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## UNVEILING PROTECTIONISM: ANTI-DUMPING, THE GATT, AND SUGGESTIONS FOR REFORM

PATRICK GAY<sup>†</sup>

*While anti-dumping actions taken under the auspices of the GATT are becoming increasingly prevalent, many commentators have questioned their economic justification and called for the replacement of current anti-dumping provisions with a system based upon competition law principles. This paper reviews the economic analyses, in light of political considerations, and suggests that calls for far reaching reforms are premature and ignore the important safety valve function of anti-dumping measures. The paper concludes that a public economic interest provision should be added to the GATT Anti-Dumping Code, and that anti-dumping regulation should be subsumed within expanded safeguard provisions of the GATT in order to enhance the legitimacy and transparency of the system while reducing its use.*

*Même si les poursuites judiciaires contre le dumping sous l'auspice du GATT deviennent de plus en plus nombreuses, plusieurs auteurs s'interrogent sur leur justification économique. Ces auteurs demandent que les dispositions actuellement en vigueur soient remplacées par un système fondé sur les mêmes principes que ceux soutenant la loi sur la concurrence. Ce travail revise cette analyse économique à la lumière des considérants politiques et suggère que les appels pour une réforme ayant une portée aussi large que celle exposé si-haut sont prématurés et ne tiennent pas compte de l'importance des dispositions sur le dumping, soit d'agir comme soupape de sûreté. L'auteur conclut que la légitimation et l'amélioration de la transparence du système, ainsi qu'une réduction de son usage pourrait s'accomplir, d'une part, en insérant des dispositions concernant l'intérêt publique économique dans le Code Antidumping du GATT, et d'autre part, en insérant les règlements contre le dumping dans les dispositions de sauvegarde du GATT.*

The use of anti-dumping duties as a defence against supposedly unfair importation of cheap goods began with Canadian legislation in 1904. Following the development of the General Agreement on Tariffs and Trade (GATT), anti-dumping action was both condoned and regulated by the provisions of Article VI of the GATT and a

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series of anti-dumping codes. Despite GATT approval, anti-dumping actions were not a frequent occurrence during the first decades of the GATT. For example, in 1958 an official tally showed a total of thirty-seven anti-dumping measures in force across all of the contracting parties to the GATT.<sup>1</sup> During the mid-1970s however, the number of anti-dumping investigations initiated by the major anti-dumping users, namely the European Union (EU), Canada, the United States (U.S.), and Australia, began to escalate at a rapid rate. Although there was some abatement during the late 1980s, by 1994 there were 778 anti-dumping measures in force within the GATT.<sup>2</sup> With their rising use anti-dumping measures and legislation became the target of increased academic scrutiny. As a result of such scrutiny, the economic rationale for dumping has been revealed as marginal, and anti-dumping has been condemned as a form of veiled protectionism that works against the freer trade principles of the GATT. This in turn has led to arguments that the GATT anti-dumping provisions and GATT endorsed domestic anti-dumping regimes should be scrapped and replaced by a system based upon competition law principles.

This article will review the position of anti-dumping within the GATT and analyze the economic critique of anti-dumping regimes. It will be demonstrated that the current anti-dumping system is not consistent with the stated objectives of the GATT. The economic rationale for anti-dumping is severely limited, and the application of anti-dumping laws appears to run counter to the GATT principle of national treatment. Despite this, calls for the replacement of anti-dumping laws with a competition law based regime will not be supported. Such reform is unrealistic given the context of current discussions on the internationalization of competition law. Furthermore, the economic analyses that support such conclusions does not sufficiently address political considerations, as it undervalues the use of anti-dumping laws as an institution-supporting safety valve to divert domestic protectionist pressures.

It will be argued that despite this institution supporting function, the veiled protectionism which anti-dumping offers and

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<sup>1</sup> J. M. Finger, *Anti-Dumping: How It Works and Who Gets Hurt* (Ann Arbor: University of Michigan Press, 1993) at 25.

<sup>2</sup> Canadian International Trade Tribunal, *Annual Report 1995-96* (Ottawa: Canadian International Trade Tribunal, June 1996).

the current endemic use of such measures represents a net loss to the system. Thus, reform is needed. However, any reform must allow for the existence of a safety valve within the GATT if it is to be politically acceptable, particularly in the U.S.. A two-pronged approach to reform is thus recommended. First, the GATT Anti-Dumping Code should be reformed to require that injury be defined in relation to all players in the domestic economy, rather than in relation to a single industry which is the current practice. Secondly, the safeguard provisions of Article XIX<sup>3</sup> of the GATT should be relaxed and expanded to allow politically motivated anti-dumping like action within the trading system, but in a manner that is both more transparent and more restrictive than the current use of Article IV.

### I. DEFINITION OF DUMPING

One commentator has defined dumping, somewhat facetiously, as "whatever you can get the government to act against under the antidumping law."<sup>4</sup> Although such a characterization may appear apt in certain circumstances, dumping is generally understood as the selling for export at below the domestic market sale price. For example, selling a product in the Canadian domestic market at \$10 U.S. while selling the same product in the U.S. at \$8 would amount to dumping at a margin of \$2 per product. This practice is referred to as international price discrimination and represents dumping in its traditional form. Since the mid-1970s, the definition of dumping has been expanded to include the selling of products in the export market at below cost price. Such products will be deemed as dumped irrespective of whether goods within the domestic market are also sold at below cost price.

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<sup>3</sup> The provisions of Article XIX of the GATT, along with those of Articles XX and XXI, are generally referred to as the "safeguard provisions." Article XIX envisions circumstances in which an importing party can temporarily suspend its obligations if faced with unforeseen imports that may injure domestic producers. Use of the safeguard does require agreement of the affected parties, which may involve some form of compensation. If no agreement is reached the Article allows the affected exporting nations to respond with equivalent trade sanctions.

<sup>4</sup> Finger, *supra* note 1 at viii.

## II. DUMPING AND THE GATT

The international trading community, within the confines of the GATT, officially condones governmental action as a means to protect domestic industries engaged in the production of like products from the economic effects of dumping. As such, the anti-dumping regimes of the contracting parties are legitimated and limited according to the terms of Article VI of the GATT. Article VI implies that dumping is an unfair trading practice, one "which is to be condemned if it causes or threatens material injury to an established industry. . . or materially retards the establishment of a domestic industry." This article, therefore, allows contracting parties, through domestic legislation, to offset or prevent dumping by imposing anti-dumping duties.

More specific regulations concerning the use of anti-dumping measures were adopted following the completion of the 1968 Kennedy Round of GATT negotiations in what was to be known as the GATT Anti-Dumping Code. This code was renegotiated and refined, rather than radically altered, during both the Tokyo (1980) and the Uruguay (1994) Rounds. The development of the Code also led to the creation of a Committee on Anti-Dumping Practices to monitor the anti-dumping activities of the contracting parties and oversee the Code's dispute resolution committee. In reference to the development of rules concerning the determination of price, the investigation period, and what constitutes a like product, K. Stegemann proclaims that in,

many ways the international regulation of dumping looks like a model of successful multilateral rule making . . . [as] . . . 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.<sup>5</sup>

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<sup>5</sup> K. Stegemann, *The International Regulation of Dumping: Protectionism Made Too Easy* (Kingston: Queen's University Department of Economics, 1991) at 1-2.

### III. ECONOMIC RATIONALE FOR ANTI-DUMPING

Except in a Kafkaesque nightmare, regulation, however successful, for regulation's sake does not make for a valid policy regime. Therefore, an evaluation of the relative success or failure of the anti-dumping provisions of the GATT must be done in light of the overall purpose of the agreement. The preamble to the GATT speaks of the need to develop "the full use of the resources of the world and [expand] the production and exchange of goods" as well as the desire to "seek the elimination of discriminatory treatment in international commerce." In light of the terms of the preamble and with regard to the position of Article VI within the GATT, one would presume that the use of anti-dumping measures has a sound economic rationale, and should on that basis be condoned by the contracting parties. Indeed, GATT negotiators have maintained the existence of just such a rationale, namely the fear of international predatory pricing:

Anti-Dumping provisions were first introduced by Canada in 1904 followed by the United States in 1916 and 1921 to deal with predatory actions by trusts and cartels which dominated large and highly protected markets and which could export at prices much lower than domestic prices with the objectives of destroying smaller competitors in the importing country. But it proved very difficult under domestic legal systems to establish evidence of predatory intent in the case of foreign firms; thus by 1921 the U.S. like Canada had adopted an administrative remedy, which was the forerunner of today's anti-dumping systems.<sup>6</sup>

At first glance, anti-dumping actions have an intuitive appeal, at least within a national framework, as a form of price support to domestic industry. By protecting the industry from unfair competition, one in turn protects those employed in such industries. However, any benefits need to be measured against those which both domestic consumers and secondary producers would garner as a result of access to cheaper goods and products.

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<sup>6</sup> General Agreement on Tariffs and Trade, Delegation of Hong Kong, *Principals and Purposes of Anti-Dumping Provisions*, GATT Doc. MTN. GNG/NG8/w/46, quoted in J. Hagelston "Some Shortcomings of International Anti-Dumping Provisions" (1991) 25:5 J. of World T. 99 at 99.

But if it can be assumed that anti-dumping measures are used in order to prevent international predation, such a balancing act need not occur, as anti-dumping measures will in the long term benefit both domestic producers and consumers. The logic espoused here is based upon the assumptions of a discriminating monopoly, which run as follows: In the short run, domestic consumers and secondary industries would enjoy economic benefits as a result of lower prices; in the long run however, dumping will lead to the failure of domestic producers, resulting in higher overall prices as consumers become victims of monopolistic price setting.<sup>7</sup> Although some claim this reasoning justifying the use of anti-dumping measures appears cogent, it is only in so far as those companies who are accused of dumping are actually engaged in international predation.

Contemporary economic theory has demonstrated that predatory pricing is a theoretical danger in situations where: one, there are a very limited number of firms, preferably two, operating within a domestic market in which a foreign based firm enjoys the benefits of asymmetrical financial resources; and, two, where the industry concerned is one with significant barriers to entry.<sup>8</sup> If the use of anti-dumping provisions was limited to situations and industries in which international predation was a theoretically possibility, it “would have a major impact on the nature and extent of antidumping activity.”<sup>9</sup> These theoretical limits may be further circumscribed by practical considerations—even given an opportunity for predation firms may find it less costly simply to collude with domestic producers.<sup>10</sup> In the early 1900s a lack of economic information made it difficult to demonstrate predation; it was, therefore, assumed. Current economic analysis indicates that such a demonstration would not be any easier today, not because of shortfalls of information or analytic technique, but because the

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<sup>7</sup> P. Tharakan, “Some Facets of Anti-Dumping Policy” in P. Tharakan, ed., *Policy Implications of Antidumping Measures* (Amsterdam: Elsevier Science Publishers, 1991) 1.

<sup>8</sup> B. Hindley, “The Economics of Dumping and Anti-Dumping Provisions” P. Tharakan, ed., *Policy Implications of Antidumping Measures* (Amsterdam: Elsevier Science Publishers, 1991) 27. See also Hagelston, *supra* note 6.

<sup>9</sup> Hindley, *ibid.* at 30.

<sup>10</sup> *Ibid.* at 25; see also Hagelstam, *supra* note 6 at 99.

theoretical possibilities are sufficiently limited as to make such predation in cases of international dumping a practical non-entity.

Some observers are prepared to go even further, suggesting that not only would anti-dumping activity be significantly curtailed if its focus was on predatory intent or possibility, but that anti-dumping policies would cease to exist if that was the case. Stegemann notes:

Having observed the anti-dumping policies of three jurisdictions for over a decade, I am not aware of a single case where it could be argued convincingly that exporters who were dumping could have hoped to attain a lasting monopoly power to exploit buyers in the importing country.<sup>11</sup>

Since predation is unlikely, both economists and businesspersons have condemned the GATT's anti-dumping provisions for their implication that price differentiation, and selling below fixed cost is somehow inherently wrong and not within "the ordinary course of trade."<sup>12</sup> In respect to below cost pricing, international practice has been to examine price as a component of fixed and variable costs over the course of the investigation period. However, as fixed costs remain constant even if production decreases, it will often make sound economic sense, especially if fixed costs are high, to continue production and lower the market price to a point where full coverage of costs is not realized. As J. Hagelstam notes, acting rationally places the exporter in an awkward situation with respect to anti-dumping regimes as "an entrepreneur who does his duty as a reasonable manager to minimize the costs of the enterprise in a depressed market can be accused and sanctioned for dumping."<sup>13</sup>

Whether such rational is in itself enough to warrant condemnation of the GATT's anti-dumping provisions is a matter of some debate. It has been suggested that if it could be demonstrated that a depression of world prices was caused by supply over-capacity as a result of the bad investment choices of large foreign

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<sup>11</sup> Stegemann, *supra* note 5 at 15.

<sup>12</sup> The GATT in using this phrase seems to imply that the "ordinary course of trade" is one in which there is no price differentiation between regions, and one in which goods are always sold above total costs; see GATT Article VI.

<sup>13</sup> Hagelstam, *supra* note 6 at 105.



firms and that general selling below cost might lead to a greater contraction of the domestic market than the foreign one then a legitimate case may be made for the intervention of government and the imposition of anti-dumping measures.<sup>14</sup>

In respect to the second element of dumping, price differentiation, it would appear that the rationally acting manager may simply be responding to differences in demand elasticity, an action that all but the most protectionist of commentators would be hard-pressed to paint as unfair. As Hagelstam demonstrates, price differentiation is a legitimate and common pricing strategy. Managers attempting to take in higher profits will price according to the elasticities of demand in different countries. The smaller the elasticity, the higher the price that can be recouped from such a market. Price elasticity is dependent upon factors such as substitution possibilities, consumer tastes and purchasing powers. As there would appear to be no reason to presume that such elasticity is the same in various countries, the threat of anti-dumping action arising from elasticity based pricing would seem both unfair and not economically merited.<sup>15</sup>

#### IV. ANTI-DUMPING AND NATIONAL TREATMENT

In addition to the condemnation of anti-dumping measures on the basis of a lack of a sound economic rationale, it seems reasonable to note that both the language of Article VI and the administrative structures borne from it appear to be at odds with one of the basic pillars of the GATT regime: national treatment. Article III of the GATT declares that the products imported from a contracting party "be accorded treatment no less favourable than that accorded to like products of national origin." Differing institutions and standards of treatment in relation to similar behaviour for a domestic producer under existing competition regimes and the importer under an anti-dumping regime suggests non-compliance with this GATT fundamental. An argument based on such a distinction is not in any manner a technically legal one in so far as

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<sup>14</sup> Tharakan, *supra* note 7 at 5.

<sup>15</sup> Hagelstam, *supra* note 6 at 100.

texts are to be interpreted in a manner which allows for the triumph of the specific over the general. Such arguments do, however, when coupled with the above economic arguments, lend further conviction to the view that Article VI is in essence a GATT aberration.

G. Marceau makes a thorough exposition of this argument in her examination of both anti-dumping and competition issues within international trade.<sup>16</sup> Before approaching anti-dumping measures specifically, Marceau examines the analysis of national treatment as discussed in the GATT *Panel Report on Section 337 of the U.S. Tariff Act*.<sup>17</sup> In relation to the parameters of national treatment the panel stated:

On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand it also has to be recognized that there may be cases where the application of formally identical provisions would in practice accord less favorable treatment to imported products . . . For these reasons, the mere fact that the imported products are subject under Section 337 to legal provisions that are different than those applying to products of national origin is not in itself conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment.<sup>18</sup>

A comparison of competition and anti-dumping regimes within North America clearly demonstrates that the differing regimes operate to the disadvantage of foreign exporters. For example, under Canadian competition guidelines the test for predation is based, in part, on the reasoning of the Ontario Court of Appeal in

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<sup>16</sup> G. Marceau, *Anti-Dumping and Anti-Trust Issues in Free Trade Areas* (Oxford: Clarendon Press, 1994) at 104-129.

<sup>17</sup> Reproduced in P. Pescatore, W. Davey & A. Lowenfeld, eds., *Handbook of GATT Dispute Settlement* (New York: Transnational Juris Publications, 1991) at 158. This case did not involve a dumping issue but rather the application of U.S. law in relation to foreign intellectual property standards.

<sup>18</sup> *Ibid.* at para. 5.11.

*R. v. Hoffmann-La Roche*.<sup>19</sup> The Court held that below cost pricing is not in itself evidence of predation or predatory intent but that factors such as duration of pricing levels and competitive circumstances must be taken into consideration. In the U.S., where there is no single legal standard in regard to a predation test, R. Rapp has argued that the following questions are usually asked:

- Is the alleged predator a dominant firm (or does it have some other advantage that would enable it to become one)?
- Do market structure and entry conditions make recoupment of a predatory investment possible?
- Has the alleged predator invested in the destruction of his rivals?<sup>20</sup>

Such considerations are not generally considered by anti-dumping regimes. The manner in which the similar pricing policies of firms may be analyzed and condoned as legal under competition laws while being condemned as an unfair trade practice under anti-dumping provisions can be illustrated by a cursory comparison of the provisions of the *Special Import Measures Act* (SIMA)<sup>21</sup> and the *Competition Act*.<sup>22</sup> The prohibition against predatory pricing is contained within section 50(1) of the *Competition Act*, which states:

Every one engaged in a business who . . . (c) engages 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 that effect is guilty of an indictable offense and is liable to imprisonment for a term not exceeding two years.<sup>23</sup>

In comparison, section 3 of the SIMA states:

<sup>19</sup> (1981), 33 O.R. (2d) 694.

<sup>20</sup> R. Rapp, "Predatory Pricing" (1991) 54 Antitrust L. J. 595 cited in Marceau, *supra* note 16 at 111.

<sup>21</sup> *Special Import Measures Act*, R.S.C. 1985, c. S-15.

<sup>22</sup> *Competition Act*, R.S.C. 1985, c. C-34.

<sup>23</sup> *Competition Act*, R.S.C. 1985, c. C-34, s.50(1).

There shall be levied, collected and paid on all dumped and subsidized goods imported into Canada in respect of which the Tribunal has made an order or finding, before the release of the goods, that the dumping or the subsidizing of goods of the same description has caused, is causing or is likely to cause material injury. . . .<sup>24</sup>

Thus a domestic producer's pricing policy will contravene the Canadian competition regime if it either substantially lessens competition or if it is intended to do so. In comparison, anti-dumping law does not address the issues of intent, result, or, as indicated in the economic analysis above, even the theoretical possibility of predation. All that is required is evidence that dumping took place and that the dumping resulted in a material injury. Although the standard for material injury varies somewhat within each jurisdiction it is clearly below that required of predation in a competition setting.<sup>25</sup> E. Bakke neatly summed up the differing results stemming from the application of anti-dumping laws as compared to competition laws at the 25th anniversary conference of the Organization For Economic Co-Operation and Development (OECD) Committee of Experts on Restrictive Business Practices. Bakke noted:

If the GATT rules on dumping had been applied in competition policy, we should not have had much competition. [As in comparison to anti-dumping laws] competition policy seeks to stimulate competition, including price competition.<sup>26</sup>

In addition to differing investigatory standards, Marceau notes that procedural differences in the investigation and prosecuting of anti-dumping and competition cases tend to infringe upon the obligation of national treatment. For example, whereas in Canada and the U.S. competition cases are tried in a court of law which

<sup>24</sup> *Special Import Measures Act*, R.S.C. 1985, c. S-15, s. 3.

<sup>25</sup> To demonstrate this point Marceau uses the example of the bifurcation test in the U.S., which is applied if the anti-dumping action involves an industry which is deemed to be in poor health. If it can be shown that dumping has contributed even minimally to the declining health of the industry trade measures will be taken. See Marceau, *supra* note 16 at 113.

<sup>26</sup> Cited in Economic Co-Operation and Development, *Twenty Five Years of Competition Policy*, (Paris: OECD, 1987) 31.

offers the parties full procedural protection and a judgment limited by *stare decisis*, anti-dumping cases are prosecuted by governmental agencies according to the quasi-judicial processes of administrative law. Administrative law sets lower standards of procedural fairness and can give rise to allegations of decision making bias as civil servants act as both inquisitors and judges.<sup>27</sup>

While there is some truth in the assertion that an administrative setting places defenders in anti-dumping cases in a somewhat weaker position than if they were being heard in a judicial setting, it must be remembered that prosecutions under competition law are quasi-criminal in nature and can lead to jail terms on conviction. Such a difference would appear to justify differing levels of procedural safeguards.

#### V. REPLACEMENT OF ANTI-DUMPING LAW WITH COMPETITION LAW

Given that, first, the economic justification for anti-dumping measures is weak, and, second, that such measures seem, at minimum, to violate the spirit of the national treatment provisions of the GATT, one obvious solution presents itself: the scrapping of all the anti-dumping provisions of the GATT in favour of competition law. This would involve the dissolution of anti-dumping law and the application of domestic competition laws monitored by a newly created international competition body within the World Trade Organization (WTO) or the OECD. Such a supra-national body might also enforce its own set of internationally subscribed to laws and procedures.<sup>28</sup>

Despite calls for the complete dissolution of anti-dumping provisions and their replacement with competition laws, such a happening would appear to be unrealistic given the scope of current trade policy discussions. Certainly the internationalization of

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<sup>27</sup> Marceau, *supra* note 16 at 115-116.

<sup>28</sup> See D. P. Wood, "Unfair Trade Injury: A Competition Based Approach" (1989) 41 Stan. L. Rev. 1153. See also "Discussion Paper Supports Replacement of Antidumping with Competition Laws" (1995) 12 Int'l Trade R. 1230; G. Horlick "The United States Antidumping System" in J. Jackson & E. Vermulst eds., *Antidumping Law and Practice* (Ann Arbor: University of Michigan Press, 1989) 99.

competition policy is an issue of some note within trade circles. M. Trebilcock echoes the position of the OECD when he argues that "competition policy is likely to be the next major issue of the trade policy agenda."<sup>29</sup> However, the focus of the existing competition agenda is not the replacement of anti-dumping provisions with competition law, but rather the creation of functioning competition regimes in all trading countries and the promotion of efforts to encourage the harmonization of domestic competition laws.<sup>30</sup>

It could be argued that the creation of an international competition body with enforceable rights would be a path to the elimination of anti-dumping even if this were not the intention of its creators. The institutional outlook of such a body would be by its very nature opposed to the use of anti-dumping provisions. As such it could act as a springboard from which to launch attacks upon the provisions of Article VI and the Anti-Dumping Code. However, calls for the creation of a body would appear to be premature at this time. B. Doern and S. Wilks note that the use of the OECD even as a coordinating body for international competition reform would be hampered by the role that the OECD has as a policy group operating in the interest of the western industrialized states. Furthermore, Doern and Wilks refer to the creation of a new supra-national competition agency as a virtual "non-starter," remarking:

The limited chances of this option are not only due to the size of the step that must be taken or contemplated. It is also because there are some inherent limits in the symbolic and real politics of sovereignty in all the key countries.<sup>31</sup>

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<sup>29</sup> M. Trebilcock, "Reconciling Competition Laws and Trade Policies" in G. B. Doern & S. Wilks, eds., *Comparative Competition Policy* (Oxford: Clarendon Press, 1996) 268 at 268.

<sup>30</sup> B. Doern, "Towards an International Antitrust Authority? Key Factors in the Internationalization of Competition Policy" (1996) 9:3 *Governance* 265.

<sup>31</sup> G. B. Doern & S. Wilks, "International Convergence and National Contrasts" in Doern & Wilks, eds., *Comparative Competition Policy* (Oxford: Clarendon Press, 1996) 327 at 339. The adoption of such a regime was advocated by group of mostly German competition academics calling themselves the International Antitrust Code Working Group during the latter stages of the Uruguay round. The group sought the establishment of a competition body within the WTO which would have had the power to request actions be taken by national antitrust bodies and

Finally, it has been argued that the elimination of the anti-dumping provisions of the GATT and the use of competition law in their stead could flow from an initial conversion within free trade areas. M. Essary argues that regional agreements "provide an opportunity to experiment with substantive reform that might someday extend globally."<sup>32</sup> In this regard, a 1995 report by Industry Canada noted that a "strong case can be made for replacing existing anti-dumping laws with competition standards, at least within the context of the North American Free Trade Area."<sup>33</sup> In the EU supra-national competition law has replaced unfair trade laws in relation to other member states.<sup>34</sup> In the course of the FTA negotiations and in the subsequent NAFTA negotiations Canada argued alternatively for the use of domestic competition laws in relation to its free trade partners or for the harmonization of anti-dumping laws of the NAFTA countries. Such reform was rejected by the U.S.<sup>35</sup>

The existing examples of the NAFTA and the EU suggest that a reform within free trading groups might be difficult to realize, and that such reform if possible will not likely, in itself, lead to the use of competition law principles throughout the global trading system. If the U.S. is not prepared to forgo the option of using anti-dumping in favour of competition policy in relation to those with whom it operates a free trade area, it is unlikely to do so with other

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would be able to bring action against such bodies. Its proposals were virtually ignored by trade negotiators.

<sup>32</sup> M. Essary, "The Sphinx Rises: An Examination of Antidumping Laws as The Emerging Trade Weapon of Choice" in J. McKinney & M. Essary, eds., *Free Trade Agreements of the Americas* (Waco: Baylor University Press, 1995) 107 at 116.

<sup>33</sup> Industry Canada, *Competition Policy as a Dimension of Economic Policy* cited in *ibid.* at 113.

<sup>34</sup> Doern & Wilks, *supra* note 31 at 340.

<sup>35</sup> See *Canada-United States: Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Law* (1996) 35 I.L.M. 309. This agreement is indicative of the current limits of the U.S. administration on this issue. The agreement calls for notification of actions and enforcement co-operation between the U.S. and Canadian competition authorities. The agreement however is not indicative of any forthcoming non-application of anti-dumping laws in relation to these two countries. In this regard it should be noted that in the newly negotiated *Canada-Chile Free Trade Agreement*, signed on December 4th, 1996, the contracting parties have agreed not to use anti-dumping legislation in respect to each others products. It remains to be seen what effect this arrangement will have upon future talks concerning Chile's entering into the NAFTA.

contracting parties of the GATT. In addition, despite the successful negotiated abandonment of anti-dumping laws within the EU, the EU remains, along with the U.S., the main user of anti-dumping measures. This suggests that regional reform may simply result in a situation in which members of various regional free trade areas operate in accordance with competition policies amongst themselves, while at the same time using anti-dumping laws to protect domestic industry from third party exporters.

## VI. GATT 1994

Given the considerable economic argument against the use of anti-dumping measures, one might have assumed that the elimination or the radical reformation of Article VI and the Anti-Dumping Code would have been one of the major outcomes of the Uruguay Round. However, while anti-dumping was on the agenda, what was at issue was not its elimination, but its further refinement.<sup>36</sup> Thus, although some commentators have suggested that the Code has been significantly altered,<sup>37</sup> it is clear upon close examination that the majority of reforms dealt with procedural rather substantive issues. Reforms of some significance included the introduction of a *de minimis* rule on the margin of dumping at two percent of the export price, the raising of the *de minimis* volume of dumped imports from one percent of the domestic market to three percent of imports and/or seven percent of the total import share, a "sunset clause" set at five years on the imposition of any anti-dumping duty, and a provision which calls for some form of judicial or administrative review of initial administrative decisions.

Overall, however, the reforms will fail to curtail in any significant manner the use of anti-dumping as veiled protectionism. Marceau remarks that whereas technical legality may be improved by reforms to the Code, "the adopted changes cannot resolve the most fundamental problems [of the Code]. . . . Anti-dumping

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<sup>36</sup> For a general account of the negotiations of the Uruguay Round and a feel for the relative importance of the various issues see E. Preeg, *Traders in A Brave New World* (Chicago: University of Chicago Press, 1995).

<sup>37</sup> See M. Hurabiell, "Protectionism versus Free Trade: Implementing the GATT Anti-Dumping Agreement in the United States" (1995) 16 U. Pa. J. Int'l Bus. L. 567.



measures remain restrictions on trade and protection against foreign competition.”<sup>38</sup> Essary is more forceful in her condemnation of the Uruguay Round reforms, referring to them as “nothing more than a bandage for a festering sore.”<sup>39</sup>

## VII. ANTI-DUMPING AS AN INSTITUTION MAINTAINING DEVICE

In assessing the reason for the failure to significantly reform the process despite the economic analysis, it is necessary to keep in mind that the development of trade policy, as compared to competition policy, is primarily a political exercise. Economic analysis by its very nature tends to lose sight of this truth. As H. Nau notes:

Studies of trade policy making almost always focus upon systematic or substantive arguments, not on the interest groups and institutional forces that make these arguments and use them to struggle to shape trade policy within individual countries.<sup>40</sup>

Nau refers to the political balance which arises out of this struggle as the “knife’s edge”<sup>41</sup> on which trade policy turns.

A systemic argument in favour of the anti-dumping provisions of the GATT does, however, flow from a focus upon the domestic political nature of trade policy. J. Bhagwati, writing in support of anti-dumping, which he acknowledges as a protectionist measure, notes that an absolute free trade system, the type of system which appears most logical according to economic theory, risks letting loose the forces that will result in its eventual destruction. In support of this proposition Bhagwati offers the following analogy: “Would one be wise to receive stolen property simply because it was cheaper, or would one rather vote to prohibit such transactions because of their systemic consequences?”<sup>42</sup> In essence, Bhagwati argues that the existence of some form of trade barrier is a political

<sup>38</sup> Marceau, *supra* note 16 at xi.

<sup>39</sup> Essary, *supra* note 32 at 108.

<sup>40</sup> H. Nau, *Domestic Trade Politics and the Uruguay Round* (New York: Columbia University Press, 1989) at 3.

<sup>41</sup> *Ibid.*

<sup>42</sup> J. Bhagwati, *Protectionism* (Cambridge: MIT Press, 1988) at 35.

necessity in order to allow for the removal of trade barriers in other areas. The politics of trade in the U.S. often appear to be both free trading and protectionist at the same moment. I. Destler refers to this as a "domestic pressure-diverting management system."<sup>43</sup> Stegemann categorizes these as pressure valve arguments, which he describes as follows:

The rule-makers realize that domestic political pressure 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 relative generous use of a "pressure valve" that has been labeled 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.<sup>44</sup>

Despite the theoretical validity of the safeguard argument, it is likely that, with the increased use of anti-dumping measures, this system supporting notion of anti-dumping measures has been manipulated by vested protectionist interests in a manner which is economically harmful and potentially system destabilizing, especially as the number of anti-dumping measures in force world wide increases. Thus the political safeguard argument should at this time be a consideration in the reform of the system, rather than an argument for the maintenance of the status quo and the restriction of reform to procedural or technical points.

### VIII. FOCUS OF REFORM—DOMESTIC LEGISLATION OR THE GATT/WTO?

As anti-dumping is not just harmful to the trading system as a whole but harmful to the economy of the individual country that imposes the duty, it may be argued that reform efforts should be focused upon domestic legislation in individual countries rather than upon substantial reform at the WTO level. After all, the GATT does not force the contracting parties to impose anti-dumping

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<sup>43</sup> I. M. Destler, *American Trade Politics: System Under Stress* (Washington: Institute for International Economics, 1986) at 11.

<sup>44</sup> Stegemann, *supra* note 5 at 12.

duties but merely offers minimum standards which must be followed in the investigation of dumping and the imposing of related duties. Economic studies would seem to indicate substantial gains from unilateral action. For example, the U.S. International Trade Commission (ITC) concluded that the combined cost of anti-dumping and countervailing duty orders in 1991 represented a net loss to the U.S. economy of \$1.59 billion. Such arguments have caused various academics to focus their calls for reform on the domestic trade laws.<sup>45</sup> Calls for unilateral reform are, however, unlikely to be more than marginally successful. They amount to easy prey for opposing political interests who will question why protections which can be afforded under the GATT are being denied, considering that trading partners refuse to act in a similar manner. There is thus an undeniable reluctance for governments to initiate substantial unilateral reform. As K. Steele notes in the Australian context:

The minister stated that although Professor Gruen had recommended the repeal of Section 5(9)[rejection of sales at a loss as not being in the ordinary course of trade], the Government did not consider this appropriate. Other countries such as the U.S., Canada and the EC which rely on anti-dumping as a means to control unfair trade practices had and used similar proceedings. The Australian government was not prepared to provide Australian industry with a lesser safeguard against unfair competition than those provided by these other countries.<sup>46</sup>

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<sup>45</sup> For a U.S. example see C. Barbuto, "Toward Convergence of Antitrust and Trade Law" (1994) *Fordham L. Rev.* 2047. Barbuto, recognizing the economic effects of anti-dumping, calls for a trade statute based upon the anti-trust Robinson-Patman Act. For a Canadian example, see L. Hunter & B. Swick-Martin "Competition Principles and Trade Remedy Laws" in M. Hart & D. Steger, eds., *In Whose Interest? Due Process and Transparency In International Trade* (Ottawa: Centre for Trade Policy and Law, 1992) 118. Hunter and Swick-Martin call for a material injury standard in the SIMA which addresses the costs to the economy as a whole rather than focusing upon injury to the petitioner, an argument which shall be revisited by this paper in relation to reform within the GATT/WTO.

<sup>46</sup> H. K. Steele, "The Australian Antidumping System" in J. Jackson & E. Vermulst, eds., *Antidumping Law and Practice* (Ann Arbor: University of Michigan Press, 1989) 223 at 230.

## IX. REFORM PROPOSALS

The reforms made to the Anti-Dumping Code during the Uruguay Round are inadequate to overcome the protectionism inherent within current anti-dumping regimes. E. Vermulst, writing during the Uruguay round, suggested a number of reforms to the Anti-Dumping Code. Some of these, such as the development of a sunset clause have been implemented as noted above,. Other suggested reforms have not, and represent a minimal standard which should be agitated for in future multilateral discussions concerning dumping. Chief amongst these is a proposal that would amend Article 9 of the Anti-Dumping Code, which currently attempts to encourage the imposition of a lesser duty by noting that "[i]t is desirable . . . that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic party." Vermulst argues that the lesser duty standard should be changed from an exhortatory to a mandatory provision.

Vermulst's proposed reforms are far from radical. They call for a tinkering with the current system, a more extensive tinkering than occurred during the Uruguay round, but a tinkering nonetheless. In Vermulst's thinking, reform is based upon the notion that the GATT Anti-Dumping Code is too vague, rather than fundamentally flawed, leading jurisdictions to "implement unilateral interpretations, either in law or in practice, and claim GATT-consistency where it may not exist."<sup>47</sup> The bulk of his reforms are thus technical in nature and focus on items such as investigation periods, definitions of "like product," notice issues, and determination of market costs.<sup>48</sup> As such, they avoid the real problems in regard to dumping, namely its protectionist nature,

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<sup>47</sup> E. Vermulst, "The Anti-Dumping Systems of Australia, Canada, The EEC and the United States of America" (1989) 10 Mich. J. Int'l L. 765 at 801.

<sup>48</sup> One type of non-structural reform which would likely be beneficial, but admittedly difficult to negotiate into the Anti-Dumping Code, would be a provision which would require costs to be paid by a petitioning industry if their allegation of dumping is without merit. This would help to prevent the tactical use of such measures to force foreign traders to raise prices or as a means to agitate governments into the negotiation of export restraint agreements. See P. Low, *Trading Free: The GATT and U.S. Trade Policy* (New York: Twentieth Century Fund Press, 1993) at 80-87 and 97-128; and OECD, *Competition and Trade Policies* (Paris: OECD, 1984) at 84-107.

and risk what Essary refers to as "due process hell."<sup>49</sup> J. M. Finger rightly opposes the brand of reform advocated by Vermulst. He notes:

Explicitly outlawing the technicalities that justified yesterday's actions provides little assurance that yesterday's cases if repeated tomorrow, would not reach the same outcome. If yesterday's petitioner succeeded on the thirteenth try, but that technicality has been banned, the lawyers simply go on to the fourteenth and the fifteenth.<sup>50</sup>

He argues that in order to curtail the use of anti-dumping as a protectionist measure, both the Anti-Dumping Code and the domestic regime must be structured in a manner which allows for domestic economic interests, who stand to lose when anti-dumping duties are imposed, to be considered when the assessment of injury is made. Such a system would shift the focus of institutional reform from the motive for dumping (i.e. whether predatory or not), to the effect of such dumping on the domestic economy. A central feature of dumping reform should therefore be the national economic interest. In forcing administrative bodies to take into consideration broader issues than injury to a single producer, anti-dumping would become "public policy rather than private policy."<sup>51</sup> Public economic policy should of course take the long range view, which would result in the imposition of duties, if price forecasting indicates a future monopolistic pricing structure.

In Canada, the SIMA contains a public interest clause that could serve as a model for WTO imposed consideration of the public interest.<sup>52</sup> Section 45(1) of the SIMA reads:

Where, as a result of an inquiry referred to in section 42 arising out of the dumping or the subsidizing of any goods, the Tribunal makes an order or finding described in any of sections 3 to 6 with respect to those goods and

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<sup>49</sup> Essary, *supra* note 32 at 123.

<sup>50</sup> Finger, *supra* note 1 at 66.

<sup>51</sup> *Ibid.* at 70.

<sup>52</sup> It should be noted that EU legislation also contains a community interest clause. Like Canada's it has been used in very limited circumstances and thus would appear to be an inadequate model on which to base reform. See Stegemann, *supra* note 5 at 29.

the Tribunal is of the opinion that the imposition of an anti-dumping or a countervailing duty, or the imposition of the full amount provided for by any of those sections, in respect of the goods would not or might not be in the public interest, the Tribunal shall, forthwith after making the order or finding, (a) report to the minister of Finance that it is of that opinion and provide him with a statement of facts and reasons that caused it to be of that opinion.<sup>53</sup>

However, since the introduction of the public interest clause in 1984 a full public interest investigation has been undertaken by the Canadian International Trade Tribunal (CITT) in only three cases, two of which resulted in a request that a duty of less than the full margin of dumping be imposed.<sup>54</sup> During the *Grain Corn* investigation the Tribunal referred to the use of section 45:

Section 45 . . . is to be applied on an exceptional basis as, for instance, when the relief provided producers causes a substantial and possibly unnecessary burden to users, downstream producers and consumers of the product. . . . The tribunal is not charged with a broad responsibility for trading off benefits to one group against injury to another.<sup>55</sup>

Thus, the Canadian experience with a public interest provision has not resulted in the analysis of outside economic interests in a manner that has significantly reduced anti-dumping activity. The Canadian legislation has two major shortcomings which must be addressed in any future reform of both the Canadian legislation and by extension in reform of the GATT Anti-Dumping Code. First, there are no explicit criteria within the SIMA as to when the public interest clause is to be used, what interests are to be balanced, and what sort of economic model should be used in the assessment of such interests. Second, in the event that the public interest clause is

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<sup>53</sup> *Special Import Measures Act*, R.S.C. 1985, c. S-15, s. 45(1).

<sup>54</sup> See *Grain Corn* (1987), 14 C.E.R. 1 (CIT), *Beer* (2 October 1991) No. NQ-91-002, *Refined Sugar* (6 November 1995) No. NQ-95-002. A lower margin of dumping was recommended by the Tribunal in *Grain Corn* and *Beer*.

<sup>55</sup> *Grain Corn*, *ibid.*; see also C. Gastle, "Policy Alternatives For Reform Of The Free Trade Agreements of The Americas" (1994) 26 Law & Pol'y Int'l Bus. 735 at 761. See also CITT, *Grain Corn Public Interest* (Ottawa: Minister of Supply and Services, 1990).

evoked, it is done so after the initial ruling of injury, and, as such, its application amounts to a retrofit of the usual practice.<sup>56</sup> This practice perpetuates the notion that the exporter is necessarily engaged in unfair trading. It also maintains the concept of a right to a remedy in respect to the domestic producer, albeit a right that the producer may be robbed of following the application of the public interest clause. Attempts at reforming the Anti-Dumping Code should focus upon making public interest a component to be analyzed in every anti-dumping case, as compared to only in exceptional circumstances, and should make the determination of broad domestic economic interests the central feature of whether an injury has occurred. This substantial reform will be difficult unless this reform is multilateral in nature.

The recently issued report of the Parliamentary Sub-Committee on the Review of the Special Import Measures Act addresses some of the above criticisms in relation to the SIMA. In its report the Sub-Committee recommended that "a non-exclusive list of factors be included in section 45 of SIMA that would guide the CITT respecting whether and how to conduct a public interest inquiry."<sup>57</sup> However, there would appear to be no support for the notion that public economic interests be included in the determination of injury.

Although the placement of public economic interest provisions within a new Anti-Dumping Code should be a central component of any proposed reforms, reform based on this alone would likely be doomed to failure in an international context as it does not adequately account for the aforementioned safety valve component of dumping duties. Governments are unlikely to abandon a system, for reasons which are not purely economic in nature, that allows for the protection of certain industries. S. Hutton and M. Trebilcock,

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<sup>56</sup> Finger, *supra* note 1 at 71.

<sup>57</sup> Canada, Sub-Committee on the Review of the Special Import Measures Act, Standing Committee on Finance, *Report on The Special Import Measures Act* (Ottawa: House of Commons Publications, December 1996) at 35. In relation to the public interest provisions of the SIMA the report also recommends that a CITT decision that a duty is not in the public interest be reviewable by the Federal Court, that the concept of lesser duty as provided by Article 9.1 of the WTO Anti-Dumping Agreement be incorporated into the SIMA, and that the SIMA be amended to allow for the temporary exemption of goods from anti-dumping or countervailing duty orders under conditions of domestic short supply.

conducted an empirical study of thirty Canadian anti-dumping cases where duties were imposed between 1984 and 1989. They found that in thirteen cases the imposition of anti-dumping duties could be justified on the basis of Rawlsian notions of distributive justice, or on the basis of a communitarian defence of long standing-communities.<sup>58</sup> In addition, arguments have been made for the use of anti-dumping measures in defence of domestically produced items which have a security component to them, and in the protection of infant industry.

In essence, all of these arguments, whether economically valid, or even GATT compatible, are potentially linked to highly charged political issues. The international trading structure is dependent upon political support in each of the contracting nations. A safety valve is thus needed to prevent any of the above concerns from eroding general support for freer trade. An economic public interest clause would by its nature fail to account for non-economic concerns; and thus, by itself, would be unacceptable to domestic governments and threatening to the integrity of the system as a whole. However, the use of Article VI in the above situations exacerbates dumping generally as it stigmatizes legitimate business practices as unfair and acts to camouflage protectionism. Thus, although protectionism in support of the system may at times be valid, it should occur in conditions where its use is more transparent and constrained than the use of Article VI and the Anti-Dumping Code.

Stegemann, as indicated, makes note of the *de facto* use of anti-dumping as a safeguard measure, and acknowledges the need for such safeguards within the GATT. He argues however that the trading system would be better served if the existing safeguard provisions of Article XIX were used in this regard. Article XIX allows "emergency actions on imports of particular products . . . [if] as a result of unforeseen developments" the importation of a particular product occurs in such increased quantities and under such conditions as to cause or threaten serious injury to domestic

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<sup>58</sup> S. Hutton & M. Trebilcock, "An Empirical Study of Canadian Anti-Dumping Laws" (1990) 24 J. of World Trade 123. Despite their findings, the authors were not in support of the use of anti-dumping in such situations claiming that direct income support or adjustment assistance would be a more effective way of dealing with these issues.



producers. Stegemann argues that the language used in relation to safeguard measures is more restrictive than in regards to anti-dumping; it is generally understood that "serious injury" under Article XIX would require more than "material injury" under Article VI and because the causation requirement of Article XIX requires that the injury be caused by "unforeseen developments."<sup>59</sup>

However, the scope of Article XIX may be too restrictive to address the full range of safety valve concerns; thus the notion of safeguard measures must be expanded to allow governments to act in favour of social or security concerns. This would allow governments to raise tariffs and use quotas over a definite period of time in support of such concerns, enabling them to adapt to intermittent security concerns or to address social problems caused by an influx of cheaper imports.

The use of safeguard provisions in this manner would come at some price for those countries who chose to use them "as they would have to compensate trade partners for the restriction in market access for that excluded good presumed to be initially tradable."<sup>60</sup> In order to facilitate the substitution of anti-dumping in favour of safeguard measures a significant reworking of the provisions and practices in relation to Article XIX is necessary, not the least of which would be the need to allow for selectivity in the application of duties and quotas. The exact direction that negotiations for reform would take is, however, beyond the scope of this paper.

## X. BARRIERS TO REFORM

Given the failure of the negotiators in the Uruguay Round to move further on the issue of reform of the Anti-Dumping Code, it is clear that institutional barriers to wide sweeping reforms exist. Perhaps the most significant barrier is the U.S. Congress, which has been traditionally reluctant to adopt any measures which would appear to encroach upon its ability to act unilaterally to protect industry against perceived threats. In fact, at the end of the Uruguay Round there was much debate as to whether Congress

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<sup>59</sup> Stegemann, *supra* note 5 at 18-22.

<sup>60</sup> Marceau, *supra* note 16 at 48.

would adopt into law its obligations in regard to the modest reforms of the GATT Anti-Dumping Code, and indeed there is still debate as to whether or not the enacted provisions are in fact GATT compatible.<sup>61</sup> As a result of such politicking Marceau describes the acceptance of a public interest clause in the U.S. as problematic "as no congressman would want it used against a petitioner from his district."<sup>62</sup>

However, Finger notes that public interest in the form of pressure from downstream producers has been a factor in the determination of U.S. anti-dumping decisions, most notably in the *Flat-Panel Displays Case*.<sup>63</sup> In addition, the U.S. Trade Subcommittee of the House Ways and Means Committee has recently indicated some willingness to examine the relationship between anti-dumping laws and downstream producers.<sup>64</sup> Furthermore, in accordance with the Article 6.12 of the GATT Anti-Dumping Code consumer organizations and downstream producers will be able to participate as parties in ITC investigations. Finally, and perhaps most significantly, it seems probable that U.S. reluctance to facilitate anti-dumping reform may change due to the fact that the creation of anti-dumping regimes in developing countries will mean that U.S. industries will increasingly be the victims of anti-dumping actions in emerging markets. In this regard Essary notes that in 1994 "some sixty countries, including Bangladesh, adopted and began implementing their own antidumping laws,"<sup>65</sup> and that Mexico since adopting anti-dumping laws in 1986, has become "a player in the high-stakes trade law games, beginning numerous dumping cases, particularly aimed at the United States."<sup>66</sup> Other countries are also moving quickly to enforce their anti-dumping laws. Information collected by the CITT indicates, in 1990, there were active anti-dumping measures in place in only four countries other than the traditional users (Mexico, New

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<sup>61</sup> See Hurabiell, *supra* note 37; A. Homer, G. Horlick & T. Stewart, "Enacted and Rejected Amendments to the Antidumping Law: In Implementation or Contravention of the Antidumping Agreement" (1995) 29 Int'l L. 483.

<sup>62</sup> Marceau, *supra* note 16 at 154.

<sup>63</sup> *Supra* note 1 at 68.

<sup>64</sup> U.S. Federal News Services, April 24, 1996.

<sup>65</sup> Essary, *supra* note 32 at 107.

<sup>66</sup> *Ibid.* at 111.

Zealand, and Brazil); but by 1994, this number had expanded to sixty.<sup>67</sup>

## XI. CONCLUSION

The continuing use of anti-dumping as a protectionist measure is damaging to the economies of those who use and those who are effected by such measures. In addition, the veiled nature of such protectionism is detrimental to the overall integrity of the trading system. Thus, substantial reform of the system is needed. In assessing the path to reform, it must be remembered that the GATT/WTO is less about free trade and ultimate economic efficiency, than it is about managed freer trade operating within a politically delineated reality. As a result, calls for the absolute abandonment of anti-dumping activity and its replacement with a competition law regime administered by a supra-national body are premature. A more effective path to reform would involve the inclusion of a public economic interest clause within the Anti-Dumping Code and the expansion of the safeguard provisions under Article XIX. Such reforms, it is suggested, will limit the use of anti-dumping by institutionalizing the concerns of players in the domestic economy other than those of the petitioning industry. At the same time, the expansion of existing safeguard provisions will allow for governments to act in defence of certain domestic political goals, which will in turn act as a safety valve in respect to the trading system. Furthermore, the transparency of safeguards will work to enhance the integrity of the system. In addition, such reform will lead to less anti-dumping type activity because it will require that compensation be given to trading partners. Finally, reform along the lines suggested above will have the positive effect of breaking the artificially created link between price competition and unfair trading practice.

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<sup>67</sup> CITT, *supra* note 2 at 58.