

# **The GATT Uruguay Round**

**A Negotiating History  
(1986-1992)**

**TERENCE P. STEWART, EDITOR**

**VOLUME II:  
COMMENTARY**

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# Antidumping

## I. INTRODUCTION

Jacob Viner defined dumping in his classic study *Dumping: A Problem in International Trade* as "price-discrimination between national markets."<sup>1</sup> More specifically, dumping may be defined as the act whereby an exporter sells goods to an export market at a price below that charged for comparable goods in the exporter's home market.<sup>2</sup> The General Agreement on Tariffs and Trade (GATT) allows countries to counteract the effects of dumping as long as the dumping leads to injury on the part of the domestic industry that must compete with the dumped imports.<sup>3</sup> Indeed, injurious dumping is to be "condemned."<sup>4</sup>

Price discrimination between markets is typically possible when the traded goods cannot be economically reexported to the country of origin (which is to say that price arbitrage is unavailable). Such may be the case, for example, when the home market is covered by trade restrictions, when the exporter is in a position of elevated market power in his home market (the extreme example being a monopoly position), where there is imperfect information, or when the product has limited shelf life.

While consumers of an importing country initially may be considered beneficiaries of price discrimination (due to a lower price for imports), the concern of a government that invokes antidumping procedures against such imports is that the outcome of international competition in the importing country may not reflect the underlying competitive positions of the domestic industry and its workers. This may injure a domestic industry in the importing country, as measured by indices such as sales, prices, market share, profitability, employment, as well as the ability to invest in capital improvements and research and development. Thus, antidumping regulations are employed as a means of protecting

1. J. Viner, *Dumping: A Problem in International Trade* 3 (Augustus M. Kelley pub., Reprints of Econ. Classics 1966) (1922) [hereinafter Viner].

2. See General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. 173, T.I.A.S. No. 1700, 55 U.N.T.S. 187, art. VI [hereinafter GATT].

3. *Id.* at art. VI, para. 1. The GATT also allows action if the effect of the dumping is to "materially retard [ ] the establishment of a domestic industry." *Id.*

4. *Id.* at art. VI, para. 1.

domestic industries and their workers (and less directly, consumers)<sup>5</sup> from the injurious effects of unfair international price discrimination.

While antidumping provisions have been criticized by some as "protectionist," the desire of sovereign states to protect their domestic industries and workers from international trade practices such as dumping is widely held to be a legitimate concern.<sup>6</sup> The thoughts of U.S. Assistant Attorney General Samuel Graham from 1916 remain relevant:

... generally accepted principles of political economy hold that it is not sound policy for any Government to permit the sale in its country by foreign citizens of material at a price below the cost of production at the place produced, for the reason that such a system, in its final analysis and on a sufficient scale, spells bankruptcy.<sup>7</sup>

## II. THE HISTORY OF ANTIDUMPING REGULATION

### A. Unilateral Efforts

At the end of the nineteenth century, global industrialization led to increased concern for the domestic effects of international trade, and international tariff structures faced limits in their application and efficacy. Antidumping legislation arose as a policy alternative, as evidenced in the ideas of Canada's father of antidumping legislation, Finance Minister William S. Fielding, who in 1904:

claimed that it was unscientific to meet special and temporary cases of dumping by a general and permanent raising of the tariff wall and that the proper method was ... to impose special duties upon dumped goods.<sup>8</sup>

Antidumping legislation became widely adopted in the early twentieth century. Canada was the first country to initiate general antidumping measures under its Customs Act of 1904,<sup>9</sup> and several Commonwealth nations followed

5. See, e.g., Tariff Act of 1930, ch. 497, Title VII, § 731, added July 26, 1979 (codified at 19 U.S.C. § 1671 (1990)); Special Import Measures Act of Canada (1984); Customs Tariff Act of Australia, 1975, as amended (1984).

6. At least twenty-two signatories to the Antidumping Code of the GATT had antidumping laws in force as of October 1990. *Report of the Committee presented to the Contracting Parties at their Forth-Sixth Session*, GATT Doc. No. L/6764, reprinted in GATT, *Basic Instruments and Selected Documents* (BISD) 37th Supp. at 298 (1991). See generally, Terence P. Stewart, *Administration of the Antidumping Law: A Different Perspective in Down in the Dumps: Administration of the Unfair Trade Laws* 288-330 (Richard Boltuck and Robert E. Litan eds. 1991). There have been hundreds of articles written on the antidumping laws of various countries. For a cite-reference of those articles, see Comm. Unfair Trade & Trade Adj., Cust. & Int'l Trade Bar Ass'n, *Research Index: U.S. International Trade Laws* (1991).

7. N. Y. Times, July 4, 1916 (letter to the editor written by Samuel J. Graham).

8. Viner, *supra* note 1, at 193 (citing *House of Commons Debates* (Canada), June 7, 1904, col. 4365).

9. An Act to Amend the Customs Tariff, 1897, 4 Edw. VII, I Canada Statutes 111 (1904).

this example in the years following:<sup>10</sup> New Zealand (1905), Australia (1906),<sup>11</sup> and South Africa (1914).<sup>12</sup> Domestic interests were surely the primary focus in the creation of these early antidumping laws, as reflected in the title of Australia's "Industries Preservation Act." Table 1, beginning on the next page, provides a brief comparison of the antidumping legislation in effect in the United States, Australia, Canada, and South Africa in this period.

While instances of dumping certainly occurred before this period, the rise of Germany as an industrial power had a profound impact on the increased appeal of antidumping legislation. In numerous sectors, German industry developed into a cartel structure, particularly in industries such as chemicals, in which the Germans held scientific superiority.<sup>13</sup> The chemical industry was highly susceptible to dumping, due to its capital-intensive nature, which resulted in barriers to entry and high fixed costs.<sup>14</sup> The cartel organization provided "machinery whereby, without the loss of the individuality of the separate concerns, the benefits and the burdens of export dumping could be equitably distributed among domestic producers."<sup>15</sup> Market power allowed German chemical companies to flex their muscles internationally and dispose of surplus stocks.<sup>16</sup>

Countries other than Germany were known to resort to dumping practices, but German actions received the greatest scrutiny, particularly as political tensions increased in the pre-World War I period.<sup>17</sup> German export sales below home market prices were facilitated by a protective tariff and the cartel organization, which combined to allow a high domestic price due to a lack of competition. German dumping practices stifled the growth of new industries abroad and drove existing competitors out of the market.<sup>18</sup> When this was accomplished, it

10. *Antidumping and Countervailing Duties: Secretariat Analysis of Legislation*, GATT Doc. No. L/712 (Oct. 23, 1957), at 4 [hereinafter *Secretariat Analysis of Legislation*].

11. Australian Industries Preservation Act 1906, V Austl. C. Acts 19 (1906).

12. Customs Tariff Act, 1914, Statutes of the Union of S. Afr. 198 (1914).

13. Viner, *supra* note 1, at 51-66.

14. Goods for which fixed costs make up a relatively high percentage of unit costs are generally more likely to be dumped than those in which variable costs predominate, due to the fact that their unit costs drop dramatically as production levels increase.

15. Viner, *supra* note 1, at 52.

16. One example of German chemical dumping comes from the United States: A group interested in the "heavy chemical industry" began to manufacture and:

the German hand was immediately shown. The price of aniline oil at the time of the establishment of this company averaged [11.5] cents. As soon as manufacture was fairly under way, the German exporters commenced to cut the price. Apparently, no definite prices were made by the Germans, but they adopted the simple policy of offering any customer of the new concern supplies at less than the price he was paying.

*Treasury Department Memorandum Relating to Antidumping Act, 1921 A29* (1961) (citing A. Mitchell Palmer, 1919 *Report of the Alien Property Custodian*).

17. *Id.*

18. *Seventh Meeting held on Friday 8 November 1946*, U.N. Econ. Social Council, GATT Doc. No. R/PC/T/C.II/48 (Nov. 11, 1946), at 6 [hereinafter *Seventh Meeting*: 1946]. One reason for this was that many countries were unequipped with antidumping laws to resist Germany's actions. India, for example, was a target of German dumping, yet "in the absence of legislation it had been difficult to do anything to counter-



TABLE 1  
PRE - 1921 ANTI-DUMPING LEGISLATION

UNITED STATES	AUSTRALIA	CANADA	SOUTH AFRICA
Definition of Dumping	Definition of Dumping	Definition of Dumping	Definition of Dumping
It is unlawful to import articles into the United States at a price substantially less than the actual market value or wholesale price of such articles, provided that it was done with the intent to destroy or injure a United States industry or to prevent the establishment of such industry.	Competition is unfair, unless proven otherwise, in the following circumstances: under ordinary circumstances of trade the competition would lead to the elimination of the Australian product from the market or lead to it being sold at a loss; the Comptroller-General or Justice finds the means employed by the importer or seller to be unfair; the competition is likely to or does result in inadequate remuneration of Australian labor; the competition creates substantial disorganization in Australian industry or substantial unemployment; goods have been purchased abroad by or for the importer at a price below the cost of production where produced or below the market price where purchased; goods are being sold at a price that does not give the importer or seller a fair profit upon their fair foreign market value or their fair selling value if sold in the country of production.	A special duty shall be levied equal to the difference between the fair market value and the selling price, when the export price or the actual selling price to the importer in Canada of any imported dutiable article, of a class or kind made or produced in Canada, is less than the product's fair market value.	A special customs duty, equal to the difference between the selling price of the goods and the true current value for home consumption, will be applied to goods imported into the Union of a class or kind made in the Union, if the export or actual selling price to an importer in the Union is less than the true current value of the same goods when sold for consumption in the country of export.

#### Commencement of Proceedings

When the Comptroller-General has received a complaint and has reason to believe that a person or group is importing

Sources: Revenue Act of 1916, ch. 463, 39 Stat. 756 (1916), amended by Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930); An Act to Amend the Customs Tariff, 1897, 4 Edw. VII, 1 Canada Statutes 111 (1904); Industries Preservation Act, 1906, V Austr. C. Acts 19 (1906); Customs Tariff Act, 1914, Statutes of the Union S. Afr. 198 (1914).

TABLE 1  
PRE - 1921 ANTI-DUMPING LEGISLATION

UNITED STATES	AUSTRALIA	CANADA	SOUTH AFRICA
Determination of Dumping	Determination of Dumping	Determination of Dumping	Determination of Dumping
Instead of a special duty, the law imposes criminal sanctions in the form of a \$5000 fine, or imprisonment not to exceed one year, or both. Any person injured in his business or property may sue in federal district court and shall recover treble damages sustained, the cost of the suit, and reasonable attorney's fee.	The Justice has the authority to determine whether the alleged intent actually existed and whether to bar the goods. The determination of the Justice shall be final and conclusive and without appeal, and shall not be questioned in any way.	The Minister of Customs or any customs officer authorized to collect customs duties may levy a special customs duty when it appears that the export price is less than the product's fair market value.	The Governor-General shall determine the goods that will receive a special duty.

ing goods with an intent to destroy or injure an Australian industry, he may certify the information to the Minister. Prior to making the certificate, the Comptroller-General will allow the importing party the opportunity to show cause why the certificate should not be made and furnish him with a copy of the complaint. On receipt of the certificate the Minister may refer it to a Justice for an investigation and determination, notify in the Gazette that the matter has been referred, and forward a copy of the certificate to the Justice.

Sources: Revenue Act of 1916, ch. 463, 39 Stat. 756 (1916), amended by Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930); An Act to Amend the Customs Tariff, 1897, 4 Edw. VII, 1 Canada Statutes 111 (1904); Industries Preservation Act, 1906, V Austr. C. Acts 19 (1906); Customs Tariff Act, 1914, Statutes of the Union S. Afr. 198 (1914).

TABLE 1  
PRE - 1921 ANTI-DUMPING LEGISLATION

UNITED STATES	AUSTRALIA	CANADA	SOUTH AFRICA
Notice of Determination	Notice of Determination		Notice of Determination
The Minister shall publish the final determination in the <i>Gazette</i> . When the determination is published, the goods will be prohibited from being imported or will be subject to conditions, restrictions, or limitations as the case may be.	When the Governor-General makes a determination that a special duty shall be levied, he must do so by proclamation in the <i>Gazette</i> . The notice must specify the date on which the determination will take effect, provided that the date is not less than six weeks after publication of the proclamation.		

Sources: Revenue Act of 1916, ch. 463, 39 Stat. 756 (1916), amended by Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930); An Act to Amend the Customs Tariff, 1897, 4 Edw. VII, I Canada Statutes 111 (1904); Industries Preservation Act, 1906, V Austl. C. Acts 19 (1906); Customs Tariff Act, 1914, Statutes of the Union S. Afr. 198 (1914).

was no longer necessary for the German exporters to sell below cost, and indeed, high profits could be realized.

World War I had the effect of limiting international trade, which forced the establishment and development of critical industries in countries that previously had imported such goods. As world trade patterns began to return to normal in the post-war period, concern for the welfare of these new industries led to renewed calls for trade protection.<sup>19</sup> In the U.S., this concern resulted in the first specific American antidumping legislation under the Revenue Act of 1916.<sup>20</sup>

Japanese concern for newly established industries prodded the 1920 authorization in that country of special duties on imports when the "staple industries of Japan were threatened thereby."<sup>21</sup> Such unilateral imposition provided protection without the bureaucratic delays entailed in formal dumping procedures.

In 1921, Australia,<sup>22</sup> Great Britain,<sup>23</sup> New Zealand,<sup>24</sup> and the United States<sup>25</sup> implemented new antidumping statutes, which are summarized on the following pages in Table 2. The laws of these countries would meet varying degrees of success; along with Canada's original legislation, they would ultimately serve as the foundation for Article VI, the antidumping understanding of the GATT, in 1947.<sup>26</sup>

(Note 18, continued)

act it." *Id.* at 12. The issue of cartels preventing new development was also addressed in *Committee of the International Conference on Trade and Employment*, GATT Doc. No. E/PC/T/C.III/PV/2 (1946), at 4.

19. Although states removed many war-time controls, new controls were created and old ones reintroduced in the early interwar period. This situation led eventually to a League of Nations declaration that "[e]ach country should aim at the progressive restoration of that freedom of commerce which prevailed before the war, including the withdrawal of artificial restrictions on, and discriminations of price against, external trade." League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies* 18 (1942) [hereinafter *Commercial Policy in the Interwar Period*].

20. Revenue Act of 1916, ch. 463, 39 Stat. 756 (1916), superseded by, Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended in scattered sections of U.S.C.) [hereinafter Revenue Act of 1916]. The basic provisions of this measure are described in Table 1, *supra*.

21. Viner, *supra* note 1, at 236.

22. Customs Tariff (Industries Preservation) Act 1921, XIX Austl. C. Acts 154 (1921).

23. Safeguarding of Industries Act of 1921, 11 & 12 Geo. 5, c. 47, XVI Halsbury's Statutes of England 893 (1930).

24. Customs Amendment Act, 1921, 12 Geo. V, N.Z. Stat. 151 (1922).

25. Antidumping Act of 1921, ch. 14, § 201-12, Pub. L. No. 67-10, 42 Stat. 9, 11-15 (codified as amended at 19 U.S.C. §§ 160-71 (1990)).

26. Indeed, these countries, along with the EEC (under which the antidumping actions of Great Britain now fall) have been the major users of the antidumping laws. The U.S. General Accounting Office (GAO) reported the following statistics: from 1980-89 four major trading partners (Australia, the U.S., Canada, and the EC) were responsible for ninety-five percent of the total 1,456 new antidumping cases reported to the GATT. GAO, *International Trade: Use of the GATT Antidumping Code* 3, Pub. No. GAO/NSIAD-90-238FS (1990). The GAO reported that the remaining five percent could be attributed to "three other trading partners (Mexico, South Korea, and Brazil) and five other signatories." *Id.* This trend is changing, however, as a number of developing countries that previously restricted imports through import licensing systems have adopted antidumping policies to protect domestic industries from injurious foreign price discrimination. GATT, *GATT Activities* 1990 9 (1991).

TABLE 2  
ANTI-DUMPING LEGISLATION 1921

UNITED STATES	AUSTRALIA	GREAT BRITAIN	NEW ZEALAND
Definition of Dumping	Definition of Dumping	Definition of Dumping	Definition of Dumping
A special dumping duty will be applied upon a finding that a U.S. industry is being or is likely to be injured, or is prevented from being established, due to the importation of a class or kind of foreign merchandise that is being sold or is likely to be sold in the U.S. or elsewhere at less than its fair value.	Goods exported to Australia that are of a class or kind produced or manufactured in Australia, that are being sold to an importer in Australia at an export price that is less than the fair market value of the goods at the time of shipment, resulting in potential or actual damage to an Australian industry. The amount of dumping duty in each case shall be the difference between the fair market value of the goods at the time of shipment and the export price.	Goods being manufactured in a country outside the United Kingdom that are sold in the United Kingdom at prices below the cost of production thereby seriously affecting employment in a domestic industry.	A dumping duty will be levied on goods imported into New Zealand in the following circumstances: goods are of a class or kind produced in New Zealand and the actual selling price of the goods to an importer is less than the current domestic value of such goods; the actual selling price of the goods to an importer in New Zealand is less than the cost of production (including reasonable profit) of similar goods in the country of origin or the country of exportation to New Zealand; goods are of a class or kind produced in New Zealand and the Minister is satisfied that any special concession that has been or will be allowed will have a prejudicial or injurious impact on a domestic industry.

#### Commencement of Proceedings

The Secretary of the Treasury shall conduct investigations as he deems necessary to determine whether imports are being sold at less than fair value. In addition, any appraiser who has reason to believe or suspect from the invoice papers presented, that the purchase

#### Commencement of Proceedings

The Tariff Board shall conduct an inquiry and report to the Minister.

#### Commencement of Proceedings

An investigation commences upon the filing of a complaint with the Board of Trade. If the Board finds that the importer is engaging in unfair trade practices, it may refer the matter for inquiry to a special committee.

Sources: Antidumping Act of 1921, ch. 14, §§ 201-12, Pub. L. No. 67-10, 42 Stat. 9, 11-15 (codified as amended at 19 U.S.C. §§ 160-71) (Note that for U.S. antidumping law the 1921 Act did not repeat the 1916 Act); Customs Tariff (Industries Preservation) Act 1921, XIX Austl. C. Acts 154 (1921); Safeguarding of Industries Act of 1921, 11 & 12 Geo. 5, c. 47, XVI Halsbury's Statutes of England 893 (1930); Customs Amendment Act, 1921, 12 Geo. V, N.Z. Stat. 151 (1922).

TABLE 2  
ANTI-DUMPING LEGISLATION 1921

UNITED STATES	AUSTRALIA	GREAT BRITAIN	NEW ZEALAND
Determination of Dumping	Determination of Dumping	Determination of Dumping	Determination of Dumping
Once the Secretary of the Treasury has made a finding that a dumping duty shall be levied, an appraiser will determine the foreign market value or cost of production and any other facts that the Secretary may deem necessary to calculate the duty amount.	The Minister shall make a final determination based on the Tariff Board's report.	If the committee finds that the goods in question are being sold at less than fair value, the Board may order that a special duty be applied. Such an order may be issued provided that the committee reports that production in the industry manufacturing similar goods in the United Kingdom is reasonably efficient. No order may be issued that is at variance with any existing treaty, convention, or engagement with a foreign state.	The Minister makes the determination whether a special duty applies as well as the amount of that duty. The Minister's decision is final.
Notice of Determination	Notice of Determination	Notice of Determination	
The Secretary of the Treasury shall make his determination public to the extent he deems necessary, together with a description of the class or kind of merchandise to which it applies in such detail as may be necessary for the guidance of the appraising officers.	The Minister may publish notice of his finding in the Gazette specifying those goods that are being sold at less than fair value thereby causing injury to Australian industry. Upon publication of such notice a dumping duty shall be levied upon the specified goods.		

Sources: Antidumping Act of 1921, ch. 14, §§ 201-12, Pub. L. No. 67-10, 42 Stat. 9, 11-15 (codified as amended at 19 U.S.C. §§ 160-71) (Note that for U.S. antidumping law the 1921 Act did not repeat the 1916 Act); Customs Tariff (Industries Preservation) Act 1921, XIX Austl. C. Acts 154 (1921); Safeguarding of Industries Act of 1921, 11 & 12 Geo. 5, c. 47, XVI Halsbury's Statutes of England 893 (1930); Customs Amendment Act, 1921, 12 Geo. V, N.Z. Stat. 151 (1922).



## 1. Canada

Canada was the first country to address the dumping problem through direct and specific legislation. The Canadian antidumping system developed largely out of a need to balance the concerns of manufacturers, who favored high import tariffs, and farmers, who favored low tariff barriers.<sup>27</sup> Under Finance Minister William S. Fielding, an "ingenious" compromise was reached through the creation of a new kind of duty.<sup>28</sup>

The 1904 Customs Tariff Act implemented this new duty.<sup>29</sup> It provided the Minister of Customs (or "any officer of customs authorized to collect customs duties") with discretion to decide if an import was being dumped.<sup>30</sup> The Act provided that the import must be "of a class or kind made or produced in Canada" and that its selling price<sup>31</sup> must be less than its fair market value.<sup>32</sup> In that event, the Act authorized the Minister of Customs (or customs official) to apply a "special customs duty" calculated as the difference between the fair market value and the selling price.<sup>33</sup> The Act was modified somewhat in 1907,<sup>34</sup> with minor changes such as a limitation of antidumping duties to fifty percent *ad valorem* as a means of protecting consumers from domestic monopolies.<sup>35</sup>

The Canadian antidumping law worked effectively, but not without opposition. Some Canadian industries found the laws to be harmful, such as the railroads and producers of specialized steel products, who complained that the antidumping duties deprived them of access to low-priced American materials. Also, large importers such as department stores argued that antidumping laws denied Canadian consumers the benefits of foreign bargains.<sup>36</sup> Nevertheless, the 1904/1907 Canadian antidumping legislation was reasonably effective at curtail-  
ing dumping into Canada,<sup>37</sup> and remained in force until replaced in 1968.

27. U.S. Tariff Commission, 66th Cong., *Information Concerning Dumping and Unfair Competition in the United States and Canada's Antidumping Law* 24-25 (Comm. Print 1919) (printed for the use of the Committee on Ways and Means, House of Representatives) [hereinafter *Information Concerning Dumping*].

28. Fielding proposed the creation of an antidumping system "as an alternative to a more general increase in tariff rates." Rodney de C. Grey, Can. Econ. Pol'y Comm. Priv. Plan. Ass'n of Can., *The Development of the Canadian Antidumping System* 8 (1973) [hereinafter Grey].

29. An Act to Amend the Customs Tariff, 1897, 4 Edw. VII, I Canada Statutes III (1904).

30. *Id.* at § 19. The 1904 Act did not use the word "dumping," rather it described the practice of selling at less than fair value and provided as a remedy a "special customs duty." *Id.*

31. The selling price was defined as "the exporter's price for the goods, exclusive of all charges thereon after their shipment from the place whence exported directly to Canada." *Id.* at § 19(2).

32. *Id.* at § 19(1.).

33. *Id.*

34. 6-7 Edw. VII, I-II Canada Statutes 134 (1907).

35. Viner, *supra* note 1, at 195. The modifications resulted from a series of hearings held from 1905-1906, which were not officially published. *Information Concerning Dumping*, *supra* note 27, at 24.

36. *Information Concerning Dumping*, *supra* note 27, at 24-25.

37. Viner, *supra* note 1, at 201.

## 2. Australia

Australia's original Industries Preservation Act of 1906<sup>38</sup> sought to protect key Australian industries from "unfair competition."<sup>39</sup> The Comptroller-General was charged with the responsibility of forwarding complaints of dumping to the Minister, if he had "reason to believe that any person ... [was] importing into Australia goods ... with [an] intent to destroy or injure any Australian industry..."<sup>40</sup> The Minister was responsible for referring the investigation to the Justice and for informing the *Gazette* that he had done so.<sup>41</sup>

The Justice was charged with determining whether the alleged intent in fact existed and whether to bar the dumped products completely or to impose "any special conditions or restrictions or limitations."<sup>42</sup> The Act also granted the Justice all jurisdiction of a judge in high court, made optional the duty to follow court rules and the rules of evidence,<sup>43</sup> and named the resultant judgments "final and conclusive and without appeal."<sup>44</sup> Despite the detailed procedures of the Industries Preservation Act of 1906, by 1921 there had been no instance of its application.<sup>45</sup> A new antidumping law, embodied in the Customs Tariff (Industries Preservation) Act 1921,<sup>46</sup> was passed in 1921. The 1921 Act assigned the Tariff Board responsibility for inquiring into an alleged case of dumping. The requirements for a finding of dumping were that the goods be "of a class or kind produced or manufactured in Australia" and sold at "less than fair market value," thereby resulting in "detriment... to an Australian industry."<sup>47</sup> There was no longer a requirement of intent.

The inquiry of the Trade Board was then referred to the Minister who could assign a dumping duty to the goods.<sup>48</sup> A limit of fifteen percent of the regular

38. Australian Industries Preservation, V Austl. C. Acts 19 (1906).

39. The text read that: "Unfair competition has in all cases reference to competition with those Australian industries, the preservation of which ... is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers." *Id.* at § 17.

40. *Id.* at § 19(1). Specific procedures were explained therein for the certification of the Comptroller-General. See *id.* at §§ 19(2)-19(4).

41. *Id.* at § 19(5).

42. *Id.* at § 19(5)(a). The Act also instructed the Justice to "expeditiously and carefully investigate" by considering all "pertinent, necessary, or material" matters. *Id.* at § 21(1).

43. The Act explained that "[t]he Justice shall be guided by good conscience and the substantial merits of the case, without regard to legal forms or technicalities, or whether the evidence before him is in accordance with the law of evidence or not." *Id.* at § 21(5).

44. *Id.* at 26.

45. Viner, *supra* note 1, at 206.

46. Customs Tariff (Industries Preservation) Act 1921, XIX Austl. C. Acts 154 (1921).

47. *Id.* at § 4(1).

48. Unlike the 1906 Act, the 1921 Act provided for several types of dumping duties: the "dumping duty" applied to goods shipped at less than market value, *id.* at § 4; the "dumping below cost duty" applied to goods sold at less than a "reasonable price," *id.* at § 5; the "dumping consignment duty" applied to goods on consignment that may have been sold at less than a reasonable price, *id.* at § 6; the "dumping freight duty" applied to goods that travelled freight free, in subsidized ships, or in ships with rates lower than rates prevailing at the time of shipment, *id.* at § 7; the "dumping exchange duty" applied to cases where the

duty for the dumped goods was established with respect to some of the antidumping duties.<sup>49</sup> The Minister was still required to publish a notice in the *Gazette*.<sup>50</sup>

### 3. Great Britain

At the Paris Conference of the Allies in 1916, Great Britain's delegation put forth a proposal calling for multinational efforts in the post-war period against unfair competition on the part of Germany, including dumping.<sup>51</sup> In 1918, the British Ministry of Reconstruction issued a study on antidumping.<sup>52</sup> The report indicated that:

generally speaking, we are of the opinion that any legislation for the prevention of dumping should be as simple as possible, that while designed to be effective in its sphere of operation, it should not extend beyond it and be of a character to hamper trade in general.<sup>53</sup>

As a result, the report suggested that the proposed Act follow the Canadian rather than the U.S. or the "much more elaborate [Australian antidumping] legislation."<sup>54</sup> The report included a brief proposal of an antidumping structure, including a preliminary enquiry as to whether the goods were "systematically dumped in substantial quantities," a public notice requirement, a duty equal to the "amount (if any) by which the home trade value exceed[ed] the net import price," and various exemptions and enforcement measures.<sup>55</sup>

Another study of antidumping was undertaken in 1919 by the Board of Trade.<sup>56</sup> This study summarized briefly the laws in force in Canada, Australia, South Africa and the United States. While an actual antidumping bill was intro-

(Note 48, continued)

exchange value of the currency had depreciated, thereby decreasing the price of the goods, *id.* at § 8; the "dumping preference duty" combined several aforementioned duties to be applied to goods "of a class or kind produced or manufactured in the United Kingdom," *id.* at § 9; and the "dumped materials duty" applied to materials supplied where currency depreciation had reduced their value, or where they were supplied at less than market value, *id.* at § 10. This distinction between types of dumping was significant in later years as parties began to negotiate terms of the General Agreement on Tariffs and Trade. *See, e.g., Seventh Meeting: 1946, supra* note 18, at 1 (reviewing four types of dumping).

49. *Id.* at § 12. The limit applied to §§ 4-7 of the Act (dumping duty, dumping below cost duty, dumping consignment duty, and dumping freight duty).

50. *Id.* at § 4(2).

51. Viner, *supra* note 1, at 216.

52. Ministry of Reconstruction, *Final Report on Antidumping Legislation* (1919). The report was compiled in response to a request by the Minister of Reconstruction for advice about the "precise character" of antidumping legislation (which had recently been addressed in Parliament). *Id.* at 3.

53. *Id.* at 3.

54. *Id.* This conclusion was consistent with a similar one reached by the Committee upon Commercial and Industrial Policy. *Id.*

55. *Id.* at 4-6.

56. Board of Trade, "Antidumping" Legislation: *Statement of the Legislative Provisions for the Prevention of Dumping* (1919).

duced in the House of Commons in 1919, it was strongly opposed, and it would not be until 1921 that Britain's Safeguarding of Industries Act<sup>57</sup> would be passed by Parliament.<sup>58</sup> The 1921 Act grew out of an increased consciousness of competitive dumping practices, fear of German industrial predation, and increased protectionist sentiment.<sup>59</sup>

Under the 1921 Act, the Board of Trade was responsible for referring alleged instances of dumping to a committee.<sup>60</sup> A finding of dumping<sup>61</sup> required that "employment in any industry in the United Kingdom [was] being or [was] likely to be seriously affected."<sup>62</sup> Upon a finding of dumping by the committee, the Board of Trade was authorized to impose a duty.<sup>63</sup> In general, the Antidumping Act was seriously flawed by cumbersome and complicated administrative procedures. By the end of 1922, only two cases had been brought, and both were lost due to inadequate evidence.<sup>64</sup>

### 4. United States

Unfair price discrimination has been a concern in the United States since the country's inception, with Alexander Hamilton being the notable champion of protection for domestic infant industries from the effects of international trade in the post-revolutionary period.<sup>65</sup> In some opinions, the genesis of antidumping legislation in the U.S. can be traced to 1890, when Congress passed the Sherman Antitrust Act, which dealt in general with unfair trade. More often, however similar, the antidumping law is viewed separately.<sup>66</sup>

57. Safeguarding of Industries Act of 1921, 11 & 12 Geo. 5, c. 47, XVI Halsbury's Statutes of England 893 (1930).

58. Viner, *supra* note 1, at 218-19.

59. *Id.* at 216.

60. Safeguarding of Industries Act, *supra* note 57, at pt. II 2.

61. Dumping included sale of goods at a price less than the cost of production and sale of goods at a decreased price because of depreciation in currency. *Id.* at pt. II 2.(1).

62. Further specific requirements were imposed by the Act. For example, the committee was required to report on the effect that the imposition of the dumping duty would have on the employment in the industry in question. The effect of the duty was required to be material in order for it to be imposed. *Id.* at pt. II 2.(2). Moreover, the Board could only impose a duty on the imports after a determination that the comparable industry in the U.K. was "being carried on with reasonable efficiency and economy." *Id.* at pt. II 2.(3)(a).

63. *Id.* at pt. II 2.(3). Again, this authorization was accompanied by numerous and complex restrictions. *Id.* at pt. II 2.(3)-(4).

64. *The Economist*, Nov. 25, 1922, at 967.

65. Hamilton, *Report on Manufactures*, S. Doc. No. 172, 63d Cong., 1st Sess., (1913), communicated to the U.S. House of Representatives, 1791, (cited in 2 Bruce E. Clubb, *United States Foreign Trade Law* 25-29 (1991)).

66. For example, Congressman Fordney, in House debates on the antidumping law of 1921, explained:

We have upon our statute books what is known as the Sherman anti-trust law, the purpose of which is to destroy or prevent monopoly in this country... But we have no law and we have no means for preventing concerns in a foreign country combining to sell their goods at a sacrifice in this country until competition here has been destroyed and thus control our markets at such prices as they wish to charge.

Cong. Rec. H326 (daily ed. Dec. 9, 1919) (statement of Rep. Joseph W. Fordney). *See also* John H. Jackson, *World Trade and the Law of GATT* 403 (1969) [hereinafter Jackson, *World Trade*] (tracing the origins of U.S. antidumping law to 1916).



International trade tensions in the early twentieth century were exacerbated by methods of competition viewed by many as unfair, and led to heightened global political tensions.<sup>67</sup> Concerns about possible predatory dumping practices by Germany and other countries led to widespread demand in the United States for more effective protection of domestic industries, particularly after the outbreak of World War I. Some called for a general increase in ordinary import duties, while others preferred Canadian-style antidumping legislation. President Wilson's administration was influenced more by Canada's model:

while showing itself wholly sympathetic with the desire for adequate protection against unfair foreign competition, [the administration] was determined that it should not be employed to build up sentiment for an upward revision of the existing tariff act. It therefore recommended that any measure... should be divorced from customs legislation and should take the form of a further extension to those engaged in the import trade of the restraints against unfair competition which had been imposed on domestic commerce.<sup>68</sup>

The U.S. Congress passed an antidumping provision under the Revenue Act of 1916<sup>69</sup> in September of 1916.<sup>70</sup> Under title VIII of the Act, the concept of dumping in international trade was formally addressed under U.S. law for the first time. The Act's antidumping provisions were rooted more in the concepts of unfair trade under U.S. antitrust law than in tariff law.<sup>71</sup> Borrowing the term "market value" established in the Tariff Act of 1913, section 801 of the new law declared the importation and sale of articles "sold at a price substantially less than market value or the wholesale price of such articles" to be unlawful.<sup>72</sup> The intent of the exporter would be a factor, for dumping was illegal only if:

... such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.<sup>73</sup>

67. Senator Russell Long described the situation as including "widespread fears that large, well-financed trusts and cartels were selling their products at lower prices in foreign markets than at home, in order to dispose of excess stocks or to lower their unit costs." Russell B. Long, *United States Law and the International Antidumping Code*, 3 Int'l Law. 464, 465 (1969).

68. Viner, *supra* note 1, at 240.

69. Revenue Act of 1916, *supra* note 20.

70. Senator Long maintained that this was in response to the "widespread fears" of trusts and cartels, and that other countries enacted their antidumping laws as a result of the same situation: Canada (1904), Australia (1906), South Africa (1914). Long, *supra* note 67, at 465.

71. 1 Bruce E. Clubb, *United States Foreign Trade Law* 112 (1991) [hereinafter 1 B. Clubb]. This theoretical basis contrasted with Canadian law (based in tariffs), but was consistent with Australian law, which viewed dumping as "merely one phase of unfair competition." *Information Concerning Dumping*, *supra* note 27, at 32.

72. Revenue Act of 1916, *supra* note 20, at § 801, 39 Stat. 798.

73. *Id.*

Violation of the 1916 Act was punishable by serious criminal and civil penalties (injured parties could recover treble damages).<sup>74</sup> However, as a criminal statute, the Act was subject to strict interpretation, and the level of proof required and the need to show an intent to injure a domestic industry severely curtailed its effectiveness.<sup>75</sup> The failure to assign the task of enforcement to a specific government agency also contributed to the Act's ineffectiveness.<sup>76</sup>

In 1919, the U.S. Tariff Commission prepared a report recommending that a civil antidumping statute, like that of Canada, would prove more effective than the criminal provisions of 1916.<sup>77</sup> The report clarified a number of issues, such as the distinction between countervailing duty rules and the new generation of antidumping law:

For many years the tariff laws of the United States have regularly provided for the imposition of countervailing duties equal to the net amount of any grants or bounties allowed by any foreign government in aid of the exportation of merchandise in this country. The countervailing section of the act of 1894 was enacted to restrict the dumping of sugar, the production of which had been stimulated by government bounties. Formerly, therefore, the provision for such countervailing duties was occasionally referred to as antidumping legislation. Reflection will show, however, that these countervailing duties possess that character in the United States only in cases where they operate against the importation or sale of articles in this country at less than their foreign market value. Indeed, what is known as dumping has, in the main, grown from modern industrial conditions of production and distribution, without reference to direct governmental subsidies.<sup>78</sup>

To overcome the shortcomings of the Revenue Act of 1916, the Antidumping Act of 1921 was enacted May 27, 1921.<sup>79</sup> The legislation's antidumping provisions granted the Secretary of the Treasury the responsibility to determine whether a U.S. industry was being injured, or was being threatened with injury,

74. *Id.*

75. 1 B. Clubb, *supra* note 71, at 112; Long, *supra* note 67, at 466. In a report to a House committee, the U.S. Tariff Commission explained the relevant interpretation of the law and then expressed an even stronger view of its ineffectiveness. The Commission asserted that "the language of the act [made] difficult, if not impossible, the conviction of offenders and, for that reason, the enforcement of its purpose." (emphasis added) *Information Concerning Dumping*, *supra* note 27, at 33.

76. Viner, *supra* note 1, at 248.

77. *Information Concerning Dumping*, *supra* note 27.

78. *Id.* at 10.

79. Antidumping Act of 1921, ch. 14, §§ 201-12, Pub. L. No. 67-10, 42 Stat. 9, 11-15 (codified as amended at 19 U.S.C. §§ 160-71 (1990)).



by imports sold in the U.S. at prices less than "fair value." The Treasury Secretary would then announce the findings publicly.<sup>80</sup>

The Act specified how the prices were to be determined, through definitions of the concepts of "purchase price" (the price paid for the imports when purchased by a buyer independent of the exporter), "exporter's sales price" (the price for imports purchased "by or for the account of the exporter"), "foreign market value" (the home market price of the exporter), and "cost of production" (the sum of costs associated with the production of the goods exported, including general expenses and profit).<sup>81</sup> The Act specified that imported merchandise was to be considered dumped "if the purchase price or exporter's sales price is less than the foreign market value (or, in the absence of such value, than the cost of production)," and that such merchandise was to be assessed by the customs authorities a "special dumping duty" equal to the difference in prices (no criminal penalties or damages to plaintiffs were imposed).<sup>82</sup>

#### B. Multilateral Efforts and the Emergence of GATT Article VI

While nations dealt with their concerns on unfair trade practices unilaterally in the early twentieth century, an effort commenced to deal with dumping through a multinational forum. For example, one of the results of the Genoa conference, held in May 1922, was a request that the League of Nations undertake a study of dumping and differential pricing.<sup>83</sup> Reporting on the conference, the League's Secretary-General explained that:

questions regarding dumping and differential prices being among those which concern most closely the equitable treatment of commerce, it is desirable that the League of Nations should undertake at an early date an inquiry on the subject.<sup>84</sup>

The League undertook the inquiry and the most tangible result was Jacob Viner's study "A Memorandum on Dumping."<sup>85</sup> The League failed, however, to

80. 19 U.S.C. § 160. The Secretary of the Treasury was to make a determination "after such investigation as he deems necessary."

81. 19 U.S.C. §§ 162-65. The definitions are very specific, taking into account a number of price adjustments to allow fair comparisons between prices, for expenses such as packing charges, shipping charges, rebated duties, export taxes, etc.

82. 19 U.S.C. § 161. This section also specified that if differences in price were attributable to differences in wholesale quantities traded (that is to say if the U.S. price reflected a greater quantity discount due to larger order size), "due allowance" was to be made to foreign market value.

83. *Commercial Policy in the Interwar Period*, supra note 19, at 23.

84. *The Genoa Conference and the League of Nations: Memorandum by the Secretary-General*, League of Nations Off. J., Aug. 1922, at 1003.

85. Jacob Viner, *A Memorandum on Dumping*, L.N. Doc. C.E.C.P.36(1), Sales No. 1926.II.63 (1926) (submitted to the Preparatory Committee for the International Economic Conference, League of Nations) (dealing with dumping in general). Also resulting from the League of Nations' effort was: Trendelenburg,

produce any direct result or reach any sort of general agreement or further international action.<sup>86</sup>

In November 1945, the United States issued a pamphlet entitled *Proposals for Expansion of World Trade and Employment*,<sup>87</sup> which contained several proposals, including some rules for international trade and an outline for an International Trade Organization (ITO).<sup>88</sup> The report was published and sent to other governments for their review.<sup>89</sup> It specifically addressed the problems with cartels, and suggested that one function of the ITO be to formulate "a general definition of circumstances under which antidumping and countervailing duties may properly be applied to products imported from other members."<sup>90</sup>

On March 5, 1946, the Economic and Social Council passed a resolution calling for an International Conference on Trade and Employment in 1946, creating a preparatory committee to prepare for the meeting, and including, among other things, general commercial policy and restrictive trade practices as issues to be considered by the committee.<sup>91</sup> The conference was held and the General Agreement on Tariffs and Trade<sup>92</sup> emerged after as an outgrowth of efforts to establish the aforementioned ITO.<sup>93</sup>

Largely at the insistence of the United States, one of the areas addressed in the original General Agreement was unfair trade in the form of dumping and subsidized exports.<sup>94</sup> There was general support in the negotiations for allowing

(Note 85, continued)

*Memorandum on the Legislation of Different States for the Prevention of Dumping, with Special Reference to Exchange Dumping*, L.N. Doc. C.E.I.7, Sales No. 1926.II.66 (1927) (presented to the International Economic Conference, League of Nations) (comparing antidumping legislation of different states).

86. The general inquiry into dumping by the League of Nations was rekindled many years later by the GATT in a study produced by the Secretariat. Moreover, the GATT Secretariat suggested therein that "the insertion of Article VI [the Antidumping provision] in GATT based on a United States suggestion, may [have been] an indirect effect" of the League of Nations action. *Secretariat Analysis of Legislation*, supra note 10, at 5.

87. Dep't of State, *Proposals for Expansion of World Trade and Employment in Trade Agreements System and Proposed International Trade Organization Charter: Hearings before the Senate Committee on Finance*, 80th Cong., 1st Sess. 677-94 (1947) [hereinafter *Proposals for Expansion*].

88. *Id.*

89. *Official Report of the U.S. Delegation to the First Meeting of the Preparatory Committee for the International Conference on Trade and Employment*, London, England, October 15, 1946 in *Trade Agreements System and Proposed International Trade Organization Charter: Hearings before the Senate Committee on Finance*, 80th Cong., 1st Sess. 884-916 (1947).

90. *Proposals for Expansion*, supra note 87, at 684.

91. Econ. Social Council, *Resolution Regarding the Calling of an International Conference on Trade and Employment in Trade Agreements System and Proposed International Trade Organization Charter: Hearings before the Senate Committee on Finance*, 80th Cong., 1st Sess. 694 (1947). The Council included the following countries as members of the preparatory committee: Australia, Belgium, Luxembourg, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, the Netherlands, New Zealand, Norway, South Africa, the USSR, the United States of America, and the United Kingdom. *Id.*

92. GATT, supra note 2.

93. *Report of the Drafting Committee of the Preparatory Committee of the U.N. Conference on Trade and Employment*, GATT Doc. No. E/PC/T/34 (Mar. 5, 1947), at 65. This report contains a copy of a charter for the ITO and a draft of the GATT itself. For a more detailed history of the General Agreement's origins, see the chapter on the Functioning of the GATT System.

94. See *Secretariat Analysis of Legislation*, supra note 10, at 5.

the imposition of antidumping and countervailing duties<sup>95</sup> under a multilateral agreement,<sup>96</sup> as long as such duties were imposed where conditions had been properly investigated.<sup>97</sup> Two major areas of disagreement arose in the negotiations: the scope of the dumping definition and the possible use of forms of retaliation other than antidumping duties against dumped imports.<sup>98</sup>

First, with regard to the scope of the definition, early in the negotiations the parties established that there were four types of dumping:<sup>99</sup> price,<sup>100</sup> service,<sup>101</sup> exchange,<sup>102</sup> and social.<sup>103</sup> Opinion on the definition of dumping was divided into two camps. On one side were the developing countries, who argued that

95. Countervailing duties are imposed by importing countries as a means of offsetting subsidies or bounties granted by exporting countries. Jackson, *World Trade*, *supra* note 66, at § 16.5 (1969). While countervailing duties were initially considered together with antidumping duties in the GATT negotiations and the two would be addressed together under Article VI, in time the two fields would be considered and addressed separately, although procedurally, dumping and countervail procedures have been very similar or identical. GATT, *Anti-dumping and Countervailing Duties*, GATT Sales No. GATT/1958-2 11 (July 1958) [hereinafter *Anti-dumping and Countervailing Duties*]. See, e.g., *Report of the Group on Anti-dumping Policies*, GATT Doc. No. TN.64/NTB/W/20 (May 5, 1967), at 1 (parties agreeing that countervailing duties could not be discussed thoroughly in the context of the antidumping group).

96. This general support was officially reported as early as November 1946. *Draft Report of the Technical Subcommittee*, U.N. Econ. Social Council, GATT Doc. No. E/PC/T/C.11/54 (Nov. 16, 1946), at 11. One notable exception was the United Kingdom. While the United Kingdom was not adverse to discussing antidumping and countervailing duties in the negotiations, it maintained throughout that antidumping duties should be prohibited because dumping was not an undesirable activity. See, e.g., *Sixth Meeting held on Thursday, 7 November 1946*, U.N. Econ. Social Council, GATT Doc. No. E/PC/T/C.11/46 (Nov. 8, 1946), at 16 [hereinafter *Sixth Meeting: 1946*]. This position was reflected by the United Kingdom in much later meetings of the GATT as well. See *Draft Int'l Code on Anti-dumping Procedure and Practice: Note by the United Kingdom Delegation*, GATT Doc. No. Spec(65)86 (Oct. 7, 1965), at 2.

97. The chairman of Committee II in the early negotiations in London commented on the draft antidumping text, remarking that it:

appeared for the most part satisfactory and precise. It might, however, be improved by safeguarding states against the ill-considered application of those measures which, if applied without due deliberation might well harm international goodwill.

*Tenth Meeting held on 19 November, 1946*, U.N. Econ. Social Council, GATT Doc. No. E/PC/T/C.11/55 (Nov. 20, 1946), at 2.

98. W.A. Brown, Jr., *The United States and the Restoration of World Trade* 110-11 (1950).

99. *Seventh Meeting: 1946*, *supra* note 18, at 1.

100. Price dumping was defined in terms of a margin of dumping, which compared actual price paid for the product to some other standard such as price of production plus a reasonable profit, or standard price of the product in other markets. *Sixth Meeting: 1946*, *supra* note 96, at 12. This is the form of dumping traditionally addressed under national legislation.

101. Service dumping was given less than cursory treatment and the parties decided that any views on it could be submitted for the Rapporteurs' report. *Seventh Meeting: 1946*, *supra* note 18, at 1-2.

102. Exchange dumping was described as resulting from exchange rate changes or depreciated currencies. *Sixth Meeting: 1946*, *supra* note 96, at 1. The parties "generally agreed" that the International Monetary Fund (IMF), rather than their committee, should address the issue of exchange dumping. *Id.* The representative from the IMF agreed that the appropriate place for consideration was in the IMF. *Id.* at 7. Nonetheless, Australia advocated the addition of another paragraph to the AD/CVD article dealing with exchange dumping. *Fifth Meeting held on 27 January 1947*, U.N. Econ. Social Council, GATT Doc. No. E/PC/T/C.6/18 (Jan. 27, 1947), at 5, but it was ultimately rejected. *Report of the Legal Drafting Committee on Articles 16-23 and 37*, U.N. Econ. Social Council, GATT Doc. No. E/PC/T/154 (Aug. 1947), at 7-16.

103. Social dumping was "very difficult to define," but an example given was the U.S. refusal to permit into the country goods produced using prison labor. *Sixth Meeting: 1946*, *supra* note 96, at 12.

almost all forms of unfair trade practices should come under the dumping heading, rather than just price dumping.<sup>104</sup> Such a broad definition would have left open a wide range of retaliatory actions.<sup>105</sup>

In contrast, the developed countries (the U.S., the U.K., Canada, and other British Commonwealth countries) favored a more limited definition. Their basic position did not exclude other types of dumping from international consideration, but it deemed non-price dumping as beyond the parameters of the antidumping article and the technical sub-committee.<sup>106</sup> In the end, the more narrow definition was adopted.<sup>107</sup>

The question of the use of retaliatory forms other than antidumping duties centered around the use of quantitative restrictions against dumped imports. While certain countries firmly believed in the utility of direct limitation of dumping through quantitative restrictions,<sup>108</sup> one of the fundamental propositions of the GATT negotiations was that quantitative restrictions were to be avoided, because they were inimical to the proper functioning of the international trade system.<sup>109</sup> Ultimately, this desire to avoid the use of quantitative restrictions would limit retaliatory dumping measures to antidumping duties.<sup>110</sup>

Three lesser issues were also addressed during the negotiations:<sup>111</sup> whether dumping should be condemned explicitly (the ultimate consensus being in the affirmative),<sup>112</sup> whether duties should neutralize margins or have a more strin-

104. Cuba, for example, included "price, freight rates, currency depreciation, sweated labor, or [] any other means." *Secretariat Note on Article 17*, Econ. Social Council, GATT Doc. No. E/PC/T/W/97 (May 19, 1947), at 1 (citing GATT Doc. No. E/PC/T/W.29).

105. Brown, *supra* note 98, at 111.

106. *Seventh Meeting: 1946*, *supra* note 18, at 3, 7.

107. See GATT, *supra* note 2, at art. VI.

108. Brazil, from the onset, was the biggest proponent of quantitative restrictions in certain settings. It believed that standard antidumping laws were inadequate to deal with cases of sporadic (as opposed to persistent) dumping. *Seventh Meeting: 1946*, *supra* note 18, at 4. The case for sporadic dumping was picked up vigorously in later years by Canada. See *Sporadic Dumping*, Note by the Government of Canada, GATT Doc. No. TN.64/NTB/W/9 (Apr. 6, 1966) [hereinafter *Sporadic Dumping*]. The Benelux countries were also proponents of other measures to counteract dumping by a foreign company. They suggested the addition of the phrase "and other measures" to the title of the Article, and thought the text could be supplemented throughout with "and other measures" wherever it read "antidumping duty." *Report of the Technical Subcommittee*, U.N. Econ. Social Council, GATT Doc. No. E/PC/T/C.11/54/Rev.1 (Nov. 28, 1946), at 13.

109. Brown, *supra* note 98, at 111.

110. In June of 1947, the Working Party on technical articles added the following interpretive note: "No measures other than antidumping and countervailing duties or charges shall be applied by any Member for the purpose of offsetting dumping or subsidization." *Record of Work Performed*, Econ. Social Council, GATT Doc. No. E/PC/T/103 (June 19, 1947), at 12. Although there was no unanimous agreement, a large majority of the subcommittee supported the addition (Australia, Belgium, Brazil, Canada, Czechoslovakia, France, Lebanon-Syria, the Netherlands, New Zealand, the Union of South Africa, the United Kingdom, and the United States supported the addition; those opposed were China and India). *Id.* at 13.

111. Brown, *supra* note 98, at 111.

112. The Cuban delegation was the most ardent supporter of explicitly condemning dumping practices. It proposed the addition of a new first paragraph that read:

The Member countries recognize that dumping, whether practiced through the mechanism of price, freight rates, currency depreciation, sweated labour, or by any other means, is a commercial practice to be condemned and is contrary to the spirit and purpose of the



gent punitive impact (consensus was to neutralize or "equalize" the margin only),<sup>113</sup> and whether an injury determination should be required before imposition of duties (yes).

The result of the negotiations in the antidumping/countervailing duty area was Article VI of the General Agreement on Tariffs and Trade. Under Article VI, the first multinational rules in this area were laid out, including the conditions under which individual countries were justified in taking defensive measures.

Article VI specifically condemns dumping, which it defines as the practice whereby the "products of one country are introduced into the commerce of another country at less than the normal value of the products," if such action materially injured a domestic industry.<sup>114</sup> In the event of dumping, a contracting party was given specific authorization to assess an antidumping duty of an amount not greater than the difference between the price in the importing country and the "normal value" of the product, "in the ordinary course of trade" in the exporter's home market.<sup>115</sup>

The article also addressed the conditions for levying countervailing duties and specified that no product could be assessed both antidumping and countervailing duties for the same offense.<sup>116</sup> Under paragraph 6 (a) of the article, neither antidumping nor countervailing duties could be levied unless the effects of dumping or subsidization were "to cause or threaten material injury to an established domestic industry, or [were] such as to retard materially the establishment of a domestic industry."<sup>117</sup>

(Note 112, continued)

International Trade Organization. With the object of indicating the nature of the legitimate defense which antidumping measures represent for a Member country, the following precepts are established...

*Secretariat Note on Article 17*, *supra* note 104, at 1 (citing GATT Doc. No. E/PC/T/W.29, at 2). The delegations of Syria and Lebanon agreed, wanting the charter to read that "dumping in any form whatever, is a reprehensible practice and inconsistent with the general purposes of this charter." *Id.* at 3. The United Kingdom endorsed the opposite view, holding that dumping was not bad in itself and that it was antidumping duties, not dumping, that should be prohibited. *Sixth Meeting: 1946*, *supra* note 96, at 16.

113. The Brazilian delegation argued that punitive damages should be allowed. It explained that "[b]ecause of the seriousness of permanent dumping, a member should be permitted to take punitive measures, ..., against it." *Seventh Meeting: 1946*, *supra* note 18, at 4.

114. GATT, *supra* note 2, at art. VI, para. 1.

115. *Id.* No definition was given in Article VI of the term "ordinary course of trade." In the absence of an acceptable home market price, the highest comparable price to any third country or a constructed price, based on the cost of production plus selling costs and profit, could be substituted. Section 1 also specifies that "[d]ue allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability." *Id.* In addition, under paragraph 4, differences in price due to variances in duties or taxes between home and export market (because of exemptions or refunds of duties or taxes) were not to be subject to antidumping duties. *Id.* at para. 4.

116. *Id.* at para. 5.

117. *Id.* at para. 6(a). Under paragraph 6(b), however, a contracting party was allowed to levy an antidumping or countervailing duty on behalf of another country (antidumping action on behalf of a "third country"). *Id.* at para. 6(b). For brevity in this chapter, any reference to material injury should be understood to include the provisions for threat and material retardation unless otherwise specified.

Article VI of the GATT is a brief section (seven paragraphs and just over two pages),<sup>118</sup> the basic tenets of which have been set forth above. Article VI does not provide full details on the administration of an antidumping system; rather it outlines a definition of dumping and the basic parameters of an acceptable response. This lack of specificity, which permitted countries to implement the GATT in accordance with their own legislative systems and resources, and the existence of preexisting antidumping laws, would in time lead to conflicts among the contracting parties and development of expanded rules of implementation.<sup>119</sup>

For example, while Article VI specified that dumping and subsidization must result in "material injury" to a domestic industry for duties to be assessed, the U.S. Antidumping Act of 1921 specified only that a domestic industry must be or be likely to become "injured."<sup>120</sup> While Article VI did not define material injury, the subtle difference in phrasing in the U.S. legislation would in time become an area of contention, as many of the other contracting parties held that the U.S. standard for injury was significantly lower than that specified in other countries and under Article VI.<sup>121</sup>

Other contracting parties had legislation that contrasted with Article VI as well. The Canadian government, for example, did not impose an injury test before assessing dumping duties, due to the fact that its existing legislation contained no such requirement.<sup>122</sup> In point of fact, many of the contracting parties made no real distinction in their legislation between antidumping and counter-

118. GATT, *Basic Instruments and Selected Documents*, Vol. I (revised) at 15-17 (1955) [hereinafter *BISD*].

119. Similarly, in the area of subsidies and countervailing duties, the United States did not require a demonstration of injury to a domestic industry from dutiable imports before the imposition of a countervailing duty. See *Tariff Act of 1930*, Pub. L. No. 96-39, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. § 1303 (1990)). The United States' position was in direct conflict with paragraph 6 (a) of Article VI, but it was justified by the fact that the General Agreement contained a "grandfather clause," under which the contracting parties were required to comply with Articles III through XXII "to the fullest extent not inconsistent with existing legislation." GATT, *supra* note 2.

120. Antidumping Act of 1921, *supra* note 25, at § 201. At the time of passage of the U.S. Antidumping Act of 1921, an injury requirement was added basically as a means of facilitating the Act's administration, viz, to remove the need for the Customs Service to examine every importation for dumping. Mr. Penrose, on behalf of the Senate Committee on Finance, explained that:

[t]he House bill [which contained no injury requirement] made it necessary for the appraising officers to look for dumping in the case of each importation of merchandise... It [the omission of your committee that the House provision is too drastic and places too great a burden upon the administrative officers of the customs service...] (emphasis added)

Senate Rep. No. 16, 67th Cong., 1st Sess. 10 (1921).

121. See, e.g., *United States Anti-dumping Legislation: Note by the United Kingdom* No. TN.64/NTB/38 (June 14, 1965), at 9 [hereinafter *U.S. Antidumping Legislation*].

122. Canada required that the dumped good be "of a class or kind made or needed to meet that requirement were very strict and subject to independent Canadian producers [were] enjoying especially favourable conditions of product" stances exist the Government may (and has) used "... the Customs Tariff Act to antidumping duties ..." GATT, *Anti-dumping and Countervailing Duties*, *supra* note 2, at 10. Williams, *Anti-dumping and Anti-Subsidy Law: The European Community*



vailing duties, largely because the establishment of a "fair value" (that is the price with which to compare the import price) was reasonably straightforward, while proving the existence of a subsidy was not.<sup>123</sup>

In addition to individual conflicts with Article VI, the laws of the contracting parties conflicted with each other. The legislation of Canada and New Zealand left the determination of dumping to customs authorities, with no specific requirement for a public decree of a dumping finding before assessment of a duty.<sup>124</sup> This was a lesser requirement than that in the U.S., where the Secretary of the Treasury was required to make independent findings and publicly state them before the levy of a duty by the Customs Service.<sup>125</sup> Also, while Canadian law limited antidumping duties on some exports, American legislation specified no such limitation.<sup>126</sup>

Despite such variations in implementing methods, each of the contracting parties considered their national legislation to conform substantially with the rule of Article VI.<sup>127</sup> While the contracting parties were under no compulsion to conform their national laws to Article VI, future legislation was required to be in line with its precepts.

The 1950's saw no major changes in Article VI, but there were modifications to the antidumping/countervailing duty (AD/CVD) laws and regulations of some of the contracting parties and an increase in the number of GATT signatories. In 1954, the United States Congress shifted the determination of injury in antidumping cases from the Treasury,<sup>128</sup> to the Tariff Commission (later to become the International Trade Commission), which was to make a determination within a period of three months.<sup>129</sup>

Over the course of the 1950's, there was also one formal challenge to an antidumping decision by a GATT signatory. Specifically, Italy challenged a dumping finding by Sweden against Italian nylon stockings. The dispute was brought before the Contracting Parties in 1954 under the dispute settlement procedures of Article XXIII of the General Agreement.<sup>130</sup> The Italian complaint concerned Swedish procedures for the determination of dumping using a minimum price system, which Italy asserted had led to the assessment of antidumping

123. *Anti-dumping and Countervailing Duties*, *supra* note 95, at 11.

124. *Id.* at 56, 69.

125. Antidumping Act of 1921, *supra* note 25, at § 201(a). See also *Anti-dumping and Countervailing Duties*, *supra* note 95, at 121.

126. *Antidumping and Countervailing Duties*, *supra* note 95, at 57-58, 122.

127. *Id.* at 10.

128. A Senate report explained that the transfer would "result[] in a more efficient utilization of government facilities." S. Rep. No. 2362 (1954) reprinted in 1954 U.S. Code Cong. & Admin. News 3900, 3901.

129. Customs Simplification Act of 1954, Pub. L. No. 83-768, § 301, 68 Stat. 1138 (1954) (codified at 19 U.S.C. § 160).

130. See *Swedish Anti-dumping Duties: Statement by the Government of Italy*, GATT Doc. No. L/215 (July 29, 1954). For more information on dispute settlement procedures under the GATT, see the discussion on dispute settlement at section IV.K, *infra*, or refer to the separate "Dispute Settlement" chapter.

duties on an Italian export (nylon stockings) without an individual determination of dumping and injury, and thus leading to the impairment of benefits to which Italy was entitled under the General Agreement.<sup>131</sup>

The Italian complaint alleged that Sweden's basic price system was inconsistent with the provisions of Article VI of the General Agreement in four ways: 1) by discriminating against low-cost producers and depriving them of the competitive advantages to which they were entitled under the most-favored-nation clause; 2) by not taking into account differences between exporting countries and the quality of their goods; 3) by tending to influence the decisions of the customs authorities and rendering ineffective the formal protection due to exporters that price comparisons be made to normal prices; and 4) by tending to become a system through which minimum prices are imposed on imported goods.<sup>132</sup> Italy argued that the Swedish system effectively reversed the burden of proof, because the importation of goods could be prevented without even a *prima facie* case of dumping being presented.<sup>133</sup>

The dispute settlement panel considered these issues, and arrived at the conclusion that a basic price system was not inherently inconsistent with the precepts of the most-favored-nation clause or Article VI, but that the administration of such a system could run afoul of those obligations.<sup>134</sup> On the question of administration, the panel report drew this conclusion:

Unless the customs authorities were prepared to decide on the alleged cases of dumping in a matter of days after arrival of the consignment, and unless the basic prices were constantly kept under review to make sure that they did not exceed the actual prices prevailing for all the varieties of stockings on the domestic markets of the most efficient producer, there was a certain danger of discrimination

131. Sweden's original antidumping system was a minimum price or basic price system. Under this system, the government established a "normal value" in the home market of the exporter; this value was then used as the Swedish "basic price," below which any import would be assessed an antidumping duty equal to the difference between the invoice price and the basic price. This system was the basis for the Italian complaint, but the system was modified shortly before the complaint was lodged. E. Petersmann, *GATT Dispute Settlement Proceedings in the Field of Antidumping Law*, 28 Common Market L. Rev. 71 (1991).

Under the modified Swedish system, the determination of injury was tightened, so that after the complaint of a domestic industry, injury and dumping were determined for a product or product category "in the pre-selection stage before the proclamation for an antidumping duty [was] issued." *Antidumping and Countervailing Duties*, *supra* note 95, at 113-14. The basic prices were after that point not used as "a determining factor for the assessment of the antidumping duty but were retained as an administrative device enabling the Swedish Customs Authorities to exempt from antidumping enquiries any consignment the price of which was higher than the basic price." *Swedish Anti-dumping Duties: Report Adopted on 26 February*, GATT Doc. No. L/328, reprinted in GATT, *BISD* 3d Supp. at 81-91 (1955) [hereinafter *Swedish Antidumping Duties*]. Despite the changes made to the Swedish regulations in the interim, the government of Italy pursued its complaint, based on its belief that while the basic price had been modified into an administrative device, it continued to be inconsistent with Article VI and other areas of the General Agreement. *Id.*

132. *Swedish Anti-dumping Duties*, *supra* note 131, at 81-83.

133. *Id.* at 83.

134. *Id.* at 86.