping protection for formal

safeguard actions has made protection too easy because anti-dumping proceedings ignore essential criteria that ought to govern the supply of safeguard protection [subsections 3.2 and 4.1 below]. Furthermore, the apparent systemic purity of anti-dumping regulation and its convoluted technicality have served to camouflage the inherent protectionism [subsections 3.3 and 3.4].

### **3. Anti-Dumping Policies Make Protection Too Easy**

#### **3.1 Protection is Obtained Much More Easily under Anti-Dumping Law than it could be under Domestic Competition Law**

Historically, as J.J. Barcelo has demonstrated so well, "GATT anti-dumping law is a hybrid of antitrust and safeguard policies, awkwardly resting on a confused notion of 'unfairness'" [Barcelo, 1990, p. 13]. The hybrid has become a creature of protectionism because essential traits of its antitrust lineage and essential traits of the safeguard lineage have been lost or were suppressed from its inception. In addition, value-charged terminology and regulatory gadgetry have been used to disguise the true nature of the beast. This allegorical description of anti-dumping law can be made more concrete by comparing it to the corresponding principles of competition law and GATT approved safeguard policies.

The contemporary literature is virtually unanimous in acknowledging that there exists a fundamental conflict between observed anti-dumping policies and the objectives of policies directed at maintaining competition in domestic markets.<sup>4</sup> GATT approved anti-dumping policies restrict aggressive import competition, categorized as dumping, because (and when) it injures the interests of domestic producers of like goods in the intervening

jurisdiction. Competition policies, by contrast, intervene against abnormally aggressive or "predatory" market practices because (and when) they injure competition as a process. A recent survey conducted by the OECD [OECD, 1989] shows that the concept of illegal "predatory" practices is interpreted narrowly by virtually all jurisdictions that might apply this concept to regulate the degree of aggressive competition permitted in domestic markets, and these jurisdictions include the four principal users of anti-dumping measures. While there are variations among countries and individual cases, the general principle is that most competition authorities will not challenge aggressive pricing practices unless there exists a substantial risk that alleged predators could acquire or reinforce market power by eliminating outsiders or disciplining aggressive competitors. The increasingly restrained enforcement of domestic anti-predation and price discrimination laws reflects the recognition that these laws should protect vigorous competition and should not be allowed to smother competition for the sake of protecting the "victims" of aggressive pricing.<sup>5</sup>

The international regulation of dumping, on the other hand, is driven almost exclusively by the interests of established producers who complain about aggressive pricing practices of foreign competitors. Rather than to protect outsiders, anti-dumping policies are designed to discipline aggressive outsiders and potential entrants if they are foreigners. Most importantly, injury due to dumping is determined in a manner that generally considers only the interests of the domestic producers of like goods. This is spelled out in the Anti-Dumping Code which demands that the determination of injury "shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent

impact of these imports on domestic producers of such products" [GATT, 1980, Article 3(1)]. The Code further requires that the examination of the impact of dumping on the domestic industry "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 investments" [ibid., Article 3(3)]. However, a finding of material injury for any single factor, such as suppressed prices or profits, can be sufficient to entitle affected producers to protection. In addition, the Code states explicitly that anti-dumping remedies (price undertakings or duties) are intended to remove the injury that dumping causes to the domestic industry in the intervening country [ibid., Articles 7 and 8].

There is nothing in the Anti-Dumping Code that corresponds to the tests of predatory pricing that would be required for an intervention under domestic competition law, and, to my knowledge, tests for predatory pricing are not required under any of the current anti-dumping statutes based on the Code. Consequently, the issue of predation, i.e., possible injury to competition as a process, is not investigated when anti-dumping laws are enforced. Furthermore, the prima facie evidence on anti-dumping cases suggests that predatory dumping, as it would be defined under competition law, is extremely rare [Caine, 1981, pp. 708-716; Hindley, 1990]. Having observed the anti-dumping policies of three jurisdictions for over a decade, I am not aware of a single case for which it could be argued convincingly that exporters who were dumping could have hoped to attain lasting monopoly power to exploit buyers in the importing country. The structure of the

relevant international industries and the conditions for market entry would not have permitted monopolization. Indeed, anti-dumping policies might cease to exist if protection could be obtained only in cases of genuinely predatory behaviour, as required under competition law.<sup>6</sup>

### 3.2 Protection is Obtained Much More Easily under Anti-Dumping Law than it could be under Article XIX Safeguard Provisions

The de facto use of anti-dumping protection as a substitute for safeguard (escape clause) protection has been noted by many authors [e.g., Dale, 1980, pp. 7 and 181-197; Norall, 1986, pp. 97-99; Grey, 1989, pp. 202-205; Hoekman and Leidy, 1989; Vermulst, 1989, p. 461; Barcelo, 1990, pp. 26-29; Finger and Murray, 1990, pp. 1 and 13-20; Hamilton and Whalley, 1990, pp. 81-84]. Two different safeguard motivations should be distinguished: The "social insurance" motive for allowing temporary protection for depressed or cyclical industries [Hillman, 1989, pp. 102-121] and the "infant industry" motive of temporary protection for new products that are considered to have a "strategic" significance for the development of an industry or related industries [Stegemann, 1989, pp. 84-89].

Organized international market sharing for depressed or cyclical industries became the primary objective of anti-dumping policies and multilateral rule making during the 1970s and early 1980s when the "old" industrial countries suffered from widespread domestic excess capacity and aggressive import competition. Primary steel products were the most conspicuous object of innovative anti-dumping policies; but other cyclical products such as chemical products and man-made fibres, are also strongly represented among the principal targets of anti-dumping measures [Tharakan, 1988]. Organized international market sharing was facilitated immensely by

the adoption of revised procedures for the determination of dumping that, in effect, permit anti-dumping protection when exports are sold below full cost, rather than below exporters' home market prices. This interpretation of the GATT rules was critical because at times of internationally depressed markets it might not have been possible to find significant dumping based on international price discrimination.<sup>7</sup> Indeed, when the four principal users of anti-dumping measures conceded to each other the new cost-based definition of dumping at a meeting in Geneva on 7 November 1978, they argued that the new interpretation was needed because otherwise a country "would be able to export its recession" [Dale, 1980, p. 202]. Since then, sales below cost of production "have become the centerpiece of U.S. antidumping law and policy" [Horlick, 1989, p. 133]; the E.C. and Australia have largely adopted U.S. practices [Bellis, 1989, pp. 70-75; Steele, 1989, pp. 253-256]; and Canada is not far behind [Magnus, 1989, pp. 196-197; Dutz, 1991].

The other principal safeguard use of anti-dumping measures, "infant industry" protection, was pioneered by the E.C. in the 1980s when it took advantage of procedural discretion to find high dumping margins for sophisticated manufactured goods imported from Japan, South Korea and Hong Kong [Norall, 1986; Hindley, 1988]. The infant industry motivation was sometimes stated explicitly in the decisions explaining why anti-dumping protection for a particular product was in the interest of the Community. More generally, the motivation has been inferred from the general trade policy context and from the methods used for the determination of dumping margins [Bellis, 1989, pp. 69-84 and 94]. The implementation of the so-called "screwdriver assembly" or "parts" provisions in Article 13(10) of the basic E.C. anti-dumping regulation [E.C. Council, 1988a] can be seen in the same light, because this provision is clearly targeted at foreign

exporters of sophisticated manufactured products and because it has been used as a "buy European" instrument to stimulate production of "high technology" components [Bellis, 1989, pp. 57-59 and 95-96; Vermulst and Waer, 1990].

Safeguard protection, properly defined, has a systemic justification in the GATT system of trade liberalization because, like a safety valve, it can help preserve the integrity of the system when protectionist pressures become too great to be resisted. But the authors of the GATT intended to have a safety valve that was much narrower than current anti-dumping law. This can be seen by looking at the more stringent conditions designed to restrict the use of Article XIX, which is the designated safeguard provision of the General Agreement [Dam, 1970, pp. 99-107; Jackson, 1989, pp. 155-165; Hamilton and Whalley, 1990, pp. 80-81]. Article XIX allows "emergency action on imports of particular products" if "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of the contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products" [GATT, 1952, Article XIX (1)(a)]. Thus, the safeguard provision has an injury test and a causation test. The injury test is more strict than the corresponding test for anti-dumping actions, as it is generally agreed that "serious injury" under Article XIX requires more injury than "material injury" under Article VI. The causation test is different, and it is quite likely that many anti-dumping actions would not have passed the causation test of Article XIX which requires serious injury "as a result of" unforeseen developments and of the effect of obligations incurred under the General Agreement, such as tariff concessions.

The GATT rules prescribing the form of safeguard remedies are also more restrictive than the corresponding rules for anti-dumping remedies. Three points are important here. First, Article XIX sets narrower limits for the level of emergency protection. A contracting party is permitted to suspend its GATT obligation for a particular product or to withdraw or modify a concession "to the extent and for such time as may be necessary to prevent or remedy such injury" as is found under the injury and causation tests [ibid.]. The GATT Anti-Dumping Code, on the other hand, allows remedies up to the full margins of dumping [GATT, 1980, Articles 7(1) and 8(1)], and there is nothing in the Code to prevent the remedies from being prohibitive of imports found to be dumped. Second, it is generally accepted that the safeguard provision in Article XIX (1) does not establish an exception to the most-favoured-nation principle of the GATT [Dam, 1970, pp.104-105; Jackson, 1989, pp.169-174]. This means remedies under the safeguard provision must apply to imports from all contracting parties, whereas anti-dumping actions, in accordance with the multilaterally approved rules, are aimed selectively at the sources of dumped imports. Third, a party planning to take an emergency action under Article XIX must give notice in writing and must give "those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action" [GATT, 1952, Article XIX(2)]. One purpose of consultation is to negotiate equivalent concessions by the acting party that would compensate the affected parties for the effects of the emergency action. If agreement is not reached, the affected parties are free to retaliate by suspending "such equivalent concessions or other obligations" as required to reestablish a reciprocal balance of concessions [ibid., Article XIX (3)(a)]. There is nothing in Article VI or the Anti-Dumping Code that would require a party



taking anti-dumping actions to consult and offer compensation to negatively affected trading partners, and the affected parties have no right to retaliate against anti-dumping actions.

The four principal users of anti-dumping protection all have safeguard laws and procedures that are based on Article XIX of the General Agreement. Not surprisingly, the individual safeguard laws reflect GATT language, such as the "serious injury" test. But the more important differences between the anti-dumping and safeguard mechanisms of these jurisdictions are embodied in the procedures that regulate the availability of the two types of contingency protection. For anti-dumping protection, direct access by domestic complainants is the preferred route for the initiation of investigations; trade remedies are practically automatic when dumping, injury and causation are found in accordance with the multilaterally approved rules; the interests of domestic producers of like goods are usually the only interests that matter; alternative forms of intervention are not considered. For safeguard protection, access to the administrative process is more guarded, and investigations typically are initiated by the government, rather than directly by an industry [Coleman, 1989, pp. 53-54 and 62-63]. A remedy is not automatic if a safeguard investigation shows that imports have caused serious injury to domestic producers. In the case of Canada, for example, it has been observed that "the government retains discretion at the end of the day to delay action or take no action at all to redress the injury if it considers that other objectives, including Canada's overall trade interests, would not be well served by such action" [ibid., pp. 53-54]. Furthermore, trade intervention is not the only remedy considered to relieve injury in safeguard cases. Indeed, the investigative bodies are typically required to

make recommendations that include alternative remedies, such as adjustment assistance [*ibid.*, pp. 62-63].

Thus, safeguard procedures, in contrast to anti-dumping procedures, are designed to restrict trade intervention to those situations where, after consideration of the relevant costs and policy alternatives, the political authorities decide that contingency protection serves the interests of the jurisdiction as a whole. One may assume that the national restrictions preventing automatic use of safeguard remedies are related to the provisions of the GATT requiring most-favoured-nation remedies, consultation and compensation, or allowing retaliation by the affected trading partners. Yet, the general approach of granting emergency protection only after all important repercussions and costs and alternatives have been considered by the domestic authorities is a fundamental principle of rational policy making. Furthermore, this same principle is widely recommended as a basis for maintaining a liberal international trade environment. A 1983 report of a GATT-sponsored commission of eminent persons, the so-called Leutwiler Report, made it very clear that the new protectionism could be contained only if trading partners confronting emergency situations would follow procedures to determine all relevant costs and policy alternatives before acting to protect a domestic industry [GATT, 1985, pp. 35-37]. Similarly, the OECD in several publications has recommended the use of an "indicative Checklist for the Assessment of Trade Policy Measures" that emphasizes the need for a broadly based investigation of all affected interests, to reduce the incidence of trade restrictions that predominantly serve the interests of the protected sectors at the expense of other groups in society [OECD, 1984, pp. 20-24; 1986, pp. 295-296].

Interestingly enough, neither the Leutwiler Commission nor the OECD recommend that equivalent procedures ought to be applied to reduce the use of anti-dumping protection. The Leutwiler Report comments that "some measures now being taken against subsidies and dumping are illegal and therefore themselves unfair, as are domestic procedures which permit harassment of importers" and the report recommends that the GATT codes "should be improved and vigorously applied to make trade more open and fair" [GATT, 1983, pp. 40 and 41]. Yet anti-dumping protection would not be included on an industry's "Protection Balance Sheet" [ibid., pp. 52-56]. The OECD at one point seemed more critical of anti-dumping policies, lamenting the pervasive conflicts between anti-dumping policies and domestic competition policy and making recommendations for fundamental reform [OECD, 1984, pp. 84-137]. However, a later version of the highly recommended indicative checklist bears a footnote saying: "This checklist applies to all trade policy measures other than laws relating to unfair trade practices" [OECD, 1986, p. 296]. The implication is clear. In the case of "unfair trade" the injured producers have a right to be protected to the fullest extent possible under multilaterally agreed rules, and a trade-off with other considerations is not recommended. Still, this leaves unanswered a fundamental question: Why should protection against dumped imports be treated differently from protection against non-dumped import competition? A simple answer is: It has been like this for a long time and the multilaterally agreed rules have simply codified a universally accepted distinction between fair and unfair trade. But what is the substance of this distinction?

### 3.3 Protection under Anti-Dumping Law is Camouflaged by a Smoke Screen of Value-Charged Language and Regulatory Gadgetry

"In the language of politicians, lobbyists and lawyers (when they are representing complainants), the term 'dumping' falls in the same category as 'theft' or 'fraud'" [Norall, 1986, p. 97]. The physical connotation of dumping suggests the unloading of unwanted things on someone's property. Likewise, the term "material injury" in a legal application suggests a violation of the private rights of an individual for which redress may be sought under the law. Anti-dumping law thus implies that domestic producers can expect to be protected against loss of sales, loss of profits and other forms of material injury if caused by dumped imports because such foreign competition violates their rights. In a market economy producers do not own their markets, and competition does not normally violate property rights. Dumping by foreign exporters, however, is considered an "abnormal" or "unfair" offensive form of competition that need not be tolerated when it has the effects that active price competition normally has. An important source of the condemnation of injurious dumping is the business code of ethics. Gentle competitors strongly resent selective price cutting by competitors trying "to steal away business" from traditional suppliers, and they have an equally strong distaste for competitors selling at "ruinous" prices below full cost when markets are depressed [Scherer, 1980, pp. 212-227 and 513-525]. Enforcement of the business standards of ethical pricing is not consistent with contemporary domestic competition law in any of the relevant jurisdictions because policy makers have recognized that adoption of the business code could virtually eliminate price competition in mature oligopolistic industries and could seriously impede entry of new competitors as well as adjustment to cyclical and structural change [subsection 3.1

above]. Yet, the use of value-charged language flowing from the business code facilitates the political acceptance of continued and increasing anti-dumping protection even if its rationale is dubious or non-existent by relevant public policy standards.

The dominant rôle of the business code of ethics is reflected in a frequently cited defence of E.C. anti-dumping policy by Willy de Clercq in the Financial Times [De Clercq, 1988].<sup>8</sup> Among the reasons for the international regulation of dumping, de Clercq lists firstly "that dumping is considered to be unfair since it is based on an artificial, rather than a true comparative advantage, in the sense that the low price does not necessarily result from cost-efficiency." Secondly, he adds "that dumping is made possible only by market isolation in the exporting country, due primarily to such factors as high tariffs or non-tariff barriers and anti-competitive practices. This prevents the producers in the importing country from competing with the foreign supplier on his own ground while allowing him to attack their domestic market by sales which are often made at a loss, or are financed from the profits made from the sale of the same or different products in a protected domestic market." From this, de Clercq concludes: "If anyone has doubts on the fairness of such action, he should ask the business community whether they consider it fair to compete against exporters who have accumulated super-normal profits while operating behind closed doors and then used these funds to attack the export market" [ibid., 1st column].

De Clercq's point about "artificially" low prices that are not necessarily based on cost efficiency clearly does not distinguish dumping from legal forms of price competition that producers must tolerate from domestic competitors who pursue new customers or adjust their prices to

depressed market conditions. In his second point, de Clercq asserts that dumped imports are considered unfair competition because foreign trade barriers prevent the producers of the importing country from competing with foreign suppliers in their home markets. He thus introduces the politically potent notion that lack of "reciprocity" of market access justifies retaliatory import restrictions. Yet, reciprocity of market access is not even mentioned as a relevant consideration in the GATT Anti-Dumping Code, and the individual anti-dumping statutes based on the Code do not require the authorities to investigate this aspect.<sup>9</sup>

If lack of reciprocal market access were a required condition for the use of anti-dumping measures, such measures could not have been implemented against exports from free-trading countries like Hong Kong or Singapore. Furthermore, for many other countries the remaining import tariffs are generally low and often much lower than the margins of dumping that are found for their exports under the existing anti-dumping procedures. Thus, if high dumping margins are believed to be a consequence of foreign "market isolation", lack of reciprocal access would have to be based on non-tariff barriers and "structural impediments" such as foreign buyers' preference for domestic goods. Various forms of import barriers and structural impediments are also found in the jurisdictions that impose anti-dumping measures. Indeed, the existing trade barriers and structural impediments protecting the complainants' markets may be the main reason why foreign exporters practice dumping (here defined as international price differentiation); exporters have to price aggressively to penetrate new markets. If lack of reciprocity of market access were the reason why dumped import competition is considered "unfair", one would have to compare the import barriers and impediments on both sides. The suppliers of dumped imports might turn out to be in a worse

position than the complainants would be if they tried to penetrate the suppliers' home markets at comparable export prices.

It is not necessary to look further than de Clercq's defence of E.C. anti-dumping policy to find typical other elements of the ideological smoke screen behind which protection has been made easy. De Clercq acknowledges that anti-dumping measures increase the prices of the affected products to consumers, but argues that consumers are also producers "and in that role may require protection against other dumped imports" [de Clercq, 1988, 2nd column]. This simply says that some consumers may on balance gain from protection; but why would protection of producer interests be justified or "required"? Furthermore, de Clercq suggests that "the consumer's interest in gaining from cheap imports in the short term may be outweighed by his long term interest of ensuring the viability of production in the importing country, especially if the disappearance of this production leads to a lessening of competition there, or if the product is of strategic importance" [ibid.]. The point about a lessening of competition that might result from dumping is, of course, the "predatory pricing" argument refuted in subsection 3.1 above. The point about disappearance of domestic production of products of "strategic importance" is a clever element of camouflage as it plays to an audience concerned about domestic industries falling behind in international competition. Yet, the strategic use of anti-dumping policy is denied in the same article, when it is claimed that "There is no question of the Community using its anti-dumping procedures as a substitute for its industrial policy or to strengthen its hand in bilateral negotiations" [ibid., 3rd column].

The existence of elaborate regulatory processes is habitually invoked as evidence of the rightness (soundness) of the effects that are achieved by such processes [Stegemann, 1982a, pp. 51-61]. In the case of anti-dumping

regulation, the reference to existing rules and procedures is a particularly successful obfuscation strategy (1) because regulation is based on multilaterally agreed rules and (2) because, largely as a result of international regulation, the domestic authorities have to follow extensive and seemingly sophisticated investigation procedures before protective measures can be finally imposed. Thus, de Clercq stresses the multilateral origin of anti-dumping regulation, observing that the "Community has always supported the elaboration of internationally accepted rules in the anti-dumping area ... and it has strictly applied these rules" [De Clercq, 1988, 2nd column]. De Clercq fails to mention that the effect of these rules, which the E.C. so prominently helped to develop, has been to make protection easy.

The observance of "due process" and "transparency" of procedures can be used to divert attention from the effects of regulation, because it is more simple for the general public to observe that elaborate procedures are being followed than to judge the economic effects of regulation. De Clercq contends that the Community's anti-dumping procedures "are seen within the Gatt as being among the most transparent" [ibid., 4th column]. He then concludes: "This means that during an investigation, the interested parties are given the opportunity to defend their interests to the full, through their right to inspect non-confidential files, to request hearings or confrontations and to request disclosure conferences during which the Commission explains all details of the dumping calculations, including the facts and the method applied" [ibid., 4th and 5th columns]. Formally this is correct, except that parties opposed to anti-dumping actions cannot really "defend their interests to the full"; they can only watch that the rules are applied correctly, and these rules are designed to protect the interests of



the complainants. In two places de Clercq points out that the E.C. Court of Justice has rejected challenges to the Commission's methodology for computing anti-dumping margins [ibid., 1st and 3rd columns]. Yet, again, the Court only checked whether the legislated rules were followed, not whether they amount to sensible economic policy [Bellis, 1989, pp. 69-84]. The same is true, of course, for court challenges of anti-dumping decisions in other jurisdictions.

#### 3.4 Anti-Dumping Protection is Made to Look Reasonable with Reference to Inappropriate Standards

Questions about the sense or nonsense of anti-dumping protection are often side-stepped by suggestions that other jurisdictions employ more protectionist policies. This tactic is very prominent in de Clercq's defence of E.C. anti-dumping policy as he contends that the "Community's policy in this area ... is incontestably by far the most liberal" [ibid.]. Five points are given in support of this claim:

- (1) Any anti-dumping complaint "is subject to the most rigorous scrutiny before it is accepted, and almost half are rejected" [ibid.].
- (2) "The Community does not automatically apply anti-dumping measures, even when dumping and injury have been demonstrated. Before doing so it has to be established whether it is in the Community's interest to take such action" [ibid.].
- (3) Unlike other jurisdictions, E.C. authorities are not obliged to apply anti-dumping measures at rates that eliminate the full margins of dumping. "On the contrary, under Community law the rate is restricted to that necessary to remove the injury caused" [ibid.].

- (4) "Price undertakings are frequently accepted as an alternative to the imposition of anti-dumping duties" [ibid., 3rd column].
- (5) Unlike the Community provisions concerning "screwdriver assembly" operations, "those of the U.S. may be applied to assembly in third countries as well as in the importing country. Moreover, a wide margin of discretion is left to the administrators and there is no provision for the acceptance of undertakings as an alternative to the imposition of duties on the assembled product" [ibid., 5th column].

The implication of these points is that those opposed to E.C. anti-dumping policies ought to be thankful for a relatively liberal application of international rules that would allow more severe intervention.

The first point affirms that anti-dumping protection is not available on demand, because rules must be followed; but this says nothing about the merit of the complaints that were accepted and about the soundness of standards and procedures used to grant anti-dumping protection. The second point also is formally correct, but still misleading. De Clercq claims that "the legitimate expectation of a Community industry to be defended against unfair competition is carefully weighted against the interests of others, including consumers and processing industries", before anti-dumping measures are applied [ibid., 2nd column]. Yet, the "legitimate expectation" of a complainant industry to be defended against "unfair competition" seems to win out almost all the time [Vermulst, 1987, pp. 244-247; Bellis, 1989, pp. 61-63]. The so-called "Community interests" very rarely lead to a denial of anti-dumping protection, and the standards that are applied to determine the Community interests would clearly not satisfy the previously mentioned OECD check list [subsection 3.2] or the standards that ought to be applied in a safeguard investigation in accordance with Article XIX of the GATT.

De Clercq's third point, about the rates of anti-dumping duty being less than the margin of dumping if a lower rate is sufficient to eliminate material injury, similarly presupposes that elimination of material injury due to dumped import competition is a valid objective of public policy. He mentions, for example, that for photocopiers from Japan "the highest dumping margin was 60.1 per cent and the duty was only 20 per cent" [de Clercq, 1988, 2nd column]. A rate of 20 percent is high in comparison to GATT-bound rates of import duty, and the only justification for a 20 percent rate of anti-dumping duty is that the existing institutions make it possible, and easy, for domestic producers to obtain substantial measures of special protection. If there are policy objectives, such as objectives of "industrial policy" or "safeguard reasons" that might justify temporary special protection, the existing anti-dumping procedures are not intended to serve such needs and the relevant questions are not, and cannot be, investigated properly in the context of anti-dumping cases. Besides, the Commission has protested that it would not use anti-dumping actions for industrial policy purposes.

De Clercq's fourth point, concerning settlement of anti-dumping proceedings by price undertakings, is formally valid in that the E.C. over a longer period has accepted more undertakings than have other jurisdictions. Yet, it is not certain that this makes E.C. policy more "liberal" in comparison to other jurisdictions, such as Canada [Stegemann, 1991]. More important, price undertakings provide protection to domestic producers that normally is at least as solid as protection through anti-dumping duties. The rates of mandatory price increases are not disclosed, but they generally are intended to eliminate material injury caused by dumping. Thus, the same questions ought to be asked about the justification of special measures of

protection. Indeed, in the case of price undertakings protection is more costly to the E.C. than it would be for equivalent rates of duty [Hindley, 1986]. A full investigation of the costs and benefits of anti-dumping protection would, therefore, reveal protection to be more costly when it is provided by price undertakings, though these are more advantageous for foreign exporters than are E.C. anti-dumping duties.

The fifth point of comparison cited at the beginning of this section is an attempt to defend the so-called "screwdriver assembly" provisions that the E.C. adopted in 1987 and that appeared to be targeted mostly at Japanese producers of sophisticated manufactured goods [Bellis, 1989, pp. 57-59]. De Clercq states that the "Community's main concern ... was to guard against the flagrant circumvention of anti-dumping duties while ensuring that the provisions did not deter genuine inward investment" [de Clercq, 1988, 5th column] and then adds: "This aim seems to have been achieved. Direct investment from Japan into Europe increased by about 90 per cent in the year following the introduction of the provisions. Furthermore, in the investigations carried out, it was found that the assemblers have been able to switch the source of their components with comparative ease and once this happened the Community readily accepted undertakings from the assemblers and removed the duty on the assembled product" [ibid.]. Thus, the regulatory innovation that ostensibly was needed for administrative reasons (to prevent "flagrant circumvention") is sold to the readers of the Financial Times as an industrial policy tool that dramatically increased Japanese direct investment in the E.C. (indeed, mostly in Britain) and that forced Japanese assemblers to switch to E.C. sources of components. The acceptance of undertakings from affected Japanese producers is characterized as a concession by E.C.

authorities, when in fact these undertakings were most convenient for the industrial policy purposes of the Commission's "anti-circumvention" design.<sup>10</sup>

The repeated references to industrial policy objectives in the defence of E.C. anti-dumping policy may seem contradictory, because de Clercq in the same article vehemently denies that the Community is using its anti-dumping procedures as a tool of its industrial policy and still manages to take credit for alleged positive effects of anti-dumping measures on foreign direct investment in the Community and on E.C. production of goods of strategic importance. The explanation seems to be that de Clercq tried to address two (or several) different audiences: The denial of industrial policy objectives is the official position intended for the international community and for certain E.C. member states that have strong reservations about the use of anti-dumping policy as industrial policy. The indirect affirmation of industrial policy objectives, on the other hand, is intended for those member states that are more strongly inclined to use any available tool for mercantilist intervention and, possibly, for a broader domestic audience with natural mercantilist instincts. Indeed, the reference to industrial policy benefits of anti-dumping measures may be seen as evidence that the alleged "unfairness" of dumped import competition alone might not be accepted by the general public as a sufficient reason for special protection.

#### 4. Deregulation will be Difficult

##### 4.1 Principles of Domestic Competition Law and Internationally Agreed

##### Safeguard Procedures Should Replace Current Anti-Dumping Law

There now exists a large literature by economists and legal scholars proposing reform of anti-dumping regulation or outright deregulation. The most common proposal for deregulation would replace existing anti-dumping laws and procedures by existing or amended domestic competition laws and safeguard procedures derived from Article XIX of the GATT. This proposal is based on the insight that, in essence, there are two types of policy problems for which regulatory protection might be justified in individual cases: genuine situations of international predatory pricing, as discussed in subsection 3.1 above, and various safeguard (escape clause) reasons for temporary protection, as discussed in subsection 3.2. Anti-dumping law as such would disappear because it cannot deal appropriately with these two types of situations.

Following deregulation, domestic competition law would be used to prevent genuinely predatory behaviour of foreign competitors, which would be defined much more narrowly than is injurious dumping under current anti-dumping law. Multilaterally agreed rules for the application of competition law to foreign competitors might be required to prevent abuse for protectionist purposes. In any event, one would expect to see very few cases in this category because predation as defined by competition law is just not a plausible type of behaviour in most international markets. For the other category of cases, temporary protection could be provided under existing or amended safeguard rules, if they apply. Thus, in most jurisdictions the same institutions that now make decisions on anti-dumping protection would

deal with the residual cases for which safeguard protection can be justified. Dumping would no longer be an issue for these investigations; rather the focus would be on the costs and benefits to society of temporary protection; remedial actions other than import restrictions would be considered; in addition, multilaterally agreed rules and surveillance should cause parties to reserve the use of safeguard protection for true emergency situations.

Options for less radical reform of anti-dumping regulation do, of course, exist. Revised anti-dumping laws could be retained for both the "anti-predation branch" and the "safeguard branch" of anti-dumping regulation. Under the revised rules it should be less easy to obtain protection than under current law, though possibly less difficult than it would be if anti-dumping regulation were simply replaced by competition law and general safeguard procedures. As concerns the anti-predation branch, it has been argued that antitrust laws and statutes like the U.S. Antidumping Act of 1916 are ineffective in preventing predatory dumping because as criminal statutes they have to be strictly construed and because litigation might take forever [Viner, 1966, pp. 244-245; Marks, 1974, pp. 581-582; Victor, 1983]. But a revised anti-dumping statute that is narrowly focussed on the prevention of predatory dumping does not have to be criminal law, and its application could be facilitated if it established a presumption of predatory dumping with the burden of rebuttal falling on the alleged predator [Barcelo, 1979, p. 68; Horlick, 1989, pp. 100-101].

Furthermore, the revised anti-dumping law could establish a "two-tier" approach as has been proposed for domestic anti-predation law [Joskow and Klevorick, 1979; OECD, 1989, pp. 30-31]. This approach would require authorities first to determine whether the market in question is susceptible to successful predation and would allow preliminary protection and a more

detailed second-tier investigation of dumping only if it is reasonable to assume that the alleged predator(s) would be able to exercise market power in the post-predation period. A two-tier approach would reduce opportunities for legal harassment of exporters and importers and would still allow the speedy implementation of preliminary anti-dumping measures in situations where genuine predation is a serious threat. Finally, a revised anti-dumping statute that is narrowly focussed on prevention of predatory dumping might prescribe more appropriate cost-of-production tests (for cases that survive the first tier of a two-tier approach). While proposals for cost-based tests of predatory pricing vary and legal practice is far from uniform [OECD, 1989, pp. 24-29, 77-78, and 82-83], it is very clear that cost-based definitions of dumping in current anti-dumping law do nothing to distinguish cases of predatory dumping from cases where special protection serves to eliminate healthy import competition.

Existing safeguard procedures based on Article XIX of the GATT make it relatively difficult for industries to obtain special protection [subsection 3.2 above]. A shift from existing anti-dumping law to existing safeguard procedures would thus imply a harsh decline in legal opportunities for special protection. A compromise could be sought by either revising the rules for the use of safeguard measures or by retaining a special safeguard branch under revised anti-dumping law. Reform of the GATT safeguard rules has been a topic on the agenda of multilateral trade negotiations for several decades, because it is recognized that new rules are needed if all de facto safeguard actions are to be brought under multilateral constraint. The successful negotiation of a safeguard code has been prevented mainly by disagreement over one issue: whether safeguard actions should be allowed to restrict selectively the imports from individual sources found to be the



cause of serious injury, or whether safeguard actions should be taken against all sources of like imports in accordance with the MFN principle [Wolff, 1983; Hindley, 1987; Hamilton and Whalley, 1990]. The issue of "selectivity" is too big a topic to be discussed adequately in the present paper. But it should be understood that all anti-dumping actions, by design, are aimed exclusively at sources of imports found to cause material injury. Such selectivity seems inevitable only in rare cases of genuine predatory dumping. For all other cases, it is just the broader (misplaced) notion of "unfair trade" that appears to justify selectivity where the MFN principle would have to be followed for safeguard actions. In any event, the selectivity issue establishes a direct link between the reform of safeguard rules and the deregulation of dumping: If new safeguard rules allowed selective actions against the most aggressive sources of import competition, it might become feasible to dismantle excessive de facto safeguard protection under anti-dumping law.<sup>11</sup>

Any reform of anti-dumping rules presumably would not remove the selectivity of protective measures if separate anti-dumping provisions were retained as a de facto instrument of safeguard protection against "unfair" imports. Yet several other steps could be taken to shift a revised anti-dumping regime closer to its safeguard purpose. Comprehensive scrutiny of the true costs and benefits of protection would seem most important. The E.C. has its "Community interest" clause as mentioned above, and Canada in 1984 adopted a "public interest" clause that has essentially the same purpose [Stegemann, 1985; pp. 475-480]; Australian anti-dumping law also would allow the national interest to be considered [Steele, 1989, p. 279]. However, the experience with these provisions has been disappointing, because they rarely have resulted in a refusal or reduction of protective measures. In fact, the

underlying presumption remains that domestic producers have a right to be protected against injurious dumping, unless very exceptional circumstances prevail. Therefore, the investigation of the "Community interest" or "public interest" comes nowhere near an application of the OECD check list or similar proposals for scrutiny of safeguard cases. This could be changed. It has been argued that full-blown check list investigations would take too long and would thus jeopardize the interests of domestic producers where protective measures are warranted [Bourgeois, 1989, p. 66]. Yet the possibility of preliminary measures could be maintained. As a minimum, a full investigation of costs and benefits and of policy alternatives should become a requirement for any renewal of anti-dumping protection beyond an initial period of, say, three years. A rigorous "sunset provision" of three years without opportunities for renewal, as exists in Australia, would be better. One should also consider the introduction of statutory limits on the level of protection, as they existed under Canada's early anti-dumping law [Viner, 1966, pp. 193-197].

All of these suggestions for reform have in common that they would make it less easy for a domestic industry to obtain protection under anti-dumping law. This feature distinguishes proposals for fundamental reform from the proposals for "refinement" of anti-dumping rules that tend to dominate multilateral negotiations. Refinements in legal procedures take existing "rights" as given. Even if they are designed to prevent abuse, such refinements mostly serve to expand the obfuscation branch of anti-dumping regulation and do nothing to achieve deregulation or to limit anti-dumping actions to genuine cases of predation and temporary safeguard protection [Finger, 1989].

#### 4.2 Domestic Support for Reform is Essential but it Must be Supplemented by International Agreement

As Grey has observed, "reform is not going to be generated in meetings of the Anti-dumping Committee ... in Geneva; these meetings consist largely of defensive exercises combined with some exchange of technical administrative knowledge, none of which constitutes a remit for reform. It is inescapable that real reform of the system will come only from some increased recognition in national capitals that the anti-dumping and countervailing duty systems are excessively protectionist and that they are anti-competitive, and thus impose unnecessary and burdensome costs on the protected economy" [Grey, 1989, p. 205]. I have pointed out elsewhere [Stegemann, 1985, pp. 480-482] how a national impetus for meaningful reform of anti-dumping law could be built.<sup>12</sup> However, it seems unlikely that the deregulation of dumping will be initiated unilaterally by any of the four jurisdictions that are now the main users of anti-dumping protection. Trade liberalization, if it happens at all, must be seen to be based on bilateral or multilateral agreement, because policy makers and the public seem to be convinced that "rights under the GATT" to protect a domestic industry constitute an opportunity to enhance national welfare that must not be given up unilaterally. This is just a reflection of the "uneasy paradox" of the GATT approach, as "it achieves freer trade by appealing to the mercantilist interests of nations" [Messerlin, 1990, p. 120].

There are no forces in sight that might simultaneously move several important jurisdictions towards deregulation by multilateral agreement.<sup>13</sup> Anti-dumping regulation is "generic" protection, and conditional protective measures are activated, on a case by case basis, by the producers desiring protection. Therefore, the deregulation of dumping is unlikely to be driven

by industry forces that might demand a liberalization of international rules if regulation were industry-specific or if the regulation of dumping were compulsory, rather than based on the domestic producers' choice. An industry can simply opt out by not complaining if, for whatever reason, the regulation of dumped imports is not in the interest of major producers. But the potential of protective regulation remains in place for any other industry -- and for this same industry for another occasion.

#### 4.3 The Use of Anti-Dumping Regulation Could Shrink because of its Futility and Countervailing Forces

There is no indication that a meaningful reform of anti-dumping regulation might be achieved during the last hours of the Uruguay Round, and this could mean that no major efforts will be made to liberalize the multilaterally agreed anti-dumping regime during this decade. But it is conceivable that the regulation of dumping might fade away in practice because of economic forces that reduce the incentives for complainants to avail themselves of anti-dumping protection. An important factor seems to be the cost of litigation which has increased substantially for various reasons [Canada, 1988b, pp. 15-26]. One hears that U.S. law firms are finding it difficult to persuade their clients to lodge an anti-dumping complaint because the cost of the process is too high in relation to the expected benefits of protection. Protection is uncertain because of the authorities' decision are unpredictable to a degree and also because an affirmative anti-dumping decision does not necessarily solve the producers' problem: Sources of aggressively priced imports governed by anti-dumping measures might be replaced by other sources in a relatively short period; importers against whom anti-dumping measures are directed might essentially have achieved entry

by the time such measures come into effect and can thus continue selling inspite of higher prices; suppliers of dumped imports might take up production or assembly in the importing country because of the anti-dumping duty or they might move production to a third country in a way that avoids being caught by "anti-circumvention" rules [Steele, 1989, pp. 273-274]. Indeed, complainants may learn that the outcome of an anti-dumping proceeding is contrary to their interests if the authorities pursue industrial policy objectives, such as attracting foreign direct investment, or trade policy objectives, such as trading off anti-dumping protection for access to foreign markets that benefits exporting industries.

Diversity of interests among domestic producers who are potential complainants could be another force causing anti-dumping regulation to fade away. Such diversity matters if producers wish to use imports to supplement their own line of products, if they are linked to foreign suppliers, or if they wish to cooperate with foreign suppliers for the production and sales of the same or other products. Thus, phenomena that have been called the "globalization" of business are likely to undercut parochial policies such as anti-dumping protection that have to be activated by complaints on behalf of a majority of domestic producers [Bourgeois, 1989, pp. 58-59; Ostry, 1990; Vermulst and Waer, 1990]. Furthermore, one should not underrate the countervailing power of domestic buyers in a process where special protection is activated at the request of domestic suppliers. A supplier that submits or supports an anti-dumping complaint inevitably antagonizes long-standing customers who resent the fact that their input prices are increased and their choice of suppliers of inputs is constrained by anti-dumping actions. The interests of domestic customers count for very little once a proceeding has been officially initiated. Therefore, customers use their influence before

domestic producers request anti-dumping protection. A Canadian survey of 69 firms with experience as anti-dumping complainants found that 23% gave customers' objections as a reason "why producers with cause do not take action", though only 4% thought that this was the main reason [Canada, 1988b, p. 15]. This percentage seems low, considering that the buyers of dumped imports typically remain buyers of domestic products. Indeed, dumped imports are often bought only to cover a small portion of total requirements, whereas a major portion is "sourced" domestically or from non-dumped imports. It should be noted, however, that the Canadian survey covered only firms with experience as complainants, rather than firms that had not requested anti-dumping protection. Furthermore, domestic supply in Canada tends to be highly concentrated for most manufactured products. This means that it is relatively easy for individual producers to qualify as complainants, and it is relatively difficult for their customers to retaliate by shifting their patronage to domestic suppliers who do not support anti-dumping actions. The countervailing power of domestic buyers could thus be greater in jurisdictions with larger domestic markets, provided competing domestic suppliers find it in their interest not to antagonize their actual or potential customers by supporting anti-dumping actions.<sup>14</sup>

When domestic buyers are unable to play off suppliers against each other, there may still be room for mutually advantageous deals between buyers and potential complainants that restrict imports less than formal anti-dumping measures would. The buyers might agree, for example, to purchase a certain portion of their requirements (for the same or other products) at a certain domestic price in exchange for freedom to cover their remaining requirements with dumped imports at lower prices. Such arrangements are feasible when the number of buyers and sellers is small and

they interact frequently. Indeed, in accordance with the Coase theorem, the effect of mutually advantageous deals could come close to the free-trade outcome [Hillman, 1989, pp. 4-5]. Yet the absence of formal anti-dumping measures is not a reliable indicator for the absence of effective anti-dumping protection, because the threat of anti-dumping actions might be sufficient for exporters or importers to restrain themselves. Thus, a shrinking incidence of formal anti-dumping protection could simply indicate that a trade-restricting outcome of anti-dumping proceedings has become more predictable.

## 5. Conclusions

The GATT was not designed to create a world of free trade, but rather represents a "compromise of embedded liberalism" [Ruggie, 1982, pp. 209-228]. This compromise promotes liberalization of international trade while making allowances for the political needs of the welfare state. Therefore, the General Agreement contains safeguard provisions and exceptions permitting trade restrictions subject to multilateral regulation. The provision permitting regulated anti-dumping protection makes it "safer" for domestic producers to face foreign competition. Yet it is difficult to find a special "systemic" justification for anti-dumping measures that would go beyond consideration of domestic competition policy or the general justification for a safeguard (escape clause) provision, and, compared to corresponding domestic competition law and internationally agreed rules for safeguard protection, the multilateral regulation of dumping has made protection too easy. More specific conclusions are given in the explicit headings of eleven subsections.

## Notes

1. Rodney de C. Grey was Canada's Ambassador and Head of Delegation to the Tokyo Round of multilateral trade negotiations during the years 1975-1979.
2. Japan's 1988 GATT complaint about the E.C. "anti-circumvention" or "screwdriver assembly" provisions appears to be the only important formal move by a country other than the principal users attempting to have an impact on the anti-dumping practices of a trading partner. Japan's complaint, which was also the first formal complaint lodged by Japan since joining the GATT, led to a panel report in March 1990 finding that the E.C. anti-circumvention measures against Japanese producers violated various provisions of the General Agreement [GATT, Focus, No. 70, April 1990, pp. 1-2; Vermulst and Waer, 1990, pp. 1177-1187]. It is, however, too early to say whether Japan's move has made an impact on the policies of the principal users of anti-dumping measures.
3. For Canada, this tendency can be documented with reference to the 1980 Discussion Paper on Import Policy [Canada, 1980 pp. 11-13], the Minutes of the Sub-Committee on Import Policy [Canada, 1981-1982] and Martin [1985]. For the U.S. see Ehrenhaft [1979], Barcelo [1980] and Metzger [1982]. For the E.C. see Didier [1980]. A similar tendency of multilateral regulation leading to more multilaterally accepted protectionism has been observed for the Multi-Fibre Agreement [Krenzler, 1986].
4. Vermulst [1989, pp. 459-460, note 91] has listed the essential references.



5. For details see OECD [1989, chapters V and VI]. This source also reviews the theoretical literature on predatory practices [ibid., chapters II-IV]. Other useful recent surveys are provided by McFetridge and Wong [1985] and by Ordovery and Saloner [1989].
6. The EEC does not have an anti-dumping law or anti-dumping policies for intra-Community trade, relying instead on competition law (Article 86 of the EEC Treaty) to prevent predatory practices in so far as they affect trade between member countries [Bellamy and Child, 1987, pp. 26-27, 414-415, and 609-610]. In the whole history of the Community's competition policy, there has been one case of significant predatory pricing: ECS/AKZO, Official Journal of the European Communities, No. L252 of 13 August 1983 and No. L374 of 31 December 1985. See also OECD [1989, pp. 74-76] and appeal decision [E.C. Court of Justice, decision of 3 July 1991 in case No. C-62/86].
7. Technically, the crucial point is the interpretation of Article 2(4) of the Anti-Dumping Code which permits parties to determine the normal value of exports on the basis of "the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits" when there are "no sales of the like product in the ordinary course of trade in the domestic market of the exporting country" [GATT, 1980, Article 2(4)]. By adopting the interpretation that persistent selling at a loss should not be considered "in the ordinary course of trade," parties can, in effect, determine dumping by comparing export prices to the exporters' fully allocated costs plus profit, rather than to the exporters' home market prices, when home market prices are below full cost for an extended period of time. See Horlick [1989,

pp. 133-138] and Bellis [1989, pp. 70-75] on the relevant history and current U.S. and E.C. practice. Koulen points out that, strictly speaking, the appropriate interpretation "remains an open question under the Code" [Koulen, 1989, p. 368].

8. Willy de Clercq at the time was the E.C. Commissioner for External Relations and, in that capacity, was responsible for the Community's anti-dumping policy. His article was written in response to a series of contributions in the Financial Times that had criticized various aspects of E.C. anti-dumping as being protectionist. It is clear that de Clercq's article was in the nature of an official E.C. response, rather than an expression of personal opinions. Indeed, an official statement on the Community's anti-dumping policy in the E.C. Bulletin, No. 7/8-1988, point 2.2.8, reads like a condensation of the Financial Times article.
9. The E.C. has occasionally referred to lack of foreign market access (not necessarily for the same industries) as a reason for choosing a "tough" interpretation of its anti-dumping law against a particular exporting country when a more lenient interpretation might have been applied to other countries [Le Lièvre and Houben, 1987]. Thus, the E.C. seems to be willing to use discretionary anti-dumping measures as a bargaining tool to gain access to foreign markets for E.C. exports. Such use of anti-dumping actions is not intended by the GATT and, in effect, undermines the multilateral trading system. It falls in the same category as the infamous "section 301" U.S. trade law [Bhagwati, 1988, pp. 123-126].
10. See note 2 above.

11. Schott [1990, pp. 18-25] emphatically makes the point that the negotiation of stricter rules for anti-dumping protection in the Uruguay Round ought to be part of a package for the "safeguards complex" consisting of Article XIX and related provisions of the General Agreement. See also Hoekman and Leidy [1989].
12. Destler and Odell [1987, chapters 5-7] offer a thoughtful and comprehensive discussion of "anti-protection activity" in the United States, though their proposals concerning anti-dumping law are exceedingly conservative [ibid., pp. 135-136].
13. The case of the Canada-U.S. Free Trade Agreement might demonstrate that the deregulation of dumping is difficult even in the context of comprehensive bilateral trade negotiations. See Hart [1989, pp. 336-342], who also reviews the experience of other regional arrangements [pp. 328-336], and Coleman [1990].
14. It should be noted that in accordance with the Anti-Dumping Code an investigation must normally be requested "by or on behalf of the industry affected" [GATT, 1980, Article 5(1)], and an industry is normally defined as "the domestic producers as a whole of the like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products" [ibid., Article 4(1)].

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