DUMPING AND THE ANTI-DUMPING AGREEMENT

BY

TSU-CHENG (CALVIN) LI

A Thesis

Submitted to the Faculty of Graduate Studies

in Partial Fulfillment of the Requirements

for the Degree of

MASTER OF LAWS

Faculty of Law

University of Manitoba

Winnipeg, Manitoba

THE UNIVERSITY OF MANITOBA

FACULTY OF GRADUATE STUDIES

*****

COPYRIGHT PERMISSION

DUMPING AND THE ANTI-DUMPING AGREEMENT

BY

TSU-CHENG (CALVIN) LI

A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of Manitoba in partial fulfillment of the requirement of the degree

Of

MASTER OF LAWS

TABLE OF CONTENTS

ACKNOWLEDGMENTS

This thesis could not have been completed without the assistance of numerous people. My special thanks to Dr. DeLloyd J. Guth, Director of Graduate Studies, for his continuous guidance and encouragement throughout my studies. I owe a debt of gratitude to my supervisor, internal and external readers: Professor Bryan Schwartz, Professor Michelle Gallant, and Dr. Maureen Irish (Faculty of Law, University of Windsor). Their valuable comments and expert advice have greatly improved the value of this thesis. I am also grateful to the librarians in the E.K. Williams Law Library and Elizabeth Dafoe Library for their extraordinary assistance.

I wish to express my sincere thanks to my parents, Tzung-Yu Li and Chin-Tzu Teng, my mother-in-law, I-Jung Lucy Chen, and my wife, Hui-Hui Gloria Chen, for their continuous support and inspiration.

OVERVIEW

This thesis presents a comprehensive analysis of dumping and the rationality of anti-dumping laws. Since national anti-dumping laws differ from country to country, the scope of this thesis is limited to the general discussion about the rationality of anti-dumping laws. As the WTO has encompassed more and more trading nations, this thesis examines core articles of the WTO *Anti-Dumping Agreement*. In the end, I propose the feasible reform of anti-dumping laws.

In order to comprehend the conception of dumping, CHAPTER ONE explores economic definitions of dumping, classifications of dumping and forms of dumping. There are two definitions of dumping prevailing in legal and administrative discussions. One is the classic theory of dumping as "international price discrimination", in which a firm sells the identical product at a lower price in the foreign market than in the home market. It is also called "price dumping". The other contemporary theory defines dumping as sales of the exported goods at prices below their costs of production. It is also termed "cost dumping". Both dumping practices are regulated, domestically, by national anti-dumping laws and, internationally, by *Article VI of GATT 1994* and the WTO *Anti-Dumping Agreement*.

To further analyze dumping both theoretically and empirically, I review different classifications of dumping, including: (1) traditional categories of dumping; (2) anti- and pro-competitive based categorization; (3) dumping as a market strategy; and (4) monopolizing and non-monopolizing dumping. This examination is beneficial to

comprehend the nature of dumping and the positive effects of dumping which will be discussed in the later chapter.

The traditional categories of dumping can be drawn from a framework provided by Viner (1923). Two classifications of dumping provided by his analysis have been widely accepted in economic and legal literature, although Dale (1980) has consistently critiqued such categorizations. These two essential categorizations are motive-based and time-based classifications. His conclusion shows that predatory dumping is most objectionable from the perspective of the dumped country and that only short-run or intermittent dumping is potentially harmful to the economic welfare of the importing country.

Dale (1980) suggests that dumping should be distinguished on anti-competitive and pro-competitive bases. For distinguishing between anti-competitive and pro-competitive dumping, the competitive test, similar to the one applied by domestic antitrust laws, should be applied. He concludes that price discrimination is not unlawful *per se* on both national and international levels, and that it is unlawful only when it has the "specified anti-competitive effect". To some degree, the thought of anti-competitive dumping is broader than that of predatory dumping. However, such a test is more than an injury test, focusing on the determination of dumping effects. It would be arguable that what significance makes his categorization more workable than Viner's classifications because the effects, motive and duration of time are all identifiable *post hoc*. In addition, this categorization creates the appearance of expanding the competitive test applied by the

domestic antitrust law to the dumping regime and such expansion appears to indicate the possible interlink between antitrust and anti-dumping laws. The validity of the possible interlink is, however, questionable.

Kostecki (1991) provides the classification of dumping, focusing on the strategic marketing dimension. Even though firms' dumping practices are motivated by various objectives and a firm's dumping behavior may be motivated by more than one exporting objective, he considers these practices to be marketing strategies. His classification illustrates the close linkage between dumping practices and market strategies.

Willig (1998) classifies different types of dumping according to monopolization or the creation of market power. He concludes that non-monopolizing dumping, including market-expansion dumping, cyclical dumping and state-trading dumping, is not considered deleterious to world welfare with the exception of when dumping transfers some profits or rents to exporters. Monopolizing dumping, including strategic and predatory dumping, is clearly harmful to both the importing nation and the global economy. He clarifies the possibility of monopolization outcome of different types of dumping practices, which is not explicitly addressed by the classic dumping theory. As a result, his classification has prevailed in the modern literature of dumping regime.

In the end of this chapter, I further observe different types of dumping and illustrate notions of them. Such an extensive examination facilitates comprehension of the nature of different types of dumping practices based on different classifications and the welfare

effects of them. It will provide the foundation for the following discussion about the rationality of anti-dumping laws.

CHAPTER TWO further analyzes dumping prices and the cost of production. The definitions of dumping in contemporary legal and administrative literature encompass the traditional "international price discrimination" and "export sales at prices below cost of production". The former means that a firm sells the identical product at a lower price in the foreign market than in the home market; the latter is usually referred to as predatory dumping, which is most condemned in the rational justification for anti-dumping laws.

Since Viner's (1923) treatise on the dumping problem, many scholars have introduced different modern models to explain dumping in the form of international price discrimination. Dumping as international price discrimination can lead to conclusions dissimilar to conventional interpretations when different approaches are adopted. This chapter briefly examines these models.

The analysis of cost in below-cost-of-production dumping is usually divided into two categories: below average cost and below marginal cost. Dumping below average cost may occur: "in periods of slack demand", "the different structure of costs for domestic firms and exporters", and "differences in labor market institutions". It is irrational under these conditions to label exporters pricing below average cost as dumpers and to offset their sales with anti-dumping duties while domestic firms behaving in the same way are not condemned. On the other hand, there are four scenarios where dumping below

marginal cost may occur: (1) short-run rigidities and uncertainties; (2) sales maximisation; (3) predation; and (4) competition for market share. Except for (1), the other scenarios all include short-run losses of profits in exchange for other purposes, allowing foreign exporters to price below short-run marginal cost. I also introduce different models of demonstrating prices below cost of production and prices below marginal costs of production.

Through the analysis of cost of production, few comments can be made. First, neither below-cost-of-production nor below-marginal-cost dumping denotes predation. Second, dumping is seldom practiced with predatory intentions because a worldwide monopolistic position is difficult to be achieved and the gains from predatory pricing are even more uncertain in the international context.

CHAPTER THREE examines the effects of dumping, rationales for anti-dumping laws and core articles of the WTO *Anti-Dumping Agreement*. Many scholars have commented on the welfare effects of cost and price dumping on the importing country, the exporting country and the global economy. While dumping is short-run, it is acknowledged that consumer gains in the importing country outweigh the losses of domestic producers of importing-competing goods, and dumping may encourage domestic production.

Analyses of the welfare impact of dumping on the exporting country usually focus on the dumper's monopoly power in the home market and on the domestic comsumers' well-being. The dumper's monopoly power brings disadvantages to domestic competition.

When dumped goods are raw materials or intermediate goods, buyers of these goods in the home country also sustain the cost disadvantage. Similarly, domestic consumers are charged monopolistic prices in comparison with foreign buyers.

However, most cases of dumping neither result in injurious impacts on distribution and competition within the importing country nor decrease global welfare. Predatory dumping is one exceptional case but most empirical studies show that predatory dumping is rare in the real world. Some argue that strategic dumping may have adverse impacts on the importing country and the global economy; however, it would be difficult to confirm the actual occurrence of strategic dumping because some requirements for strategic dumping to occur must be met and the readiness of these requirements being met is uncertain. It is generally considered that predatory and strategic dumping largely belong in the theoretical realm.

Most literature has proposed economic and non-economic justifications for anti-dumping laws. Economic rationales include prohibiting injurious international price discrimination, predatory and intermittent dumping. However, the validity of these rationales is questionable. International price discrimination is not *per se* objectionable because it is the common commercial practice and acceptable business strategy, which can be justified based on different market conditions. Since market conditions vary considerably from country to country, pricing policies differ accordingly.

Predatory pricing in an international context is inconceivable and it provides a tenuous

link with anti-dumping laws. Empirical studies show that instances of predatory dumping are rare or extremely limited. Additionally, a worldwide monopolistic position is difficult to achieve and gains from predatory dumping are uncertain. Even if this rationale is valid, it is questionable why neither current anti-dumping laws nor the WTO *Anti-Dumping Agreement* contains any mechanism to identify and penalise true predatory dumping.

Preventing intermittent (or short-run) dumping as the rationale for anti-dumping laws is also questionable because the occurrence of intermittent dumping depends on the presence of certain structural conditions and these necessary conditions are unlikely to arise. In addition, the overall effects of intermittent dumping on consumer welfare are ambiguous. Empirical studies further indicate that the main concern in the few actual cases of agricultural products does not center on intermittent dumping but on the agricultural price instability and income stabilisation programs.

Some supporters of anti-dumping laws assert that anti-dumping laws can be justified on the ground of notions of fairness. These non-economic rationales include: distributive justice and communitarian values, and fairness and level playing field. However, these rationales are questionably valid.

Distributive justice and communitarian values as fairness rationales for anti-dumping laws are indeed implausible. From a theoretical perspective, supporters of these rationales provide no rational principle for distinguishing between the harm caused by non-predatory dumping and the harm caused by non-dumped low-priced imports,

although low-priced imports may inflict losses on the domestic industry. From an empirical perspective, studies show that most Canadian anti-dumping cases in which anti-dumping duties have been imposed were not to enhance the welfare of the least-advantaged members of society but to benefit those workers and communities who were already better off than most in Canada.

Some maintain that anti-dumping laws are to deal with the conflict between a level playing field on the one hand and unfair traders on the other. Fairness means a level playing field, meaning that similarly situated producers are being treated with similarity. Anti-dumping laws are needed to maintain a level playing field among producers in different countries. However, this assertion is invalid. First, this assertion provides neither clear definitions of "fairness" and "level playing field", nor explanations for how current anti-dumping rules advance those goals. Second, analyses have suggested that dumping can also be the result of purely private conduct, having nothing to do with unfairly trade-distorting government policies. Third, some WTO members have argued that the association between dumping and this fairness assertion has no significance in *Article VI of GATT 1994* or in the *Anti-Dumping Agreement*.

As a consequence, neither economic nor non-economic rationales can justify anti-dumping laws. Anti-dumping laws offer only punitive responses to common importer activities and business tactics and such measures merely act as another form of import protection.

In the end of this chapter, I briefly introduce *Article VI of GATT 1994* and the *Anti-Dumping Agreement*, and examine core articles of the *Anti-Dumping Agreement*: principles, determination of dumping, and determination of injury. Through examining the WTO Panel and Appellate Body Reports on actual cases, I make some reform suggestions about these core articles.

As anti-dumping laws cannot be justified on either economic or non-economic rationales, many reformers have submitted different proposals. CHAPTER FOUR examines three main proposals on which reformers generally focus: (1) replacement of anti-dumping laws by competition or antitrust laws; (2) replacement of anti-dumping laws by safeguards; and (3) reform for clauses of the *Anti-Dumping Agreement*. In the end, I draw few conclusions from the overall examination, and suggest that anti-dumping laws should be abolished and be replaced by revised safeguard measures.

Many reformers have proposed that anti-dumping laws should be replaced by either supra-national or harmonised domestic antitrust regimes. Because current anti-dumping laws are unable to identify and penalise true international predatory pricing, and anti-dumping duties are imposed on goods priced at non-predatory levels, they should be replaced by supra-national or harmonised antitrust laws. Several studies have also suggested that competition laws can be seen as a more economically rational substitute for anti-dumping laws in a free trade agreement. In practice, the EU competition laws and the *Australia-New Zealand Closer Economic Relations Trade Agreement* exemplify this proposal.

However, this proposal is not feasible. First, defense against international predation is never more than the rhetoric of anti-dumping and it has never been anti-dumping law's function; the function of anti-dumping is ordinary protection. Second, transferring anti-dumping responses to the competition law arena is difficult because of the lack of harmonised competition policies in different countries. Third, the replacement proposal is not easily achieved with the creation of a free trade agreement because anti-dumping measures still exist in some free trade agreements. Fourth, anti-dumping laws and antitrust laws have different purposes, functions and outcomes. Antitrust laws are consumer protection statutes and aimed at countering predatory pricing practices; anti-dumping laws are protectionist instruments and focus on dealing with the so-called "unfair business practices".

Other reformers have proposed replacing anti-dumping laws with revised safeguard measures because anti-dumping laws and safeguard measures are similar in providing import protection and act as contingent protectionist measures. Moreover, anti-dumping laws function like quasi-safeguard laws, or as safeguard-like measures. While there is no economic or non-economic rationale for anti-dumping law and there is another import protection tool available (if the import protection is in fact needed), anti-dumping laws should be abolished and replaced by safeguard measures.

Opponents of this proposal have argued that anti-dumping laws deal with "unfairly" traded imports and that safeguard measures deal with "fairly" traded imports. However,

such an assertion is invalid because dumping practices are not *per se* unfair. Anti-dumping laws, in fact, arm protection-seeking interests with the emotionally compelling argument that foreigners are behaving unfairly.

Some may argue that existing safeguard procedures based on the WTO *Agreement on Safeguards* make it relatively difficult for industries to obtain special protection and that this proposal thus implies the decline in legal opportunities for special protection. Nonetheless, flexibility in the use of the revised safeguard system may provide the possibility for easier recourse to respite in case of a sudden surge of imports. As a result, the need for another "escape route" or protectionist measure such as the anti-dumping mechanism can be diminished. Although dismantling the anti-dumping system and replacing it with a revised safeguard system is a matter of political will, the proliferation of anti-dumping actions and their negative effects on the multilateral trading system deserve to be considered seriously. The revised safeguard measures can well satisfy the political need for a proper and well-administered protectionist tool, and provide a rational and systemic mechanism.

Some commentators on anti-dumping have provided clause-by-clause suggestions for reform. Each suggestion deals with the specific technical trick or arguably redresses some elements of current anti-dumping practices that conflict with the so-called basic concepts, principles, and objectives of the WTO *Anti-Dumping Agreement*. Although these clause-by-clause suggestions may serve to identify technical shortcomings in the *Anti-Dumping Agreement* and provide solutions to them, these reforms overlook the

fundamental fact that there is no rationale for anti-dumping laws and that anti-dumping is the compromised protectionist mechanism under political pressure. Thus, this proposal may not be the best approach to dealing with anti-dumping laws.

In the end, I draw conclusions from the overall examination and suggest that anti-dumping laws should be abolished and be replaced by revised safeguard measures. These include: (1) dumping is practiced for achieving certain commercial objectives; (2) international price discrimination and prices below cost of production are common business activities; (3) the welfare effects of dumping on the importing country is not *per se* injurious; (4) anti-dumping laws cannot be justified on economic or non-economic rationales; (5) anti-dumping measures are politically-oriented and legalized protectionist tools; and (6) anti-dumping laws should be abolished and replaced by revised safeguard measures.

Chapter One

Economic Definitions, Classifications and Forms

Section One: Economic Definitions

The common phenomenon in competitive marketing is that firms charge different customers different prices for the same product in different national markets. This practice is generally termed "price discrimination". The practice of price discrimination in international trade is usually named "dumping"—selling the identical product at a lower price in the foreign market than in the home market. Most scholars assert that there are two conditions, which must be met, for the occurrence of dumping. First, "the industry must be imperfectly competitive, so that firms set prices rather than taking market prices as given". [1] Second, the "market must be segmented, so that domestic residents cannot easily purchase goods intended for export".[2] In other words, the firm must have greater monopoly power in its domestic market than abroad and domestic buyers cannot purchase the product as a cheaper import.[3]

There are two definitions of dumping prevailing in legal and administrative discussions.[4] One is the classic theory of dumping as "international price discrimination", in which a foreign producer charges lower prices in the export market than in its home market. It is also called "price dumping". The price discrimination in the traditional model of dumping is, most often, explained by the differences in demand elasticity between markets. The other contemporary theory defines dumping as sales of the exported goods

---

[1] Paul R. Krugman and Maurice Obstfeld, *International Economics: Theory and Policy*, 2nd ed (New York: HarperCollins, 1991) 142.
[2] *Ibid.*
[3] Peter H. Lindert, *International Economics*, 8th ed (Homewood: Richard D. Irwin, 1986) 184.
[4] John H. Jackson & Edwin A. Vermulst, eds., *Antidumping Law and Practice: A Comparative Study* (Michigan: The University of Michigan Press, 1989) 24.

at prices below their costs of production.[5] It is termed "cost dumping". To define dumping, there are controversies over the appropriate definition of costs to be applied. The recent discussions focus on "dumping below average cost" and "dumping below marginal cost". Some even insist that pricing below average cost is believed to be the normal business practice, as a short-run response to a depressed market, and pricing below marginal cost as a means of investment in the firms' future;[6] therefore, such practices should not be labeled dumping. This chapter will focus on the conventional theory of dumping and the contemporary model will be discussed in the next chapter.

Use of the term "dumping" can be traced back to the nineteenth century. In the early nineteenth century, the tariff issue was the major concern in Great Britain and, since then, the word, "dumping", came into the economic terminology in Europe. However, it had no precise and certain meaning[7] until Jacob Viner in his work in 1923 exclusively analyzed it and established an accurate definition of this term: "price-discrimination between national markets" or "selling at a lower price in one national market than in another". [8] His definition symbolised the focus on dumping in the traditional meaning of price discrimination. The traditional dumping theory defines dumping as "international price discrimination"[9] and "consists of an analysis of monopolistic price

---

[5] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed (Cambridge: MIT Press, 1997) 261.

[6] Jackson and Vermulst, *supra* note 4 at 29-39.

[7] Jacob Viner, *Dumping: A Problem in International Trade* (Chicago: University of Chicago Press, 1923) 1. There were various meanings, such as "diverse price-practices as severe competition", "customs undervaluation", "bargain", "sacrifice", "slaughter sales", "local price-cutting", and "selling in one national market at a lower price than in another".

[8] *Ibid* at 3.

[9] Michael Hart, *Finding Middle Ground: Reforming the Anti-dumping laws in North America* (Ottawa: CPTL, 1997) 33.

discrimination between national markets".[10] To determine the existence of dumping and dumping margins, the rule of the "price-discrimination test", a comparison of selling prices between home and foreign markets, was followed by traditional scholars. When there was no domestic price available, or other reasons circumvented the establishment of this comparison, the traditional approach shifted to "comparisons with sales to third markets, or to a 'constructed-cost' method of arriving at a 'fair' home price".[11]

Prior to Jacob Viner, Theodore Emanuel Gugenheim Gregory in 1921 attempted to solve the controversy over the term dumping and considered that dumping encompassed the four following types:

1. Sale at prices below foreign market prices.
2. Sale at prices with which competitors cannot cope.
3. Sale at prices abroad which are lower than current home prices.
4. Sale at prices unremunerative to the sellers.[12]

Nevertheless, he failed to define explicitly the term dumping. Jacob Viner claimed that type three was closest to the definition of dumping and that "price-discrimination between purchasers in different national markets" characterized the essence of dumping.[13] Some scholars have contended that dumping is charging different prices to different buyers in different nations.[14]

---

[10] Wilfred J. Ethier, "Dumping" (1982) 90:3 J. Political Econ. 487.
[11] Jackson, *supra* note 5 at 261.
[12] Theodore E. Gregory, *Tariffs: A Study in Method* (London: C. Griffin & Company, 1921) 177.
[13] Viner, *supra* note 7 at 4.
[14] Frank William Taussig, *Principles of Economics*, vol. 1, 3d ed. (New York: Macmillan, 1921-34) 207. "The possibility of charging different prices to different purchasers explains the phenomenon of 'dumping'—that is, the disposal of commodities in a foreign country at one price, and to domestic purchasers at another and higher price."

Viner's definition disregarded the relations between specific dumping prices and the cost of production, the dumper's profits or the prices of rival sellers. His definition was unable to deal with these complicated problems and, in many cases, was unclear as to whether dumping had to be profitable to the dumper and whether dumping prices had to be lower than the competitors' prices. These phenomena will be discussed subsequently. His definition embraced the following common form and rarer forms of international price-discrimination:

1. The conventional form--sales are made at lower prices for export than in the domestic market; or,
2. The rarer forms—(1) the significant price-discrimination is between purchasers in different export markets when there is no, or only a small, domestic market for a particular commodity. For example, in the nineteenth century, cotton manufacturers in England might sell low-grade and heavily sized cottons, which had no domestic market, at lower prices in China than in India in order to enter into the Chinese market; (2) the sellers charge higher prices to purchasers in foreign markets than to those in the home market.[15]

The above "conventional form" can be considered to be the general rule of dumping but there are some exceptional circumstances. Different forms of dumping can be termed differently under different conditions. These different forms of dumping will be further explored in the latter section.

In short, the widely-accepted definitions of dumping nowadays include two aspects:

---

[15] Viner, *supra* note 7 at 5.

"price dumping" and "cost dumping". The former means international price discrimination. The latter denotes sales abroad at prices below the cost of production. Both dumping practices are regulated, domestically, by national antidumping laws and, internationally, by the *Article VI of GATT 1994* and the *Anti-Dumping Agreement.*[16]

Section Two: Classifications of Dumping

In order to analyze dumping both theoretically and empirically, it is necessary to categorise and classify different types of dumping. Different types of dumping can be categorised according to various bases and from diverse perspectives. In this section, I examine the traditional and modern classifications of dumping and assess the contemporary notions of multifarious appearances of dumping.

(1) Traditional Categories of dumping

The traditional categories of dumping can be drawn from a framework provided by Viner (1923).[17] He opined that different forms of dumping could be made distinctions from varied points of view. I summarize these different forms of dumping and different classifications proposed by Viner as the following chart.

---

[16] *Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade 1994.*
[17] Viner, *supra* note 7 at 23-32.

Distinction	Types	Description
1. Conventional v. Unconventional	(a) Conventional form	Sales made at lower prices for export than in the home market.
	(b) Unconventional form	Including reverse, spurious, exchange, freight and concealed dumping.
2. Open v. Hidden	(a) Open dumping	Including conventional, reverse, spurious, exchange and freight dumping.
	(b) Concealed dumping	By means of maintaining secrecy about export prices.
3. Direct v. Reverse	(a) Direct or export dumping	Sales of cheaper identical commodities directing at "foreign" buyers.
	(b) Reverse dumping	Sales of cheaper identical commodities pointing at "home" buyers.
4. Strength v. Weakness	(a) Dumping with strength	With predatory intention to capture foreign market power, or the domestic monopoly position sustaining dumping abroad.
	(b) Dumping with weakness	For liquidating an overstock, or reducing losses from a shutdown, partially or completely, of the plant under the stress of business conditions.
5. Motive-based Classification	(a) For the disposal of over-stocking. (b) Unintentional. (c) For maintaining connections with the foreign market. (d) For developing trade connections in a new market. (e) For eliminating competition in the dumped market. (f) For forestalling the development of competition in the dumped market. (g) For retaliation against dumping. (h) For maintaining full production from existing plant facilities without cutting home prices (i) For obtaining the economies of larger-scale production without cutting home prices. (j) On purely mercantilistic grounds ("mercantilistic dumping").	
6. Time-based Classification	(a) Sporadic dumping	Including type (a) and (b) of motive-based classification.
	(b) Short-run or intermittent dumping	Including type (c), (d), (e), (f) and (g) of motive-based classification.
	(c) Long-run or continuous dumping	Including type (h), (i) and (j) of motive-based classification.

Among the above categorizations[18], the motive-based and time-based classifications are essential. These classifications were followed by his contemporary, Haberler (1936).[19] However, Richard Dale (1980), in his survey of anti-dumping, has criticised the practical value of and the economic rationales behind Viner's classifications, and the correlation between these two classifications.[20]

The conventional economic notion of dumping is that continuous dumping benefits the importing country because of the welfare effects of the persistent cheaper supply of commodities on the importing country. Discontinuous or short-run dumping, on the other hand, has a disruptive effect on the dumped country since it induces a misallocation of domestic resources. Viner adopted this assessment of welfare effects on the importing country and classified dumping, according to its duration, as sporadic, short-run (or intermittent) or long-run (or continuous) dumping. He further attributed motives to these categories.[21]

There are some key points which can be drawn from his analysis of the above categorizations. First, dumping aiming to eliminate competition in the dumped market is termed "predatory or malignant" dumping. It is the most objectionable from the perspective of the dumped country. Second, dumping, for the purpose of maintaining full production from existing plant facilities without cutting home prices, is the most

---

[18] Dumping with strength indicates that the monopolist can reduce prices abroad and still gain a substantial margin of profit from dumped products because of the domestic monopoly position resulting in higher domestic market prices.

[19] Gottfried von Haberler, *The Theory of International Trade: with its applications to commercial policy*, trans. Alfred Stonier and Frederic Benham (London: William Hodge, 1936) 300-301.

[20] Richard Dale, *Anti-dumping Law in a Liberal Trade Order* (London: Macmillan, 1980) 8-11.

[21] Dumping served as a measure of retaliation against dumping in the reverse direction is termed "defensive dumping". See Haberler, *supra* note 19 at 300.

prevalent type of dumping. Third, in most instances of dumping, no single motive is dominant and there are usually some combinations of the above motives. Fourth, dumping continuing steadily and systematically for a period of time duration constitutes short-run or intermittent dumping. On the other hand, dumping without continuing steadily and systematically throughout "an indefinitely long period" is termed sporadic dumping. Long-run, permanent or continuous dumping is carried on continuously over a permanent period and usually considered the most advantageous. Fifth, his conclusion shows that only short-run or intermittent dumping is potentially harmful to the economic welfare of the importing country. Haberler affirmed such a conclusion.[22] However, Arnold Plant (1931) argued the regularity element of intermittent dumping and stated the recurrence of intermittent dumping on an irregular basis.[23]

Although Viner's categorizations have been widely accepted in economic and legal literature, Dale has critiqued this two-fold classification of dumping. First, he questions the possibility of misallocation of resources resulting from short-run dumping in a short period of time and the consideration for the true cost of resource misallocation in the importing country. He states that "displacement of domestic production for any duration may result in under-employment of labour and capital in the importing country, whereas productive resources will only be shifted into alternative uses after some considerable

---

[22] Haberler, *supra* note 19 at 314. "Dumping is harmful only when it occurs in spasms and each spasm lasts long enough to bring about a shifting of production in the importing country which must be reversed when the cheap imports cease. Such intermittent dumping may be harmful even when there is no competing home industry".

[23] Arnold Plant, "The Anti-dumping Regulations of the South African Tariff" (1931) 31 Economica 88, as cited in Dale, *supra* note 20 at 18. "There remains the class of intermittent dumping which does not recur with sufficient regularity to enable the community to rearrange its production on the basis of allowing for it, and which consequently causes temporary dislocation to local production".

lapse of time".[24] He also considers that short-run or intermittent dumping may "overlap with sporadic dumping in terms of duration"[25] since Viner didn't precisely differentiate the periods of time between intermittent and sporadic dumping. Additionally, there is no definite time distinction between short-run and long-run dumping under Viner's definitions, with the result that the cost of domestic industry exit and re-entry under long-run dumping cannot be determined and then be equalized with consumer benefits. The uncertainty of accumulative welfare benefits to the consumer of cheap dumped imports, therefore, fails to justify Viner's theoretical basis for permanent dumping. Although Article 11 (II) (b) of *Antidumping Code 1979*[26] defined "sporadic dumping" as "massive dumped imports of a product in a relatively short period", this provision on massive imports are not necessarily about sporadic dumping in the sense discussed here and they are also directed at importers trying to get products into the country ahead of the start of an investigation. It is clear that Viner's view on harmlessness of sporadic dumping is rejected.

Second, Dale criticizes Viner's motive-based classification of dumping for the insufficiency of the utilitarian merit. Although dumping with predatory intentions has been condemned for arousing economic misallocation of productive resources in the importing country, such motives and others are only identifiable *post hoc*. There is no documented instance of predatory price-cutting in the post-Second World War period.[27] As a result, the relevance of motive-based classification to the contemporary

---

[24] Dale, *supra* note 20 at 9.
[25] *Ibid.*
[26] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (1979), online: LEXIS (BISD § 26S/171-188).
[27] Dale, *supra* note 20 at 10.

international trade problems is arguable.

Although Dale's criticism is obviously rational and empirical, Viner's categorizations provide frameworks of theoretical analyses in the dumping regime. Such classifications have been further adjusted according to the empirical problem-solving necessity and to different concerns. Furthermore, his frameworks have continued being the fundamentals of expertise in the economic and legal fields of dumping.

(2) Anti- and Pro-Competitive Based Categorization

Dale (1980) suggests that dumping should be distinguished on anti-competitive and pro-competitive bases.[28] For distinguishing between anti-competitive dumping and pro-competitive dumping, the competitive test should be applied to this distinction. This test is similar to the one applied by domestic anti-price discrimination laws (or anti-trust laws), such as the United States *Robinson-Patman Act*. This competitive test can also be viewed as the injury test, determining whether dumping causes the anti-competitive injury to or pro-competitive effect on competition.

Based on this test, price discrimination is not unlawful *per se* on both national and international levels. It is unlawful only when it has the "specified anti-competitive effect". As a result, anti-competitive dumping is defined as dumping "undermining a domestic industry to the point of endangering the competitive process". It may cover "cut-throat pricing" or "any other form of aggressive competition" even though there is no predatory intention involved. To some degree, the thought of anti-competitive

[28] *Ibid.* at 11 and 45-66.

dumping is broader than that of predatory dumping.

Dale also mentions that some the United States commentators have urged that this test should be applied to determine the injury of dumping under the U.S. anti-dumping legislation. Some proposals of the U.S. enforcement agencies, such as the United States Federal Trade Commission, have also commented on the importance of application of this test in practices of international price discrimination and predatory behavior. However, the application of this anti-trust injury test in international trade has been challenged by Professor Edward[29] because of two reasons. First, the focus of the domestic anti-price discrimination laws, such as the United States *Robinson-Patman Act*, is on secondary line or buyer-level injury. That is irrelevant to dumping because dumping at buyer level only benefits the importing country's buyers, who purchase dumped products at lower prices. Second, the essential purpose of this Act is to curb competition rather than protect it. Anti-dumping regulations, on the contrary, are commonly viewed as the protection instrument even though there is much controversy over "protecting whom": domestic competitors or competition.

Indeed, such a test has never come into the territory of the U.S. anti-dumping law even though proposals for legislative reform of adopting this test in anti-dumping regime have often been addressed and the U.S. agencies in enforcing the Act have commented that the competitive test should be given consideration in both domestic and international fields. The distinction between anti-competitive and pro-competitive dumping has never been explicitly drawn in any anti-dumping law although paragraph four of article three of

---

[29] Corwin D. Edward, *The Price Discrimination Law* (Washington: Brookings Institution, 1959) 12-13, as cited in Dale, *supra* note 20 at 46.

GATT Anti-dumping Code 1979 states that restrictive trade practices in the importing country should be taken into consideration in anti-dumping proceedings.

In short, Dale's categorization provides an interesting distinction between dumping behavior: anti-competitive and pro-competitive effect on competition. In fact, such a competitive test applied by this categorization is more like an injury test, focusing on the determination of dumping effects. It would be doubtful whether this categorization, based on competitive effect, is more workable than Viner's time- and motive-based classification since the effects, motive and duration of time are all identifiable *post hoc* and these classifications simply analyze dumping behavior with focus on certain dimensions of it. Dale also questions the operational value of any classification.[30]

Second, this categorization creates the appearance of expanding the competitive test applied by the domestic antitrust law to the dumping regime. Such expansion indicates, to some degree, the possible interlink between anti-trust and anti-dumping laws. This interlink has long been discussed, as well as the issue of replacing anti-dumping law with antitrust law. The discussion about this subject will be provided in the later chapter.

(3) **Dumping as a Marketing Strategy**

Kostecki[31] (1991) provides the classification of dumping, focusing on the strategic marketing dimension. His perception of occurrence of dumping still follows the traditional theory. There are three prerequisites: (1) an exporter possessing the market

---

[30] Dale, *supra* note 20 at 11.

[31] Michel M. Kostecki, "Marketing Strategies between Dumping and Anti-dumping Action" (1991) 25 Eur. J. Marketing 7.

power over prices in at least one of the markets; (2) the existence of segmented markets; and (3) the higher elasticity of demand in the export market than in home market. When these three prerequisites are met, an exporter may engage in dumping practices with different marketing objectives, such as the purpose of maintaining export sales during periods of slack demand.

Basically, Kostecki's classification is not significantly different from Viner's categories.[32] He conforms to the above classic theory and observes dumping from the motive-based perspective. Even though firms' dumping practices are motivated by various objectives, Kostecki considers these practices to be marketing strategies. His illustration of dumping at strategic level has added a new dimension to traditional classifications of dumping in modern international trade. It is author's opinion that such a classification showing a new look of Viner's categories is significant in the modern dumping regime. As a result, it is worth the following demonstration.

Kostecki categorizes different types of dumping according to different export marketing objectives. This categorization is re-presented in the following table.

[32] Gunnar Niels, "What is Antidumping Policy Really about?" (2000) 14 J. Econ. Surv. 467 at 472.

Types	Export Marketing Objectives
1. Cyclical Dumping	to stabilize production over the business cycle, even during periods of slack demand, i.e. practiced by European steel companies in the mid-1980s.
2. Penetration Dumping	to rapidly gain market share with the aim of reaching economy of scale in production and export distribution, i.e. practiced by Japanese electronics in U.S. in 1986.[33]
3. Defensive Dumping	to deter entry by potential competitors into the target market, i.e. usually practiced by state trading organization exporting minerals[34] and agricultural products.[35]
4. Early Arrival Dumping	to acquire market leadership in a newly-invented high technology products, i.e. practiced by Japanese exporters of video-cassette recorders to France in the mid-1980s.
5. Head-on Dumping	to attack the price leader in the export market, i.e. practiced by Japanese exporters of consumer electronic products in the U.S. and the EU markets in the 1980s.
6. Predatory Dumping	to eliminate rivals in the export market and thereafter gain monopoly prices.[36]
7. Accidental Dumping[37]	without deliberate intention to engage in dumping practices, i.e. "new product dumping".[38]

Kostecki concludes that a firm's dumping behavior may be motivated by more than one

---

[33] Michel M. Kostecki, "Electronic Trade Policies in the 1980s" (1989) 23 J. World T. 17.

[34] W. Labys, "The Role of State Trading in Mineral Commodity Markets", in M. M. Kostecki, ed., *State Trading in International Markets* (London: Macmillan Press, 1982), as cited in M. M. Kostecki, *supra* note 31 at 19.

[35] A. McCalla & A. Schmitz, "State Trading in Grain", in M. M. Kostecki, ed., *State Trading in International Markets* (London: Macmillan Press, 1982), as cited in *Ibid.*

[36] Kostecki considers that the occurrence of predatory dumping in contemporary international trade is relatively rare. See Kostecki, *supra* note 31 at 9.

[37] Kostecki opines that accidental dumping may arise from the change of demand conditions and exchange rate fluctuations. In this regard, accidental dumping is in some ways similar to "incidental dumping", as opposed to "systematic dumping", proposed by Edwin Vermulst. This similarity will be discussed in the next section.

[38] "New product dumping" arises from the experiment of "learning by doing" firms on various pricing policies for gathering valuable information on how to conduct production. This case usually happens in high technology industries. Because of the lack of experience in pricing of new products, firms may accidentally engage in pricing below marginal cost. See Jackson & Vermulst, *supra* note 4 at 38.

export marketing objective, and different dumping patterns are not necessarily mutually exclusive.[39] His analysis re-presents and re-illustrates the traditional dumping theory closely connected with modern trading behavior. The empirical examination of dumping motives also provides policy-makers and regulators with a new dimension to re-valuation on anti-dumping policies or laws if these policies or laws are need.

(4) Monopolizing and Non-monopolizing Dumping

Willig[40] (1998) classifies the type of dumping according to monopolization or the creation of market power. There are five types of dumping behavior. The monopolizing dumping aims at creating monopoly power. On the other hand, "non-monopolizing dumping" is not motivated by the creation of monopoly power.

Some have argued that Willig's classification does not distinctly differ from Viner's motive-based categorization.[41] However, his approach to analyzing dumping at market power level explains the complexity of combinations of different motivations involved in dumping behavior. Dumping with certain motives may accompany acquisition of monopoly power. This analysis may also contribute to policy consideration with respect to the correlation between dumping behavior and the possible creation of market power. This categorization is re-presented in the following table.[42]

---

[39] Kostecki, *supra* note 31 at 9.

[40] Robert D. Willig, "Economic Effects of Antidumping Policy" in Robert Z. Lawrence, ed., *Brookings Trade Forum 1998* (Washington, D.C.: Brookings Institution Press, 1998) 57 at 61-66.

[41] Niels, *supra* note 32 at 472.

[42] The table presents a summary of Willig's classification and a framework provided by Holden. See Merle Holden, "Anti-Dumping: A Reaction to Trade Liberalisation or Anti-Competitive?" (2002) 70:5 S.A.J. Econ. 777, online: ESSA <http://www.essa.org.za/download/papers/004.pdf> (date accessed: 11 April 2003).

Non-monopolizing Dumping

Types of Dumping	Description	Motivation
1. Market-Expansion Dumping	Expansion of export sales by price discrimination according to different elasticities of demand in the home and foreign market.[43]	to expand export sales and earn additional profits by pricing exports at a smaller margin above marginal production and transport costs.
2. Cyclical Dumping	Exports priced at unusually low prices[44] in the presence of excess production capacity owing to depressed demand.	a. to generate more sales and gain profits. b. to reduce the social costs of layoffs by additional production stimulated by unusually low-priced exports.
3. State-Trading Dumping	Exports from state-owned industries in non-market countries at low prices[46] in order to earn hard currency.	to earn hard currency,[45] possibly in company with other motives found in in other categories of dumping.

[43] Willig considers that the demand abroad will be more price elastic even though the market demands at home and abroad are equally price elastic. This situation may result in "reciprocal dumping". The notion of reciprocal dumping will be discussed in the next section.

[44] The unusually low prices are below the "full cost" but above the level of "marginal variable cost". The possibility of prices below "full cost", including the "sunk (committed) cost of capacity", arises from the concept that "the costs of sunk capacity that is in excess supply are not reflected in marginal or opportunity costs, even though such costs do reflect the costs of capacity when capacity is not in excess". On the other hand, if firms sell at prices below the marginal variable cost, it denotes that firms sell at a loss. It is not profitable and rational for firms to do so in order to generate more sales. See Willig, *supra* note 40 at 62-63.

[45] Because of a non-convertible currency, the exporting country must obtain hard currency to finance its own imports from nations in the free world. See Willig, *supra* note 40 at 63.

[46] In this case, dumping is determined by the comparison between export prices and cost-based constructed values because, in non-market countries, exchange rates are relatively meaningless or home prices are not judged by economic market forces.

Monopolizing Dumping

Types of Dumping	Description	Motivation
1. Strategic Dumping	Dumping by benefiting from an overall strategy, including both low export pricing[47] and maintaining a closed home market.[48]	(1) to acquire certain profitable market power abroad while the home market is protected. (2) to reap benefits, transformed by the cost advantage and generated by economies of scale[49] with the with the employment of the strategy.
2. Predatory-Pricing Dumping	Low-priced exports[50] to drive competitors out of business to establish a monopoly.	to drive rivals out of business by low-priced exports and to recoup losses by charging the higher prices while the monopoly position in the foreign market is established.

[47] Willig, *supra* note 40 at 65. The most profitable export price may be "below the calculated full cost" because the higher prices in the protected home market benefits the exporters.

[48] *Ibid.* at 64. The closed home market should be sufficiently large so that exporters can enjoy "cost advantage" over foreign rivals and the protection of the home market causes a significant impact on rivals' competitiveness elsewhere.

[49] *Ibid.* at 65. The cost advantage enjoyed by exporters deters foreign rivals' needed investment because of the creation of certain market power for exporters in importing markets. Competing rivals' opportunity to exploit the available economies of scale will be limited by the creation of market power.

[50] *Ibid.* at 66. Below-cost pricing is usually considered predatory. The conventional view is that predation denotes prices below "avoidable cost". The comprehensive examination of predatory dumping will be discussed in the next chapter.

In general, non-monopolizing dumping, not motivated by the creation of monopoly power, is not considered deleterious to world welfare with the exception of when dumping transfers some profits or rents to exporters. First, although these three forms of dumping cause injury to local manufacturers, they need not "prevent those buying the exports from having many attractive sources of supply available to them".[51] Second, even though non-monopolizing dumping injures the interests of domestic producers of import-competing goods, domestic buyers benefit from low-priced goods. The benefit to buyers outweighs the financial losses of perfectly competitive producers, as long as the local manufacturer retains its ability to operate as before. Third, non-monopolizing dumping is advantageous to the net interest of the importing country because it, to some extent, acts as "direct subsidies to factors of domestic production". It not only causes rent shifting or protection against social losses in the importing nation but also "encourages domestic production". The domestic producers may utilize the cheaper imports as inputs into their own operations.[52]

Non-monopolizing dumping may be exceptionally deleterious when profits are transferred from domestic producers to exporters. In this situation, domestic producers earn profits through the exercise of market power or the social benefits are greater than market returns. If local producers have market power and rents are shifted, "it is possible, but by no means assured, that non-monopolizing dumping causes greater aggregate social loss and injury to domestic import-competing suppliers than benefits to domestic buyers".[53]

---

[51] *Ibid.* at 67.
[52] *Ibid.* at 68.
[53] *Ibid.* at 67.

Contrary to non-monopolizing dumping, strategic and predatory-pricing dumping is clearly harmful to both the importing nation and the global economy. In the case of strategic dumping, it has adverse effects on the importing nation and the global economy. First, the exporters' protected home market limits the export opportunities of the producers in the importing country. Second, domestic producers' ability to invest in R&D, learning by doing, and human and physical capital, is reduced by the constraint on the sales of them. The constraint also causes domestic producers to operate with higher costs. Third, strategic dumping leads to market domination and abuse of market power. With respect to the global economy, the negative effects of strategic dumping on the importing country outweigh the positive benefits to the exporting nation. This is because the concomitant losses of consumers' surplus in the importing nation and the additional losses, resulting from the protection of market, to consumers in the exporting nation exceed exporters' gain from the exercise of market power in the foreign market.[54]

Similarly, predatory-pricing dumping causes injuries to the importing nation and the global economy. Foreign predators create and exercise monopoly power over domestic consumers by raising prices after "destroying the productive capability of alternative sources of supply". Such predatory behavior has anti-competitive effects in the importing market. The achieved monopoly pricing also lowers the welfare of everyone as a whole. As a result, any behavior leading to a greater monopoly power in the economy should be objected in both domestic and international context even though the possibility of

[54] *Ibid.* at 70-71.

international predation has long been considered rare or relatively limited.[55]

In short, Willig's classification is based on the traditional dumping categorizations and he has further explored the complex combinations of different motivations involved in dumping behavior at market-power level. Dumping can be motivated by acquisition of monopoly power, such as predatory-pricing dumping. Dumping may lead to market domination or the gain of monopoly power, such as strategic dumping. By contrast, dumping can have little to do with the creation of market power, such as market-expansion, cyclical and state-trading dumping. Willig clarifies the possibility of monopolization outcome of different types of dumping practices, which is not explicitly addressed by the classic dumping theory. As a result, his classification has prevailed in the modern literature of dumping regime.

Section Three: Forms of Dumping

There are different forms of dumping, according to various criteria and different conditions. Different categorizations also underline certain significance of classified types of dumping. In order to comprehend the concept of dumping represented in different forms, the following observes miscellaneous types of dumping and illustrates notions of them.

(1) Reverse Dumping

There are two major reasons for the general rule governing dumping: to compete with

[55] The possibility of international predation and preventing predatory dumping as the justification for anti-dumping laws has long been argued. The discussion about this controversy will be provided in the next chapter.

foreign manufactures, and further to gain the market share in the export market, as well as to maximize profits by lowering the selling price in the less important export market. Both reasons can be considered to be motivated by profit maximisation.

Due to the profit-maximising motive, a perfectly competitive firm could choose to sell all of its output in the market with the higher price, and pursue sales-maximisation if the market conditions were perfectly competitive. In fact, a firm cannot fulfill such wishes in any given market because trade-related barriers, such as a prohibitive tariff in foreign markets, or extra costs associated with re-sale and with the movement among markets, exist. These various factors can force a firm to vary its pricing decisions for different markets. The usual scenario, therefore, should be that the selling price of the identical product in the export market is higher than it is in the domestic market, because of the above additional costs. However, if so, a firm cannot compete with the foreign manufacturer and gain the market share in the export market. As a result, a firm strategically lowers the foreign selling price and sustains certain losses in the short run; but it may generate more profits in the long run after it gains the market share in the foreign market. Such a motive commonly contributes to the occurrence of conventional dumping.

There additionally exists the other reason for the occurrence of conventional dumping: the relative importance between the domestic and the export markets, in terms of source of profits. Because of the existence of trade barriers in the foreign market, such as tariffs, domestic manufacturers are forced to allocate between different markets and to adjust the selling price in these markets to maximise profits. Without adding the extra costs to the

product, the domestic market is usually considered to be the more important source of profits and the principal market for manufacturers, except that where there is no domestic market for the particular product, such products are specially destined for export markets.[56] They generate reasonable profits in the principal market and their losses result from the dumping practice in the less important export market, or a subsidiary market, and can be compensated for by the gain in the principal market. Besides, every firm, economically speaking, is determined to maximise its profits. It is illogical for firms to dump their products in the principal market, since the more they sell there the more losses they sustain. When they make this price strategy in different markets, they can take this "relative-importance factor" into account.

However, the relative importance of different markets may shift from the domestic (principal) market to the foreign (subsidiary) market. In certain circumstances, when the export market is more important than the domestic market, and is the principal destination of the product, the manufacturers may quote prices lower to domestic than to foreign buyers: this practice is termed "reverse dumping". From the exporting country's point of view, reverse dumping is beneficial to producers in the exporting country because they generate more profits. On the other hand, reverse dumping can be injurious to the importing country since the foreign producer targets his monopoly power at the export market.[57] The practice results in "deterioration in the importing country's terms of trade" and is detrimental to the local industry's international competitiveness.[58]

---

[56] In such a case, the comparison of relative importance between the domestic and export market cannot be established and the common form of dumping could not occur under Viner's definition because of a lack of the domestic product at the price available.

[57] Dale, *supra* note 20 at 62.

[58] Charles P. Kindleberger, *The Terms of Trade: A European Case Study* (Cambridge: MIT Press, 1956) 89, as cited *ibid.* at 62.

Reverse dumping can occur: (1) occasionally at different seasons of the year, or in different years; (2) sporadically when market conditions change; (3) under other exceptional circumstances.[59] The following are some documented instances of reverse dumping.

A Canadian miller engaged in export trade in flour commented on the circumstances under which reverse dumping usually arises:

> Of the lower grades [of flour] most of the output of Canadian mills is sold abroad, very little of it being used for home consumption....These grades are on the average sold cheaper in the United Kingdom than in this country; but, at times, one or other of them sells for less in Canada than abroad, because Great Britain, being the big consuming market for such flour, the surplus is disposed of in Canada if there is any risk of breaking the market by exporting the flour abroad.[60]

In 1969, the *Special Report on Prices* of the Canadian Royal Commission on Farm Machinery presented a proposal for establishment of a reverse dumping duty on identical tractors which were sold higher in Canada than in Britain and other countries of Western Europe.[61] However, Robert T. Kudrle (1974) questioned the achievability of elimination of price discrimination by the establishment of a reverse dumping duty, because this proposal "fails to treat adequately the distinction between discrimination at the international transfer-price and the final-purchaser levels".[62]

---

[59] Viner, *supra* note 7 at 6.
[60] Canada, *Report of the Board of Inquiry into the Cost of Living*, vol.1 (Ottawa: J. L. Tache, 1915) at 757, as quoted in Viner, *supra* note 7 at 6.
[61] Royal Commission on Farm Machinery, *Special Report on Prices* (Ottawa: Queen's Printer, 1969) 97.
[62] Robert T. Kudrle, "A 'reverse dumping duty' for Canada?" (1974) 7 Can. J. Econ. 75.

The Canadian ferro-silicon industry during 1917 and 1918 exemplified another exceptional circumstances under which reverse dumping might occur. In these years, more than ninety percent of this alloy was exported to the United States and the export price for the identical product was higher than the domestic price. By ingeniously selling this product at the higher price in the export market, Canadian producers avoided the American system of levying *ad valorem* duties on this product. Besides, the American market was the principal market for this alloy, so that it was profitable for Canadian producers to practice reverse dumping in the American market.[63]

Professor Machlup (1952) stated that: "when he was associated with the Austrian cardboard cartel in the inter-war period, the elasticities of demand in the Hungarian and Italian markets were lower than in the domestic Austrian market and these markets were therefore charged higher prices by the cartel".[64] There are also many examples of reverse dumping in one American study of international price discrimination in 1940.[65] Additionally, the European luxury automobile industries in 1984 and 1985 represented the more recent and notable instance of reverse dumping.[66]

---

[63] Viner, *supra* note 7 at 7.

[64] Fritz Machlup, *The Political Economy of Monopoly: Business, Labor and Government Policies* (Baltimore: Johns Hopkins Press, 1952) 149, as cited in Dale *supra* note 20 at 62. Professor Machlup categorises this reverse dumping as one type of "geographic price discrimination" and names this type for "the get-the-most-from-each-region type of discrimination".

[65] Milton Gilbert, "A Sample of Differences between Domestic and Export Pricing Policies of United States Corporations" in *Investigations of Concentration of Economic Power* (Washington: US Government Printing Office for the Temporary National Economic Committee, 1941) Monograph 6, as cited in Dale *supra* note 20 at 62.

[66] Krugman and Obstfeld, *supra* note 1 at 145. "When the dollar rose sharply against European currencies, European manufacturers such as Volvo and Mercedes chose not to cut their U.S. prices, even though the equivalent dollar prices of their cars in Europe had dropped greatly. Thus a Mercedes could be bought in Germany for as much as 40 percent less than it cost in the United States. The gap was so large that many U.S. buyers started purchasing cars in Europe and shipping them home. The situation could not have gone forever, but it was eventually resolved through a decline in the dollar rather than a change in

Flam[67] (1987) analyzes several large Swedish companies marketing new and complex products, such as nuclear reactors and telephone communications equipment, and develops a new model to explain reverse dumping. In this model, the monopolist will sacrifice some of his profits in the domestic market in order to increase his foreign and his total profits. It is hard to find the empirical verification of reverse dumping in practice because of two reasons. First, it is difficult to obtain price information from producers of nuclear reactors and telephone communications equipment since the price information is a highly business secret. Second, it would be hard to interpret and evaluate the price information if it were available. This is because these products are usually sold as a package, including spare parts, training service, guarantees and other conditions of sales. Flam concludes that reverse dumping "takes the form of more generous side benefits than outright price discrimination"[68] in these products and the marketing of many types of sporting goods exemplifies the noticeable cases of reverse dumping.

In short, reverse dumping is defined as "selling at a higher price abroad than in the home market", which is inconsistent with the concept of dumping covered by GATT or national anti-dumping laws.[69] The reason why it is not considered objectionable is that "a higher price for export than for domestic sales can easily be attributed to transport costs and to other additional costs associated with selling in a foreign market".[70] It

---

pricing policy".

[67] Harry Flam, "Reverse Dumping" (1987) 31 Eur. Econ. Rev. 82.

[68] *Ibid.* at 88.

[69] Peter Holmes & Jeremy Kempton, "Study on the Economic and Industrial Aspects of Anti-dumping Policy", SEI Working Paper No. 22 (July 1997), online: Sussex European Institute <http://www.sussex.ac.uk/Units/SEI/pdfs/wp22.pdf> (date accessed: 17 April 2003)

[70] Jackson & Vermulst, *supra* note 4 at 26.

would be viewed as an economic phenomenon, which is characterized by lower-priced goods in the home market rather than in the foreign market. Either motivated by the shift of relatively important source of profits from the home market to the foreign market under certain circumstances or by Flam's marketing model, reverse dumping has nothing to do with the notion of dumping at legal level.

(2) **Spurious Dumping**

The term "price-discrimination", in the definition of dumping illustrated above, commonly denotes "sales at different prices to different purchasers". This broad approach to explaining this term results in disregarding "differences in the conditions and terms of sales" and "price-discrimination may in fact result from the quotation of identical prices without adjustment for differences in the terms and conditions of sale".[71] In other words, the quotation of different prices to purchasers in different national markets is considered to be price-discrimination and dumping only if: (1) "the different prices are quoted simultaneously for identical or substantially identical commodities offered for sale under similar conditions and terms"; or (2) "the price-differential embodies what is either more or less than a reasonable allowance for the differences in conditions and terms".[72] Other quotations of different prices to different purchasers under different conditions and terms are not regarded as an unfair competitive practice, even though such a practice has a fictitious appearance of dumping.[73] In this case, the fictitious appearance of dumping is termed "spurious dumping", which is not dumping

---

[71] Viner, *supra* note 7 at 8.

[72] *Ibid.* at 9.

[73] Article 2.4 of *World Trade Organization Agreement on Interpretation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-dumping Agreement) provides that differences in conditions and terms of sale should be taken into consideration when the national authority makes a fair price comparison between the export price and the normal value to determine whether dumping exists.

per se but is a variant presented above.

Based on Viner's definition, "spurious dumping" means that the sale at different prices to various purchasers occurs without involving price-discrimination:

1. if the price-differentials are just adjustments to variations:

   (1) "in the size of the unit orders from various nations,

   (2) in the length of the credits,

   (3) in the extent of the credit risks,

   (4) in the grades of commodities,

   (5) in the time at which the sales contracts were made,[74]

   (6) in the method of conducting the selling operations,[75] or

   (7) in the treatment of freight and packing charges";[76] or

2. if the variations in prices arise from:

   (1) "the grant of export drawbacks in the exporting country on dutiable imported materials re-exported after further manufacture,[77] or

   (2) the temporary admission of such materials free of duty, or

---

[74] Viner, *supra* note 7 at 12.Foreign purchasers often anticipate their needs ahead of time and such practices usually cause the lapse of time between the date of the original purchase and the date of shipment. When the prices in exporting countries rise during the interval, such practices might constitute dumping if the price comparison of product in export and domestic markets is determined by the date of shipment. On the other hand, such practices might not be considered dumping if the price comparison is based on the date of purchase. Viner opines that the price comparison should be made as of the same date which is the date on which the export contract was made.

[75] *Ibid.* at 11. To save extra expenses, such as the mediation of salesmen and advertising, foreign buyers sometimes dispatch their agents to the exporting country to purchase directly from the producer. The conduct of selling operations might give rise to the lower prices in the foreign market than in the domestic market because the above expenses and other costs to the producers, such as the maintenance of agencies, are attached to the product in the domestic market. There was an example of the Canadian flour mills in 1913 illustrating this point. See Canada Report, *supra* note 60 at 752.

[76] *Ibid.* at 9.

[77] *Ibid.* at 13. The drawback system functions as mitigation of protective tariffs in foreign markets for exporters and, therefore, the sales at different prices resulting from such system can not be considered dumping. However, the drawback can not contain any concealed bounty and can not exceed the amount of collected duty on the imported materials.

(3) the exemption from excise duties in the exporting country of commodities destined for export".[78]

The differences in the size of the unit orders from various nations most commonly result in the occurrence of spurious dumping. Foreign buyers usually order larger units in a single purchase, unlike domestic buyers, because they can save buying trips and reduce the frequency of their purchase in a year, or because they might operate in a larger market. The large-unit orders are also economical in clerical, packing and transportation expenses and in selling costs. From the producer's point of view, large-unit orders are also beneficial to them, since they can reduce the cost of raw materials and input, maintain considerable productivity in a period of time and save the storage expense. As a result, concessions in price to foreign buyers, due to the large-unit orders, cannot be considered dumping if similar concessions can be made on domestic orders, or if the sellers are willing to make similar concessions if such orders are domestically obtainable.[79]

The price-differential resulting from an exemption from excise duties in the exporting country, of commodities destined for export, cannot be regarded as dumping, because the exemption does not give such commodities any advantage over competition with similar products manufactured in the importing country, and because the remission cannot be equated with the grant of special aid to export sales. If there is no similar excise tax in the importing country, this exemption merely enables these commodities to compete with similar domestic products on an equal level. If there is a similar excise tax in the

[78] *Ibid.*
[79] *Ibid.* at 10.

importing country, this tax will be imposed equally on the imported and the similar domestic product.[80] Therefore, it is clear that such a price-differential cannot be considered price-discrimination or dumping.

In summary, sales at different prices to different purchasers in different national markets without involving price discrimination are termed "spurious dumping". The most important single factor giving rise to spurious dumping is the difference in the size of the unit orders. In practice, there has been little attention paid on this subject since Viner's study because charging different buyers different prices under different conditions and terms is normal business behavior and there is nothing wrong with such practices. Although Viner defines this practice as spurious dumping, it, in essence, doesn't fall into the territory of dumping either on theoretical or legal level.

(3) **Exchange Dumping**

"Exchange dumping" means "a situation in which a country increases its export competitiveness through an effective depreciation of its currency".[81] In other words, a country manipulates its exchange rates to lower the selling price of its products when calculated in terms of the foreign currency. These practices are usually considered to be unfair competition by manufacturers in the country in which the goods are being dumped. Prior to the Second World War, many nations, including Britain, Canada, Australia, New Zealand and South Africa, legislated against this unfair tactic of competitive devaluations.[82] For example, Canada's legislation in October 1931 imposed dumping

---

[80] *Ibid.* at 14.
[81] Dale, *supra* note 20 at 13.
[82] See Ernst Trendelenburg, *Memorandum on the Legislation of Different States for the Prevention of*

duties on imports if the sale price of the imports in Canada was less than the invoice price of the products in the foreign currency, converted at a rate decided by the governor-in-council.[83]

Haberler (1936) dissented from the genuineness of "exchange dumping" because of the nonexistence of price discrimination.[84] Some also argue that the term,"exchange dumping", is confusing since it has nothing to do with price discrimination or dumping in the economic sense.[85] By means of the depreciation of its currency, a country can increase its exports of products but, in contrast, the depreciation causes the decline in its internal purchasing power.[86] For instance, the Colombian government periodically devalued the peso between 1967 and 1973 and its exports dramatically increased.[87] It seems that the depreciating currency operates as a premium on the exports by making export prices temporarily low. However, the exporters do not discriminate between the prices at which they sell to domestic and foreign buyers or between buyers of various foreign nations.[88] Such practices cannot be equated with price discrimination or dumping.[89]

Dumping, with Special Reference to Exchange Dumping (Geneva: League of Nations, 1927)

[83] Orville John McDiarmid, *Commercial Policy in the Canadian Economy* (Cambridge: Harvard University Press, 1946) 314.

[84] Haberler, *supra* note 19 at 300. Haberler also argued over the genuineness of so-called "social dumping" because of the lack of price discrimination.

[85] Dale, *supra* note 20 at 13.

[86] For a discussion about the internal and external purchasing powers affected by depreciating currencies, see U.S. Tariff Commission, *Depreciated Exchange and International Trade* (Washington: Government Printing Office, 1922)

[87] J. Michael Finger, ed., *Antidumping: How It Works and Who Gets Hurt* (Ann Arbor: University of Michigan Press, 1993) 112.

[88] Viner, *supra* note 7 at 16.

[89] Some also support this point and consider that neither *Article VI of the General Agreement on Tariffs and Trade 1994* nor Anti-dumping Agreement covers exchange dumping and freight dumping. See Edwin Vermulst et al., "UNCTAD Training Module on Anti-dumping" (February 2002), UNCTAD/ITCD/TSB/Misc.71 at 9, online: United Nations Conference on Trade and Development <http://www.unctad.org/en/docs//itcdtsbmisc71_en.pdf> (date accessed: 17 January 2003).

In a recent report of the Panel on EC - imposition of anti-dumping duties on imports of cotton yarn from Brazil[90] in 1995, Brazil proposes an interesting illustration of exchange dumping. Exchange dumping occurs "when the export price expressed in domestic currency falls below normal value as a result of distortions in the export currency/domestic currency exchange rate". With respect to the issue of exchange dumping, there is a boundary between the international regulation of trade (under the GATT) and international monetary regulation (under IMF). There is a significant distinction between a "sustained exchange rate disequilibrium" and a "temporary exchange rate distortion". The former falls within the scope of international monetary regulation. The allowance should be made for the latter in the context of an anti-dumping proceeding in order to establish a fair comparison between normal value and the export price.[91]

Brazil is also of the opinion that there are two types of exchange dumping, namely "devaluation exchange dumping" and "apparent exchange dumping". The former means a "manipulation of exchange rates in order to achieve a competitive advantage for exports" and it is not regulated by the GATT. The latter denotes that "the export price expressed in domestic currency falls below normal value as a result of distortions in the export currency/domestic currency exchange rate" and the GATT covers situations of apparent exchange dumping.

---

[90] *EC - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil* (1995), GATT Doc. ADP/137, B.I.S.D. (1995) 42/17 (Panel Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 31 May 2003)

[91] *Ibid.* at para. 241.

European Economic Community contests Brazil's allegation. It considers that there is no plausible difference between these two types of exchange dumping because they both have an effect on trade and increase the possibility of dumping. The devaluation benefits the exporting country's competitiveness. Even though national governments don't frequently formally devalue their currency, they "let it slide in the financial market". This behavior gives competitive advantage to exporters.[92]

However, the Panel does not verify Brazil's allegation of the classification of exchange dumping in its findings and conclusions. In practice, the concept of exchange dumping appears nowhere in the *Article VI of GATT 1994* or the *Anti-Dumping Agreement*. From the perspective of the drafting history of Article VI of GATT, Jackson[93] (1969) considers that the intention of the drafters was not to include exchange dumping. The drafters, on the other hand, wished to deal explicitly with "the effects of currency devaluations and exchange rate fluctuations" and "their effects on the rights and obligations of the contracting parties" on other provisions of the GATT. The note ad Article VI on "multiple currency practices" is an example of a provision dealing with multiple currency practices which can, in certain circumstances, constitute a form of dumping by means of a partial depreciation of country's currency which is subject to the imposition of anti-dumping duty.

(4) **Freight Dumping**

Freight dumping means that, by receiving preferential export transportation rates from

---

[92] *Ibid.* at para. 175.
[93] John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill Company, 1969) 404-405.

the national government, the exporters can make sales in the foreign markets without making concessions from their home prices. In other words, the preferential export transportation rates enable exporters to reduce transportation costs; and therefore, they can sell their products abroad at lower prices compared with the selling prices with full export transportation rates. For instance, the German government in the early 1900s gave preferential railroad rates to exporters to stimulate export trade.[94]

However, in fact, such practices can merely be considered an example of dumping of freight services and must be differentiated from commodity dumping. By nature, transportation costs attached to exporting products serve as a natural protection to the domestic producers in the importing country. Purchasers usually pay the freight charges. Even with preferential export rates, the selling prices of exported products in foreign markets should still be higher than those products sold in the home market. The preferential export rates should act as a restraint on the dumping of commodities in foreign markets. Therefore, the terminology of freight dumping is confusing and can merely be illustrated as the sale of freight services at lower rates to foreign than to domestic buyers.[95]

Furthermore, *GATT 1947* applied only to goods, which implied that dumping of services was not covered. The General Agreement on Trade in Services, negotiated during the Uruguay Round, does not contain provisions with regard to dumping or anti-dumping measures. As a result, freight dumping, an example of dumping of freight services by

---

[94] Viner, *supra* note 7 at 16. Nowadays, preferential freight rates for exports would be considered export subsidies and thus be prohibited under the Subsidies Code.

[95] *Ibid.* at 17.

nature, is not regulated by either *Article VI of GATT 1994* or the *Anti-Dumping Agreement*.

(5) Concealed Dumping

Concealed dumping occurs when the same price is charged to different purchasers in different markets with various terms and conditions of sale. The various terms and conditions may cover the quotation of the same prices to domestic and foreign buyers but: (1) with longer credit terms to foreign buyers; (2) at no extra charge to foreign buyers for packing or transportation to the final destination; and (3) at no extra charge to foreign buyers for better-finished or higher-grade goods.[96] For instance, an American beer-bottling manufacturer in the early 1900s quoted the same prices to domestic and foreign buyers but omitted the extra charge for boxing and packing only to the latter buyers.[97]

Exporters, for example in modern pharmaceutical products, usually engage in concealed dumping by means of maintaining secrecy about export prices. The common reasons for such practices are: (1) to prevent the home consumers from complaining about the lower selling prices in foreign markets; (2) to prevent the home manufacturers, who buy materials from concealed dumpers for further manufacture at higher prices, from complaining about such practices impairing their competitiveness in foreign markets; (3) to avoid provoking domestic consumers to demand the elimination of the import duties, in order to lower the home prices; (4) to circumvent the animosity of competing

---

[96] *Ibid.*

[97] United States Industrial Commission, *Report of United States Industrial Commission*, vol. XIII (Washington: Government Printing Office, 1901) 726.

producers in the dumped country and their demand for imposing countervailing duties on dumped products; and, (5) to evade the existing anti-dumping legislation of the dumped country.[98]

Concealed dumping is occasionally employed as an elaborate trick to evade technically the anti-dumping law of the dumped country. For example, in order to disable the dumped nation to establish the fundamental price-comparison element for the application of anti-dumping law, the exporting industry may: (1) sell a small amount of its products to a remote portion of the domestic purchasers at a bogus low price; (2) produce export-oriented commodities, which are not available in the home market; (3) remodel the domestic commodities slightly in shape, form, style or material, for export purpose;[99] or (4) utilise the special consignment method of sales by overvaluation of exported commodities.[100]

Many instances were found in the early 1900s to demonstrate the employment of these tactics. American pig-iron manufacturers in the early 1900s exemplified the first scenario of the above. They sold domestically a section of their goods to distant points in the

---

[98] Viner, *supra* note 7 at 18.

[99] However, paragraph one of Article VI of *General Agreement on Tariffs and Trade*, 1947, forestalls contingencies of case (2) and (3). It states that "[t]the contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products...a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another...(b) in the absence of such domestic prices, is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit". Besides, paragraph two of Article 2 of *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, 1994, illustrates that "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country...the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".

[100] Viner, *supra* note 7 at 20.

American market at "dumping prices". Such tricky practices crippled the Canadian anti-dumping legislation because a comparison between "the export price" and "the fair market value in the principal markets of the exporting country"[101] could not be established to determine the existence of dumping.[102] The second and third approaches were adopted by some certain foreign producers to circumvent the application of American undervaluation and anti-dumping provisions.[103] We can also retrieve an example presenting employment of the last tactic. Some exporters to the United States overvalued their commodities for the purpose of escaping the imposition of anti-dumping duties on their goods. They shipped such goods to commission merchants in America. These commission merchants could sell these products, on exporters' instructions, at the best prices; however, these actual sales prices were usually dumping prices. For lack of invoices and the unavailability of the genuine domestic and export prices, American administrative agencies found it difficult to achieve the price-comparison to impose anti-dumping duties on these actually dumped commodities.[104] Nevertheless, Canadian anti-dumping provisions appeared to provide

---

[101] *The Customs Tariff*, 1907, c. II, s. 6. and *Customs Act*, R.S. 1906, c. 32, s. 58. The former states that "[i]n the case of articles exported to Canada of a class or kind made or produced in Canada, if the export or actual selling price to an importer in Canada is less than the fair market value of the same article when sold for home consumption in the usual and ordinary course in the country whence exported to Canada at the time of its exportation to Canada, there shall, in addition to the duties otherwise established, be levied, collected and paid on such article, on its importation into Canada, a special duty (or dumping duty) equal to the difference between the said selling price of the article for export and the said fair market value thereof for home consumption...". The latter states that "[w]henever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada".

[102] W. J. A. Donald, *The Canadian Iron and Steel Industry* (Boston: Houghton Mifflin, 1915) 184. He states that "[t]he iron and steel interests themselves admit that often the clause cannot be applied, as American furnaces sometimes sell part of their product for delivery to distant points in their own country at prices as low as for shipment to Canada".

[103] United States, *Selling Foreign Manufactures in the United States at Prices Lower than the Domestic Prices* (Washington: Government Printing Office, 1909) 36, as cited in Viner, *supra* note 7 at 20.

[104] *Ibid.* at 37, as cited in Viner, *supra* note 7 at 20.

for such contingencies.[105]

In fact, concealed dumping is rare in contemporary international trade under the governance of GATT. For example, concealed dumping by means of maintaining secrecy about export prices may not be feasible because, pursuant to Article 2 of *Anti-Dumping Agreement*, the investigating agency in the importing country can adopt the constructed cost method to determine the export prices and then to determine the existence of dumping. The contingency of selling a small amount of a firm's products to a remote portion of the domestic buyers at a bogus low price with the aim of evading the anti-dumping law is also regulated by Article 2 of *Anti-Dumping Agreement*. The investigating agency in the importing country should make a fair comparison between the export price and the normal value. Due allowance shall be made in each case for differences which affect price comparability, "including differences in conditions and terms of sale, quantities and physical characteristics". As a result, this form of dumping is no longer contracting parties' major concern.

(6) Sporadic (or Occasional) and Intermittent (or Short-Run) Dumping

The concept of "sporadic or occasional dumping" is addressed quite differently in the conventional and modern literature. From the perspective of Viner's conventional definition, characteristics of sporadic dumping are that: (a) "occasional and casual"; (b) "occurring only in scattered instance and at irregular intervals"; and (c) "not the

---

[105] *An Act to amend the Customs Tariff*, 1904, c. II. The subsection 19(4) states that "[i]f at any time it appears to the satisfaction of the Governor in Council, on a report from the Minister of Customs, that the payment of the special duty by this section provided for is being evaded by the shipment of goods on consignment without sale prior to such shipment, the Governor in Council may in any case or class of cases authorize such action as is deemed necessary to collect on such goods or any of them the same special duty as if the goods had been sold to an importer in Canada prior to their shipment to Canada".

manifestation of a definitely established price-policy on the part of the dumping concern". Sporadic dumping does not continue steadily and systematically throughout "an indefinitely long period". It may be motivated by the disposal of over-stocking or may be practiced unintentionally. Viner concludes that sporadic dumping is not potentially deleterious to the economic welfare of the importing country because it does not last long enough to induce a misallocation of domestic resources in the dumped country.[106] Haberler[107] and Willig[108] agree with such a conclusion. However, Dale has criticized this conclusion.[109]

Some still take the similar view. Loehr[110] (1997) opines that sporadic dumping occurs "with no intention on the part of the producer to export at prices that are below cost". In this case, damage to the importing country is small and temporary because it is not the exporter's intention to dump but to sell above cost. Gries and Block[111] (1998) consider that sporadic dumping is "the occasional sale of products at lower prices abroad than domestically, in an effort to unload an unforeseen and temporary surplus or to create consumer interest in the products". Bajwa[112] (1999) is of the opinion that sporadic dumping is "an unloading of overstocks by a foreign producer who prefers to dump his

---

[106] Viner, *supra* note 7 at 30-31.
[107] Haberler, *supra* note 19 at 314.
[108] Robert D. Willig, "The Economic Effects of Antidumping Policy" (1992) OECD Restricted Document, as cited in New Zealand, "Trade Remedies in New Zealand", Ministry of Economic Development, Discussion Paper (February 1998), online: Ministry of Economic Development <http://www.med.govt.nz/buslt/trade_rem/trinnz/trinnz.pdf> (date accessed: 29 April 2003)
[109] Dale, *supra* note 20 at 9.
[110] William Loehr, *Dumping and Anti-dumping Policy with applications in Lithuania*, CAER II Discussion Paper No. 11 (November 1997), online: CAER II <http://www.cid.harvard.edu/caer2/htm/content/papers/paper11/paper11.pdf> (date accessed: 10 May 2003)
[111] Michael Gries & Walter Block, "Predator" (September 1998), online: Consent Journal <http://www.freedomparty.org/consent/cons29_3.htm> (date accessed: 10 May 2003)
[112] Mohammad A. Bajwa, "Antidumping: Trade Law or Game Law?" (11-29 October 1999) WTO On-line Forums, Developing Countries and the Millennium Round, online: Trade & Development Centre <http://www.itd.org/wb/essay4.doc> (date accessed: 10 May 2003)

goods in a foreign market rather than endanger his domestic price structure". These scholars focus on the conventional idea of the exporter's intention of disposal of over-stocking.

Intermittent or short-run dumping, defined by Viner, denotes that dumping continues steadily and systematically for a period of time duration, possibly several months or years at a time. Some motives for intermittent have been illustrated in the foregoing section two, such as maintaining connections with foreign market. It is harmful to the economic welfare of the importing country because it lasts long enough to injure domestic producers without providing consumers with a permanently cheap supply of goods.[113] However, Willig considers that the forms of intermittent dumping, which are or can be anti-competitive, are predatory dumping, limited price dumping and reciprocal, and these three forms of intermittent dumping as being harmful to the importing country are relatively uncommon.[114]

Interestingly, some modern literature seems to make no distinction between the conventional concept of sporadic dumping and intermittent dumping or equate sporadic dumping with intermittent dumping.[115] It is considered that "sporadic or distress dumping" occasionally occurs when a firm purposes to dispose of its excess inventories by selling abroad at lower prices than at home without spoiling the domestic market. The reason for such practices might result from misfortune, bad production planning or

---

[113] Viner, *supra* note 7 at 30-31.
[114] Willig, *supra* note 108.
[115] Indeed, this idea is not a new one. Viner states that this is the classification of dumping based on its continuity which only distinguishes between "sporadic" and "permanent". Sporadic dumping covers dumping which does not last steadily throughout "an indefinitely long period". See Viner, *supra* note 7 at 29-30.

unforeseen changes in supply and demand conditions.[116]

Leclerc[117] (1999) states that "sporadic dumping occurs when dumping is not done on a sustained basis: exporters dump for a few months at a time, then stop for a few months, then begin dumping again". It is usually adopted as a rational business strategy. For example, foreign firms might engage in sporadic dumping on the model of "experience" or "learning by doing" goods[118]. Even though sporadic dumping hurts consumers in the dumped country, "overall global welfare might be improved as a result of the exporter's gain achieved through sporadic dumping". Therefore, it is "rational and pro-competitive behavior on an international scale". It is clear that sporadic dumping, addressed by Leclerc, is dumping on a sporadic basis and it is consistent with the notion of intermittent dumping.

Trebilcock and Howse[119] (1999) state that intermittent dumping is systematic dumping which lasts for several months or years at a time. It might occur in the context of "oversupply of perishables", especially agricultural products. Similarly, Hutton and Trebilock[120] (1990) equate sporadic dumping with intermittent dumping and consider that sporadic or intermittent dumping may cause economic harm to the dumped country. In their survey, they find that "the only cases which exhibited any indication of intermittent dumping of a nature likely to impose significant exit and re-entry costs on

---

[116] Robert J. Carbaugh, *International Economics*, 4th ed. (Belmont: Winthrop, 1992) 162.
[117] Jean-Marc Leclerc, "Reforming Anti-dumping Law: Balancing the Interest of Consumers and Domestic Industries" (1999) 44 McGill L.J. 111.
[118] Presley L. Warner, "Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrust" (1992) 23: 4 L. & Pol'y Int'l Bus. 791.
[119] Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 2nd ed. (London: Routledge, 1999) 184.
[120] Susan Hutton & Michael Trebilcock, "An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Normative Rationales" (1990) 24:3 J. World T. 123 at 130.

the Canadian industry, and ultimately consumers, were the agricultural cases". The intermittent dumping motivated by disposing of oversupply of perishables is also consistent with conventional notion of sporadic dumping.

The wording of sporadic dumping appeared in the international trading system although these provisions are not necessarily about sporadic dumping in the sense discussed here. They are also directed at importers trying to get products into the country ahead of the start of an investigation. The wording of sporadic dumping addressed by Article 11 (iii) (b) of *Anti-Dumping Code 1967*[121] is "massive dumped imports of a product in a relatively short period", causing the "material injury" to such an extent. Similarly, Article 11 (II) (b) of *Anti-Dumping Code 1979*[122] addresses sporadic dumping as "massive dumped imports of a product in a relatively short period", causing the injury to such an extent. Under both Codes, the importing country can levy "a retroactive anti-dumping duty" on the imports concerned, in order to preclude sporadic dumping recurring.

However, Article 10.6 (ii) of *Anti-Dumping Agreement* does not clearly address the wording of "sporadic dumping" but it similarly authorizes the importing country to levy "a definitive anti-dumping duty" on dumped products when "massive dumped imports of a product in a relatively short time" cause the injury in the importing country. The importing country should take "the timing", "the volume of the dumped imports" and "other circumstances (such as a rapid build-up of inventories of the imported product)", into consideration.

---

[121] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (1967), online: LEXIS (BISD § 15S/4-35).

[122] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (1979), online: LEXIS (BISD § 26S/171-188).

(7) Predatory, Malignant or Aggressive Dumping

"Predatory dumping" is "the gaining of an export-market share at the expense of the competition by dumping and undercutting".[123] In other words, a firm temporarily reduces the prices charged abroad to drive foreign competitors out of business and then raise the prices after gaining a monopoly position. It is also called "aggressive dumping" by which a firm can increase its share of the foreign market and establish a monopolist position by destroying the competition through dumping and subsequently raising his prices. In this case, the exporting company must "finance its sales below average prices with profits from other markets or other products" and will raise its prices as soon as the competition disappears. The damaging effect on the importing country comes form the subsequently high monopolist prices.[124] In fact, predatory dumping is a form of short-run or intermittent dumping with the predatory motive.[125] Kostecki observes that predatory dumping is a marketing strategy with the aim of eliminating rivals in the export market and thereafter gaining monopoly prices.[126] Willig classifies it as a type of monopolizing dumping.[127]

Selling abroad at prices below the cost of production is usually considered predatory dumping.[128] Ordover and Willig[129] (1981) observe that predatory dumping is

---

[123] Catrinus Jepma & Andre Rhoen, eds., *International Trade: a business perspective* (New York: Addison Wesley Longman, 1996) 222.

[124] Christian A. Conrad, "Dumping and Anti-dumping Measures from Competition and Allocation Perspective" (2002) 36:3 J. World T. 563 at 564.

[125] See Viner, *supra* note 7 at 31; Phedon Nicolaides, "The Competition Effects of Dumping" (1990) 24:5 J. World T. 115 at 117; Conrad, *ibid.*

[126] Kostecki, *supra* note 31 at 8.

[127] Willig, *supra* note 40 at 65-66.

[128] William A. Kerr, "Dumping—One of Those Economic Myths" (2001) 2:2 J. Int'l L.T. Pol'y 211 at 215, online: Estey Centre Journal of International Law and Trade Policy

"systematically pricing below cost with a view to intimidating and/or eliminating rivals in an effort to bring about a market price higher then would otherwise prevail". Niles[130] (2000) defines predatory dumping as "a dominant firm setting its prices at non-remunerative levels long enough to drive rivals or entrants from the market and then to recoup its losses afterwards by charging monopolistic prices". However, there exists controversy over the common thought. A comprehensive examination of this subject will be provided in the chapter two.

The frequency of predatory dumping is considered rare or inconceivable. The OECD Report[131] (1989) mentioned that predatory dumping may occur but its occurrence is very infrequent. Dale[132] (1980), Hindley[133] (1991), Messerlin and Reed[134] (1995), Hoekman and Kostecki[135] (1995), Loehr[136] (1997), Hart[137] (1997), Trebilcock and Howse[138] (1999), and Niels[139] (2000) all confirm this hypothesis. Isaac and Smith[140] (1985), and Hoekman and Leidy[141] (1989) maintain that it is inconceivable for the predator to suffer

---

<http://128.233.58.173/estey/j-pdfs/editors2-2.pdf> (date accessed: 11 April 2003)

[129] Janusz A. Ordover & Robert D. Willig, "An Economic Definition of Predation: Pricing and Product Innovation" (1981) 91 Yale L.J. 8, as cited in Trebilcock and Howse, *supra* note 119 at 180.

[130] Niles, *supra* note 32 at 475-476.

[131] OECD, "Predatory Pricing" (1989) OECD Publications, online: OECD <http://www.oecd.org/pdf/M00007000/M00007601.pdf> (date accessed: 16 May 2003)

[132] Dale, *supra* note 20 at 16.

[133] Brain Hindley, "The Economics of Dumping and Anti-Dumping Action: Is there a baby in the bath water?" in P. K. M. Tharakan, ed., *Policy Implications of Antidumping Measures* (Amsterdam: North-Holland, 1991) at 29, as cited in Raj Krishna, "Antidumping in Law and Practice", World Bank Working Paper No. 1823 (September 1997), online: World Bank <http://econ.worldbank.org/docs/507.pdf> (date accessed: 25 April 2003)

[134] Patrick A. Messerlin & Geoffery Reed, "Antidumping Policies in the United States and the European Community" (1995) 105 Econ. J. 1565.

[135] B. M. Hoekman & M. Kostecki, *The Political Economy of the World Trading System: from GATT to WTO* (Oxford: The Oxford University Press, 1995), as cited in Loehr, *supra* note 109 at 8.

[136] Loehr, *supra* note 110 at 8.

[137] Hart, *supra* note 9 at 35..

[138] Trebilcock & Howse, *supra* note 119 at 182.

[139] Niels, *supra* note 32 at 483.

[140] R. Mark Isaac & Vernon L. Smith, "In Search of Predatory Pricing" (1985) 93 J. Political Econ. 320.

[141] Bernard M. Hoekman & Michael P. Leidy, "Dumping, Antidumping and Emergency Protection" (1989)

losses over a long period of time in order to establish the global monopoly while the recoupment of predatory losses is uncertain. However, some scholars, such as post-Chicago scholars[142] and Hartigan[143] (1994), try to explore conditions under which predatory dumping might be rational.

On the international regulatory level, preventing predatory dumping has long been the plausible justification for anti-dumping laws because it harms competition in the export market, arouses economic misallocation of productive resources in the importing country, damages the global economy,[144] and results in exporters' monopoly profits. Even though predatory dumping is not likely to occur frequently, some economic analysts suggest that "anti-dumping measures will be advisable if by action we can thereby prevent a monopoly arising; it is better still if the existence of our laws and the threat of their use deters attempts to monopolise".[145] Even though the current *Anti-Dumping Agreement* does not explicitly address the underlying rationale for the anti-dumping law and does not cover predation as a condition for dumping, economists insist that preventing predation remains the strongest economic justification for anti-dumping laws, in terms of protecting the consumer welfare.[146] Deardorff also maintains that "any behavior that will lead to greater monopoly power in the economy should be subject to discipline of some sort" and "the objection is even stronger in the international context".[147]

23:5 J. World T. 27.

[142] Niels, *supra* note 32 at 476.

[143] J. C. Hartigan, "Dumping and Signalling" (1994) 23 J. Econ. Behaviour & Organization 69.

[144] Willig, *supra* note 40 at 73.

[145] Holmes & Kempton, *supra* note 69 at 9.

[146] Aradhna Aggarwal, "Anti-Dumping Law and Practice: An Indian Perspective", ICRIER Working Paper No. 85 (April 2002), online: ICRIER <http://www.icrier.res.in/pdf/antiDump.pdf> (date accessed: May 25 2003)

[147] Alan V. Deardorff, "Economic Perspective on Antidumping Law", in Jackson and Vermulst, *supra* note 4 at 35.

By contrast, some argue such rationality. For example, Loehr considers that some conditions must be met in order to succeed in predatory dumping. First, the predator must have sufficient financial resources to sustain losses during the period of predation. Second, there exist barriers to new entrants once the predator has eliminated competitors. Third, the domestic market in the predator's home country is protected so that its monopoly position can be maintained. In fact, these conditions make predatory dumping unlikely. There are no documented cases of predatory dumping in the post-war period.[148] Therefore, "the proper policy response to predatory dumping is to ensure competitive markets with few barriers to entry". In order to prevent predatory dumping, the law protecting market access is much needed, instead of anti-dumping laws.[149]

In short, no one can argue over the necessity of abolishing international predatory pricing (if it really exists) because of its damaging effect on the global economy. The domestic predatory pricing is penalized by antitrust legislation and there is no reason why the same pricing behavior in international context should not be penalized while it is more harmful than domestic predatory pricing. However, the question is how to determine the existence of predatory dumping. This question requires more elaborate examinations of cost of production which will be provided in the next chapter.

(8) Persistent, Permanent, Long-Run or Continuous Dumping/Strategic Dumping

"Persistent or continuous dumping" means that a producer consistently sells abroad at

---

[148] Hoekman & Kostecki, *supra* note 135.
[149] Loehr, *supra* note 110 at 8.

lower prices than at home in order to maximize economic profits.[150] The sustained form of dumping can realistically only be achieved if the firm has a stable domestic monopoly and it is also protected from import competition by transportation cost or government restrictions. In this case, the dumper charges a higher price in the domestic market, where competition is weak (and demand is less elastic), and a lower price in the foreign market, where competition is stronger (and demand is more elastic). Therefore, persistent dumping can also be understood as a profit-maximizing domestic monopolist practicing price discrimination in separable markets with a higher elasticity of demand abroad than at home. Such dumping is harmful to the producers in the dumped country but it benefits its consumers from the lower priced products.

Continuous (or long-run) dumping under Viner's classification can be motivated: (1) by maintaining full production from existing plant facilities without cutting home prices; (2) by obtaining the economies of larger-scale production without cutting home prices; or (3) on purely mercantilistic grounds.[151] The advantage of continuous dumping to the consumers in the importing country must be considered in the long-run "more important than the injury to the domestic producer".[152] "If the domestic industry cannot compete with the dumped imports, it will be to the national interest that it shifts its capital and labor to the production of other commodities". Nonetheless, Viner admits that the case of permanent dumping is rare because the importing country cannot foresee the duration of

---

[150] Carbaugh, *supra* note 116 at 162.

[151] Viner, *supra* note 7 at 23-31. Viner considers that dumping to maintain full production from the existing plant and to obtain the economies of larger-scale production might be either short-run or long-run. Dumping on purely mercantilistic grounds is termed "mercantilistic dumping", which might be short-run or long-run, depending on the degree of permanence.

[152] Nicolaides also concludes in his study that permanent dumping raises the welfare level of the importing country even though such dumping causes adjustment costs to some domestic industries and their workers. See Nicolaides, *supra* note 125 at 118.

dumping and the uncertain duration of dumping disables producers and consumers in the importing country to adjust themselves to the permanence of the dumping prices.[153]

As I have illustrated in the foregoing section two, Dale, however, has criticized Viner's conclusions that only intermittent or short-run dumping is injurious to the importing country because the temporary cheap imports induce the misallocation of domestic resources. He maintains that the uncertainty of accumulative welfare benefits to the consumers of cheap dumped imports fails to justify Viner's theoretical basis for persistent dumping since there is no definite time distinction between short-run and long-run dumping, with the result that the cost of domestic industry exit and re-entry under long-run dumping cannot be determined and the be equalized with consumer benefits. Dale nevertheless mentions that "it is not possible to say what Viner's classification was intended to serve" and it might not be Viner's intention to explain that long-run dumping is justified by the continuity of low-priced imports even though it also causes a shift in the use of domestic resources.[154]

Fischer (1973) considers that continuous dumping may or may not be economically desirable, depending on whether the importing country has a "smoothly functioning system of adjustment from import-impacted industries".[155] Bajwa (1999) states that:

> Continuous dumping may not be predicated upon an assumption by the foreign producer that its costs over the long term will be cheaper if it manufactures a large number of items in order to realize maximum economies of scale. In times of slack

---

[153] Viner, *supra* note 7 at 138-139.
[154] Dale, *supra* note 20 at 8-9.
[155] Bart S. Fischer, "The Antidumping Law of the United States: A Legal and Economic Analysis" (1973) 5 L. Pol'y Int'l Bus. 85.

> demand, economists note that it is rational for a firm to continue to produce as long as it can sell its products at or above its short term variable costs. This is true only for limited periods; presumably over the regular course of the business cycle, the firm must not incur losses in the long term.[156]

Contrary to Viner's conclusions, some authors have found some theoretical ground for condemning two long-run dumping practices and justify the anti-dumping policy. In the case of dumping to maintain full production from existing plants without cutting domestic prices, Scherer and Ross[157] (1990), and Belderbos and Holmes[158] (1995) find "long-run dumping, which may be rational for a monopoly with capacity beyond domestic market needs, objectionable on efficiency grounds if it induces the exit of otherwise viable competitors".

With respect to the other long-run dumping aiming at obtaining the economies of larger-scale production without cutting home prices,[159] Willig[160] (1998) finds that it may be anti-competitive if firms in the importing country cannot obtain the scale economies because the dumper's home market is protected. He calls this "strategic dumping".[161] It injures domestic rivals through a strategy covering both "the pricing of the exports and restraints protecting the exporters' home market". It provides exporters with the cost advantage over foreign rivals because exporters have access to wider markets. The cost advantage will distort the competition and create profitable market

---

[156] Bajwa, *supra* note 112 at 4.
[157] F. M. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* (Boston: Houghton Mifflin Company, 1990), as cited in Niels, *supra* not 32 at 472.
[158] R. Belderbos & P. Holmes, "An Economic Analysis of Matsushita Revisited" (1995) 40 Antitrust Bulletin 825, as cited in Niels, *ibid.*
[159] This form of long-run dumping is a "dynamic version of dumping" to maintain full production from existing plants. See Niels, *ibid.*
[160] Willig, *supra* note 40 at 64-73.
[161] Such strategic behavior includes many types. See Holmes & Kempton, *supra* note 69 at 9-11.

power. The cost advantage also limits foreign rivals' opportunity to exploit the available economies of scale. Willig furthermore concludes that such strategic dumping results in a number of adverse effects on the importing country, such as causing suppliers in the importing country to operate with higher costs, and on the global economy because the dumper's gain from the exercise of market power in the importing country is exceeded by the "concomitant losses there of consumers' surplus".

Interestingly, Kong[162] (2003), in his recent article, maintains that welfare effects are ambiguous in the case of persistent dumping. Persistent dumping may reduce welfare in the home country under certain conditions, such as if the domestic market is relatively less concentrated, or if the products are close substitutes to each other. As a result, the existing international trade theory can not rationalize policies to prohibit such international price discrimination.

In short, the phenomenon of persistent dumping has been widely considered to be part of the price-discriminating behavior of international monopolists. This behavior requires "monopoly power"[163] and "market segmentation". The negative effects of such practices on the importing and the global economy can justify the anti-dumping policy.

(9) Systematic Dumping/Incidental Dumping and Accidental Dumping

In his analysis of the reform of *Anti-Dumping Agreement* for developing countries,

---

[162] Ying Kong, "Persistent Dumping, Competition and Welfare" (2003) 12:1 J. Int'l T. & Econ. Development 19.

[163] However, Nicolaides argues that the monopoly power might not be necessary. See Nicolaides, *supra* note 125 at 118.

Vermulst[164] (1999) provides an illustration of systematic and incidental dumping. The present *Anti-Dumping Agreement* covers two forms of dumping: "price dumping", meaning the selling at a lower price abroad than in the home market, and "cost dumping", meaning selling below cost of production in an export market. Based on the definitions, anti-dumping measures can be applied to both systematic and incidental dumping. He contends that *Anti-dumping Agreement 1994* should be revised to exclude situations of incidental dumping.

"Systematic dumping", explained by van Marion[165] (1993), is "dumping as a result of structural differences between economies", such as the market and non-market economy. The interface problem of international differences in market structure "may lead to systematic differences between producers' price levels on their home market and that on their export market". In this case, whether dumping causes damage depends on specific market conditions. Vermulst considers that "systematic, as opposed to incidental, price/cost dumping presupposes separation of markets and existence of closed home market". Under these two conditions, the foreign firm benefits from the openness of the dumped market and limits competition in its home market. As a result, dumping practices are considered unfair.

Contrary to systematic dumping, incidental dumping may result from different factors

---

[164] Edwin Vermulst, "Anti-Dumping and Anti-Subsidy Concerns for Developing Countries in the Millennium Round: Key Areas for Reform" (Seoul 8-10 June 1999) UNCTAD Workshop on Development of Positive Agenda, Positive Agenda for AD/CVD, Summary of Presentation, online: SICE <http://www.sice.oas.org/geograph/antidumping/vermulst.pdf> (date accessed: 26 April 2003)

[165] M.F. van Marion, *Liberal Trade and Japan: the Incompatibility Problem* (New York: Physica-Verlag, 1993), as cited in Giancarlo Gandolfo, *International Economics I: The Pure Theory of International Trade*, 2nd rev. ed. (New York: Springer-Verlag, 1994) 224-225.

and should not be deemed objectionable because the most evident case of it is dumping caused by calculation methods, insufficiently taking account of economic realities.[166] These factors include: (1) "differences in economic or business cycles in two markets"; (2) "price differentiation to initially enter a market"; (3) "exchange rate fluctuations"; and (4) "technicalities of dumping margin calculation methods". The case of dumping caused by calculation methods is most evident in developing countries. These countries may be more serious about the application of the anti-dumping investigations because of the lack of legal expertise and financial resources.[167] The lack might result in inappropriately applying calculation methods to the determination of existence of dumping. As a result, it is clear that incidental dumping should not be considered objectionable on this basis.

"Accidental dumping" proposed by Kostecki[168] (1991) is somewhat similar to "incidental dumping" in terms of dumping caused by exchange rate fluctuations. Accidental dumping means exporters with no deliberate intention to engage in an aggressive export pricing but some conditions make the selling price lower abroad than in the home market. First, a firm, which maintains a multinational pricing strategy, may price at different levels corresponding to the consumer's price sensitivity in various markets. Such a multinational pricing strategy increases the possibility of higher selling prices at home than abroad. Second, the change of demand conditions or exchange rates after goods have been produced may cause the occurrence of accidental dumping. Third, accidental dumping may arise from so-called "new product dumping", caused by the

---

[166] Aggarwal, *supra* note 146 at 33.
[167] Edwin Vermulst, "Adopting and Implementing Anti-dumping Laws: Some Suggestions for Developing Countries" (1997) 31:2 J. World T. 5.
[168] Kostecki, *supra* note 31 at 8-9.

lack of experience in pricing of a new product. With respect to unexpected exchange rate fluctuations resulting in the occurrence of incidental and accidental dumping, these two forms of dumping are alike.

(10) State-Trading, Cyclical and Market-Expansion Dumping

Willig[169] (1998) differentiates between various types of dumping according to monopolization or the creation of market power. There are two sources of monopolizing dumping: strategic and predatory. Non-monopolizing dumping covers state-trading, cyclical and market-expansion dumping. His classification has prevailed in the modern literature on the dumping regime. Therefore, I follow his framework and illustrate state-trading, cyclical and market-expansion dumping on a unified basis.

1. State-Trading Dumping

"State-trading dumping" arises from exports from state-owned industries in the non-market economy at low prices in order to earn hard currency. This form of dumping is inconsistent with the customary assumption that dumping is usually motivated by considerations of profits. The commercial considerations here are not paramount. Such dumping is most likely to be motivated by "random variations in international production and pricing patterns", including multiple exchange rates and arbitrary. Because the random uncertainties, which are unpredictable for competing firms,[170] obviously act as "a deterrent to investment in a market economy", state-trading dumping

---

[169] Willig, *supra* note 40 at 61-68.

[170] For instance, fluctuating prices by state-traders can give the wrong signals to investors. See Jorge Miranda, "Should Antidumping Laws be Dumped?" (1996) 28:1 L. Pol'y Int'l Bus. 255.

is considered objectionable in the present anti-dumping legislation.[171]

Willig maintains that home prices in the case of state-trading dumping are unreliable because exchange rates in the non-market economy are meaningless and the economic market forces do not determine home prices. As a result, dumping here is determined by "comparing export prices and cost-based constructed values". He further states that:

> [w]ith a nonconvertible currency, the exporting nation needs to acquire hard currency to finance its own imports from countries in the trading system of the free world. The exporting nation can gain from foreign sales priced below cost-based constructed values owing to the additional benefits derived from the imports made possible by the hard currency that the exports provide. Thus incentives to undertake such international sales will reflect the relative scarcity values of different hard currencies to the exporting nation.[172]

2. Cyclical Dumping

"Cyclical dumping" means producers selling exports at unusually low prices in the presence of excess production capacity owing to depressed demand. It is typically caused by "international economic waves giving rise at a particular moment to differences in the level of demand on various sub-markets".[173] Exporters usually engage in cyclical dumping by selling below full or marginal cost during a recession in order to keep plants in business. Some argue that the central issue of cyclical dumping is not the existence of cyclical sales below full cost plus a reasonable profit. The problem is "if some producers can take advantage of other's market in down turns but do not allow these other

---

[171] Holmes & Kempton, *supra* note 69 at 12-13.
[172] Willig, *supra* note 40 at 63.
[173] Jepma and Rhoen, *supra* note 123 at 222.

producers to do the same". Even though cyclical dumping is beneficial to consumers in the dumped market, it is objectionable if foreign firms cannot benefit from cyclical peaks or from the ability to off load their goods on the dumper's home market during a downturn.[174]

In fact, the notion of dumping to stabilize production over the business cycle was early recognized by Viner. Exporting firms may engage in dumping surplus stocks[175] abroad in order to obtain the economies of operation at full capacity without cutting home prices. Viner considered such behavior "the most prevalent type of dumping".[176] However, Ethier (1982) argued that Viner only treated it as a "distinct motive".[177]

Haberler (1937) theoretically treated cyclical dumping as "a special case of price discrimination" and his view was well accepted over thirty years until the early 1980s.[178] Ethier nevertheless argued that both Viner and Haerler disregarded the fundamental considerations: "imperfectly adjusting factor markets in the presence of changing conditions of product demand".[179] He found that the nation with higher fixed costs, which are "adjustment costs", will engage in dumping. Such adjustment costs "prevents a firm from fully adjusting its output to fluctuating demand and thus excess and dumping may occur if the realized demand is too low compared to its expectation".[180] Based on

---

[174] Holmes & Kempton, *supra* note 69 at 12.
[175] Surplus stocks are intentionally produced in order to be dumped. In this regard, such dumping is different from dumping motivated by disposing of over-stocking. See Viner, *supra* note 7 at 28.
[176] *Ibid.*
[177] Ethier, *supra* note 10 at 489.
[178] Haberler, *supra* note 19 at 310, as cited in Satya P. Das, "Market uncertainties and cyclical dumping" (1992) 36 Eur. Econ. Rev. 71. Haberler actually termed the form of dumping "trade-cycle dumping".
[179] Ethier, *supra* note 10 at 489.
[180] Das, *supra* note 178 at 72.

Ethier's model of cyclical dumping, Davies and McGuinness[181] (1982) examined the factor of price uncertainty in the foreign market and Hillman and Katz[182] (1986) illustrated the factor of demand uncertainty in the dumper's home market.

Kostecki described the motivation for cyclical dumping as stabilizing the exporter's production over the business cycle. The exporter may practice cyclical dumping to "cover the fixed costs" or "to ensure job security".[183] Many cases were found in European steel industries in the mid-1980s.[184]

Das[185] (1992) formulated a theory of the exporting firm engaging in cyclical dumping in the forms of price discrimination and pricing below the marginal cost because of the fluctuating demand in home and foreign markets and the firm's inability to make adjustments of its output to these fluctuations. Two significant points are made in his study. First, the form of cyclical dumping is extended to cover pricing below marginal cost. He treated the traditional form of price discrimination and the type of sales at less than marginal cost in a unified framework. Second, he identified simultaneous demand uncertainty in home and foreign markets, giving rise to the incidence of cyclical dumping. However, he didn't address the welfare implications of cyclical dumping even though he mentioned that cyclical dumping is considered unfair by producers in foreign markets.

---

[181] Stephen W. Davies & Anthony J. McGuinness, "Dumping at less than marginal cost" (1982) 12 J. Int'l Econ. 169, as cited in Das, *ibid.*

[182] Arye L. Hillman & Eliakim Katz, "Domestic uncertainty and foreign dumping" (1986) 19:3 Can. J. Econ. 403, as cited in Das, *ibid.*

[183] Kostecki, *supra* note 31 at 7.

[184] See David G Tarr, "Cyclical Dumping: the case of steel products" (1979) 9:1 J. Int'l Econ. 57; "Cyclical Dumping of Steel Products: another look" (1982) 12:3 J. Int'l Econ. 377.

[185] Das, *supra* note 178 at 71-72.

Willig maintains that exporters in the presence of excess production, owing to a downturn in demand, may engage in cyclical dumping by the form of price discrimination or pricing below the full cost but above the marginal variable cost. The motivation arises from "unusually low marginal costs" or "opportunity costs of production" resulting from excess production capacity. Unusually intense degrees of competition among competing firms possessing excess capacity may also result in the incidence of cyclical dumping. Besides, reducing the social costs of layoffs by additional production stimulated by unusually low-priced exports may be part of the motivations.[186]

3. Market-Expansion Dumping

Market-expansion dumping generally denotes selling at a lower price for export than domestically in order to gain market share. It is a form of price discrimination. For a small firm without reputation in the foreign market, price cutting is the normal way of entering a new market. In this sense, this form of dumping is also called "market opening dumping". It is said that such dumping "may be facilitated by closure of the exporter's home market but it need not be".[187]

Willig[188] precisely defines market-expansion dumping as a firm exporting at a price lower than the one it charges in the domestic market by cutting the markup, given that it faces a higher price elasticity of demand in the foreign markets. This is the type of dumping based on price discrimination. Such dumping is motivated by expanding export

---

[186] Willig, *supra* note 40 at 62-63.
[187] Holmes & Kempton, *supra* note 69 at 11.
[188] Willig, *supra* note 40 at 61-62.

sales and earning additional profits by pricing exports at a smaller margin above marginal production and transport costs. There are some factors contributing to differences in the price elasticities of demand in the home and foreign markets, such as stronger buyer preferences for the goods in the home market, a larger variety of alternative goods in the foreign markets, the firm's share of the foreign country's market smaller than its share of the home market, and rivals more competitive abroad than at home. Such dumping adversely impacts on consumers in the exporting country who pay higher prices but it benefits consumers in the importing. It may also benefit home consumers "by expanding export market opportunities and thus making possible lower costs of production and greater investments in new products and capacity".

Irwin[189] (1998) examines market-expansion dumping in the semiconductor industry in the 1980s. Producers in the industry with scale economies from learning by doing may price products below cost early in a product cycle to expand output and reduce future costs. Such dumping can be expected shortly after a new product is introduced. He considers that such dumping is not worrisome from an antitrust standpoint. A firm prices below cost while its market power is at its peak. As long as such forward pricing does not deter entry by competitors, it is not anti-competitive behavior. He concludes that there is no evidence of market-expansion dumping in his study of the semiconductor industry in the 1980s.

In Willig's discussion about differences in the elasticities of demand in the domestic and foreign markets, he mentions the occurrence of "reciprocal dumping". He states that:

---

[189] Douglas A. Irwin, "The Semiconductor Industry" in Robert Z. Lawrence, ed., *Brookings Trade Forum 1998* (Washington, D.C.: Brookings Institution Press, 1998) 57 at 173-200.

> even though the overall market demands at home and abroad may be equally price elastic, the demands facing the firm will be more price elastic abroad. This situation may lead to "reciprocal dumping", which may lower prices for consumers in both affected countries.[190]

The possibility of "reciprocal dumping" was first noted by James Brander[191] (1981). He examines reasons for two-way trade in identical products owing to strategic interaction among firms. James Brander and Paul Krugman[192] (1983) further develop a reciprocal dumping model of international trade. When two monopolies, in the imperfectly competitive markets with the existence of transportation costs, produce the same good, one in home market and one in foreign market, and they have the same marginal cost, they sell a few units at a price that is lower than each one's own home market price, but still above marginal cost. The situation in which dumping leads to two-way trade in the same product is named reciprocal dumping.[193] Such dumping is considered rare in international trade because it is obviously wasteful to ship the identical goods back and forth when transportation is costly. However, the initially pure monopolies involved in such dumping may lead to some competition and the benefits resulting from the increased competition may offset the waste of resource in transportation. The economic welfare effect of such trading behavior on each nation is therefore uncertain.[194]

---

[190] Willig, *supra* note 40 at 62.
[191] James A. Brander, "Intra-Industry Trade in Identical Communities" (1981) 11 J. Int'l Econ. 1.
[192] James A. Brander & Paul Krugman, "A 'Reciprocal Dumping' Model of International Trade" (1983) 15 J. Int'l Econ. 313.
[193] Krugman and Obstfeld, *supra* note 1 at 143.
[194] *Ibid.*

Richard Boltuck[195] (1991) however argues that reciprocal dumping should be treated separately even though it is a subcategory of market-expansion dumping under Willig's classification. Reciprocal dumping arises when a firm attempts to enter oligopoly markets. Even though such dumping beneficially increases competition, it also brings a negative welfare effect due to "inefficient cross-hauling of homogenous products". His conclusion argues that the welfare effect of such dumping is ambiguous.

As I have illustrated in the foregoing section, Willig categorizes these three forms of dumping as non-monopolizing dumping, which does not aim at monopolization or the creation of market power. Although non-monopolizing dumping is not considered harmful to the world welfare, there exists one exception if dumping transfers some profits or rents to exporters. The rents may give exporters advantages over factors of production, such as "holders of equity capital in oligopoly or monopoly firms", "owners of tangible or intangible property utilized by exporters", or "workers that exporters employ".[196] In this situation, the social loss and injury to domestic importing-competing firms outweighs the benefits to domestic buyers.[197]

Under the *Anti-Dumping Agreement 1994*, dumping, though not illegal per se, is actionable if it can be shown to have caused injury. It has been accepted that dumping defined by this Agreement covers these three forms of economic circumstances:

---

[195] Richard Boltuck & Robert Litan, eds., *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington, D.C.: Brookings Institution Press, 1991), as cited in Robert Z. Lawrence, ed., *Brookings Trade Forum 1998* (Washington, D.C.: Brookings Institution Press, 1998) 215.

[196] Willig, *supra* note 40 at 67.

[197] In this regard, I have provided an illustration in the foregoing section two. Also see Holden, *supra* note 42 at 10.

state-trading dumping, cyclical dumping and market-expansion dumping.[198] Willig however argues that the affected exporting country may also adopt anti-dumping measures when the importing country imposes the anti-dumping duty on the dumped exports which result in rent shifting. He states that:

> The ensuing mutual antidumping enforcement postures of the involved nations may effectively separate the various national markets, eliminating opportunities for costs to be saved and innovations to be widely marketed through international operations, and enlarging the market power possessed by domestic firms in each nation. As a matter of economic logic, under these circumstances, the mutual threat of antidumping enforcement could stifle international competition, to the detriment of consumers and efficient suppliers in all countries involved.[199]

Section Four: Concluding Remarks

Since Viner comprehensively evaluated the phenomenon of dumping in international trade, the notion of dumping has been widely accepted as "price discrimination between national markets" or "selling the identical product at a lower price abroad than at home". Such a traditional approach to analyzing dumping characterizes dumping as "international price discrimination" and "an examination of monopolistic price discrimination between national markets". Two conditions must be met for the occurrence of dumping: (1) the industry must be imperfectly competitive; and (2) the markets must be segmented. To determine the existence of dumping and a dumping margin, the rule of "price-discrimination test", a comparison of selling prices between home and foreign markets, is adopted under the traditional theory. There is also an

---

[198] Edwin Vermulst, *UNCTAD Course on Dispute Settlement, WTO, Module 3.6 Anti-dumping Measures* (March 2003), UNCTAD/EDM/Misc.232/Add.14 at 4, online: United Conference on Trade and Development <http://www.unctad.org/en/docs//edmmisc232add14_en.pdf> (date accessed: 20 April 2003)

[199] Willig, *supra* note 40 at 68.

alternative to the establishment of the price comparison in the absence of the domestic selling price, namely the constructed-cost method of arriving at a fair home price, or the comparison with sales to the third markets. Dumping below cost of production does not attract much attention in the conventional analysis of dumping behavior.

The current treatises on dumping analyses and the legal concern have shifted the focus to explore below-cost dumping practices. Under *Article VI of GATT 1994* and the WTO *Anti-Dumping Agreement*, dumping is expressed as the sale of products for export at a price less than "normal value", meaning roughly the price for which those same products are sold on the "home" or "export markets". Dumping is usually considered to be separated into two categories: "price dumping" and "cost dumping". Price dumping represents the conventional theory of dumping as international price discrimination. Cost dumping denotes sales in foreign markets at prices below "average cost of production". Such illustrations of price and cost dumping look simple. However, cost dumping, in fact, arouses much controversy over the concept of "cost of production". In practice, it is technically difficult to determine the cost of production in multinational firms' dumping behavior and to allocate costs among products if a firm produces multiple products. Additionally, there is no guideline provided by *Article VI of GATT 1994* for the calculation of cost-of-production. There also exist arguments over dumping below average cost and below marginal cost. These factors all contribute to the complexity of concepts of cost-of-production. To disentangle the complexity, the comprehensive examination on this subject will be provided in the next chapter.

The classification of dumping in general has not changed much since Viner's framework

even though his classifications have been criticized for the lack of the utilitarian merit. Most proposed classifications are either motive-based or time-based to interpret and label dumping practices with focus on certain phenomena. Based on his framework, there are some new terminologies developed to address dumping under certain conditions or with certain motivations. For example, cyclical dumping means dumping to stabilize production over the business cycle and this notion was recognized by Viner as short-run or long-run dumping motivated by maintaining full production from existing plant facilities without cutting home prices. The new analyses and development also re-interpret the welfare effect of different forms of dumping, which is different from Viner's conclusions. For instance, his view on harmlessness of sporadic dumping is rejected. Indeed, his categorizations have been considered the fundamentals of expertise in the economic and legal analyses of dumping. Willig further supplements his framework with focus on monopoly power involved in dumping practices. As a result, Willig's classification has been dominant in the modern literature of dumping regime.

Through different bases for classifying dumping behavior and different approaches to analyzing economic phenomena of dumping, various forms of dumping are presented. Some represent the historical significance but are not the contemporary concern. Freight dumping is an example. Some have long attracted attention and are enthusiastically discussed to be the justification for anti-dumping laws. Predatory dumping exemplifies the case. Some are the major concern within anti-dumping legislation, such as state-trading, cyclical and market-expansion dumping. The comprehensive examination of different forms of dumping provided here lays the foundation for further analyses of rationality of the anti-dumping policy and legislation.

In summary, the economic phenomenon of dumping in international trade has long been a worry for trading nations because dumping practices are deemed unfair trading behavior and damage the welfare of importing countries. To circumvent the harmful effect resulting from dumping practices, the anti-dumping mechanisms must be provided and regulated on the international level. However, this assumption has been criticized. Based on theoretical and empirical analyses of definitions and forms of dumping, the evaluation of anti-dumping policies and legislation will be explored subsequently.

Chapter Two

Analysing Dumping Prices and Cost of Production

As illustrated in Chapter One, there are two schools of thought on definitions of dumping in contemporary legal and administrative literature. One is the traditional "international price discrimination", in which a foreign firm charges different prices in the export and its home markets. The other definition denotes dumping as export sales at prices below costs of production. This definition of dumping is usually referred to as "predatory dumping", which is most condemned in the rational justification for anti-dumping laws. In international trade, Slayton (1979) describes dumping as the sales of products for "export at prices lower than those charged to domestic buyers, taking into account the conditions and terms of sale".[200] Hoekman and Leidy[201] (1989) find that dumping may occur if the export price of goods is less than "total average costs or marginal costs".

Evenett (2000) also separates dumping, defined in *Article VI of GATT 1994* as sales in overseas markets at prices below "normal value", into two categories: "price definition", meaning the lower selling prices charged to foreign buyers than to domestic buyers, and "cost definition", meaning sales in foreign markets at prices below the average cost of production.[202] These two definitions acknowledge the significance of prices in determining what is dumping. They are also subject to much controversy. In order to evaluate dumping practices and the rational justifications of dumping, I examine the

---

[200] P. Slayton, "The Canadian Legal Response to Steel Dumping" (1979) 5 Can.-U.S. L. J., as quoted in Fred Lazar, "Antidumping Rules following the Canada-United States Free Trade Agreement" (1989) 23:5 J. World T. 45.

[201] Hoekman & Leidy, *supra* note 141.

[202] Simon J. Evenett, "Antidumping: Regulating the Price of Imports", online: World Bank Group <http://www1.worldbank.org/wbiep/trade/c_papers/evenett_antidumping.pdf> (date accessed: 30 April 2003).

"price" component of price-based dumping and the "cost of production" component of cost-based dumping.

Section One: International Price Discrimination

The notion of "price discrimination" can be contemplated on two levels: domestically and internationally. There is a general apprehension that price discrimination on these two levels is a common business activity and that such an activity is not deemed, by economic theory, detrimental to the general welfare.[203] However, the forms of domestic price discrimination are prohibited by antitrust laws, for example, in Canada[204] and in the United States.[205] The practices of international price discrimination are regulated by anti-dumping laws; for instance, *Article VI of GATT 1994*, the *Anti-Dumping Agreement*[206] and the Canadian anti-dumping law.[207] The following explores the concept of international price discriminatory practices and introduces briefly the phenomenon of domestic price discrimination.

(1) Domestic Price Discrimination

One economic definition of price discrimination is provided by Dunlop, McQueen and Trebilcock as, follows:

> It is discriminatory to charge significantly different product prices to two or more customers when there are no significant differences between the costs to the seller

---

[203] Willig, *supra* note 40 at 59.
[204] *Competition Act*, R.S.C. 1985, c. C-34, ss 50(1)(a), (b).
[205] *Clayton Act*, as amended by the Robinson-Patman Act, ss 2, 3; 15 USC para. 13 (1988), as cited in Trebilcock & Howse, *supra* note 119 at 548.
[206] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.*
[207] *Special Import Measures Act*, R.S.C. 1985, c. S-15, s. 2(1) [hereinafter *SIMA*].

of supplying those customers.[208]

In order to price discriminate, a seller must have some degree of "market power" under conditions of imperfect competition, so that he can sell an identical good in different markets for different prices.[209]

On the domestic level, price discriminators create both a lower priced market and a higher priced market within the same country. The practices of domestic price discrimination are forbidden because of two seeming grounds. One is that such activities impose welfare losses on society, in that a monopolist's total produced and sold output may decrease. The other is that the social cost imposed on society may be wasteful when the monopolist engages in segregating its markets and computing its customer's elasticities of demand; the social cost resulting from the competing sellers' lure of acquiring monopoly profit may be higher. However, the validity of these justifications for restricting domestic discriminatory pricing has been much debated.[210] Since the domestic discriminatory pricing regulated by antitrust laws is not the focus of this paper, it is unnecessary to go further on this topic.

(2) International Price Discrimination

On the international level, dumping is traditionally defined as "price discrimination between national markets" or "international price discrimination". The distinction between domestic and international price discrimination is that dumpers create only a

---

[208] B. J. Dunlop, D. McQueen & M. J. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) 208.
[209] Trebilcock & Howse, *supra* note 119 at 177.
[210] *Ibid.* at 178. Also see Michael J. Trebilcock, *The Common Law of Restraint of Trade* (Toronto: Carswell, 1986) 364-365.

lower priced market in the foreign country, whereas domestic price discriminators create both a lower-priced market and a higher-priced market within the same country.

Viner's theory represents the traditional analysis of dumping and it, mainly from the importing country's point of view, is concerned about the welfare effects on the importing country and the misallocation of domestic resources in the importing country. Other than Viner's traditional approach to illustrating "international price discrimination", some scholars have made efforts to evaluate it through different modern models since the early 1980s.

Viner[211] (1923) defines dumping as price discrimination between national markets, covering common and rare forms of "international price discrimination". These forms have been explained in the preceding chapter. He also considers that types of price discrimination do not necessarily denote unfair competitive practices[212] and that, except for sporadic dumping or other exceptions, "the dumping is being practiced by concerns or combinations in substantial monopoly control of their domestic markets".[213] His contemporary, Haberler[214] (1936), follows his approach to analysing dumping on the international-price-discrimination ground.

Caves and Jones[215] (1977) provide the standard theory for the phenomenon of dumping in international trade as "monopolistic price discrimination". This theory seems to focus

---

[211] Viner, *supra* note 7 at 4-5.
[212] *Ibid.* at 8.
[213] *Ibid.* at 100.
[214] Haberler, *supra* note 19 at 297.
[215] Richard E. Caves & Ronald W. Jones, *World trade and payments: an introduction*, 2nd ed. (Boston: Little, Brown, 1977) 152-154.

on "accidental differences in country demand". When a profit-maximising firm encounters a higher elasticity of demand abroad than at home, it may discriminate between foreign and domestic markets by charging a lower price in the foreign market.[216]

Brander and Krugman[217] (1983) present their model of dumping as international price discrimination by oligopolistic rivals. They survey how much the rivalry of oligopolistic firms contributes to dumping of goods in foreign markets and reveal that such dumping can be "reciprocal", each firm dumping the identical product into the other firms' home markets, because the transportation costs distort the firms' comprehension of firm-specific demand elasticities between markets.

Weinstein[218] (1992) extends the analysis of Brander and Krugman and states that the existence of transportation costs necessitates the occurrence of unilateral dumping in bilateral intra-industry trade. He also finds that the existence of large domestic oligopolistic firms has a tendency to stimulate foreign firms to dump goods into the domestic market, and that the dumped goods flow from the more competitive market to the less competitive one.

Staiger and Wolak[219] (1991) and Hartigan[220] (1994) also contribute similar models of oligopolistic rivalry to demonstrate dumping as "international price discrimination".

---

[216] Brander & Krugman, *supra* note 192 at 313.
[217] *Ibid.*
[218] David E. Weinstein, "Competition and unilateral dumping" (1992) 32 J. Int'l Econ. 379.
[219] Robert W. Staiger & Frank A. Wolak, "The effect of domestic antidumping law in the presence of foreign monopoly" (1992) 32 J. Int'l Econ. 265.
[220] Hartigan, *supra* note 143.

Sun[221] (1995), in his study of why firms dump in one or more markets, defines those above models, mainly focusing on dumping in the traditional meaning of price discrimination, as an application of the "structural approach". This approach counts on the fundamental structures of the competing firms. It usually leads to the conclusion that the practice of price discrimination in various markets is beneficial and represents the inevitability of intrinsic characteristics of the markets.

Niles (2000) explains the theory of international price discrimination through the industrial organisation approach and states that:

> Conventional theories of price discrimination assume a monopoly and the impossibility of arbitrage between segregated markets. Nevertheless, since the 1970s some models have established that oligopolists and monopolistic competitors may also practice price discrimination. Thus, the often heard claim that dumpers are foreign monopolists does not necessarily hold....Dumping as international price discrimination can best be analysed as a third-degree case, where customers are divided into separate markets, each of which has its own continuous demand function.[222]

(3) **Summary**

Viner's theoretical and empirical treatise on dumping offers the traditional approach to analysing "price discrimination" between national markets; but some contributors attempt to interpret the notion of "price discrimination" by various modern models and to enrich possible patterns of price-discrimination activities in the international trade cycle. These modern contributors usually arrive at conclusions different from the conventional wisdom.

---

[221] Xiaolun Sun, *The Effects of Antidumping Law Enforcement* (D. Phil. Dissertation in Agricultural and Resource Economics, University of California at Berkeley 1995) [Ann Arbor, Michigan: UMI, 2003].
[222] Niels, *supra* note 32 at 474.

For instance, Weinstein concludes that firms in more competitive markets tend to dump unilaterally, compared to firms in less competitive markets. Such a finding is contrary to the traditional perception that firms monopolising the protected home market are capable of succeeding in exporting into relatively competitive world markets.[223] However, these modern models unquestionably remain based on the traditional principle of "price discrimination" when studying international price-discriminating activities.

Section Two: Prices below the Cost of Production

In addition to the conventional price definition, today the terminology of "dumping" has been extended to encompass the cost definition, meaning exporting at prices below the cost of production. Paragraph one of *Article VI of GATT 1994* and paragraph 2 of Article 2 of the *Anti-Dumping Agreement* provide the definition of dumping, meaning the exporting of a product at a price lower than its "normal value". The conception of "normal value" comprises not only the product's home price but also its highest price in a third country and its cost of production under certain circumstances. In practice, the price comparison between the home and the export prices of the identical good under the anti-dumping investigation is based on the cost of production, in the absence of the domestic price available in the exporting country. In this circumstance, the approach of a "cost-based constructed value" is adopted. The constructed value is usually built on the concept of "full cost", including fixed and sunken costs of tangible capital and R&D, and a margin of normal profit.[224]

Selling abroad at prices below the cost of production is usually considered "predatory

[223] The traditional perception of dumped goods flow can be found in Haberler, *supra* note 19 at 301.
[224] Willig, *supra* note 40 at 60.

dumping". Predatory dumping denotes that "a dominant firm sets its prices at non-remunerative levels long enough to drive rivals or entrants from the market, and recoups its losses afterwards by charging monopolistic prices".[225] Ordover and Willig[226] (1981) illustrate the economic definition of predation as "systematically pricing below cost with a view to intimidating and/or eliminating rivals in an effort to bring about a market price higher then would otherwise prevail".

Indeed, preventing predatory pricing by foreign competitors from harming competing firms in the importing country has long been the plausible justification for strong anti-dumping laws. However, some argue that there is little evidence of its existence for practical cause[227] and that the frequency of its occurrence is relatively low.[228] Some analyses show that the scope for predatory pricing in the international context is quite finite.[229] These arguments are many. First, the predator must establish its monopoly by driving domestic competitors from the market, while deterring new competing entrants. This will be difficult if the domestic market is characterised as having low barriers to exit and low barriers to entry. Second, to sustain its monopoly, the predator must continue pricing low enough to deter entry forever, so that the recoupment of predatory losses is uncertain.

In order to grasp the full significance of dumping below the cost of production, the following examines four aspects of such behavior: definitions of cost, models illustrating

---

[225] Niels, *supra* note 32 at 475.
[226] Ordover & Willig, *supra* note 129 at 8.
[227] James R. Markusen et al., *International Trade: Theory and Evidence* (New York: McGraw-Hill, 1995) 355.
[228] Trebilcock and Howse, *supra* note 119 at 181.
[229] Hart, *supra* note 9 at 35.

below-cost dumping under different circumstances, below-marginal-cost dumping, and arguments over below-cost pricing and predation.

(1) **Definitions of Cost**

For the purpose of understanding the economics of below-cost dumping, the distinction between different definitions of cost must be clarified. The definitions of cost are usually divided into two categories on the subject of below-cost pricing: "average cost" (or "fully allocated cost") and "marginal cost" (or "short run variable cost"). The average cost means the amount spent on producing each unit of output. It is calculated by dividing the total level of cost by the level of output. The marginal cost, on the other hand, is defined as the amount spent on producing one extra unit. It is the increase in total cost when one more unit is produced.

Most analyses of below-cost dumping focus either on the below-cost-of-production basis or on the below-marginal-cost basis; and few provide a comprehensive examination of below-cost dumping that is based on these two various definitions of cost. Jackson and Vermulst[230] (1989) separate their discussion of dumping below cost into two parts, and comprehensively evaluate patterns of dumping below average cost and below marginal cost. The following interpretation is based on their framework.

1. Below Average Cost

Jackson and Vermulst explore possible situations in which dumping below average cost may occur: "in periods of slack demand", "the different structure of costs for domestic

---

[230] Jackson & Vermulst, *supra* note 4 at 29-39.

firms and exporters" and "differences in labor market institutions". In their survey, firms normally engage in below-average-cost pricing as a "short run response to a depressed market", and such pricing behavior should not exemplify the market imperfection. Perfectly competitive firms may continually produce and sell at prices below their average cost, as long as prices exceed their marginal cost. On the other hand, imperfectly competing firms are less likely to do this. Such an explanation applies to both domestic and international sales while the structure of costs is the same for domestic firms and exporters. Thus, it is not rational, in periods of slack demand, to label exporters pricing below average cost as dumpers and to offset their sales with anti-dumping duties while domestic firms behaving in the same way are not condemned.

Dumping below average cost may arise from the different structure of costs for domestic firms and exporters, and from differences in labor market conditions. The former presents the foreign exporters' view on a larger portion of their costs as fixed, unlike domestic firms'; and exporters' responses are presumed to continue to produce even at prices below average cost. The differences of the use of labor between Japan and the U.S. provide an example of the phenomenon of the latter; and such differences encourage Japanese firms to produce and price below average cost. Jackson and Vermulst conclude that anti-dumping duties are not the first policy response to dumping below average cost.

2. Below Marginal Cost

With respect to dumping below marginal cost, they show four scenarios where such behavior may occur: (1) short-run rigidities and uncertainties; (2) sales maximisation; (3) predation; and (4) competition for market share. Except for (1), the other scenarios all

include short-run losses of profits in exchange for other purposes, allowing foreign exporters to price below short-run marginal cost.

The uncertainty about export markets and the need for firms to decide production in advance is explained by Davies and McGuiness[231] (1982). The uncertainty and need may give rise to pricing below marginal cost. Jackson and Vermulst, however, critique their mis-definitions of marginal cost and/or price. Their explanation simply shows that, in certain circumstances, short-run marginal cost may be different from long-run average cost. As a result, their finding is questionable.

With regard to pricing below marginal cost motivated by sales maximisation and predation, Jackson and Vermulst confirm that motivation may encourage foreign exporters to price below marginal cost, and that such behavior would be subject to anti-dumping duties.

Jackson and Vermulst provide two examples to interpret the last scenario, where foreign exporters price below marginal cost for the purpose of gaining market share. Both producers of "experience goods" and "learning by doing" firms, particularly in high technology industries, may engage in such practices with special incentives to attract new consumers and to experiment on various pricing policies, for gathering valuable information on how to conduct production. Even though both behaviors would be accused of dumping, neither can be deemed harmful to society.

---

[231] Davies & McGuinness, *supra* note 181 at 169.

In short, Jackson and Vermulst propose a comprehensive analysis of dumping below cost, even though there are some arguments over their findings. For example, the different treatments for "experience goods", priced below marginal cost on the domestic and international levels, may be open to question if their findings are sustained. Nevertheless, their analysis represents a clear interpretation of the notion of cost; and it is beneficial to policy-makers when they contemplate the rationality of anti-dumping policies.

(2) Models of Demonstrating "Below-Cost-of-Production" Behavior

The term "cost of production" in the economic sense is commonly used to refer to "total costs", made up of "fixed costs" and "variable costs". In other words, it means the amount spent on producing a given level of output. The total costs are calculated by total fixed costs plus total variable costs. Fixed costs are production expenses that are independent of the level of output, including loan payments, security costs, and marketing and administration costs. In general, fixed costs do not change with changes in the quantity of output produced. The same fixed cost is incurred at any and all output levels; but the average fixed cost declines as the output level increases. On the other hand, variable costs are production expenses that are dependent on the level of output, including direct labor costs, variable overhead, and depreciation. If output increases, variable cost will then increase. If there is no production, there is no variable cost.

Since the conception of dumping in legal and economic regimes has been extended to include exporting at prices below the cost of production, some literature has shown an interest in analysing the behavior of pricing below the cost of production. The following demonstrates modern models on this subject.

Viner (1923) defines "predatory or malignant dumping" as sales at dumping prices in a given market with the objective of eliminating its competitors. Such predatory pricing is likely to be practiced only temporarily or intermittently. Even if dumping is motivated by predatory objectives, it may result in an additional non-predatory outcome.[232] He also mentions that sales at prices below cost of production must be of limited duration, whereas dumping may carry on indefinitely. The greater concern over dumping, than sales at prices below cost of production, is attributed to assumptions that these two are identical, or that examples of the latter are contained in instances of the former and that there exists the administrative difficulty determining foreign cost of production.[233]

Ethier[234] (1982) has developed a new theory, on a cyclical or intermittent basis, to explain an alternative definition of dumping: "export sales at a price below the cost of production", as "an integral part of the relationship between domestic factor markets and international commodity markets in a world of uncertainty and sluggish adjustment". There are three key determinants of dumping involved in this theory: "international differences in laborer-manager endowments", "the wage equivalents of unemployment in both countries" and "the pattern of demand uncertainty".

Eichengreen and van der Ven[235] (1984) provide a model in which profit-maximising firms set below-cost prices on a cyclical basis to replenish their customer base. They also

---

[232] Viner, *supra* note 7 at 122.
[233] *Ibid.* at 122 and 147.
[234] Ethier, *supra* note 10 at 487.
[235] Barry Eichengreen & Hans van der Ven, "U.S. Antidumping Policies: The Case of Steel" in Robert E. Baldwin & Anne O. Krueger, eds., *The Structure and Evolution of Recent U.S. Trade Policy* (Chicago: University of Chicago Press, 1984) 67-103.

explain that the existence of costs of adjustment associated with changes in output causes firms to price below cost.

Gruenspecht[236] (1988) demonstrates "experience effects" as a motivation for sustained below-cost sales by profit-maximising firms. He states that the importance of "learning effects" should be taken into account while the measurement of economic cost of production is being constructed. Providing for comparable treatment of investment in learning and capital equipment is much needed for constructing the "cost of production" test.

Clarida[237] (1993) develops a model, showing that firms may produce at a price that falls short of average total cost in a cyclical downturn. When "there is a surge in demand for the dumped product and a rise in total production of the dumped product in the dumping country", foreign firms may engage in practices of selling abroad at prices below cost of production.

Sun[238] (1995) applies the model of "uncertainty approach" to explain "below-cost-pricing". Those models proposed by Ethier (1982), Davies and McGuinness[239] (1982), Blair and Cheng[240] (1984), Bernhardt[241] (1984), Hillman and Katz[242] (1986), and Lahiri and Sheen[243] (1990), are categorised as applications of the

---

[236] Howard K. Gruenspecht, "Dumping and Dynamic Competition" (1988) 25 J. Int'l Econ. 225.
[237] Richard H. Clarida, "Entry, Dumping, and Shakeout" (1993) 83 Am. Econ. Rev. 180.
[238] Sun, *supra* note 221.
[239] Davies & McGuinness, *supra* note 181.
[240] R. D. Blair & L. Cheng, "On Dumping" (1984) 50 S. Econ. J. 857.
[241] D. Bernhardt, "Dumping, Adjustment Costs and Uncertainty" (1984) 8 J. Econ. Dynamics & Control 349.
[242] Hillman & Katz, *supra* note 182 at 403.

"uncertainty approach". In this uncertainty-approach model, production decisions must be made in advance so that "unexpected changes and/or non-zero adjustment costs" make it beneficial for firms to over-produce and to price below cost of production.

Hartigan[244] (1996) has developed a modern theory depending on "a capital market imperfection and an asymmetry in financial resources that favour the foreign firm". The asymmetry in financial resources may encourage foreign firms to utilise profits generated in the foreign market to engage in predatory behavior. He also conducts an analysis of the modern form of predatory dumping based on "incomplete information". For example, Eaton and Mirman[245] (1991), and Hartigan[246] (1994) all adopt the similar approach to comprehending predatory behavior via this model. However, Hart[247] (1997) claims that Hartigan's model is valid only when there exists "the protected home market", "barriers to the markets for corporate ownership and control" and "the lack of transparency in financial disclosure".

(3) Prices below Marginal Costs of Production

The traditional analysis of the term "dumping" is restrictively defined as price discrimination by a domestic monopolist in an international context. Two assumptions are made: (a) price discrimination is workable and beneficial; and (b) dumping results in welfare losses of domestic consumers. Such an analysis suggests that dumping occurs only if "marginal costs are rising at all scales beyond the no-trade profit maximizing

---

[243] S. Lahiri & J. Sheen, "On Optimal Dumping" (1990) 100 Econ. J. 127.
[244] James C. Hartigan, "Predatory Dumping" (1996) 29 Can. J. Econ. 228.
[245] J. Eaton & L. J. Mirman, "Predatory dumping as signal jamming", in A. Takayama, M. Ohyama & H. Ohta, eds., *Trade, Policy, and International Adjustments* (New York: Academic Press, 1991) 60-76.
[246] Hartigan, *supra* note 143.
[247] Hart, *supra* note 9 at 36.

output", and if "the net export price exceeds marginal cost at that output".[248] Even though there is a possibility, by this definition, that dumping can be practiced at a price below average costs, goods are never dumped at below marginal costs.

Nonetheless, modern literature on this subject has shown the possibility of dumping at prices lower than marginal costs. Some scholars even claim that the standard for judging whether a firm engages in predatory pricing is to examine whether a firm prices below its marginal cost. Ethier[249] (1982) is the forerunner of the modern analysis of below-marginal-cost pricing as a profit-maximising strategy in international trade. He propounds that, in a world of uncertain demand with perishable goods, some firms may choose to keep workers and reduce prices in circumstances of low demand. The behavior may cause prices lower than marginal costs.[250]

Davies and McGuinness[251] (1982) propose that below-marginal-cost dumping may occur: "in circumstances of uncertainty"; "pursuance of managerial goals"; and "strategic entry deterrence". Among these three contingencies, the first exemplifies the situation in which a risk-neutral monopolist in a non-stochastic home market encounters price uncertainty in the competitive foreign market at the time of his output decision. The second and third represent the incentives for the domestic monopolist to maximise sales revenue rather than profits and to discourage new domestic entry.

---

[248] Davies & McGuinness, *supra* note 181 at 179.
[249] Ethier, *supra* note 10.
[250] Sun, *supra* note 221 at 15.
[251] Davies & McGuinness, *supra* note 181.

Bernhardt[252] (1984) modifies the model of Davies and McGuinness to show that the probability of below-marginal-cost pricing is closely connected to the finding—"the more competitive the domestic market becomes, the more is dumped".[253] Hillman and Katz[254] (1986) investigate the linkage between uncertainty and below-cost dumping. They conclude that "domestic demand uncertainty" and "additive supply uncertainty" may stimulate a risk-neutral monopolist to increase output and to dump at a price lower than the marginal cost, even when the monopolist knows that the world market price is below that marginal cost.

Gruenspecht[255] (1988) explores the motivation for firms to set prices below marginal cost and presents a model centering on "experience effects" as a motivation for sustained below-cost sales by profit-maximising firms. It is possible that uncertainty or reputation motivates unconstrained profit-maximising firms to sell below marginal costs, as part of a strategy. He also insists that the cost standard constructed on determining the existence of dumping should take the learning factor into consideration, providing for "comparable treatment of investment in learning and capital equipment".

(4) Arguments on Below-Cost Pricing and Predatory Behavior

As illustrated above, the terminology of "dumping" on legal and economic grounds nowadays has been expanded to cover both the traditional concept of "international price discrimination" and the modern theory of exports at prices below the cost of production. Such an extension has resulted in a shift of contemporary interest from the former to the

---

[252] Bernhardt, *supra* note 241.
[253] Sun, *supra* note 221 at16.
[254] Hillman & Katz, *supra* note 182.
[255] Gruenspecht, *supra* note 236.

latter, and aroused considerable controversy surrounding predatory behavior and below-cost pricing. In practice, Gruenspecht concludes in his survey of below-cost pricing that, in recent years in the U.S., dumping cases have been increasingly found in the form of pricing below cost of production, other than in the price discrimination model.[256] The following provides analyses of arguments over these matters.

1. Does below-cost pricing denote predation?

It is usually considered "predatory dumping" when firms sell abroad at prices below the cost of production. The concern for predatory pricing by foreign competitors has been continually expressed by national anti-dumping laws and international anti-dumping agreements, and has plausibly justified stronger anti-dumping laws. For example, Canadian, US and EU anti-dumping laws penalise predatory dumping in addition to international price discrimination and adopt the constructed-cost methodology for calculation of the normal value. *Article VI of GATT 1994*, on the other hand, authorises Contracting Parties to impose anti-dumping duties on imports below "fully allocated costs" (or "average cost"). However, the rationale for penalisation of below-cost pricing and predatory dumping must be reviewed. It is also necessary to examine different scenarios of pricing below cost of production for unraveling the correlation between such pricing behavior and predation.

As interpreted above, the definition of cost includes two conceptions: "average cost" (or "fully allocated cost") and "marginal cost". Current competition theory does not perceive below-cost pricing as predatory unless two factors exist: (1) sales below marginal costs;

---

[256] *Ibid.* at 228-229.

and (2) the ability of firms to price low enough to eliminate rivals in the foreign market and thereafter gain monopoly prices. *Article VI of GATT 1994* and Article 2 of the *Anti-Dumping Agreement* nevertheless penalise export prices lower than "cost of production" (referring to "average cost"), regardless of whether prices are below marginal costs and whether firms with low prices possess the above ability. This simply indicates that a determination of dumping is not contingent on prices below marginal costs and that exporters' abilities of predation are not the concern of anti-dumping laws. In this respect, anti-dumping is likely to penalise foreign producers with low prices under excessive competition. Deardorff (1989) further points out that below-average-cost pricing is normal behavior for a firm as a "short run response to a depressed market or to the market in periods of slack demand", provided that a portion of its costs are fixed. Dumping, to some degree, simply reflects prices below average cost but not marginal cost.[257]

Canadian and US anti-dumping laws, on the other hand, provide more elaborate examinations of predation involved in below-cost pricing. Trebilcock and Howse (1999) produce a detailed illustration in this regard and it can be summarised as the following.[258]

---

[257] Deardorff, *supra* note 147 at 21-39.
[258] Trebilcock & Howse, *supra* note 119 at 181.

Affirmation of Predation	Pricing Behavior
(1) presumed predatory	"below marginal cost" or "below average variable cost".
(2) may or may not be predatory	between "average total cost" and "average variable cost".
(3) presumed non-predatory	"above average total cost" (including fixed costs).

* The average total cost is made up of the average fixed cost and the average variable cost.

Whether prices between average total cost and average variable cost are considered predatory dumping relies on circumstances, such as "proof of predatory intent" or "dumper's ability to recoup short-run losses in the long run by raising prices without being under-cut by remaining competitors or new entrants". The instances in which firms may be compelled to sell below cost but above the variable cost in periods of slack demand are not presumed predatory. As a result, pricing below cost of production cannot be equated with predatory behavior.

Moreover, below-marginal-cost pricing, presumed predatory by Canadian and US anti-dumping laws, unnecessarily denotes predatory pricing. Trebilcock and Howse present an example of export prices lower than the "*ex ante* marginal cost" and opine that this pricing behavior does not reflect a predatory intention. When a firm estimates that its export market price exceeds its marginal cost in the process of making its production decisions, it will produce and sell abroad. If unexpectedly future fluctuating exchange rates or changed market conditions result in the actual export market price lower than the estimated one, the firm must continue to sell at the best available price, because the

output has already been produced. The best available price may be below the *ex ante* marginal costs but the firm can "minimize its losses in the face of its inaccurate *ex ante* estimate of the market price" by continuing to sell its output and can "recoup a portion of its sunk costs". In this circumstance of pricing below marginal cost, no predatory intention can be found.[259] However, there are four documented anti-dumping cases initiated in Canada against US exporters with respect to this below-marginal-cost pricing.[260]

Similarly, below-marginal-cost pricing as a marketing strategy may, in some cases, promote competition, with the aim of competing for market share. There is no predatory intention involved. Deardorff identifies two scenarios of pricing lower than marginal cost: "experience goods" and "learning by doing goods". Firms' pricing based on the former model aims to induce first buyers; and their initial losses can be recouped by experienced consumers' subsequent purchases. Sellers' pricing based on the latter model attempts to realise efficient production methods when they first enter the market with new technology or new goods. Pricing built on these two models can only be viewed as a marketing strategy for expanding into new markets. Such below-marginal-cost pricing, in fact, boosts consumer demand, competition and productive efficiency. Firms can recoup their losses in the period of selling below marginal cost without acquiring market power.[261]

In short, neither below-cost-of-production pricing nor below-marginal-cost pricing

---

[259] *Ibid.* at 182.
[260] Hutton & Trebilcock, *supra* note 120 at 128.
[261] Deardorff, *supra* note 147 at 183.

inherently denotes predation. The determination of predation relies on more elaborate cost analyses. However, the difficulties acquiring the actual cost of foreign products and the predatory intention, identifiable *post hoc*, make the determination more unachievable.

2. Possible Existence of Predatory Pricing

The possibility of the occurrence of predatory dumping has long been one of theoretical and empirical arguments over the rational justification for anti-dumping laws. Economists have also contributed many models to explain the possible contingency of this pricing behavior as well as its irrationality in this regard. If the existence of predatory dumping is possible in the international context, the rationality of anti-dumping laws can be justified. If not, the justification for these regulations may be questionable.

Some maintain that it is inconceivable for the predator to suffer losses over a long period of time, for the purpose of establishing the global monopoly, while the recoupment of predatory losses is uncertain. Isaac and Smith[262] (1985), in their laboratory experimental work, report that there is no evidence of predatory pricing out of ten experiments. Hoekman and Leidy (1989) contend that it is difficult to conceive of this occurrence and that there is no successful documented predatory dumping in practice.[263]

Some consider that the instances of predatory pricing are rare or extremely limited. The OECD Report mentioned that "[p]erhaps all that can be said is that cases of predation may arise but at most only very infrequently".[264] Hindley (1991) observes that there are

---

[262] Isaac & Smith, *supra* note 140 at 320.
[263] Hoekman & Leidy, *supra* note 141 at 32.
[264] OECD, *supra* note 131 at 75.

few examples of predatory pricing and that most anti-dumping cases cannot be explained in terms of predatory pricing.[265] Messerlin and Reed (1995) suggest that only a few dumping cases handled by the US and EC authorities were involved in predation.[266]

Niels (2000) demonstrates an analysis of predatory pricing theory from perspectives of the Chicago school and post-Chicago school.[267] From the Chicago school perspective, predatory pricing is rarely successful and irrational. McGee[268] (1958 and 1980), Bork[269] (1978) and Easterbrook[270] (1981) argue that eliminating domestic competitors through low prices is costly and its success is uncertain, so that the recoupment of predatory losses through later monopoly prices is questionable. On the contrary, post-Chicago scholars try to clarify the rationale of predatory behavior. Milgrom and Roberts[271] (1982), and Kreps and Wilson[272] (1982) affirm that "an incumbent, multi-market firm prices aggressively in one market in order to build a reputation as a fanatical predator or tough incumbent, and thus deter less well-informed potential entrants in other, subsequent markets".[273] However, Niels questions the validity of their explanations for dumping as a form of predatory pricing.

Indeed, some contributors have consistently searched for modern models to rationalise the possibility of predatory dumping under certain conditions. These various models and

---

[265] Hindley, *supra* note 133 at 29.
[266] Messerlin & Reed, *supra* note 134 at 1565.
[267] Niels, *supra* note 32 at 476.
[268] J. McGee, "Predatory Price Cutting: the Standard Oil (N.J.) case" (1958) 1 J. L. & Econ. 137, and "Predatory Pricing Revisited" (1980) 23 J. L. & Econ. 23.
[269] R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).
[270] F. H. Easterbrook, "Predatory Strategies and Counterstrategies" (1981) 48 U. Chi. L. Rev. 263.
[271] P. Milgrom & J. Roberts, "Predation, Reputation and Entry Deterrence" (1982) 27 J. Econ. Theory 280.
[272] D. M. Kreps & R. Wilson, "Reputation and Imperfect Information" (1982) 27 J. Econ. Theory 253.
[273] Niels, *supra* note 32 at 476.

different conditions have been illustrated in the foregoing subsection: for example, the model based on "incomplete information" and the condition of the lack of transparency in financial disclosure.

Interestingly, Weinstein (1992), in his survey of unilateral dumping, concludes that firms in more competitive markets are more likely to dump unilaterally and to export at prices below average cost. This behavior may not be evidence of predation and may simply be a "reflection of the tendency of competitive rent-seeking firms to expand into less competitive markets that have high rents".[274]

In summary, dumping is seldom practiced with predatory intentions. The reasons are primarily owing to the fact that a worldwide monopolistic position is difficult to be achieved and the gains from predatory pricing are even more uncertain in the international context.

Section Three: Concluding Remarks

The notion of dumping as "international price discrimination" has long been the traditional definition of dumping practices, since Viner's (1923) treatise on this subject. Rooted in the traditional definition, modern literature has further developed various models to evaluate possible price-discriminating behavior on the international trade ground since 1980s. Under different conditions, dumping as international price discrimination can be described variously. For example, it is "monopolistic price discrimination" in international trade, focusing on "accidental demand differences"

---

[274] Weinstein, *supra* note 218 at 386-387.

between foreign and home markets. Dumping as international price discrimination can lead to conclusions dissimilar to conventional interpretations when different approaches are adopted. Weinstein's finding of the flow of dumped goods from the more competitive market (*i.e.*, Japanese market) to the less competitive one (*i.e.*, U.S. market) exemplifies the divergence.

Dumping practiced by means of pricing below cost of production, on the other hand, is not a new idea. Viner's treatise also briefly discusses such practices. Because of the conventional assumptions that international price-discriminating dumping and below-cost dumping are identical, or that examples of the latter are also examples of the former, and that the administrative difficulty determining foreign cost of production cannot be effectively conquered, below-cost dumping has not been the focus of attention until the inclusion of such behavior in *Article VI of GATT 1994* and the *Anti-Dumping Agreement*. Modern theories have further elaborated on two dimensions of below-cost dumping: dumping below average cost and dumping below marginal cost. This inclusion arouses considerable controversies. Some argue that pricing below average cost is believed to be normal business practice under certain market conditions and that there is no sound economic rationale found for any firm to practice below-marginal-cost pricing.[275] On the contrary, some rationalise pricing lower than marginal cost as a marketing strategy in a condition of price/demand uncertainty.

Moreover, there have been arguments over whether pricing below cost of production denotes predation and whether predatory pricing in the international context possibly

---

[275] Sun, *supra* note 221 at 13.

occurs. In fact, pricing below cost of production cannot be equated with predatory behavior. On one level, the more elaborate mechanism for analyzing the structure of cost and determining the predatory objective is expected to be advanced. On another level, the unavailability of the actual cost of foreign products, and the predatory intention identifiable *post hoc*, may paralyse the determination of predation. The dilemma reflects perplexities in the international trade context. The other question of possible predatory pricing in international trade seems to be less arguable. It is widely acknowledged that the possibility is relatively slim; but preventing the rare occurrence of international predation as a justification for anti-dumping laws has been consistently under attack.

Dumping practices in international trade, either price-dumping or cost-dumping, have long been a major concern for trading parties. Such practices are often assumed injurious to the welfare of the dumped country and beneficial to foreign producers engaged in these practices. In order to proceed to evaluate dumping impacts on different markets, I present a framework of analyses on dumping prices and cost of production. Based on this framework, the consequence of dumping will be examined in the next chapter.

Chapter Three

Rationales for Anti-dumping Laws and the Anti-Dumping Agreement

Section One: Effects of Dumping

Economists have traditionally defined dumping as selling the identical product at a lower price abroad than in the home market. It is international price discrimination. This traditional definition, rooted in Viner's treatise, indicates that a firm can sell goods at a higher price at home because it possesses more market power in the domestic market and faces competition in the exporting market. The more elastic demand abroad inspires the firm to export at a lower price.

Viner's price definition of dumping has been extended to encompass the cost definition of dumping, meaning exporting at prices below the cost of production. Dumping below average cost may occur in three possible situations: in periods of slack demand, where there is a different structure of costs for domestic firms and for exporters, and when there are differences in labor market institutions. Such dumping is a firm's short run response to a depressed market.[276] Besides, a firm may also sell exports below the cost of production for reaching a large scale of production and then benefiting from economies of scale.[277]

Most economists consider dumping as a rational, sensible and legitimate profit-maximising action.[278] It is also a "typical response to trade barriers and is

---

[276] Jackson & Vermulst, *supra* note 4 at 30-33.
[277] Jose Tavares, Carla Macario & Karsten Steinfatt, "Antidumping in the Americas" (2001) 35:4 J. World T. 555 at 559.
[278] *Ibid.* at 560.

generally pro-competitive, benefiting consumers".[279] To some extent, dumping practices may simply reflect "the tendency of competitive rent-seeking firms to expand into less competitive markets that have high rents".[280] Most cases of dumping do not decrease global welfare; some cases might improve consumer's welfare. Even though predatory-pricing in dumping, and most instances of strategic dumping, raise welfare concerns, they rarely occur in the real world.[281] More explicitly, some economists identify the effects of dumping from different perspectives or according to different categories of dumping.

The comprehensive study of the welfare effects of dumping on the importing country and on the exporting country was provided by Dale[282]. From the exporting country's point of view, the dumper's monopoly power in the home market and domestic consumers' well-being are of concern. The harmful effect on the exporting country originates from the existence of the dumper's monopoly power in the home market. Domestic consumers are charged higher (monopolistic) prices in comparison with foreign buyers. When dumped goods are raw materials or producer goods, purchasers of them in the home market are also at a disadvantage.

The detrimental impact of dumping on the importing country can be illustrated from different dimensions. Illustrative studies are usually centered on the conflicting interests between domestic producers and consumers created by the re-distributive effects of

---

[279] Ian Wooton & Maurizio Zanardi, "Trade and Competition Policy: Anti-Dumping versus Anti-Trust", Discussion Paper No. 2002-6 (June 2002), online: Department of Economics, University of Glasgow <http://www.gla.ac.uk/Acad/PolEcon/pdf02/2002_6.pdf> (date accessed: 19 May 2003)

[280] Weinstein, *supra* note 218 at 387.

[281] Tavares, Macario & Steinfatt, *supra* note 277 at 560.

[282] Dale, *supra* note 20 at 29-40.

low-priced imports. Dumping reduces the output and/or profitability of domestic producers. Such practices impair free trade. The damaging effects of dumping on the importing country are obviously shown in the case of intermittent dumping. When dumping is intermittent or short-run, domestic producers suffer idled capital, labour and plants, as well as a shift in the use of domestic resources. Domestic producers sustain the additional adjustment cost resulting from moving domestic resources from one productive use to another and the losses caused by idled capital, employees and plants. When the foreign exporter is a profit-maximiser, the idled plants denote that the domestic producer's short-run marginal cost is higher than the price of the dumped imports, and that the domestic producer's short-run operation costs exceed those of the foreign exporter. As a result, the exporter gains the price advantage over the domestic producer and then the efficiency of the domestic industry is injured.

On the other hand, when the foreign exporter is not a profit-maximiser and sells at a price below short-run marginal cost, his behavior may be considered predatory. However, such a predatory behavior involves the "recurrent and pointless losses" of the exporter, making it irrational, and it is not likely to be successful in the real world.[283]

By contrast, dumping may promote a vigorous domestic industry in the importing country and benefit domestic producers. In the case of dumping of raw materials or intermediate goods, the domestic producers profit from the low-priced imports, resulting in the cost advantage of further production over their competitors elsewhere. Dumping of this kind is beneficial to the competitive status of domestic buyers. However, some

---

[283] Hoekman & Leidy, *supra* note 141 at 27.

literature argues that dumping of this kind can be injurious to the "intermediate users of the dumped goods" because it may cause these users to mistakenly rely on the prospect of permanently cheap imports and then to adopt wrong production methods.[284] Dale rejected this argument for prohibiting dumping because "intermediate producers will frequently benefit from the practice" and "a law-enforcement agency is unlikely to be in any better position than the domestic producer to assess the prospective duration of any particular dumping situation".[285] A similar argument is that domestic consumers' tastes in the dumped country may "adjust to the prospect of a permanently cheap supply of the product". However, the considerable welfare benefit to these consumers is "the more probable outcome" because "the mean price of the product is lower over some given period than without dumping".[286]

Two conclusions drawn from Dale's analysis of the welfare implications of dumping for the importing country are that: (1) it is unlikely that dumping results in injurious impacts on distribution and competition of the importing country; and (2) in two exceptional situations, predatory dumping and cyclical dumping, dumping may be considered injurious to the importing country. However, Dale's analysis indicates that these exceptional situations are rare in practice.

Miranda[287] (1996), in his survey of anti-dumping laws, concludes that some types of

---

[284] Haberler, *supra* note 19 at 314. In this case of intermittent dumping, dumped goods are "producers' goods". When the dumped goods are "consumers' goods", such dumping injuriously leads to a shifting of demand.

[285] Dale, *supra* note 20 at 31.

[286] Stephen J. Turnovsky, "Technological and Price Uncertainty in a Ricardian Model of International Trade" (1974) 41:2 Rev. Econ. Stud. 201, as cited in *ibid.*.

[287] Miranda, *supra* note 170 at 259-264.

dumping might be considered non-injurious to the domestic industry in the importing country. Dumping, "arising from the absorption of freight and tariff differentials vis-à-vis another exporter that is the market leader in the country of import", is not considered dumping. In this situation, exporting firms "mimic the market leader's landed export price" for "meeting the going market price ('meeting the competition')" in the importing country. Dumping, arising from "the neutralization of devaluations" and "the transmission of recessions", is widely considered detrimental to the import-competing producers; but the effects of these phenomena on the overall welfare of the importing country are vague. The literature gives little attention to comprehensive examinations of these two types of dumping. In contrast, predatory dumping is the only type that is widely deemed injurious to the welfare of national and global economies.

Howell[288] (1997) states that there are two characteristics of the effect of dumping: capacity utilization and investment deterrent. In the presence of market distortions, less efficient firms, by means of dumping, prevail over more efficient firms in international competition. Over the short run, dumpers enjoy lower unit costs because they can operate their plant facilities at higher rates of capacity utilisation. Over the long run, dumping discourages investment in the dumped markets and encourages higher levels of investment in the protected home market. Dumping can "gradually lead to a shift in competitive advantage", with the result that the composition of a national economy is shaped by anti-competitive strategies and market distortions in other countries.

---

[288] Thomas R. Howell, "Dumping: Still a Problem in International Trade" in Charles W. Wessner, ed., *International Friction and Cooperation in High-Technology Development and Trade: Papers and Proceedings* (Washington, D.C.: National Academy Press, 1997) 325 at 327-328, online: National Academy Press <http://www.nap.edu/openbook/0309057299/html/R1.html> (date accessed: 10 April 2003).

Willig[289] (1998) further illustrates the definition of different categories of dumping. As discussed in Chapter One, he classifies dumping according to monopolisation or the creation of market power. Non-monopolising dumping encompasses types of market-expansion, cyclical and state-trading dumping. Monopolising dumping, on the other hand, consists of predatory-pricing and strategic dumping. Among these types of dumping, market-expansion dumping is considered the standard type of dumping based on price discrimination. In the case of cyclical dumping, price discrimination may or may not occur because firms might sell at the same low price abroad and at home.

Willig concludes that the impacts of non-monopolising dumping on world welfare are not negative, with the exception of when dumping transfers some profits or rents to exporters. From the perspective of the importing country, non-monopolising dumping injures the interests of domestic manufacturers of import-competing goods but domestic consumers benefit from low-priced goods. The benefit to consumers outweighs the financial losses of perfectly competitive producers, as long as the domestic producer retains its ability to operate as before. Non-monopolising dumping is also beneficial to the net interest of the importing country because it may encourage domestic production when domestic producers utilise the cheaper imports as inputs into their own operations. However, when domestic producers earn profits through the exercise of market power or the social losses to domestic producers are greater than benefits to domestic consumers, non-monopolising dumping causes the rent shift from domestic producers to exporters. In this situation, non-monopolising is exceptionally considered deleterious.

---

[289] Willig, *supra* note 40 at 61-74.

Contrary to non-monopolising dumping, Willig's finding shows that the impacts of monopolising dumping on both the importing country and the global economy are clearly negative. Strategic dumping enables dumpers to dominate foreign markets and leads to abuse of market power. On the global level, the concomitant losses of consumers' surplus in the importing nation and the additional losses, resulting from the protection of the home market, to consumers in the exporting nation outweigh exporters' gains from the exercise of market power in the foreign market. Predatory-pricing dumping enables foreign predators to create and exercise monopoly power over consumers in the foreign market, by raising prices after destroying the productive capability of alternative sources of supply. The achieved monopoly price lowers the welfare of everyone as a whole.

In fact, market distortions in the home market give the exporting firm the market power to engage in price dumping or below-cost dumping. The different economic structures between countries, such as Japan and China, may also give rise to dumping. Dumping can result in certain effects on competition. First, dumping is a "mechanism which enables firms to obtain or hold market share based on factors other than efficiency or productivity". Dumpers enjoy a degree of price competitiveness because of a distortion in their home market. Such price competitiveness does not result from their efficiency. Domestic firms in the importing nation are compelled to either sell at the same dumped price or maintain their prices, while conceding certain market share to imports. Either way causes domestic firms to lose revenues and sales volume for reasons irrelevant to their relative competitiveness. Second, dumping may cause disinvestments in the dumped market. Firms in the dumped market may exit the market because they cannot earn a

return on their investment and attract new investment capital. As a result, the dumped nation's economy is unfairly determined by market distorting practices of other countries.[290]

Bajwa[291] (1999) provides a lucid analysis of the effects of dumping on the domestic producers and on the importing country. Dumping results in three types of "implied injuries" to the domestic producers in the importing country. The first is "the loss of amount of growth" that the competing industry suffers because of dumping. The second is "the harm suffered by domestic industries with products that are not directly competitive with the dumped imports". The third is that the user industries' expansion of production programs in the importing country is disrupted when the flow of dumped goods comes to an end. By contrast, dumping beneficially provides consumers in the importing country with low-priced goods. In the case of sporadic dumping, the benefits of low-priced goods to consumers outweigh the injury suffered by domestic producers. Conversely, the substantial injury, resulting from intermittent and predatory dumping, to the domestic industry outweighs benefits to consumers. The economic harmful effect of continuous dumping depends on "whether the importing country has a smoothly functioning system of adjustment from import-impacted industries".[292]

Conrad[293] (2002) observes the effects of dumping from the perspective of international competition and resource allocation. He considers that the effects of dumping are difficult

---

[290] Alan Wm. Wolff, "Role of the Antidumping Laws" (May 1995) DB LLP Trade Group Publications, online: DB LLP <http://www.dbtrade.com/publications/181925w.pdf> (date accessed:10 April 2003).
[291] Bajwa, *supra* note 112.
[292] Fischer, *supra* note 155 at 85.
[293] Conrad, *supra* note 124 at 563.

to determine, even though dumping is generally deemed injurious to international resource allocation and competition. That is because dumping practices are sometimes "financed through profits from other branches of the company, subsidies, or monopoly rents" and, in these cases, dumping prices do not reveal the company's performance in the market. In order to determine explicitly the effects of dumping, Conrad evaluates dumping in terms of different motivations and the continuity of dumping.

Conrad's analytical framework separately examines two types of dumping practices: selling below cost of production and selling below the price on the home market. Many forms of short-term dumping, covered in the category of selling below cost of production, have damaging effects on the importing country and thus justify anti-dumping measures. These impacts on the domestic industry and jobs generally result in the welfare losses of the importing country. The losses surpass the importing country's gains from cheap imports. On the other hand, long-term dumping transfers resources from the exporting country to the importing country and thus results in a net welfare benefit for the importing country.

Different types of short-term dumping in the form of selling below cost of production are injurious to the importing country. In the case of "aggressive (or predatory) dumping", the negative effects on the importing country come from the subsequently high monopolist prices. The exporting firm practicing "defensive dumping" causes a retreat which "changes the previous investments into sunk costs" in the importing country. Both "demand compensation dumping" and "detour of trade dumping"[294] over the short-term

[294] *Ibid.* at 565. Demand compensation dumping is motivated by compensating a temporary reduction of

cause temporarily disruptive effects on the importing country; but detour of trade dumping may have a positive net effect on the importing country over the long-term. "Contribution margin dumping"[295] and "strategic dumping", motivated by increasing capacity over a short term, may cause a shift in demand, injurious to the production operation of the industry in the importing country; these two forms of dumping, on the other hand, may benefit the overall welfare of the importing country if motivated by transferring part of production over a long term. For avoiding a loss in sales on the foreign market, the exporter may engage in "exchange rate compensation dumping" over a short term. This form of dumping distorts "international real exchange relations of goods" and "international resource allocation".

Under the category of selling below the price on the home market, Conrad examines three forms of dumping. In the case of "price differentiation dumping", the firm that has a monopoly on the domestic and foreign markets may sell at lower prices abroad than at home in the presence of the greater price elasticity of demand on the foreign markets. That is because the higher price elasticity usually means consumers are more sensitive about increasing prices. Therefore, the firm may continue to sell at lower prices abroad when the higher price elasticity in the foreign market remains stable over a long term. In this situation, dumping is beneficial to the importing country. Second, when exporters experience a downturn in the demand in the export market, they may sell at lower prices abroad, in order to remain in the export market and to normalise demand in the future.

---

demand on the domestic market through increasing exports. The motivation for detour of trade dumping is the "compensation of a reduction in sales caused by protectionist trade measures on the part of the importing country".

[295] *Ibid.* Dumping to gain additional contribution margins by decreasing unit costs is termed "contribution margin dumping".

Such short-term "demand fluctuation dumping" has a negative effect on competition in the importing country. Third, the exporter, possessing a monopolistic position in his home country but not in the foreign country, may sell at lower prices abroad than at home in order to meet the price level in the importing country. Such dumping is termed "trade position dumping". Because it tends to last over a long term, it is not *per se* "unfair competition" and is not harmful to the importing country.

In summary, the argument over the detrimental effect of dumping on the importing country is centered on the conflicting interests between domestic producers and consumers. When dumping is short-run, it reduces the production and/or profitability of domestic producers and results in re-allocation of domestic resources. The reduced production or profitability, caused by idled capital, employees and plants, usually accompanies the losses. The re-allocation of domestic resources brings domestic producers the additional adjustment cost. As a result, the efficiency of the domestic industry is injured by short-run dumping. However, the intermediate users of the dumped raw materials or intermediate goods in the importing country may benefit from the low-priced imports. This kind of dumping enables the intermediate users to gain the cost advantage of further production over their competitors elsewhere. From the perspective of consumers in the importing country, they benefit from the low-priced imports in both cases of short-run and long-run dumping. It is acknowledged that consumer gains outweigh the losses of domestic producers of importing-competing goods, and dumping may encourage domestic production.

Willig also confirms that three forms of non-monopolising dumping are advantageous to

domestic buyers and to the net interest of the importing country, even though they injure the interests of domestic producers of importing-competing goods. Non-monopolising dumping, to some extent, acts as "direct subsidies to factors of domestic production". The benefits to domestic buyers outweigh the financial losses of perfectly competitive producers in the importing country, as long as domestic producers maintain their abilities to operate as before.

The welfare impact of dumping on the exporting country focuses on the dumper's monopoly power in the home market and on the domestic consumers' well-being. The dumper's monopoly power brings disadvantages to the domestic competition. When dumped goods are raw materials or intermediate goods, buyers of these goods in the home country also sustain the cost disadvantage. Similarly, domestic consumers are charged monopolistic prices in comparison with foreign buyers. They are also at a disadvantage.

In fact, it is generally acknowledged that most cases of dumping neither result in injurious impacts on distribution and competition within the importing country nor decrease global welfare. There are exceptional cases. Predatory dumping is unquestionably considered harmful to the importing country and to world welfare, because foreign predators create and exercise monopoly power over domestic consumers by raising prices after destroying the productive capability of alternative sources of supply. The achieved monopoly pricing injures the welfare of everyone as a whole. However, most professional and empirical studies show that predatory dumping is rare in the real world.

Except for predatory dumping, some maintain that cyclical dumping may be considered injurious to industrial efficiency, based on the notion of ruinous competition of cyclical pricing. This form of dumping has caused considerable concern in the steel industry. A firm may price its exports at short-run marginal cost during recessionary periods, while maintaining a higher monopolistic price in the home market. Dale argues that "[t]emporary cheapness which reflects promotional selling or cyclical pricing by foreign exporters may well be beneficial to the importing country and in many other cases, and perhaps even the vast majority of them, dumping is largely irrelevant".[296] Additionally, such a claim against dumping does not find favour in academic literature.[297]

In the case of strategic dumping, Willig[298] considers that it may have adverse impacts on the importing country and the global economy. First, the export opportunities of producers in the importing country are confined by the exporter's protected home market. Exporters have access to wider markets than their foreign competitors do. Second, the domestic producers' abilities to invest in research and development are reduced by the constraint on their sales. This constraint also compels domestic producers to operate with higher costs. Exporters enjoy the cost advantage over domestic producers. This artificial advantage distorts competition and creates profitable market power. Third, strategic dumping leads to market domination and abuse of market power. Fourth, strategic dumping is deleterious to the global economy because its negative effects on the importing country outweigh its positive benefits to the exporting country. This arises

---

[296] Dale, *supra* note 20 at 33.
[297] *Ibid.* at 29.
[298] Willig, *supra* note 40 at 70-73.

from the economic proposition that "the profits from the exercise of market power in the importing country's market are exceeded by the concomitant losses there of consumers' surplus; and here there is the additional net loss to consumers in the exporting nation who are subject to the market power created by the protection of that market".[299]

For strategic dumping to occur, all the following requirements[300] provided by Willig must be met. First, the exporter's home market must be protected. Second, there are important static or dynamic economies of scale in the supply of the product. Third, exclusion from the exporter's home market significantly affects rival suppliers. Fourth, it is likely that exclusion from the exporter's home market disadvantages rival suppliers in relation to the exporter. Although Willig provides these requirements as guidelines in examining the occurrence of strategic dumping, he questions the practical value of these inquiries as a formal tool in anti-dumping proceedings; for example, these requirements might not be met readily or quickly by parties with conflicting interests. He further elaborates on these requirements which "offer a practical means of sharpening the analysis and making it easier to assess specific cases".

However, it would be difficult to confirm the actual occurrence of strategic dumping since the readiness of these requirements being met is uncertain. Additionally, it is emphasised that "the economic logic of strategic dumping limits its applicability to home markets that are sufficiently large in relation to the rest of the relevant world's trading market for the protection of the home market to have a significant impact on the ability of

---

[299] *Ibid.* at 71.
[300] *Ibid.* at 72-73.

rivals to compete elsewhere".[301] It would be difficult to conceive in the real world how sufficiently large the exporters' protected home markets are, giving exporters advantages of the scale economies and cost advantages over competing rivals elsewhere. In fact, there is no actual case of strategic dumping provided in Willig's work. It is considered that two forms of strategic and predatory dumping largely belong in the theoretical realm.[302]

Section Two: Rationales for Anti-dumping Laws

As illustrated above, most economists consider dumping to be a rational, sensible and legitimate profit-maximising action. Such regular business practices are aimed at achieving some commercial objectives, such as disposing of surplus production, building market share, or gaining a commercial advantage through the scale of economy of operations. Dumping is generally pro-competitive and beneficial to consumers. Most cases of dumping do not injure distribution or competition of the importing country and global welfare; some cases may promote a vigorous industry in the importing country and benefit domestic producers, such as the dumping of raw material or intermediate goods. Predatory dumping is the only exception.[303] It is widely acknowledged as the only form of dumping detrimental to the welfare of everyone as a whole.

Since predatory dumping is injurious to the importing country and the global welfare, it is agreed that such practices must be regulated. This agreement among nations generates

---

[301] *Ibid.* at 64.

[302] Tavares, Macario & Steinfatt, *supra* note 277 at 560.

[303] Some scholars consider that there exist some other forms of dumping injurious to the importing nation and global welfare but there is no recognition among scholars of these perceptions. For instance, Willig believes that strategic dumping has adverse effects on the importing country and the global economy. See Willig, *supra* note 40 at 70-71.

one plausible assumption. To prevent the occurrence of predatory dumping and to safeguard the national interest and global welfare, national and international anti-dumping laws are much needed. However, because predatory dumping rarely occurs in practice and largely belongs in the theoretical realm, preventing predatory dumping as a justification for anti-dumping laws appears to be tenuous. Some literature proposes other justifications for anti-dumping laws, such as notions of fairness, distributive justice and communitarian principles. These rationales are arguably regarded as politically oriented and whether dumping is predatory or beneficial appears to be of little concern. To critique these rationales economically and non-economically, the following offers a comprehensive examination.

(1) **Economic Rationales**

Proponents of anti-dumping laws frequently refer to economic rationales as the foundation of their positions. These rationales, in fact, may not be considered the dominant factors impacting the design of import relief laws. Because of such economic rationales, policy makers are usually persuaded to presume that it is unlikely that international trade benefits both importing and exporting countries.[304] As a result, when dumping occurs, it may economically injure the importing country. How valid are these economic rationales?

1. International Price Discrimination

As discussed in the foregoing chapters, dumping is traditionally defined as "international price discrimination", meaning that a foreign producer sells it products at a lower price in

[304] Hart, *supra* note 9 at 40.

the importing country than it does in its home country, or alternatively in other primary markets. It is also termed "price dumping". When Canada was the first country to enact anti-dumping legislation in 1904, this legislation was a response to the US Steel Corporation's practice of selling its exports at prices substantially below its domestic prices,[305] prompted by fears of international price discrimination. US anti-dumping laws are also recognised as a response to international price discrimination.[306]

In fact, whether international price discrimination is *per se* objectionable is questionable, as it is acknowledged as a common practice justified on different market conditions.[307] First, because national antitrust laws prohibit various forms of domestic price discrimination, some may assume that the validity of arguments for prohibiting domestic price discrimination may be analogously applied to prohibition of dumping in the form of international price discrimination. Such an assumption is however invalid because "dumping gives the export country the benefit of the price discriminator's low priced market without the social costs of its high priced market".[308] The argument of the potential reduction in output against domestic price discrimination is not analogous since "whether total world output will rise or fall under international price discrimination is an empirical question".[309]

Second, some argue that international price discrimination is symbolic of asymmetric

---

[305] Viner, *supra* note 7 at 86.
[306] W. Caine, "A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930" (1981) 13 L. Pol'y Int'l Bus. 681, as cited in Trebilcock & Howse, *supra* note 119 at 177.
[307] WTO, *Summary Report of the Meeting Held on 25-27 November 2002*, WTO Doc. TN/RL/M/5 (2003) at para. 14, online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).
[308] Trebilcock & Howse, *supra* note 119 at 179.
[309] *Ibid.*; also see Warner, *supra* note 118 at 817-824.

market access and economic distortions in exporters' home markets. Anti-dumping duties must be imposed on dumped goods to redress these distortions. The imposition of anti-dumping duties may induce the dumper to reduce its home market prices and "this would remove the economic distortion in the allocation of resources reflected in overproduction for export markets and underproduction for the home market".[310] Proponents of this view usually cite the dumping complaint brought in Canada by General Motors and Ford against Hyundai for selling cars in Canada at lower prices[311] as an illustrative example, because the domestic automobile manufacturers unfairly competed with low-priced Korean imports in the Canadian market while they lacked equivalent access to the Korean market. This case exemplifies asymmetric market access and economic distortions in exporters' home markets. The U.S. submission[312] to the WTO addressed the similar concern. The anti-dumping rules act as a remedy for market-distortive government industrial policies and a remedy for domestic producers, disadvantaged by differences in national economic systems. In addition, international price discrimination is broadly and rightly condemned in the case of a protected home market. Anti-dumping laws serve "the private function of providing a remedy for injured producers" and "the public function of discouraging the continued closure of foreign markets".[313]

---

[310] *Ibid.*

[311] *Cars Produced by or on Behalf of Hyundai Motor Company* (1988), CIT-13-87 (C.I.T); Matthew S. Kronby, "Kicking the Tires: Assessing the Hyundai Anti-dumping Decision from a Consumer Welfare Perspective" (1991) 18 Can. Bus. L.J. 95.

[312] WTO, *Observations on the Distinctions between Competition Laws and Antidumping Rules, Communication from the United States*, WTO Doc. WT/WGTCP/W/88 (1998), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

[313] John A. Ragosta & John R. Magnus, *Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief* (Ottawa: CTPL, 1996) 5-6, online: DB LLP <http://www.dbtrade.com/publications/183619w.pdf> (date accessed: 21 June 2003).

Trebilcock and Howse[314] however criticise the validity of this argument. First, whether the imposition of anti-dumping duties can effectively remove the distortion in the exporter's home market is uncertain because the exporter must "weigh the loss of sales (and profits) in export markets from the imposition of duties against the loss of profits entailed in abandoning supracompetitive pricing in the home market". Second, whether the domestic producers' concerns about dumped imports is the lack of equivalent access to the exporters' home markets is unclear. This might be a plausible or indirect means of addressing market access problems in these markets. Third, if a decision of the imposition of anti-dumping duties made by the competition authority in the importing country conditions the exporting country's market, it would seem "a clearly unacceptable extraterritorial application of an importing country's domestic law". Furthermore, it is unimaginable in international trade that the domestic policy environment in exporting and importing countries is the same. In *Hyundai*, concerns about equivalent access to the Korean market were never addressed by the complainants, GM Canada and Ford Canada, nor were concerns about economic distortions in the Korean market. As a result, this argument is manifestly invalid.

Third, the United States maintains that anti-dumping laws remedy international price discrimination to prevent injury to domestic industries.[315] Such laws prohibit international price discrimination.[316] However, the U.S. Supreme Court contests such assertions. The *United States v. Matsushita* case[317] provides an illustrative example. In

---

[314] Trebilcock & Howse, *supra* note 119 at 179-180.
[315] *Zenith v. United States*, 988 F.2d 1573 (Fed. Cir. 1993); *American Alloys v. United States*, 30 F.3d 1469 (1994).
[316] *Zenith v. Matsushita*, 494 F. Supp. 1190 (1980).
[317] *United States v. Matsushita*, 475 U.S. 574 [hereinafter *Matsushita*] (1986); Clarisse Morgan, "Competition Policy and Anti-Dumping: Is it Time for a Reality Check?" (1996) 30 J. World T. 61.

this case, Japanese exporters sold televisions to the United States at lower prices than those at which they were sold in Japan. The U.S. Supreme Court found that the Japanese producers' prices did discriminate between the U.S. and Japanese markets; but this price discrimination was not motivated by predatory intent, and predation since the domestic industry had survived for many years in the presence of low-priced imports in the U.S. market. The Court concluded that "the international price discrimination itself was simply an acceptable business strategy".[318]

Fourth, prohibiting international price discrimination as a rationale for the WTO *Anti-Dumping Agreement* has consistently aroused much controversy. The submission of the United States, regarding the role of trade remedies in responding to trade-distorting practices, noted that "[a]s a remedial mechanism, the anti-dumping rules are triggered in response to international price discrimination, where a foreign producer sells its product at a lower price in the importing country than it does in its home country, or, alternatively, in other primary markets".[319] This assertion was however argued by Hong Kong, China. Their submission noted that

> "[i]t is, however, a frequent and accepted business practice that the same product could be sold under a wide-range of prices across countries in today's globalized economy. Such price discrimination, which may flow from the operation of competitive advantages or common and legitimate commercial practices, represents nothing but the essence of "fair trade"....We cite here two obvious examples....Differences in brand value can lead to normal price discrimination....At times of slackening demand...[exporters] may decide to sell

---

[318] *Ibid.*

[319] WTO, *Basic Concepts and Principles of the Trade Remedy Rules, Communication from the United States*, WTO Doc. TN/RL/W/27 (2002) at 3, online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

certain products below costs in order to recover a portion of the total costs and reduce the losses. Such a decision of selling below costs clearly has nothing to do with unfair trade".[320]

It was also stated that the existing *Anti-Dumping Agreement* contained no mechanism to distinguish between "normal price discrimination" and "unjustified price discrimination".[321] Considering the submission of Hong Kong, it is obvious that international price discrimination does not necessarily indicate the presence of trade-distorting practices, but represents common commercial practices.

The above discussion about plausible claims that anti-dumping laws can be justified in prohibiting international price discrimination clearly demonstrates the irrationality of anti-dumping laws. International price discrimination is a common commercial practice and acceptable business strategy, which can be justified based on different market conditions. It is impossible to expect every country's market conditions to be the same. Since market conditions vary considerably from country to country, pricing policies differ accordingly. The different pricing policies across countries are the essence of commercial practices. Therefore, the prohibition of international price discrimination as a rationale for anti-dumping laws appears to be odd.

Even if some maintain that anti-dumping laws prohibit some forms of international price discrimination, such an assertion remains questionable. As argued by the submission of Hong Kong, the *Anti-Dumping Agreement* contains no mechanism to distinguish between

---

[320] WTO, *Concept Paper on Trade Remedy Rules: Evidence of Trade Distorting Practices, Communication from Hong Kong, China*, WTO Doc. TN/RL/W/129 (2003) at 2, online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

[321] *Ibid.*; WTO Meeting Report, *supra* note 307.

"normal price discrimination" and "unjustified price discrimination". Nor do national anti-dumping laws. As a result, it is possible that anti-dumping laws irrationally prohibit some forms of "normal" price discrimination. Furthermore, some may assert that anti-dumping laws contain the mechanism of the "material injury" test to determine the harmful forms of international price discrimination. When the price discriminating practices cause or threaten material injury to the domestic industry, or materially retard the establishment of the domestic industry, these forms of practices should be prohibited. However, such an assertion is still arguable on grounds of insufficient consideration given to the consumer's gain and the world welfare. It is dubious that the injury to the domestic industry outweighs the consumer's gain from these practices. In addition, the causation of injury is arguably difficult to establish. When dumping occurs and the domestic industry displays symptoms of injury, there exist alternative hypotheses about the causes of symptoms of injury displayed by the domestic industry; for example, products of the domestic industry may simply be unattractive.[322] In this respect, anti-dumping laws cannot be rationalised as anything more than symbolic of protectionism.

2. Predatory Pricing

The concept of predatory pricing in the international context is borrowed from domestic antitrust laws. Such behavior is objectionable because efficient competitors are driven from the market and, in the process, the predator acquires market power. When predatory pricing in the international trade context occurs, its outcome is considered more harmful than the result of predatory pricing in the domestic context. The disappearance of

[322] Brian Hindley & Patrick A. Messerlin, *Antidumping Industrial Policy: Legalized Protectionism in the WTO and What to Do about It* (Washington, D.C.: The AEI Press, 1996) 17.

domestic firms and the resulting monopolised market imply a greater net loss for the importing country's welfare and the world welfare.[323] As a result, both Canadian and U.S. anti-dumping laws penalised predatory pricing in addition to international price discrimination. U.S. anti-dumping laws were initially enacted because of a fear of predatory pricing by foreign competitors.[324] This suggests that predatory pricing may be an added rationale for anti-dumping laws. However, there are a few arguable lines on this assertion.

Economic literature has shown that predatory pricing is even more inconceivable in international contexts and therefore the idea of predatory pricing provides a weak basis for anti-dumping laws. Economists agree that predatory pricing is not an effective means for achieving market power, and such behavior is non-feasible and irrational unless certain conditions are present.[325] First, predatory pricing is an expensive policy for sellers to pursue. While competitors know that prices will rise in the future, they therefore have an incentive to stay in the market. It is questionable that predators can sustain losses long enough to drive competitors out of the market. Second, it is widely accepted that predatory pricing is conceivable when certain market structures exist. For instance, an industry consists of two firms. One is more powerful and better financed than the other. In this situation, predatory pricing may be a plausible tactic for acquiring market power. Two questions, however, must be answered in this regard. One is "why the two firms do not collude over pricing?"; the other is "why one firm does not buy control of the other"?

---

[323] Wooton & Zanardi, *supra* note 279 at 12.

[324] *Antidumping Act of 1916*, 39 Stat. 798 (current version at 15 U.S.C. § 72 (2003)). The predatory intent was an element of the dumping offense under the Antidumping Act of 1916. See Warner, *supra* note 118 at 824; also see Ragosta & Magnus, *supra* note 313 at 9.

[325] Warner, *supra* note 118 at 825-826.

Either way is a potentially cheaper means of acquiring monopoly profits.[326] Furthermore, it is not conceivable that predatory pricing may occur in the simple two-firm market structure in global industries. As the number of firms in the world industry increases, the plausibility of predatory pricing as a means of dumping declines.[327] Third, scholars have addressed the assertion that a rational firm will never use predatory pricing and therefore accusations of predatory pricing or predatory dumping are always baseless.[328] Price wars are even more expensive for predators in international contexts, while the gains from predatory pricing are uncertain. The worldwide monopolistic position is more difficult to be achieved because predators must face the possibility that competitors will re-enter the market or that new firms will enter when prices rise. As a result, predatory pricing in international contexts is inconceivable, and it provides a tenuous link with anti-dumping laws.

Empirical studies create doubts about the possible instances of predatory dumping. Most conclude that instances of predatory pricing in international contexts are rare or extremely limited. Dumping rarely occurs with predatory intentions. The reasons are simple. A worldwide monopolistic position is difficult to achieve, and gains from predatory pricing are even more uncertain in international contexts. Nevertheless, although examples of predatory pricing are few, they are not zero. Recent theoretical studies suggest that "the conclusion that predatory pricing will never occur is too strong".[329] While prohibition of predatory pricing in the international trade regime was

---

[326] P.K.M. Tharakan, *Policy Implications of Antidumping Measures* (New York: Elsevier Science Publishing, 1991) 28-29.
[327] *Ibid.*
[328] McGee, *supra* note 268.
[329] Jean Tirole, *The Theory of Industrial Organization* (Cambridge, Mass.: MIT Press, 1988), as cited in Tharakan, *supra* note 326 at 28.

the earliest and the most robust justification for anti-dumping measures, a large number of empirical studies have shown that it is not a significant factor in actual cases,[330] which remain undocumented.[331] The empirical findings of Hutton and Trebilcock echo this perception.[332] None of thirty Canadian cases between 1984 and 1989 in which anti-dumping duties were imposed could be supported on grounds of predatory pricing. Similarly, Shin's analysis demonstrates that very few of the anti-dumping petitions filed in the 1980s in the United States were brought against instances of possible predatory dumping.[333] It appears that predatory dumping may largely belong in the theoretical realm.[334] Empirical evidence demonstrates that preventing predatory dumping, as a rationale for anti-dumping laws, seems irrelevant because the instances of predatory pricing are rare or extremely limited.

Even if the assumption that predatory pricing in international contexts is conceivable is valid, the question is whether anti-dumping laws are equipped to identify and penalise true predatory dumping. First, the *Anti-Dumping Agreement* contains no mechanism to deal with predatory practices. Dumping, at prices below the cost of production, is not necessarily predatory even though the *Anti-Dumping Agreement* condemns below-cost-of-production dumping, as do Canada's and U.S. anti-dumping laws. As illustrated in the foregoing chapters, neither below-cost-of-production pricing nor

---

[330] Richard Whitwell, *The Application of Anti-Dumping and Countervailing Measures by Australia* (Rockhampton: Central Queensland University Press, 1997) 377, as cited in Jeff Waincymer, "Impliactions for anti-dumping and countervailing" (2001) Australian APEC Study Centre Conference Proceedings, at 22, online: Australian APEC Study Centre <http://www.apec.org.au/docs/waincymerfta.PDF> (date accessed: 19 May 2003).

[331] Hoekman & Leidy, *supra* note 141 at 32.

[332] Hutton & Trebilcock, *supra* note 120 at 128.

[333] Hyun J. Shin, "Possible Instances of Predatory Pricing in Recent U.S. Antidumping Cases" in Robert Z. Lawrence, ed., *Brookings Trade Forum 1998* (Washington, D.C.: Brookings Institution Press, 1998) 81 at 85-94.

[334] Tavares, Macario & Steinfatt, *supra* note 277 at 560.

below-marginal-cost pricing inherently denotes predation; for example, below-marginal-cost pricing for "experience" or "learning by doing" goods. These practices do not reflect a predatory intent to capture monopoly profits. Even if dumping below the cost of production was predatory, why does the *Anti-Dumping Agreement* contain no mention or mechanism to deal with predatory practices? In fact, the *Anti-Dumping Agreement* does not use the term or concept of predatory dumping. It does not contain any mechanism to identify predatory intent, and the possibility of the resultant monopolistic position and monopoly rents. While the determination of predation relies on more elaborate cost analyses, and the predatory intention is identifiable *post hoc*, it is questionable that the current *Anti-Dumping Agreement* intends to deal with true predatory dumping.

Second, identifying predatory pricing in international contexts is more difficult than in the domestic context. U.S. experience in dealing with predatory pricing in the domestic context provides an illustrative example. Four cases on predatory pricing under the competition law went to the U.S. Supreme Court: *Utah Pie* (1967),[335] *Matsushita* (1986),[336] *Cargill* (1986),[337] and *Brooke* (1993).[338] The U.S. Supreme Court, in *Utah Pie*, concluded that predatory behavior was determined by a showing of intent. In *Brooke*, the Court set out two criteria for determining predatory behavior: (1) "prices must be below cost", and (2) "there must be reasonable prospects for recoupment".[339] Even though the explicit criteria for establishing the existence of predatory pricing in the

---

[335] *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).
[336] *Matsushita, supra* note 317.
[337] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).
[338] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).
[339] Miranda, *supra* note 170 at 278.

domestic context were ruled by the Court, there is a wide controversy over the validity of the "recoupment test". Furthermore, the United States experience shows that the requirement for proving predatory intent to dumping has proved unworkable.[340] As a result, the *Antidumping Act of 1921*[341] amended the *Antidumping Act of 1916*,[342] and no longer required a demonstration of predatory intent.

On the contrary, there are no explicit criteria for identifying predatory pricing under the *Anti-Dumping Agreement*. Although below-cost dumping is condemned, such practices do not necessarily show predatory intent. The motives for either dumping or predatory dumping, indeed, are not the concern of the *Anti-Dumping Agreement*. It simply requires the existence of dumping, proof of material injury to the domestic industry, and causation between dumping and material injury. Nevertheless, the *Anti-Dumping Agreement* contains no analogue of the "recoupment test". This makes the determination of predatory dumping more difficult. Marceau has noted that

> "[n]otwithstanding the fact that it is difficult to identify domestic predation and even more difficult to try to capture international predation, the main point is that anti-dumping laws have nothing to do with predation. Tests used to identify foreign dumping do not follow economists' argument that the main purpose of anti-dumping laws should be to deter international price discrimination and predation".[343]

In the presence of the less elaborate cost analyses of predatory dumping, insufficient

---

[340] Greg Mastel, *Antidumping Laws and the U.S. Economy* (New York: M.E. Sharpe, 1998) 18-19.
[341] 19 U.S.C.S. §§ 160-171 (2003).
[342] 15 U.S.C.S. § 72 (2003).
[343] Gabrielle Z. Marceau, *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas* (Oxford: Clarendon Press, 1994) 26.

consideration given to the intent or effect of predatory behavior, and predatory intent identifiable *post hoc*, the current *Anti-Dumping Agreement* is obviously incapable of identifying true predatory dumping.

Concern over the Agreement's incapability to identify predatory dumping, and over the plausibility of predatory dumping as an additional rationale for the *Anti-Dumping Agreement*, has consistently been addressed by WTO members. A written contribution by Mexico[344] notes that practices of predatory pricing are included in the broader concept of price discrimination. However, price discrimination is, to an extent, defined in the *Anti-Dumping Agreement*; on the contrary, predatory pricing is not explicitly defined although it is part and parcel of the concept of dumping. It is important to define properly the concept of predatory pricing, through specification of variables that will be considered and the application of relevant tests.

The submission of Japan[345] states that anti-dumping measures were originally intended to regulate predatory pricing in international contexts, just like competition laws do with respect to domestic markets. The *Anti-Dumping Agreement* however regulates price discrimination, instead of regulating specifically predatory pricing in international trade. This demonstrates the disparity between the wording of this provision and the original

---

[344] WTO, *Anti-Dumping Measures and Competition, Communication from Mexico*, WTO Doc. WT/WGTCP/W/136 (1999); and WTO, *Report on the Meeting of 10-11 June 1999*, WTO Doc. WT/WGTCP/M/9 (1999), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

[345] WTO, *The Contribution of Competition Policy to Achieving the Objectives of the WTO, including the Promotion of International Trade, Communication from Japan*, WTO Doc. WT/WGTCP/W/122 (1999); *Report on the Meeting of 19-20 April 1999*, WTO Doc. WT/WGTCP/M/8 (1999); and *Report (1999) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WTO Doc. WT/WGTCP/3 (1999), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003)

objectives of anti-dumping measures. In Japan's view, the purpose of anti-dumping measures should become the regulation of predatory pricing, instead of regulation of international price discrimination.

The Korean submission[346] also addresses concern over the insufficient mechanism in the *Anti-Dumping Agreement* to identify predatory dumping and doubt about the rationality of the Agreement. Among various forms of dumping, only predatory dumping is considered detrimental to the importing country. However, anti-dumping action can hardly be justified on grounds of penalising predatory dumping. First, documented instances of successful predatory dumping are rare. Second, it is difficult to "discern whether a firm is merely pricing aggressively in order to compete with its rivals, or to induce the exit of its rivals to gain a monopolistic position in the market". Third, the definition of dumping contained in the *Anti-Dumping Agreement* does not consider the motive of dumping. As a consequence, anti-dumping duties could be imposed on low but justified pricing, regardless of whether there is a predatory intent or not.

The above Japanese suggestion was rejected by the United States,[347] because "any suggestion to mutate anti-dumping rules into a different set of rules to govern predatory pricing is misplaced and misguided". Anti-dumping and competition rules have different objectives. They are founded on different principles. They seek to address different problems. Article VI of the *GATT 1994* has never had anything to do with the issue of

---

[346] WTO, *Impact of Trade Policy on Competition: An Assessment of Anti-Dumping Rules, Communication from the Republic of Korea*, WTO Doc. WT/WGTCP/W/90 (1999), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

[347] WTO Communication from the United States, *supra* note 312; WTO Meeting Report, *supra* note 345; WTO Working Group Report, *supra* note 345.

predatory pricing, even in 1948 when it was concluded. It is also noted that "anti-dumping rules are not intended as a remedy for the predatory practices of firms or as a remedy for any other private anti-competitive practices typically condemned by competition laws". In addition, anti-dumping rules are a remedial mechanism which is necessary to maintenance of the multilateral trading system.

3. Intermittent Dumping

Aside from predation, intermittent (or short-run) dumping may give rise to an economical rationale for anti-dumping laws because it causes net economic harm to the importing country's economy. Jacob Viner[348] defines intermittent dumping as steady and systematic dumping which lasts for several months or years at a time. It is objectionable on the ground that it "lasts long enough to injury domestic producers without providing consumers with a constant long-run supply of goods". However, the rationality of anti-dumping laws in this regard is debatable. It has been consistently criticised by economists, empirical studies and legal analyses.

Economic scholars have proffered certain situations in which intermittent dumping may occur.[349] First, exporters may charge low prices for "experience" or "learning by doing" goods to achieve a foothold in the export market. Such practices are pro-competitive. Second, exporters may maintain full capacity by dumping excess output into its export market in times of slack home-market demand. This is to maintain economies of scale

---

[348] Viner, *supra* note 7 at 30-31.

[349] P.D. Ehrenhaft, "Protection Against International Price Discrimination: United States Countervailing Duty and Antidumping Duties" (1958) 58 Colum. L. Rev. 75, as cited in Lazar, *supra* note 200 at 46-47; John J. Barceló III, "Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code" (1972) 57:4 Cornell L. Rev. 491 at 508-513; Warner, *supra* note 118 at 830-833.

and to prevent the loss of global market share. Third, exporters may engage in predatory pricing with the intention of monopolising an export market.

The above third form of dumping is predatory dumping. As the preceding section argued, predatory pricing as a rationale for anti-dumping rules is questionable. Therefore, this following discussion focuses on the rationality of the first and second forms of non-predatory intermittent dumping.

The occurrence of non-predatory intermittent dumping depends on the presence of certain structural conditions; but these necessary conditions are unlikely to arise.[350] First, exporters cannot compete with domestic producers under normal market conditions; otherwise, they would provide a source of supply permanently rather than intermittently. Second, non-predatory intermittent dumping must be so extensive that it substantially disrupts domestic production. However, it is unlikely that dumping will last long enough to disrupt domestic production. Although dumping may last long, disruption to domestic production will only occur if domestic buyers substitute foreign goods for domestic goods. When the dumping period is over, domestic producers will charge higher prices to recoup their readjustment costs. Domestic buyers may however circumvent higher prices by not substituting buying domestic goods. As a result, the necessary structural conditions for non-predatory intermittent dumping to occur can rarely be satisfied.

The overall effects of non-predatory intermittent dumping on consumer welfare are

---

[350] Michael Trebilcock & John Quinn, "The Canadian Antidumping Act: A Reaction to Professor Slayton" (1979) 2 Can-US L.J. 101 at 104, as cited in Warner, *supra* note 118 at 831; Trebilcock & Howse, *supra* note 119 at 185.

ambiguous.[351] When non-predatory intermittent dumping occurs, domestic producers in the export market incur "adjustment costs" for meeting lower import prices and "readjustment costs" for filling the vacuum left by the departing dumper. These costs incurred by domestic producers certainly harm producer welfare. Company resources are diverted to maintaining the producer's market share in the more competitive market. During the dumping period, domestic producers incur losses, and these losses may force some producers into bankruptcy and create unemployment.[352] It is possible that the adjustment and readjustment costs may also be passed on to consumers. Non-predatory intermittent dumping harms consumers only if consumers "end up paying a higher long run average price for goods than they would pay if there were no dumping".[353] The dumping margin however may so depress prices during the dumping period that consumers end up paying lower long run average prices. As a consequence, the net effect of non-predatory intermittent dumping on consumer welfare remains uncertain.[354]

Given the ambiguous effect of non-predatory intermittent dumping on consumer welfare, and the low possibility of the necessary structural conditions for non-predatory intermittent dumping being satisfied, economic literature clearly demonstrates that anti-dumping laws arguably seek to prevent this form of dumping.

Empirical studies[355] indicate that the only situation in which non-predatory intermittent

---

[351] Trebilcock & Howse, *supra* note 119 at 185; Warner, *supra* note 118 at 831-832.
[352] Trebilcock & Quinn, *supra* note 350 at 831.
[353] *Ibid.*
[354] In fact, the consumer welfare is not the concern of current anti-dumping laws even though it has been consistently criticised that anti-dumping laws should take consumer welfare into consideration.
[355] Hutton & Trebilcock, *supra* note 120 at 130-131; Trebilcock & Howse, *supra* note 119 at 184; Warner, *supra* note 118 at 833.

dumping might occur is the case of oversupply of perishables, such as agricultural cases. The case of perishables is not a dumping problem but rather the nature of agricultural price instability. In thirty Canadian cases between 1984 and 1989 in which anti-dumping duties were imposed, only four cases of agricultural products presented any indication of non-predatory intermittent dumping: *Whole Potatoes* (1985)[356], *Yellow Onion* (1987)[357], *Sour (Tart) Cherries* (1988)[358], and *Delicious Red and Golden Apples* (1988).[359] Agricultural producers often make planting decisions long before selling their produce; for instance, the time gap for sour cherries is three to four years. Because the agricultural production is cyclical and it follows well-documented cycles, producers often sell their produce at low prices, instead of allowing it to rot, when they have excess produce. Given the cyclical nature of supply in agricultural markets, it is questionable that these four cases represent non-predatory intermittent dumping.

In addition, these cases may not represent the concern of non-predatory intermittent dumping. In *Delicious Red and Golden Apples* (1988), federal and provincial agricultural stabilisation payments were issued in response to the financial difficulties suffered by Canadian growers in crop year 1987/88. In *Sour (Tart) Cherries* (1988), the stabilisation payments were issued to make up Canadian growers' losses incurred in 1987, although there were no imports of cherries from the United States in 1987. It is clear that the concern in these cases was not really a dumping problem and Canadian farmers were subject to below-cost prices regardless of whether or not there were any imports of similar goods. The efficient price or income stabilisation program could alleviate the

---

[356] *Whole Size "A" Potatoes from the U.S.A. for Consumption in B.C.* (1985), CIT-16-85 (C.I.T.).
[357] *Fresh, Whole, Yellow Onions from the U.S.A. for Consumption in B.C.* (1987), CIT-1-87 (C.I.T.).
[358] *Sour (Tart) Cherries from the U.S.A.* (1988), CIT-2-88 (C.I.T.).
[359] *Whole Delicious Red and Golden Apples from the U.S.A.* (1988), CIT-3-88 (C.I.T.).

wide swings in agricultural product prices and farmer income. However, anti-dumping duties raise prices without stabilising them and therefore make inefficient production economically viable. The cases of *Whole Potatoes* (1985) and *Yellow Onion* (1987) also indicate that production in B.C. was simply less efficient than in the milder U.S. climate. As a consequence, the four cases show that "the protection of comparatively inefficient domestic producers may well have been the result of the use of anti-dumping duties"[360] and thus non-predatory intermittent dumping is arguably present.

Furthermore, if the prohibition of non-predatory intermittent dumping is a rationale for anti-dumping laws, it is questionable that the current anti-dumping laws, such as Canada's, are well-equipped to address non-predatory intermittent dumping. For instance, anti-dumping investigation under Canada's anti-dumping law, *Special Import Measures Act*, accesses dumping margins[361] and material injury.[362] Dumping margins are accessed regardless of whether dumping is temporary or permanent. While the Canadian International Trade Tribunal determines whether material injury occurs and considers several relevant factors prescribed by section 37.1 (1) of the *Special Import Measures Regulations*,[363] the material injury inquiries examine falling domestic market share instead of domestic market disruption.[364] It is obvious that the desire to prohibit non-predatory intermittent dumping does not justify the existing Canadian anti-dumping regime. Indeed, it has even been noted by the Tribunal member in *Fresh Iceberg (Head)*

---

[360] Hutton & Trebilcock, *supra* note 120 at 131.

[361] *SIMA*, s. 30.1, 30.2 and 30.3. The dumping margin under section 30.2 (1) of *SIMA* is "the amount by which the normal value of the goods exceeds the export price of the goods".

[362] Section 2 (1) of *SIMA* defines "injury" as "injury to a domestic industry". The preliminary determination of injury of dumping is also defined in s. 37.1, 38-41, 41.1, 41.2 and 42.

[363] S.O.R/84-927.

[364] The focus is on the dumped goods' effect on domestic industry and the existence of a significant increase in the volume of dumped goods.

Lettuce (1992)[365] that the purpose of Canada's anti-dumping legislation is not to protect Canadian producers from non-predatory intermittent dumping. As a result, the prohibition of non-predatory intermittent dumping is not justifiable in the current anti-dumping laws.

In short, the link between prohibition of non-predatory intermittent dumping and anti-dumping laws can not be justifiably proved. Economic literature demonstrates the low possibility of the structural conditions for non-predatory intermittent dumping being satisfied and the ambiguous effects of non-predatory intermittent dumping on consumer welfare. Empirical studies further indicate that the main concern in the few actual cases of agricultural products does not center on non-predatory intermittent dumping but on the agricultural price instability and income stabilisation programs. The mechanism contained in anti-dumping laws does not justify the prohibition of non-predatory intermittent dumping. All the evidence leads to the conclusion that non-predatory intermittent dumping as a rationale for anti-dumping laws is implausible.

(2) **Non-Economic Rationales**

In addition to economic or efficiency-based rationales for prohibiting dumping, supporters of anti-dumping laws commonly assert that such laws can be justified politically because they address the perceived "unfairness" of low-priced foreign imports. Dumping has been called "pernicious" by a U.S. Committee[366] and has been characterised as an unfair trade practice by the U.S. courts.[367] The increasing anti-dumping actions in international contexts appear to reflect growing domestic

---

[365] *Fresh Iceberg (Head) Lettuce from the U.S.A.* [1992] C.I.T.T. No. 141.
[366] S. Rep. No. 249, 96th Cong., 1st Sess. 37 (1980), as cited in N. David Palmeter, "The Capture of the Antidumping Law" (1989) 14:1 Yale J. Int'l L. 182 at 189.
[367] *Bingham and Taylor Div. Va. Industries, Inc. v. United States*, 815 F.2d 1482, 1485 (Fed. Cir. 1987).

political objections to the alleged unfairness of dumped goods. These indicate that anti-dumping measures can be justified on the ground of notions of fairness.[368] In fact, the notion of fairness as a justification for anti-dumping rules has prevailed in the current anti-dumping regime.

Fairness has been considered a difficult concept.[369] The fairness terminology in anti-dumping laws is indeed "inherently vague"[370] and is "reflective of the psychological mood of a nation losing hegemony in the world economy".[371] The disruptive impacts of low-priced imports on the domestic industry symbolise the perceived unfairness of non-predatory dumping. The disruptive impacts will result in domestic workers losing jobs and shareholders of affected producers losing capital. As a consequence, anti-dumping measures are needed to secure the domestic industry's interests.

The notion of fairness as a rationale for anti-dumping rules has, however, been consistently criticised. Apart from the inherent vagueness of fairness, it has been argued that

> fairness is a tricky ground on which to defend an economic policy...When fairness is to the fore, that is probably because no other argument is available...the slipperiness and subjectivity that characterize notions of fairness can work to the advantage of protectionists...Any fairness that antidumping duties might restore to domestic producers is purchased by an increase in the price that domestic buyers must pay for the "unfairly traded" product...To create an antidumping law that could

---

[368] Warner, *supra* note 118 at 833-834.
[369] Robert E. Hudec, "Mirror, Mirror, On the Wall: The Concept of Fairness in United States Trade Policy", in 1990 Proceedings, Canadian Conference on International Law, as cited in Warner, *supra* note 118 at 834.
[370] Jagdish N. Bhagwati, *Protectionism* (Cambridge, Mass.: MIT Press, 1988) 50.
[371] *Ibid.* at 68.

> be defended in terms of fairness, it would be necessary to draft a law that openly defined "unfair"; and then to write into it conditions that ensure that *only* cases of unfair dumping were vulnerable to its sanctions.[372]

It has been argued that "to a large extent the issue of unfairness is really a red herring because dumping has simply been defined to be unfair".[373] As illustrated in the previous chapters, dumping is not intrinsically harmful or unfair. It is the common business practice in most instances. It can be described as unfair only on an eccentric or biased definition of fairness.[374] Dumping *per se* is not condemned. The preamble of the Tokyo Round *Anti-Dumping Code*[375] (GATT 1979) stated that "...anti-dumping practices should not constitute an unjustifiable impediment to international trade...anti-dumping duties may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry...". The Uruguay Round *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* still requires demonstration of dumping, material injury and causation of injury. It by no means equates dumping *per se* with an unfair trade practice. It has been further argued that the term "unfair trade" has no inherent significance with the framework of the GATT.[376] The systemic justification of anti-dumping measures is dubious on the ground that the GATT does not distinguish between "fair" trade and "unfair" trade. While anti-dumping rules are incapable of addressing the underlying determinants of dumping (sources of "unfairness"), it is

---

[372] Hindley & Messerlin, *supra* note 322 at 6-23.
[373] Hoekman & Leidy, *supra* note 141 at 34.
[374] *Ibid.* at 15.
[375] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (1979), online: LEXIS (BISD § 26S/171-188).
[376] Bajwa, *supra* note 112 at 7.

therefore questionable that anti-dumping measures are designed to restrict unfair trade.[377]

Despite the inherent vagueness of fairness terminology, conventional wisdom has strived to rationalise this terminology on grounds of distributive justice and communitarian values. In the recent WTO anti-dumping negotiations, on the other hand, defenders of anti-dumping rules have advanced the idea of the connection between fairness and "a level playing field" to rationalise anti-dumping laws. This section critiques these assertions from economic, empirical and legal perspectives.

1. Distributive Justice and Communitarian Values

Conventional wisdom asserts that distributive justice and communitarian values are fairness rationales for anti-dumping laws.[378] These fairness rationales consider the disruptive impact of cheap foreign imports. Anti-dumping laws are justified in terms of distributive justice because they are to enhance the welfare of the employees among the least-advantaged in society.[379] The least-advantaged members of society include immobile, unskilled, and low-income workers. The disruptive effects of low-priced imports may outweigh the gains in consumer welfare, particularly through the impact on low-skilled, low-paid workers. Anti-dumping laws can be justified on a communitarian rationale because they "minimize the disruptive effect of imports on established communities and their corresponding network of family and social relationships".[380]

---

[377] Klaus Stegemann, "The International Regulation of Dumping: Protection Made Too Easy" (1991) 14:4 World Econ. 375 at 381.

[378] For detailed discussions, see Hutton & Trebilcock, *supra* note 120 at 131-140; Warner, *supra* note 118 at 835-837; Trebilcock & Howse, *supra* note 119 at 186-188.

[379] See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), as cited in Warner, *supra* note 118 at 835.

[380] *Ibid.* Also see Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), as cited in Trebilcock & Howse, *supra* note 119 at 186.

Low-priced imports may result in a negative impact on the welfare of industry-dependent communities, particularly on social and related networks and infrastructure on which such communities depend.

However, such assertions have been argued theoretically. It is true that low-priced imports inflict losses on domestic industry but "the severity of these losses does not depend on whether the market price of those imports is lower than their home market price, which is what distinguishes dumped imports from other imports".[381] In other words, such assertions fail to provide rational principles for distinguishing between the harm caused by non-predatory dumping and the harm caused by non-dumped low-priced imports. Furthermore, Trebilcock[382] points out that the current anti-dumping regimes do not appear to focus significantly on the concern over distributive justice and communitarian values. Even if these are of concern, it is unclear that such allegedly unfair trade practices have anything to do with these impacts.

The empirical study of Hutton and Trebilcock[383] suggests that most Canadian cases in which anti-dumping duties have been imposed do not reflect distributive justice and communitarian rationales. Only two of the thirty Canadian anti-dumping cases between 30 October, 1984 and 3 February, 1989 could be plausibly justified on the ground of a distributive justice rationale alone. Five cases could be plausibly justified by a communitarian rationale alone. Four cases could be plausibly justifiable from combined distributive justice/communitarian rationales. Nineteen cases could not be justifiable on

---

[381] Warner, *supra* note 118 at 835.
[382] Michael J. Trebilcock, "Competition Policy and Trade Policy: Mediating the Interface" (1996) 30:4 J. World T. 71 at 76-77.
[383] Hutton & Trebilcock, *supra* note 120 at 131-143.

any plausible normative rationale, either economic or non-economic. Even if the assumption that anti-dumping laws can be justified on these rationales is valid, there, indeed, exists an indication that the current Canadian anti-dumping regime actually violates distributive justice concerns. These rationales are ignored by anti-dumping authorities. Hutton and Trebilcock conclude that "there was no economic justification found for the current anti-dumping regime on the basis of the 30 recent cases studied, and the majority of the cases ended up helping workers and communities which are already better off than most in Canada".[384] It is clear that the empirical study rejects these non-economic justifications.

In summary, distributive justice and communitarian values as fairness rationales for anti-dumping laws are indeed implausible. From a theoretical perspective, supporters of these rationales provide no rational principle for distinguishing between the harm caused by non-predatory dumping and the harm caused by non-dumped low-price imports, although low-priced imports may inflict losses on the domestic industry. From an empirical perspective, studies indicate that most Canadian anti-dumping cases in which anti-dumping duties have been imposed were not to enhance the welfare of the least-advantaged members of society but to benefit those workers and communities who were already better off than most in Canada. As a consequence, anti-dumping laws cannot be sustained on these non-economic rationales, both theoretically and empirically.

2. Fairness and a Level Playing Field

Despite the vagueness of the notion of fairness, defenders of anti-dumping rules have

---

[384] *Ibid.* at 143.

proposed the connection between "fairness" and "a level playing field" to rationalise anti-dumping laws. This assertion has been the focus in the recent WTO anti-dumping negotiations. Defenders assert that anti-dumping laws are to deal with the conflict between a level playing field on the one hand and unfair traders on the other.[385] Fairness means a level playing field, meaning that similarly situated producers are being treated with similarity. Anti-dumping laws are needed to maintain a level playing field among producers in different countries. This assertion indicates "a level playing field" as a fairness rationale for anti-dumping laws.

The United States has been the strongest advocate of this assertion. The 1998 submission by the U.S. government to the WTO Working Group on the Interaction of Trade and Competition Policy states that

> "Although some dumping may be due to business advantages and market segmentation which have arisen in response to commercial forces, more typically it is a government's industrial policies or key aspects of the national economic system which a government has created, prompted or tolerated that enables injurious dumping to take place....The antidumping rules are a practical, albeit indirect, response to these trade-distorting policies....From this perspective, the antidumping rules represent an effort to maintain a "level playing field" among producers in different countries....The antidumping rules simply seek to remove unfairness and create a "level playing field" for producers and workers...."Fairness" means a level playing field, with similarly situated producers being treated similarity. In other words, "fair" trade envisions that producers will use only natural comparative advantages, such as natural resources, a favorable climate, advanced technology, skilled workers, greater efficiency or lower labor costs, and not any artificial advantages...".[386]

---

[385] Brink Lindsey & Daniel J. Ikenson, *Antidumping Exposed: the Devilish Details of Unfair Trade Law* (Washington, D.C.: CATO Institute, 2003) 150.

[386] WTO Communication from the United States, *supra* note 312 at 2-7.

This statement asserts that the need for anti-dumping rules arises from imperfections in the multilateral trading system. Dumping is generally the result of governmental policies. Although these policies may take on different forms, they provide similar artificial advantages to the benefiting producers. Anti-dumping laws are needed to remove unfairness and to offset the effects of distortions caused by the anti-market policies of foreign governments. Thus, anti-dumping laws restore a level playing field.[387]

The 2002 submission[388] by the U.S. to the Negotiating Group on Rules further illustrates the similar point. This paper states that

> "Effective trade remedy instruments are important to respond to and discourage trade-distorting government policies and the market imperfections that result. Ideally, companies and nations would compete in the international marketplace on the basis of real comparative advantages such as natural resource endowments, labour skills and abundance, availability of capital, and technological innovation...market-distorting practices reduce worldwide economic efficiency....A government's industrial policies or key aspects of the economic system supported by government inaction can enable injurious dumping to take place....While anti-dumping rules are an indirect response to such trade-distorting practices, they can help domestic producers and workers obtain at least some remedial action against artificial advantages of foreign firms....Consequently, anti-dumping measures should be seen not as an ultimate solution to trade-distorting practices abroad but instead as a means to help create a "level playing field" among producers across different countries...".

This statement restates the assertion that government policies may cause market

---

[387] Lindsey & Ikenson, *supra* note 385 at 155-159.
[388] WTO Communication from the United States, *supra* note 319 at 3-4.

distortions and market-distorting practices may cause losses to worldwide economic efficiency. Although the focus on losses to worldwide economic efficiency is different from the usual focus on the unfairness to domestic industries, which must face foreign competitors with artificial (*i.e.*, government policy-caused) competitive advantages, the bottom line in either case is the same: anti-dumping measures are needed to offset artificial competitive advantages and to restore the so-called "level playing field".[389]

Minutes of the Meeting on Canada's Trade Policy Review in 2001 address the similar assertion that Canada uses anti-dumping measures to ensure a level playing field.[390] The U.S. position on this rationale has been consistently shown in WTO documents.[391] However, the assertion that dumping is usually the result of trade-distorting governmental policies and anti-dumping measures therefore are needed to offset unfairly artificial competitive advantages and to restore a level playing field, cannot survive careful scrutiny.

First, supporters of this assertion provide neither clear definitions of "fairness" and "level playing field", nor explanations for how current anti-dumping rules advance those goals. They fail to spell out the specific circumstances that supposedly give rise to unfair trade, and the criteria for distinguishing those circumstances from normal conditions of competition. They simply assert the connection between anti-dumping rules and fairness,

---

[389] Lindsey & Ikenson, *supra* note 385 at 153.

[390] WTO, *Minutes of Meeting on Trade Policy Review: Canada* (held on 13-15 December 2000), WTO Doc. WT/TPR/M/78 (2001) at 31 and 99, online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

[391] *United States-Anti-Dumping Act of 1916 (Complaint by the European Communities)* (2000), WTO Doc. WT/DS136/R at para. 3.115 (Panel Report); *United States-Anti-Dumping Act of 1916 (Complaint by Japan)* (2000), WTO, Doc. WT/DS162/R/Add.1 at para. 3.144 (Panel Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

and further count on the complexities of the law's methodologies to protect their assertion from careful scrutiny.[392]

Second, analyses have suggested that dumping can also be the result of purely private conduct, having nothing to do with trade-distorting government policies. For instance, oligopolistic market power can give rise to price-discrimination dumping and cross-subsidisation by a multi-product firm.[393] In fact, many industries are characterised by oligopolistic competition and many enterprises are multi-product firms. There exists no regulation of price premiums earned by oligopolistic firms in the United States; for example, it is not illegal that a firm with a strong brand name charges a higher price for its product. There exists no general regulation of cross-subsidies by multi-product firms in the United States; for example, it is not legally actionable that a manufacturer of razors and blades sells the former at or below cost to maximise revenue from the latter. If these practices are not considered legally actionable in the domestic context, it is questionable that the same practices by foreign firms are considered unfair trade behavior.[394] In this regard, anti-dumping measures are apparently symbolic of protectionist instruments.

Third, some WTO members have argued that the association between dumping and this fairness assertion has no significance in *Article VI of GATT 1994* or in the *Anti-Dumping Agreement*. Hong Kong, China, has stated that there is no mention in *Article VI of GATT 1994* or in the *Anti-Dumping Agreement* of anti-dumping as a response to objectionable

---

[392] Lindsey & Ikenson, *supra* note 385 at 150.

[393] Wolff, *supra* note 290 at 2; Terence P. Stewart, "Administration of the Antidumping Law: A Different Perspective" in Richard Boltuck & Robert E. Litan, eds., *Down in Dumps: Administration of the Unfair Trade laws* (Washington, D.C.: Brookings Institution Press, 1991) 280 at 288, as cited in Lindsey & Ikenson, *supra* note 385 at 159.

[394] Lindsey & Ikenson, *supra* note 385 at 159-160.

trade-distorting governmental policies, or as a tool to level the playing field among producers in different countries. In no anti-dumping investigation is there a need to show or prove government involvement.[395] Japan has further argued the idea that market-distortive industrial policies keeping out foreign competitors should be addressed by anti-dumping measures. If there are such policies, they should be addressed by the dispute settlement procedures of the WTO. In addition, market-distortive industrial policies are legitimate under the WTO rules in certain circumstances; for instance, developing countries in some cases are allowed to maintain temporarily such policies.[396]

To sum up, neither *Article VI of GATT* nor the *Anti-Dumping Agreement* makes mention of the association between anti-dumping and the asserted fairness rationale. The *Anti-Dumping Agreement* provides WTO members with standards for how to conduct an anti-dumping investigation and to impose duties but it illustrates nothing about why dumping is a problem. In other words, it defines the "solution" but not the problem. To assert that anti-dumping measures are needed on the ground that dumping is the result of trade-distorting governmental policies may result in penalising some commercial practices which have nothing to do with such policies and are legitimate private conduct. As a consequence, the validity of "a level playing field" as a fairness rationale for anti-dumping rules is apparently questionable.

Neither economic nor non-economic rationales can justify anti-dumping laws. Without such justification, anti-dumping laws offer only punitive responses to common importer

---

[395] WTO, *Report on the Meeting of 27-28 July 1998*, WTO Doc. WT/WGTCP/M/5 (1998), at para. 67, online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003)

[396] *Ibid* at para. 69.

activities and business tactics. Anti-dumping laws authorise action against common commercial practices that ought to be allowed,[397] and such measures merely act as another form of protection, entirely unconnected to any observed dumping behavior.[398] In particular, anti-dumping measures offer a discriminatory form of protection. This is often not transparent and it distorts production, consumption and trade.[399] Anti-dumping laws have also become the weapon of choice for import protection.[400] Indeed, the multilaterally approved regulation of dumping, the *Anti-Dumping Agreement*, has "become a preferred tool of regulatory protectionism, and the incidence of this protectionism is still spreading because the multilaterally approved rules have made protection too easy".[401]

Section Three: The Anti-Dumping Agreement

If anti-dumping laws cannot be justified on economic and non-economic bases, then they become the tool of regulatory protectionism. To promote international trade in today's globalised economy, such protectionist barriers should be eliminated. However, the World Trade Organization has expanded to encompass more trading nations and thus more nations have adopted anti-dumping laws. The goal of abolishing this protectionist tool remains less achievable. The proliferation of anti-dumping cases initiated over the past decades also reflects this unachievability. By 1997, there were 94 per cent more cases initiated than in 1987.[402]

---

[397] Hindley & Messerlin, *supra* note 322 at 70-76.
[398] Wooton & Zanardi, *supra* note 279 at 12.
[399] Hoekman & Leidy, *supra* note 141 at 42.
[400] Christopher F. Corr, "Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures" (1997) 18:1 Nw. J. Int'l L. & Bus. 49 at 53.
[401] Stegemann, *supra* note 377 at 376.
[402] Gary Horlick, "Antidumping at the Seattle Ministerial: With Teargas in my Eyes" (2000) 3:1 J. Int'l Econ. L. 178 at 180.

Given the difficulty in abolishing anti-dumping laws, the next question becomes: how to "fix" anti-dumping laws to make them more transparent and less protectionist? While the number of WTO member nations has consistently increased, and *Article VI of the General Agreement on Tariffs and Trade 1994* authorises the importing member to impose an anti-dumping duty where goods are dumped and where dumping causes or threatens material injury to the domestic industry, the *Agreement on Implementation of Article VI of the Agreement on Tariffs and Trade 1994* (the *Anti-Dumping Agreement*), containing detailed procedural requirements, obviously represents the heart of this proposal. Thus, this section will review the eighteen articles of the *Anti-Dumping Agreement*, raise relevant issues and suggest possible solutions.

Paragraph 1 *of Article VI of the General Agreement on Tariffs and Trade 1994* states

> "[t]he contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purpose of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
> (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
> (b) in the absence of such domestic price, is less than either
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
> (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

> Due 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".

To implement *Article VI of the General Agreement on Tariffs and Trade 1994*, the *Anti-Dumping Agreement* governs the application of *Article VI of the General Agreement on Tariffs and Trade 1994*. The *Anti-Dumping Agreement* is divided into three parts and two annexes. Part I, covering Article 1 to 15, is the core of the Agreement and contains definitions of dumping (Article 2) and injury (Article 3). This part also contains all procedural provisions that must be complied with by an importing member's authorities. Part II, covering Article 16 and 17, establishes the WTO Committee on Anti-Dumping Practices and special rules for WTO dispute settlement relating to anti-dumping matters. Article 18 in Part III contains the final provisions. Annex I provides procedures for on-the-spot investigations pursuant to paragraph 7 of Article 6. Annex II imposes constraints on the use of the best information available in cases where interested parties insufficiently cooperate in the investigation. The following will discuss and critique the core articles: Principles, Determination of Dumping, and Determination of Injury.

(1) **Principles**

Article 1 of the *Anti-Dumping Agreement* states

> "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations".

It is argued that the language of this article means that the Agreement is *lex specialis* to Article VI of GATT 1994, and applies in lieu of Article VI of *GATT 1994*.[403] However, it is generally accepted that this article provides the *Anti-Dumping Agreement* with a legal basis for implementing Article VI of *GATT 1994*. This article also provides that an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of *GATT 1994* and be conducted in accordance with the provisions of the *Anti-Dumping Agreement*.

Although there has been little debate over this provision, the Appellate Body and the Panel have put interpretations on its application.[404] In the Report of the Appellate Body on United States – Anti-Dumping Act of 1916, the United States argues that "the phrase 'anti-dumping measures' refers only to definitive anti-dumping duties, price undertakings and provisional measures".[405] The Appellate Body, however, states that "the ordinary meaning of the phrase 'anti-dumping measures' seems to encompass all measures taken against dumping"[406] and "[w]e do not see in the words 'anti-dumping measures' any implicit limitation to particular types of measures".[407]

Because of the dependent nature between this provision and other provisions of the Agreement, it is unnecessary to address the violation of this provision if there exists any

---

[403] David Palmeter, "A Commentary on the WTO Anti-Dumping Code" (1996) 30: 4 J. World T. 43 at 46.

[404] For interpretations of the Appellate Body and the Panel on the Agreement, see James P. Durling & Matthew R. Nicely, *Understanding the WTO Anti-Dumping Agreement: Negotiating History and Subsequent Interpretation* (London: Cameron May, 2002), and WTO, *WTO Analytical Index: Guide to WTO Law and Practice*, 1st ed. (Lanham: Bernan, 2003).

[405] *United States – Anti-Dumping Act of 1916 (Complaints by the European Communities and Japan)* (2000), WTO Doc. WT/DS136, 162/AB/R at para. 119 (Appellate Body Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

[406] *Ibid.*

[407] *Ibid.*

violation of other provisions of the Agreement. In the Panel Report on Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico, the Panel states that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 1, are dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the Agreement.[408] In the Panel Report on US – Stainless Steel, Korea asserts that "because certain provisions of the *AD Agreement* have been violated, Article VI of the GATT 1994 and Article 1 of the *AD Agreement* are consequently violated".[409] The Panel however addresses: "[b]ecause of their dependent nature, we can perceive of no useful purpose that would be served by ruling on these claims. Accordingly, we do not consider it necessary to address them."[410]

(2) Determination of Dumping

Article 2 is one of the most important Articles of the Agreement, covering the essence of the subject: the determination of dumping. Article 2.1 provides the key definitional concept of "dumping" and is considered the foundation for the remainder of Article 2. This provision provides the standard situation in which the normal value is determined. Article 2.2 provides investigating authorities with alternatives for calculating the normal value when there are insufficient sales in the home market for comparison purposes. Article 2.2.1 provides the Agreement's only specific definition of sales that can be treated as not being in the ordinary course of trade. Article 2.2.1.1 sets out further guidance to

---

[408] *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* (2000), WTO Doc. WT/DS156/R at para. 8.296 (Panel Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

[409] *United States – Anti-Dumping Measures on Stainless Steel Plate in coils and Stainless Sheet and Strip from Korea* (2000), WTO Doc. WT/DS179/R at para. 6.138 (Panel Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 August 2003).

[410] *Ibid.*

authorities calculating costs in accordance with Article 2.2.1. Article 2.2.2 elaborates the calculation of two cost elements in order to arrive at an appropriate constructed normal value: (1) reasonable amount for administrative, selling and general costs; and (2) reasonable amount for profits.

Article 2.3 covers the construction of the export price. Article 2.4 provides detailed rules for making a fair comparison between export price and normal value. Article 2.4.1 identifies the choice of exchange rates that can be used when converting currencies. Article 2.4.2 is aimed at limiting the use of the unbalanced transaction-to-weighted average comparisons common under many anti-dumping regimes. Article 2.5 deals with trans-shipments. Article 2.6 defines the concept of the like product. Article 2.7 clarifies the relationship of Article 2 to specific provisions in Article VI of GATT 1994 dealing with non-market economies.

The following examines the significant concepts contained in these provisions and the relevant issues. The critiques of these selected concepts are also provided.

1. Ordinary Course of Trade

The concept of the "ordinary course of trade" is not the subject of a specific provision. The Agreement does not clearly define the term the "ordinary course of trade". Article 2.2.1 simply provides an instance of sales, "below cost sales", which can be deemed outside the ordinary course of trade, but does not provide a clear definition. Because of the absence of any clear definition, the Panel and the Appellate Body have opined on the meaning of the concept.

Article 2.1 of the *Anti-Dumping Agreement* states

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

Article 2.2.1 of the *Anti-Dumping Agreement* states

> "[s]ales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time".

In the *U.S. Hot–Rolled Steel*[411] case, the Appellate Body noted that

> "Article 2.1 of the *Anti-Dumping Agreement* provides that normal value – the price of the like product in the home market of the exporter or producer – must be established on the basis of sales made 'in the ordinary course of trade'. Thus, sales which are *not* made 'in the ordinary course of trade' must be excluded, by the investigating authorities, from the calculation of normal value. The Anti-Dumping

[411] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (Complaint by Japan)* (2001), WTO Doc. WT/DS184/AB/R (Appellate Body Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 September 2003).

Agreement does not define the term 'in the ordinary course of trade'...."[412]

The issue in this case was the U.S. Department of Commerce's treatment of sales to home market affiliates as "outside the ordinary course of trade". The Appellate Body concluded that the standard applied by the U.S. Department of Commerce for deeming sales to affiliates as outside the ordinary course of trade failed to determine whether the sales to affiliates were truly outside the ordinary course of trade.[413] Its report states that

> "Although we believe that the Anti-Dumping Agreement affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not "in the ordinary course of trade", that discretion is not without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation...."[414]

The Appellate Body further noted that "under Article 2.1, it is for the *investigating authorities*, and not exporters, to ensure that the calculation of normal value is based on sales made "in the ordinary course of trade", as they are responsible for making a determination of dumping".[415] Although such an interpretation on the basic principle may help to limit abuses by the investigating authorities,[416] there exist arguments over the concept of "ordinary course of trade".

First, lack of a clear definition of "ordinary course of trade" in the *Anti-Dumping Agreement* may result in the investigating authority's abuse of discretion, and thus the

---

[412] *Ibid.* at para. 139.
[413] Durling & Nicely, *supra* note 404 at 29.
[414] WTO Appellate Body Report, *supra* note 411 at para. 148.
[415] *Ibid.* at para. 153.
[416] Durling & Nicely, *supra* note 404 at 30.

Panel and Appellate Body must review and interpret the proper concept of "ordinary course of trade" in disputing cases. As disputing cases increase in this regard, the interpretation burden on the Panel and Appellate Body becomes heavy.

Second, although the report of the Appellate Body notes that "the discretion must be exercised in an even-handed way", it is questionable that the means of "an even-handed way" provides the investigating authority with clear guidelines for exercising discretion. It is common in such disputes that the investigating authority's interpretation on such an even-handed way is different from the affected parties'. As a result, the dispute settlement mechanism will be frequently consulted. Such a mechanism thus becomes intended for the frequently used tool, instead of for the final decision-making.

Third, Article 2.1 states that a product is to be considered as being dumped, or sold at less than normal value: "...if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Article 2.2.1 further provides that sales of the like product in the domestic market of the exporting country: "...at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value." It has been argued that the averages for the export price and normal value can be skewed because

> "all export sales – whether above or below total costs – will be averaged to obtain export price, but only those domestic sales 'in ordinary course of trade' will be averaged to obtain normal value. This skewing of the components of the averages

> for export price and normal value may do much to diminish the fair comparison impact of Article 2.4.2's average-to-average and transaction-to-transaction comparison requirement".[417]

As a consequence, the clear definition or clarification of the concept of "the ordinary course of trade" must be provided in the text of the *Anti-Dumping Agreement*. This can enable the investigating authority to exercise discretion under disciplined instructions, avoid abuses by the investigating authorities, decrease disputed cases centred on this point, and further provide a fair basis for the averages for export price and normal value.

2. Like Product

Article 2.6 of the *Anti-Dumping Agreement* states

> "[t]hroughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".

The term "like product" defined in Article 2.6 means "a product which is identical, *i.e.*, alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". In fact, the crucial concept of "like product" remains relatively vague. It has been argued that "the language 'characteristics closely resembling' does not provide much guidance, particularly given the central role that 'like product' plays in defining the parameters of a dumping

[417] Palmeter, *supra* note 403 at 48-49.

investigation".[418] As of 31 December 2001, there has been no WTO precedent on this provision.[419]

The term "like product" also appears in Article III of *GATT 1994*.[420] In the *Japan – Taxes on Alcoholic Beverages*[421] case, the Panel stresses that

> "In the view of the Panel, like products should be viewed as a subset of directly competitive or substitutable products. The wording ('like products' as opposed to 'directly competitive or substitutable products') confirmed this point, in the sense that all like products are, by definition, directly competitive or substitutable products, whereas all directly competitive or substitutable products are not necessarily like products...in the Panel's view, the wording makes it clear that appropriate test to define whether two products are 'like' or 'directly competitive or substitutable products' is the marketplace..."[422]

The Panel notes that the term of "like product" appears in various GATT provisions and it does not necessarily follow that the term has to be interpreted in a uniform way.[423] The term should be interpreted on a case-by-case basis, and previous panels had not established a particular test that had to be strictly followed in order to define likeness.[424] Subsequently, the Appellate Body has confirmed this new approach: marketplace-based

---

[418] Durling & Nicely, *supra* note 404 at 112.
[419] *Ibid.*
[420] Paragraph 4 of Article III of GATT 1994 states that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product".
[421] *Japan – Taxes on Alcoholic Beverages (Complaints by the European Communities, Canada and the United States)* (1996), WTO Doc. WT/DS8, 10, 11/R (Panel Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 September 2003).
[422] *Ibid.* at para. 6.22.
[423] *Ibid.* at para. 6.20.
[424] *Ibid.* at para. 6.21.

analysis of the competitive relationship between products, and the use of competition in the determination of like goods.[425] The other Appellate Body Report focuses on "directly competitive or substitutable" products in the second sentence of Article III: 2 and states that "[t]he GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets".[426] The Appellate Body further notes that its market-based interpretation of "like products" is limited to the GATT provision in this dispute.

Although the Panel and the Appellate Body clearly state that the market-based interpretation of "like products" is applicable to Article III of *GATT 1994* and the term in different provisions should be interpreted on a case-by-case basis, Bronckers and McNelis consider that this market-based interpretation should be applicable to any inquiry into GATT provisions that use the term of "like product".[427] For the interest of legal certainty, the application of this marketplace-based analysis can serve to limit the latitude for manipulation.[428] The market-based approach to determining "like products" in the context of Article III of *GATT 1994* can provide an over-arching guideline for the determination of "like product" in the anti-dumping field because the WTO is concerned with markets and anti-dumping is designed to correct an injurious situation on the foreign markets.[429] Although the same terms may have different meanings and purposes in different contexts, the interpretation in certain domains can be of use in another.

---

[425] *EC – Asbestos* (2001), WTO Doc. WT/DS135/AB/R (Appellate Body Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 September 2003).

[426] *Japan – Taxes on Alcoholic Beverages (Complaints by the European Communities, Canada and the United States)* (1996), WTO Doc. WT/DS8, 10, 11/AB/R at 25 (Appellate Body Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 September 2003).

[427] Marco Bronckers & Natalie McNelis, "Rethinking the 'Like Product' Definition in WTO Antidumping Law" (1999) 33: 3 J. World T. 73 at 73-74.

[428] *Ibid.* at 76.

[429] *Ibid.*

However, it is questionable that the approach from Article III jurisprudence would be applied to Article 2.6. As clearly stated by the Panel and the Appellate Body the term "like product" in various GATT provisions is not necessarily interpreted in a uniform way; it is by no means certain that the market-based approach from Article III is applicable to the anti-dumping domain. In addition, Article 2.6 of the *Anti-Dumping Agreement* clearly states that the term must be interpreted to mean a product which is identical or has characteristics closely resembling those of the product under consideration. Before this provision is actually litigated, and the Panel and the Appellate Body interpret the concept of "like product", the application of this market-based approach to the anti-dumping domain remains questionable.

Few submissions by WTO members have also shown concern over the concept of "like product". The submission by Australia in 2003 suggests replacing the word "identical" in this provision with "goods, which have essentially the same physical characteristics" as part of the process of specifying criteria for the purpose of determination of dumping and determination of injury, and for the definition of domestic industry.[430] The submission states that

> "Australia would welcome views on the merits of whether considerations should be given to developing separate criteria for consideration of like product under ADA Article 2 for the purpose of determining a dumping margin, ADA Article 3 for the purpose of determining injury and ADA Article 4 for the purpose of defining domestic industry. One view is that a market test, as reflected in the Japan Alcoholic Beverages case, is appropriate to be used in assessing the like goods

[430] WTO, *"Like Product" within the Meaning of the WTO Anti-Dumping Agreement, Communication from Australia*, WTO Doc. TN/RL/W/91 (2003), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 September 2003).

> produced by a domestic industry...for the purpose of making a determination under ADA Article 2, a test which concentrates more on the actual physical characteristics, e.g. physical characteristics and Customs classification, may be sufficient".[431]

Nevertheless, Hong Kong, China argues about this suggestion.[432] Its submission states that the definition of "like product" should be applied uniformly throughout the proceedings in order to ensure consistency and predictability for the whole process. Australia fails to elaborate the practical problems associated with the uniform application of the definition and to elaborate on justifications for adopting separate criteria for consideration of "like product". Australia does not explain why it is appropriate to abandon the "identical" criterion in the definition.

It is clear that the concept of "like product" is ambiguously defined in Article 2.6 of the *Anti-Dumping Agreement* and the language "characteristics closely resembling" does not provide much guidance. As the Panel and the Appellate Body have concluded that the term in various provisions must be interpreted on a case-by-case basis, one can only hope that the clarifying interpretation for the concept of "like product" in the anti-dumping domain can be provided in future litigation.

3. Constructed Value Calculation

Article 2.2.2 of the *Anti-Dumping Agreement* states

---

[431] *Ibid.* at 2-3.

[432] WTO, *Questions from Hong Kong, China on Papers Submitted to the Negotiating Group on Rules*, WTO Doc. TN/RL/W/109 (2003), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 September 2003).

"[f]or the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

To arrive at an appropriate constructed normal value, Article 2.2.2 sets out three methodological options for calculating the amounts for administrative, selling and general costs, and for profits. These amounts should be added to the cost of manufacturing. Although these options provide a certain discipline to the calculation, this provision restricts the investigating authority's options in this constructed value calculation. In this regard, two Panel reports and one Appellate Body report have made a few comments.[433]

First, there is no hierarchy among the three methodological options concerning the determination of the profit amount in Article 2.2.2(i), (ii) and (iii). In the *EC – Bed Linen*[434] case, the Panel notes that "the mere order in which the options appear in Article

---

[433] Durling & Nicely, *supra* note 404 at 55-72.

[434] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (Complaint by India)* (2000), WTO Doc. WT/DS141/R (Panel Report), online: WTO

2.2.2 has no preferential significance", although these options are listed in a sequence. These three alternative methods for calculating the profit amount are "intended to constitute close approximations of the general rule set out in the chapeau of Article 2.2.2",[435] when the amount cannot be determined on the basis of the chapeau of Article 2.2.2. The Panel further stresses that "...there is no basis on which to judge which of these three options is 'better'...there is no specific language in the Agreement to suggest that the drafters considered one option preferable to the others".[436] The WTO Members have complete discretion as to which of these three methodologies they use in their investigations.[437]

Similarly, the Panel makes the same point in the *Thailand – H-Beams*[438] case by saying that "...we note that the chapeau of Article 2.2.2 provides that where the methodology in the chapeau 'cannot' be used, one of the methodologies in subparagraphs (i), (ii) or (iii) 'may' be used...We note that the text of Article 2.2.2 establishes no hierarchy among the subparagraphs...".[439]

Second, the two options set forth in Article 2.2.2 (i) and (ii) are by definition reasonable and thus there is no separate requirement of "reasonability" test on these two options to determine the amounts of profits. In *EC – Bed Linen*, the Panel notes that

---

<http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 September 2003).

[435] *Ibid.* at para. 6.60.

[436] *Ibid.* at para. 6.61.

[437] *Ibid.* at para. 6.62.

[438] *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Complaint by Poland)* (2000), WTO Doc. WT/DS122/R (Panel Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 September 2003).

[439] *Ibid.* at para. 7.123.

"[t]he text thus indicates that the methodologies set out in Article 2.2.2 are outlined 'for the purpose' of calculating a reasonable profit amount pursuant to Article 2.2. There is no specific language establishing a separate reasonability test, or indicating how such a test should be conducted. In these circumstances, we consider that there is no textual basis for such a requirement. Thus, the ordinary meaning of the text indicates that if one of the methods of Article 2.2.2 is properly applied, the results are by definition 'reasonable' as required by Article 2.2."[440]

In *Thailand – H-Beams*, the Panel also considers that "the ordinary meaning of the text seems rather to indicate that, if one of the methodologies is applied, the result is by definition reasonable"[441] and "the notion of a separate reasonability test is both illogical and superfluous".[442]

Third, Article 2.2.2 (ii) methodology can only apply when there is more than one other exporter or producer. In *EC – Bed Linen*, the Appellate Body reverses the Panel's finding and concludes that

"...the phrase 'weighted average' in Article 2.2.2 (ii) precludes, in this particular provision, understanding the phrase 'other exporters or producers' in the plural as including the singular case. To us, the use of the phrase 'weighted average' in Article 2.2.2 (ii) makes it impossible to read 'other exporters or producers' as 'one exporter or producer'. First of all, and obviously, an 'average' of amounts for SG&A and profits *cannot* be calculated on the basis of data on SG&A and profits relating to only *one* exporter or producer. Moreover, the textual directive to 'weight' the average further supports this view because the 'average' which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall

---

[440] WTO Panel Report, *supra* note 434 at para. 6.96.
[441] WTO Panel Report, *supra* note 438 at para. 7.122.
[442] *Ibid.* at para. 7.125.

mean..."[443]

Fourth, the actual amounts of SG&A (selling, general and administrative costs) and profits incurred and realised by other exporters or producers under Article 2.2.2 (ii) must encompass those amounts incurred and realised on below-cost sales. In other words, Article 2.2.2 (ii) methodology must include below-cost sales and all other sales. In *EC – Bed Linen*, the Appellate Body reverses the Panel's finding and notes that

> "...In referring to 'actual amounts incurred and realized', this provision does not make any exceptions or qualifications...the ordinary meaning of the phrase '*actual* amounts incurred and realized' includes the *SG&A actually incurred*, and the *profits or losses actually realized* by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin....It follows that, in the calculation of the 'weight average', *all* of 'the actual amounts incurred and realized' by other exporters or producers must be included, *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not...."[444]

Fifth, "the same general category of products" in Article 2.2.2 (i) can be interpreted to include a narrower category of products and the investigating authorities need not to adopt a broader category. In *Thailand – H-Beams*, the Panel considers that

> "...the text of Article 2.2.2 (i) simply refers without elaboration to 'the same general category of products' produced by the producer or exporter under investigation. Thus, the text of this subparagraph provides no precise guidance as to the required breadth or narrowness of the product category...."[445]

---

[443] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (Complaint by India)* (2001), WTO Doc. WT/DS141/AB/R at para. 74 (Appellate Body Report), online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 September 2003).

[444] *Ibid.* at para. 80.

[445] WTO Panel Report, *supra* note 438 at para. 7.111.

The Panel further stresses that

> "We do find a certain amount of guidance in other provisions of Article 2.2.2, in particular its chapeau and its overall structure, however...Article 2.2 and Article 2.2.2 concern the establishment of an appropriate proxy for the price 'of the like product in the ordinary course of trade in the domestic market of the exporting country' when that price cannot be used. As such, as the drafting of the provisions makes clear, the preferred methodology which is set forth in the chapeau is to use *actual* data of the exporter or producer under investigation for the *like product*. Where this is not possible, subparagraphs (i) and (ii) respectively provide for the database to be broadened, either as to the product...or as to the producer...but not both. Again this confirms that the intention of these provisions is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country."[446]

Consequently, the Panel concludes that

> "[t]his context indicates to us that the use under subparagraph (i) of a narrower rather than a broader 'same general category of products' certainly is permitted. Indeed, the narrower the category, the fewer products other than the like product will be included in the category, and this would seem to be fully consistent with the goal of obtaining results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country."[447]

Although the Panel and the Appellate Body have put the above interpretations on Article 2.2.2, some arguments exist. As there is no hierarchy among the three methodological options for calculating the selling, general and administrative costs, and profits in Article

---

[446] *Ibid.* at para 7.112.
[447] *Ibid.* at para 7.113.

2.2.2 (i), (ii) and (iii), the administering authorities still have flexibility in calculating these costs and profits. The flexibility denotes that the provision may be abused in favor of inflating a dumping margin.[448] While the amounts for administrative, selling and general costs and for profits cannot be determined on the basis of the general rule in the chapeau of Article 2.2.2, the administering authorities have the discretion to adopt one option which may yield the utmost amount for these costs and profits, and thus the utmost amount of dumping margin. This would be inconsistent with the goal of obtaining "close approximations of the general rule set out in the chapeau of Article 2.2.2". Furthermore, inflating the dumping margin subsequently yields the unreasonable inflation of anti-dumping duties. The imposition of these anti-dumping duties unreasonably counteracts the injury which is not actually caused by dumping.

In addition, it has been argued that calculations of SG&A and profits addressed in Article 2.2.2 are controversial.[449] Article 2.2.2 requires that these calculations "shall be based on actual data pertaining to production and sales in the ordinary course of trade". The "ordinary course of trade" means that the "actual data" pertaining to the calculation of the exporter's home-market profits only includes the exporter's profitable sales but excludes the exporter's sales at a loss. The exporter's sales at a loss are thus excluded from the calculation of normal value. This provision has been criticised that

> "[i]t is interesting to speculate as to what would happen to the management of a company that reported profits to shareholders or to securities regulators on this basis. In most countries, it would constitute criminal fraud and could lead to imprisonment. Only in the Orwellian world of anti-dumping are calculations like

[448] Durling & Nicely, *supra* note 404 at 72.
[449] Palmeter, *supra* note 403 at 50.

these a solemn and important part of a 'fair comparison'".[450]

Furthermore, the three options in Article 2.2.2 (i), (ii) and (iii) provide reasonable methods for calculations of the exporter's profits and SG&A costs on the same "general category of products", and for calculation of the weighted-average amounts for other exporters or producers in the investigation. The Appellate Body in *EC – Bed Linen* concludes that Article 2.2.2 (ii) methodology can only apply when there is more than one other exporter or producer. It has been argued that these methodologies and the Appellate Body's interpretation are not workable under certain circumstances; for instance: "What would be a 'reasonable method' for a single-product company that exported 100 percent of its production, if it were the only party investigated?"[451]

(3) **Determination of Injury**

Article 3.1 provides the basic framework for injury determinations under the *Anti-Dumping Agreement*. Subsequent provisions provide elaborations of the concepts of Article 3.1. Article 3.2 elaborates on the meaning of volume effects. Article 3.3 deals with the cumulation of imports from more than one country. Article 3.4 provides listed factors for the investigating authorities to consider, concerning the impact of dumped imports on the domestic industry. Article 3.5 provides guidelines for the investigating authorities to demonstrate the causation between the effects of dumping and the injury. Article 3.6 elaborates on the assessment of the effects of the dumped imports. Article 3.7 provides guidelines for determination of a threat of material injury. Article 3.8 provides that the application of anti-dumping measures must be considered and decided with

[450] *Ibid.* at 50-51.
[451] *Ibid.*

special care, with respect to cases where injury is threatened by dumping.

The following are critiques the significant concepts contained in these provisions and the relevant issues.

1. A Significant Increase in Dumped Imports

Article 3.2 of the *Anti-Dumping Agreement* states

> "[w]ith regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance".

Article 3.2 requires that the investigating authorities "consider whether there has been a significant increase in dumped imports". In *Thailand – H-Beams*, the Panel notes that

> "[w]e examine the nature of the obligation in Article 3.2...While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as 'significant', and to give a reasoned explanation of that characterization, we believe that the word 'significant' does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped

> imports, in absolute or relative terms"[452], and that "[w]e next examine whether the Thai authorities considered whether there has been a significant increase in dumped imports in absolute terms within the meaning of the first sentence of Article 3.2. In this context, we note that the Concise Oxford Dictionary defines 'significant' as, inter alia, 'noteworthy, important, consequential'...."[453]

Although the text of this provision and the Panel's interpretation require that the volume effects and the price effects must be 'significant' to meet the standards of Article 3.2, in fact, it does not provide much guidance and the concept of the term "significant" is still open to question. It has been argued that "[t]he text is obviously trying to apply some real standards, but it is easy for authorities to announce something is 'significant', and difficult for reviewing panels to evaluate that judgment in a meaningful way".[454] Therefore, this textual standard contained in Article 3.2 needs to be clarified.

2. The Concept of the Cumulation of Imports from More than One Country

Article 3.3 of the *Anti-Dumping Agreement* states

> "[w]here imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product".

---

[452] WTO Panel Report, *supra* note 438 at para. 7.161.
[453] *Ibid.* at para. 7.163.
[454] Durling & Nicely, *supra* note 404 at 155.

Article 3.3 provides the textual basis for investigating authorities to assess cumulatively the effects of dumped imports from more than one country under their national laws. However, the standard contained in this provision is somewhat vague and there has been no WTO decisions concerning this provision to date.[455]

Although the text requires that "a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product", the phrase "conditions of competition" has not yet been clarified. Similarly, this provision requires that "the volume of imports from each country is not negligible" but the concept of "negligible volume" has not been defined. Furthermore, the investigating authorities "may" cumulate in appropriate circumstances under this provision. Although the nature of cumulation is discretionary under Article 3.3, many national anti-dumping laws make cumulation "mandatory" if the certain standards have been met.[456] It is questionable whether such interpretations of Article 3.3 are permissible and whether these national laws are consistent with this provision.

(4) **Conclusion**

Through the above discussion about the core articles in the *Anti-Dumping Agreement*, some key concepts of the text are relatively vague and further clarification will be required. However, it is questionable that such a goal of clarification can be achieved through subsequent WTO negotiations because anti-dumping laws are by nature the tool of regulatory protectionism. They cannot be justified on both economic and

[455] *Ibid.* at 158.
[456] *Ibid.* at 158-159.

non-economic rationales. To be the protectionist tool, the text of anti-dumping laws must be vague and uncertain. Thus, the vagueness somewhat grants national authorities the abilities to arbitrarily determine dumping and their imposing anti-dumping duties. It is easy for authorities to manipulate the protectionist tool. The proliferation of anti-dumping cases initiated over the past decades reflects how easy the tool can be manipulated. As a result, the abolition of anti-dumping laws is preferable and, without rationales for anti-dumping laws, efforts to improve and clarify anti-dumping laws might be in vain.

Chapter Four

Proposals for Reform and Conclusion

Section One: Proposals for Reform

As anti-dumping laws cannot be justified on either economic or non-economic rationales, a number of critics of anti-dumping laws have proposed few reforms. Reformers generally focus on three proposals: (1) replacement of anti-dumping laws by competition or antitrust laws; (2) replacement of anti-dumping laws by safeguards; and (3) reform for clauses of the *Anti-Dumping Agreement*. The following analysis examines these proposals.

(1) Replacing Anti-dumping Laws with Competition or Antitrust Laws

It has been proposed that anti-dumping laws should be replaced by either supra-national or harmonised domestic antitrust regimes.[457] While only predatory pricing might give rise to a legitimate economic rationale for prohibiting dumping, current anti-dumping laws are "ill-designed to identify and penalize true international predatory pricing". Anti-dumping duties are imposed on goods priced at non-predatory levels. The true predatory intent cannot be identified. Foreign firms are subjected to burdens that domestic competitors do not bear. In addition, the current anti-dumping laws are ill-equipped to deal with non-economic rationales for anti-dumping laws, such as concerns over distributive justice or communitarian impacts of low priced imports. However, replacement for anti-dumping laws may provide solutions to these problems.

The supranational or harmonised domestic antitrust laws can penalise true international

---

[457] Trebilcock & Howse, *supra* note 119 at 188-189.

predatory pricing without, at the same time, penalising non-predatory international price discrimination because "price discrimination laws should play no role in regulating cross-border trade".[458] The EU competition laws exemplify this proposal, although they constrain not only predatory pricing but also cross-border price discrimination. The internal abolition of anti-dumping duties and their replacement with EU competition laws binds member states of the European Union and their citizens.

The *Australia-New Zealand Closer Economic Relations Trade Agreement*[459] is another example. Pursuant to Article Four of the *Protocol on Acceleration of Free Trade in Goods*,[460] 1988, Australian and New Zealand agreed that as of 1 July 1990 anti-dumping action between the two countries could no longer be taken and that anti-dumping duties then in place should be terminated. Both countries agreed to extend the application of their respective competition law prohibitions on the misuse of market power to the trans-Tasman markets. This article clearly focuses on cross-border predatory pricing and not cross-border price discrimination. This agreement still allows anti-dumping actions to be taken in cases where dumped imports in either Australia or New Zealand from a third country are causing or threatening to cause material injury to industry in the other country.[461]

Several studies have also suggested that anti-dumping laws should be replaced by

---

[458] *Ibid.*

[459] *Australia-New Zealand Closer Economic Relations Trade Agreement* (1983), online: LEXIS (LNZ Trade and Commerce 43).

[460] *Protocol on Acceleration of Free Trade in Goods* (1988), online: WL.

[461] Joan Fitzhenry & David Robertson, "Australia New Zealand Closer Economic Relations Trade Agreement" (2001) ITIS Online Articles, online: ITIS <http://www.itis-online.com.sg/doc/Australia-NZ%20FTA.pdf> (date accessed: 10 November 2003).

antitrust or competition laws.[462] It has been suggested that competition laws can be seen as a more economically rational substitute for anti-dumping laws in a free trade agreement, because "the goal of a free trade agreement, like any liberalizing trade agreement, is to reduce barriers to the free flow of goods and services between the partners to the maximum extent possible".[463] This approach to eliminating anti-dumping laws and to replacing them with competition laws would eliminate border remedies to the maximum extent possible and encourage achieving a more competitive and richer economy, consistent with the objectives of the free trade agreement. Competition laws within the free trade agreement regime can more properly deal with some cross-border pricing practices, such as discriminatory or predatory pricing.[464] Similarly, many reformers have proposed replacement for anti-dumping laws in the *North American Free Trade Agreement* (NAFTA).[465]

However, there exist a few arguments against this proposal.[466] First, it has been argued that "defense against predation was never more than the rhetoric of antidumping; it has never been its function".[467] The function of anti-dumping is ordinary protection. It has been further stated that

---

[462] See Ivan Feltham et al., *Competition (Antitrust) and Antidumping Laws in the Context of the Canada-US Free Trade Agreement* (Ottawa: Canadian Chamber of Commerce, 1991); Thomas M. Boddez & Michael J. Trebilcock, *Unfinished Business: Reforming Trade Remedy Laws in North America* (Toronto: CD Howe Institute, 1993); Ralf Boscheck, "The Governance of Global Market Relations: The Case of Substituting Antitrust for Antidumping" (2001) 24: 1 World Comp. 41.

[463] Michael Hart, "Dumping and Free Trade Areas", in John H. Jackson & Edwin A. Vermulst, eds., *Antidumping Law and Practice: A Comparative Study* (Michigan: The University of Michigan Press, 1989) 326 at 331.

[464] *Ibid.*

[465] See Hart, *supra* note 9; John A. Ragosta & John R. Magnus, "Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief" (August 1996) DB LLP Articles, online: DB LLP <http://www.dbtrade.com/publications/183619w.pdf> (date accessed: 21 June 2003).

[466] Ehrenhaft also provides a comprehensive analysis of some practical issues. See Peter D. Ehrenhaft, "Is Interface of Antidumping and Antitrust Laws Possible?" (2002) 34: 2 Geo. Wash. Int'l L. Rev. 363.

[467] Finger, *supra* note 87 at 60.

> "Antidumping is not public policy, it is private policy. It is a harnessing of state power to serve a private interest: a means by which one competitor can use the power of the state to gain an edge over another competitor. Antidumping regulation was created by removing from antitrust law the checks and balances that constrain antitrust policy to disciplining only competitive practices that compromise society's overall interests. Antitrust is in both theory and practice an instrument to defend the public interest. But antidumping is a different matter. Free of the constraints that rule of law impose on antitrust, antidumping is an instrument that one competitor can use against another – like advertising, product development, or price discounting. The only constraint is that the beneficiary interest must be a domestic one and the apparent victim a foreign one".[468]

Second, transferring anti-dumping responses to the competition law arena is difficult because of the lack of harmonised competition policies in different countries. While western common law developed economies are likely to have many similarities, it is unforeseeable that the various provisions of the antitrust regime in different countries can be harmonised on the multilateral level. It has been argued that

> "...a bilateral regime could in theory ignore harmonization and simply agree to let each domestic competition law apply to dumping in that jurisdiction...many complex international trade disputes could not easily be resolved by any individual country's competition authorities. Instead some multilateral initiative would in theory be necessary. Yet such an initiative is impossible in the foreseeable future".[469]

Third, some may argue that replacement of anti-dumping laws by competition laws is pretty much easily achieved with the creation of a free trade agreement. The European

---

[468] *Ibid.* at 34.
[469] Waincymer, *supra* note 330 at 26.

Community and the *Australia-New Zealand Closer Economic Relations Trade Agreement* are illustrative examples. However, pushing for creation of more and more free trade agreements does not guarantee the elimination of anti-dumping laws and the achievability of a replacement proposal. It has been stated that

> "...while antidumping measures were dropped within the European Community and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), one should not fail to recognize that such measures were retained within NAFTA and in the Europe Agreements (the bilateral free trade agreements between the European Community and several Eastern European countries). In addition, it is instructive to point out that the elimination of antidumping measures within the European Economic Area (the free trade agreement between the European Community and the countries remaining in EFTA) is not complete, since it does not apply to fisheries, a major sector for two of the three remaining EFTA members. Hence, the relationship between the death of antidumping measures and the birth of free trade agreements is not as straightforward as one might think".[470]

As the replacement proposal is not easily achieved with the creation of a free trade agreement covering relatively few trading nations,[471] the achievability of this proposal is, thus, even more unforeseeable within the multilateral trading system and the WTO.

Fourth, the replacement proposal is not workable because anti-dumping laws and antitrust laws have different purposes, functions and outcomes.[472] Although antitrust laws and

---

[470] Miranda, *supra* note 170 at 280.

[471] Hoekman's paper however questions, from economic and empirical approaches, the relationship between the attainment of the abolition of anti-dumping and the replacement of the agreement on common antitrust rules in regional agreements. See Bernard Hoekman, "Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements" (31 July 1998) World Bank: Policy Research Working Papers No. WPS1950, online: World Bank <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1998/07/01/000009265_39809 28162543/Rendered/PDF/multi0page.pdf> (date accessed: 30 May 2003).

[472] Mastel, *supra* note 340 at 99-101.

anti-dumping laws share the same general objective of establishing rules for the competitive marketplace, and they were born at roughly the same period, they had different objectives form the beginning and they have moved in different directions. Antitrust laws are consumer protection statutes and are, most importantly, aimed at countering predatory pricing practices. Anti-dumping laws are protectionist instruments and focus on dealing with the so-called "unfair business practices". International predatory pricing practices are never anti-dumping laws' concern. In addition, the anti-dumping laws have moved in a restrictive direction, while antitrust laws have taken a more liberal course.[473] Given their different purposes, an international agreement on antitrust enforcement (if universal international application of antitrust laws were possible) would not be sufficient to replace anti-dumping laws. The different international attitudes on the desirability of creating such an agreement make the replacement proposal even more unforeseeable.

Considering the above arguments against replacing anti-dumping laws with competition laws or antitrust laws, the proposed reform is not feasible within the multilateral trading system, although there are few examples demonstrating the achievement of this reform in any regional free trade agreement. Furthermore, while some relevant factors are taken into account, such as different national attitudes on the desirability of this reform, different national competition policies, and different economic development between developed and developing countries, it is questionable that the reform is, in practice, possible at regional or global levels.

---

[473] Bajwa, *supra* note 112 at 22.

(2) Replacing Anti-dumping Laws with Safeguards

There are three main agreements governing import protection under the WTO Agreement: (1) the *Agreement on Safeguards*,[474] (2) the *Agreement on Subsidies and Countervailing Measures*[475] and (3) the *Anti-Dumping Agreement*. Safeguard actions are legally "temporary measures to restrict imports in order to allow the competing domestic industry to downsize, become more competitive, or otherwise adapt to import competition".[476] These actions are useful because they provide firms and workers in the less competitive industry with the opportunity to retrain for other jobs and reinvest in other sectors. They can also provide the industry with the critical adjustment time to become more competitive.

The *Safeguards Agreement* allows member states to provide temporary protection to domestic industries facing increased import competition and authorizes members to restrict imports when they are in increased quantities causing or threatening serious injury to the domestic industry. If the serious injury standards are satisfied, WTO members may impose safeguard remedial measures to protect the domestic industry while it recovers or shifts production to another sector.[477] The quantitative import restrictions and increased import duties are the primary safeguard remedies.[478] The duration of safeguard actions is limited to eight years (actually four years, with a four-year extension).[479]

Many reformers have proposed replacing anti-dumping laws with improved safeguard

---

[474] *Agreement on Safeguards*, online: LEXIS.
[475] *Agreement on Subsidies and Countervailing Measures*, online: LEXIS.
[476] Mastel, *supra* note 340 at 101.
[477] Corr, *supra* note 400 at 61-68.
[478] See *Agreement on Safeguards*, *supra* note 16, article 5.1 and 6.
[479] *Ibid.* article 7.1 and 7.2.

measures.[480] It has been argued that anti-dumping laws and safeguard measures are similar in providing import protection and act as contingent protectionist measures, or that anti-dumping laws function like quasi-safeguard laws[481] or as safeguard-like measures.[482] While anti-dumping laws cannot be justified on economic or non-economic grounds, the current state of anti-dumping measures "represents the entitlement to import protection that import-competing interests have established for themselves".[483] As there is no sound rationale for anti-dumping laws and there is another import protection tool available (if the import protection is in fact needed), the anti-dumping measures should be abolished and replaced by safeguard measures. Although opponents of replacement have argued that anti-dumping measures deal with "unfairly" traded imports, while safeguard measures deal with "fairly" traded imports,[484] such an assertion is invalid because, as illustrated in the foregoing chapters, dumping practices are not *per se* unfair. Indeed, anti-dumping laws "arm protection-seeking interests with the emotionally compelling argument that foreigners are behaving unfairly".[485]

While anti-dumping measures became the developed countries' major safeguard instrument by the 1990s, it has gained increasing popularity among developing countries since the WTO went into effect in 1995. Many authors have noted the *de facto* use of

---

[480] John J. Barceló III, "Subsidies, Countervailing Duties and Antidumping after the Tokyo Round" (1980) 13 Cornell Int'l L. J. 257 at 260; Finger, *supra* note 87 at 57-60.

[481] John J. Barceló III, "A History of GATT Unfair Trade Remedy Law – Confusion of Purposes" (1991) 14:3 World Econ. 311 at 332.

[482] Bajwa, *supra* note 112 at 25.

[483] Finger, *supra* note 87 at 57.

[484] Mastel, *supra* note 340 at 102; also see Krishna, *supra* note 133.

[485] J. Michael Finger, Francis Ng & Sonam Wangchuk, "Antidumping as Safeguard Policy" (2001) World Bank: Policy Research Working Papers No. 2730, at 6, online: World Bank <http://econ.worldbank.org/files/3172-wps2730.pdf> (date accessed: 25 April 2003).

anti-dumping protection as a substitute for safeguard protection.[486] The frequent use of anti-dumping measures results from the fact that protection is obtained much more easily under anti-dumping laws than it could be under safeguard measures.[487] Compared with the higher "serious injury" standard[488] required for safeguard measures, anti-dumping measures require the relatively low material injury standard. The anti-dumping action is unilateral and the WTO rules require no compensation or re-negotiation.[489] On the contrary, compensation or re-negotiation may be required under the *Agreement on Safeguards*.[490] Anti-dumping measures may also remain in place almost indefinitely without retaliation, whereas retaliation is permitted under the *Agreement on Safeguards* after only three years of relief.

The safeguard measure has indeed a systemic justification in the GATT/WTO system of trade liberalisation because it can "help preserve the integrity of the system when protectionist pressures become too great to be resisted". This protectionist measure contains more stringent conditions and standards in the GATT/WTO system. On the contrary, anti-dumping measures make it too easy for the domestic industry to obtain special protection without any economic or non-economic rationales. Over time, the political pressure to impose protectionist biases and the vague language in the anti-dumping law continuously contributes to the proliferation of anti-dumping actions. Thus, if the goal of the multilateral trading system is to promote trade and to lower trade barriers, anti-dumping laws should be abolished. If the protectionist tools are needed due

---

[486] Dale, *supra* note 20 at 7 and 181-197; Hoekman & Leidy, *supra* note 141 at 38-42; Barceló III, *supra* note 480 at 312-319.
[487] Stegemann, *supra* note 377 at 385.
[488] See *Agreement on Safeguards*, *supra* note 16, article 4.
[489] Finger, Ng & Wangchuk, *supra* note 485 at 5.
[490] See *Agreement on Safeguards*, *supra* note 16, article 8.

to political pressure, they must be more stringent, rational, well-administered and systemic. This follows from the conclusion that anti-dumping laws should be replaced by safeguard measures.

Some may argue that existing safeguard procedures based on the *Agreement on Safeguards* make it relatively difficult for industries to obtain special protection and that replacement thus implies the decline in legal opportunities for special protection.[491] However, a compromise can be sought by revising the rules for the use of safeguard measures. Flexibility in the use of the revised safeguard system may provide the possibility for easier recourse to respite in case of a sudden surge of imports. Thus, the need for another "escape route" or protectionist measure such as the anti-dumping mechanism can be diminished.[492]

Indeed, dismantling the anti-dumping system and replacing it with a revised safeguard system is a matter of political will. This proposal will result in the adverse reaction of industrial users and some big retail houses who are frequent users of anti-dumping measures. They may induce policy makers to reconsider the wisdom of relying on easy access to the protectionist anti-dumping system. Increased globalisation of production is the other concern of adversaries.[493] However, the proliferation of anti-dumping actions and their negative effects on the multilateral trading system deserve to be considered seriously. The political needs for a proper and well-administered protectionist tool can be expected to continuously exist. In this regard, revised safeguard measures can well satisfy

---

[491] Stegemann, *supra* note 377 at 397.
[492] P.K.M. Tharakan, "Is Anti-Dumping Here to Stay?" (1999) 22: 2 World Econ. 179 at 202.
[493] *Ibid.*

such needs and provide a rational and systemic mechanism. In future multilateral trading negotiations, the conditions necessary for dismantling anti-dumping measures and their replacement by revised safeguard measures might be in the offing.

(3) Clause-by-Clause Reform of the Anti-Dumping Agreement

Many commentators on anti-dumping have provided clause-by-clause suggestions for reform.[494] Each suggested proposal deals with some specific technical tricks that the authors have criticised, or arguably redresses some elements of current anti-dumping practices that conflict with the so-called basic concepts, principles, and objectives of the *Anti-Dumping Agreement*.

Lindsey and Ikenson[495] provide twenty reform proposals focusing on the conflicts between the elements of current anti-dumping practices and the concepts of the Anti-Dumping Agreement. They explain why these reform proposals are needed and illustrate how these reforms would help to reduce the gap between anti-dumping theory and anti-dumping practice. For instance, the proposed amendment to article 5.2 of the Agreement provides that domestic industries should be required to present evidence of underlying market distortions in their anti-dumping petitions. The proposed amendments to article 5.3 and 2 provide that "national antidumping authorities should be required to make a finding of underlying market distortions before initiating an investigation as well as in their final determination of sales at less than normal value".[496]

---

[494] Finger, *supra* note 87 at 60-74; Corr, *supra* note 400 at 97-103; Mastel, *supra* note 340 at 116-133; Waincymer, *supra* note 330 at 11-19; Hindley & Messerlin, *supra* note 322 at 70-76; Durling & Nicely, *supra* note 404.

[495] Lindsey & Ikenson, *supra* note 385 at 160-195.

[496] *Ibid.* at 162.

Other proposed reforms include: (1) eliminating the cost test, (2) revising criteria for use of "constructed value" and eliminating profit component, (3) eliminating use of third-country sales in calculating normal value, (4) prohibiting "zeroing" methodology, (5) eliminating asymmetric treatment of indirect selling expenses, (6) giving second-quality merchandise special consideration, (7) tightening standards on causation of injury, (8) changing standards for "negligibility", (9) raising initiation standards, (10) mandating "lesser-duty rule", (11) raising *de minimis* to five percent in investigations and reviews, (12) mandating the public-interest test, and (13) making termination of anti-dumping duty orders automatic.

Similarly, Palmeter[497] reviews the eighteen articles of the *Anti-Dumping Agreement* and provides comments on each article. He also proposes reforms of the *Anti-Dumping Agreement*. For example, article 2.1 and 2.2.1 provide that all export sales, including above or below total costs, are averaged to obtain export price and only those domestic sales "in the ordinary course of trade" are averaged to obtain normal value. The skewing methodologies of obtaining export price and normal value should be amended to ensure the fair comparison impact of article 2.4.2. In addition, critiques of the controversy over the core articles – principles, determination of dumping and determination of injury – in the Anti-Dumping Agreement and proposed reforms for these articles have been provided in the foregoing chapter.

Although these clause-by-clause suggestions for reform may serve to identify technical

[497] Palmeter, *supra* note 403 at 45-67.

shortcomings in the *Anti-Dumping Agreement* and provide solutions to them, these reforms overlook the fundamental fact that there is no rationale for anti-dumping laws and that anti-dumping is the compromised protectionist mechanism under political pressure. Too some degree, technical shortcomings in the *Anti-Dumping Agreement* result from the irrationality of anti-dumping measures and the political compromise between various national wills. Thus, clause-by-clause reforms may not be the best approach to dealing with anti-dumping laws. Such reforms are largely determined by how far the political compromise between various national wills in multilateral trading negotiations can be reached and what interest group reformers represent. While exporters may propose repeal of all technicalities on which they have been impaled, the protectionists, on the contrary, may propose repeal of all technicalities that got prospective victims off the hook.[498]

(4) **Summary**

Because anti-dumping laws cannot be rationalised, either economically or non-economically, their aim remains protectionism. Anti-dumping is a means by which domestic competitors use the power of the state to gain an edge over foreign competitors.[499] Anti-dumping laws therefore authorise actions against commercial practices that ought to be allowed.

Anti-dumping, as practiced today, is "the worse of policy making: power politics, bad economics, and shameful public administration".[500] The anti-dumping law is indeed an

---

[498] Finger, *supra* note 87 at 61.
[499] *Ibid.* at 34.
[500] *Ibid.* at 57.

oxymoron. It represents the fact that "expansion of the power of the state to act against imports in the name of antidumping has been built on the meanest of violations against the principles of law".[501]

Considering the protectionist nature of anti-dumping laws and the lack of rationales for them, replacing them with competition or antitrust laws is not sensible. Defense against international predation has never been anti-dumping laws' function. Anti-dumping laws and antitrust or competition laws have different purposes, functions and outcomes. Such a reform is obviously irrational.

Although clause-by-clause reforms for the *Anti-Dumping Agreement* may provide solutions to technical shortcomings in the agreement, it is questionable how much such reforms can alter an irrational system, when such shortcomings result from the irrationality of anti-dumping laws and represent a political compromise between various national wills. While the political will to retain protectionist anti-dumping measures continuously exists, such reforms can only resolve certain technical shortcomings for serving certain groups but fail to rationalise anti-dumping laws themselves.

The abolition of anti-dumping laws and replacing them with revised safeguard measures may be the better proposal if the need for certain protectionist measures under political pressure continues. In fact, "if the political realities confronted by nations during the process of trade liberalisation require the existence of a mechanism which can provide temporary protection to facilitate restructuring without social disruption, it is better to

---

[501] *Ibid.*

provide only one safeguard instrument".[502] The revised safeguard system may provide the possibility for easier recourse to respite in case of a sudden surge of imports and provide the protection which anti-dumping measures wish to address.

Section Two: Conclusions

Since Viner's treatise comprehensively analysed dumping practices in international trade, and Canada enacted the first anti-dumping legislation in the world, dumping practices have caused widespread concern among trading nations. More developing countries, which were frequently the developed countries' targets of anti-dumping measures in the 1980s, have begun to enact their own anti-dumping laws in the 1990s, resulting in the proliferation of anti-dumping cases. By 1997, there were 94 per cent more cases initiated than in 1987.[503] In fact, the number of anti-dumping investigations initiated has risen significantly since 1995.[504] The WTO report indicates nearly 1,500 initiations of anti-dumping investigations world-wide during the period 1995-2000 and more than half of these investigations were initiated by developing countries.[505] The rising trend in the use of anti-dumping measures has prompted WTO Members to place the matter on the subsequent WTO negotiations, and to clarify the basic concepts of anti-dumping measures.

Clarifying the basic concepts, improving the disciplines and maintaining effectiveness of

---

[502] P. K. M. Tharakan, "Political Economy and Contingent Protection" (1995) 105: 433 Econ. J. 1550 at 1561.

[503] Horlick, *supra* note 402 at 180.

[504] WTO, *Overview of Developments in the International Trading Environment: Annual Report by the Director-General*, WTO Doc. WT/TPR/OV/8 (2002), at para. 58, online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 October 2003).

[505] WTO, *Overview of Developments in the International Trading Environment: Annual Report by the Director-General*, WTO Doc. WT/TPR/OV/7 (2001), at para. 80, online: WTO <http://www.wto.org/wto/english/docs_e/docs._e.htm> (date accessed: 10 October 2003)

anti-dumping measures may promote the proper use of anti-dumping measures and may thus reduce anti-dumping initiations. Nevertheless, these efforts overlook the core issue which must be solved in the first place: "Why are anti-dumping measures needed?" or "What grounds can anti-dumping measures be justified on?" If dumping practices are not inherently injurious or anti-dumping measures cannot be rationalised on economic or non-economic grounds, the virtue of these measures is questionable and these measures may serve for other purposes, instead of remedying the so-called "unfair" trade practices.

As tariff barriers have been lowered through successive GATT negotiating rounds, the domestic pressures seeking protection have turned to opt for other types of trade remedies (*i.e.*, countervailing duties or safeguards). Being one type of these trade remedies, anti-dumping measures have become the frequently invoked protectionist tool of choice, "given the ubiquitous yet largely innocuous act of inter-market price discrimination, and a relatively low material injury standard (as compared with the higher 'serious' injury standard required for safeguard measures)".[506] It has been argued that

> "...price discrimination must merely be shown to injure a domestic industry with none of the concomitant legal elements normally associated with competition policy (such as intent, predatory pricing, or market power). The Members decided not to make such elements a part of the Anti-Dumping Code or Agreement because the various domestic political interests in maintaining relatively low standards for trade remedy relief were too strong and thus prevented negotiation of economically sound policy.... Anti-dumping measures, though subject to certain five-year 'sunsetting' rules, may also remain in place almost indefinitely without retaliation, whereas retaliation is permitted under the Agreement on Safeguards after only three years of relief."[507]

---

[506] Durling & Nicely, *supra* note 404 at 2.
[507] *Ibid.*

Indeed, economists have endeavoured to analyse different forms of dumping and the resulting welfare effects within the importing country and exporting country. Different forms of dumping represent such dumping practices motivated by common desires to achieve certain commercial objectives. The only form of dumping detrimental to everyone's welfare is predatory dumping but it largely belongs in the theoretical realm. Most cases of dumping do not decrease global welfare; some cases might even improve consumer's welfare. The widely-accepted conclusion is that dumping in international trade is a rational, sensible and profit-maximising action. It is also a typical response to trade barriers and is generally pro-competitive, benefiting consumers. It reflects the tendency of competitive rent-seeking firms to expand into less competitive markets that have higher rents.

Through this comprehensive examination of dumping, anti-dumping measures and the *Anti-Dumping Agreement*, a few conclusions can be drawn.

(1) Dumping is practiced for achieving certain commercial objectives

The traditional and modern classifications of dumping assess the notions of multifarious appearances of dumping. Viner classifies dumping according to motive and to continuity. Willig provides classifications based on monopolisation or the creation of market power. Theses approaches to analysing different types of dumping represent the complexity of combinations of different motivations involved in dumping behavior. Most forms of dumping are motivated by certain legitimate commercial objectives. The only form of dumping detrimental to the welfare of everyone is predatory dumping but it rarely occurs

and largely belongs in the theoretical realm.

(2) **International price discrimination and prices below cost of production are common business activities**

There are two schools of thought on definitions of dumping in the contemporary legal and administrative literature. One is the traditional "international price discrimination"; the other is below-cost-of-production dumping. Either international-price-discrimination dumping or below-cost-of-production dumping is sensible business behavior and is not *per se* injurious.

(3) **The welfare effects of dumping on the importing country are not *per se* injurious**

From the perspective of consumers in the importing country, they benefit from the lower-priced imports in both cases of short-run and long-run dumping. It is generally acknowledged that consumer gains outweigh the losses of domestic producers of importing-competing goods, and dumping may encourage domestic production. In addition, most cases of dumping neither result in injurious impacts on distribution and competition of the importing country nor decrease global welfare. The only exceptional case is predatory dumping.

(4) **Anti-dumping laws cannot be justified on economic or non-economic rationales**

There is no economic rational for anti-dumping laws. Dumping in the form of international price discrimination is the common practice based on different market conditions. The prohibition of predatory dumping has never been the rationale for anti-dumping laws. As predatory pricing is an expensive policy for sellers to pursue and a

worldwide monopolistic position is difficult to achieve, a rational firm will never use predatory pricing in the international context. The prohibition of non-predatory intermittent dumping cannot justify anti-dumping laws because of the ambiguous effect of non-predatory intermittent dumping on consumer welfare and the low possibility of the necessary structural conditions for it being satisfied.

Anti-dumping laws cannot be sustained on non-economic rationales, whether as distributive justice and communitarian values or on arguments of fairness and level playing field. The concept of "fairness" or the "level playing field" is inherently vague and reflects the psychological mood of a country losing hegemony in the world economy. The distributive justice and communitarian values cannot rationalise anti-dumping laws because empirical studies show that most Canadian anti-dumping cases between 1984 and 1989, in which anti-dumping duties were imposed, were not to enhance the welfare of the least-advantaged members of the society but to benefit those workers and communities who were better off than most in Canada.

(5) **Anti-dumping measures are politically-oriented and legalised protectionist tools**

The proliferation of anti-dumping cases and the frequent use of anti-dumping measures result from the fact that protection is obtained much more easily under anti-dumping laws than it could be under safeguard measures. Anti-dumping laws arm protection-seeking interests with the emotionally compelling argument that foreigners are behaving unfairly. Anti-dumping law has become a means by which the domestic producers can use the power of the state to gain an edge over foreign competitors.

Some policy analysts even call the use of anti-dumping actions to restrain foreign competitors "anti-dumping protectionism".[508] Thus, anti-dumping has become the most used instrument of administered protection. While developed economies like the United States, EU and Australia have long used anti-dumping measures to reduce import competition from more efficient foreign competitors, a large and growing numbers of new economies have become the users of anti-dumping measures. Many of these new users are even more capricious in their implementation than those traditional users. This phenomenon should be a worry for the multilateral trading system.[509]

(6) **Anti-dumping laws should be abolished and replaced by revised safeguard measures**

Anti-dumping laws function like quasi-safeguard laws or as safeguard-like measures. While the safeguard measure has a systemic justification in the GATT/WTO system of trade liberalisation, and it contains more stringent conditions and standards, anti-dumping measures make it too easy for the domestic industry to obtain special protection without any economic or non-economic rationales. While political needs for a proper and well-administered protectionist tool can be expected to continuously exist, revised safeguard measures can well satisfy such needs and provide rational and systemic mechanisms. On the contrary, the irrational anti-dumping measures should be abolished because anti-dumping represents "power politics", "bad economics" and "shameful

---

[508] R. E. Cumby & T. H. Moran, "Testing Models of the Trade Policy Process: Anti-dumping and the 'New Issues'", in Robert C. Feenstra, ed., *The Effect of U.S. Trade Protection and Promotion Policies* (Chicago: University of Chicago Press, 1997) 158, as cited in Leonard K. Cheng, Larry D. Qiu & Kit Pong Wong, "Anti-dumping measures as a tool of protectionism: a mechanism design approach" (2001) 34: 3 Can. J. Econ. 639 at 640.

[509] Bruce A. Blonigen & Thomas J. Prusa, "The Cost of Antidumping: The Devil is in the Details" (February 2002) Working Papers, online: University of Oregon <http://www.uoregon.edu/~bruceb/ADDetails.pdf> (date accessed: 26 April 2003).

public administration".

Although dismantling the anti-dumping system and replacing it with a revised safeguard system is a matter of political will, it can be expected that the conditions necessary for the dismantling and the replacement reform might be in the offing in the future multilateral trading negotiations.

Bibliography

LEGISLATION:

Agreement

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1967).

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1979).

Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade 1994.

Agreement on Safeguards.

Agreement on Subsidies and Countervailing Measures.

General Agreement on Tariffs and Trade 1947.

General Agreement on Tariffs and Trade 1994.

Australia-New Zealand Closer Economic Relations Trade Agreement (1983).

Canada

Competition Act, R.S.C. 1985, c. C-34, ss 50(1)(a), (b).

Customs Act, R.S. 1906, c. 32, s. 58.

Customs Tariff, 1907, c. II, s. 6.

Special Import Measures Act, R.S.C. 1985, c. S-15, s. 2(1).

Special Import Measures Regulations, S.O.R/84-927.

United States

Antidumping Act of 1916, 39 Stat. 798 (current version at 15 U.S.C. § 72 (2003)).

Antidumping Act of 1921, 19 U.S.C.S. §§ 160-171 (2003).

JURISPRUDENCE:

Canada

Cars Produced by or on Behalf of Hyundai Motor Company (1988), CIT-13-87 (C.I.T).

Fresh Iceberg (Head) Lettuce from the U.S.A. [1992] C.I.T.T. No. 141.

Fresh, Whole, Yellow Onions from the U.S.A. for Consumption in B.C. (1987), CIT-1-87 (C.I.T.).

Sour (Tart) Cherries from the U.S.A. (1988), CIT-2-88 (C.I.T.).

Whole Delicious Red and Golden Apples from the U.S.A. (1988), CIT-3-88 (C.I.T.).

Whole Size "A" Potatoes from the U.S.A. for Consumption in B.C. (1985), CIT-16-85 (C.I.T.).

United States

American Alloys v. United States, 30 F.3d 1469 (1994).

Bingham and Taylor Div. Va. Industries, Inc. v. United States, 815 F.2d 1482, 1485 (Fed. Cir. 1987).

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986).

United States v. Matsushita, 475 U.S. 574 (1986).

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

Zenith v. Matsushita, 494 F. Supp. 1190 (1980).

Zenith v. United States, 988 F.2d 1573 (Fed. Cir. 1993).

REPORTS and MEETINGS:

GATT Reports

EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil (1995), GATT Doc. ADP/137, B.I.S.D. (1995) 42/17 (Panel Report).

WTO Communication, Reports & Meetings

WTO, *Anti-Dumping Measures and Competition, Communication from Mexico*, WTO Doc. WT/WGTCP/W/136 (1999).

WTO, *Basic Concepts and Principles of the Trade Remedy Rules, Communication from the United States*, WTO Doc. TN/RL/W/27 (2002).

WTO, *Concept Paper on Trade Remedy Rules: Evidence of Trade Distorting Practices, Communication from Hong Kong, China*, WTO Doc. TN/RL/W/129 (2003).

WTO, *Impact of Trade Policy on Competition: An Assessment of Anti-Dumping Rules, Communication from the Republic of Korea*, WTO Doc. WT/WGTCP/W/90 (1999).

WTO, *"Like Product" within the Meaning of the WTO Anti-Dumping Agreement, Communication from Australia*, WTO Doc. TN/RL/W/91 (2003).

WTO, *Minutes of Meeting on Trade Policy Review: Canada* (held on 13-15 December 2000), WTO Doc. WT/TPR/M/78 (2001).

WTO, *Observations on the Distinctions between Competition Laws and Antidumping Rules, Communication from the United States*, WTO Doc. WT/WGTCP/W/88 (1998).

WTO, *Overview of Developments in the International Trading Environment: Annual Report by the Director-General*, WTO Doc. WT/TPR/OV/7 (2001).

WTO, *Overview of Developments in the International Trading Environment: Annual Report by the Director-General*, WTO Doc. WT/TPR/OV/8 (2002).

WTO, *Questions from Hong Kong, China on Papers Submitted to the Negotiating Group on Rules*, WTO Doc. TN/RL/W/109 (2003).

WTO, *Report (1999) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WTO Doc. WT/WGTCP/3 (1999).

WTO, *Report on the Meeting of 27-28 July 1998*, WTO Doc. WT/WGTCP/M/5 (1998).

WTO, *Report on the Meeting of 19-20 April 1999*, WTO Doc. WT/WGTCP/M/8 (1999).

WTO, *Report on the Meeting of 10-11 June 1999*, WTO Doc. WT/WGTCP/M/9 (1999).

WTO, *Summary Report of the Meeting Held on 25-27 November 2002*, WTO Doc. TN/RL/M/5 (2003).

WTO, *The Contribution of Competition Policy to Achieving the Objectives of the WTO, including the Promotion of International Trade, Communication from Japan*, WTO Doc. WT/WGTCP/W/122 (1999).

WTO Panel and Appellate Body Reports

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (2001), WTO Doc. WT/DS135/AB/R (Appellate Body Report).

European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (Complaint by India) (2000), WTO Doc. WT/DS141/R (Panel Report).

Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico (2000), WTO Doc. WT/DS156/R (Panel Report).

Japan – Taxes on Alcoholic Beverages (Complaints by the European Communities,

Canada and the United States) (1996), WTO Doc. WT/DS8, 10, 11/R (Panel Report).

Japan – Taxes on Alcoholic Beverages (Complaints by the European Communities, Canada and the United States) (1996), WTO Doc. WT/DS8, 10, 11/AB/R (Appellate Body Report).

Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (2000), WTO Doc. WT/DS122/R (Panel Report).

United States-Anti-Dumping Act of 1916 (Complaint by the European Communities) (2000), WTO Doc. WT/DS136/R (Panel Report).

United States-Anti-Dumping Act of 1916 (Complaint by Japan) (2000), WTO, Doc. WT/DS162/R/Add.1 (Panel Report).

United States – Anti-Dumping Act of 1916 (Complaints by the European Communities and Japan) (2000), WTO Doc. WT/DS136, 162/AB/R (Appellate Body Report).

United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (Complaint by Japan) (2001), WTO Doc. WT/DS184/AB/R (Appellate Body Report).

United States – Anti-Dumping Measures on Stainless Steel Plate in coils and Stainless Sheet and Strip from Korea (2000), WTO Doc. WT/DS179/R (Panel Report).

SECONDARY MATERIALS:

Books and Reports

Bhagwati, Jagdish N., *Protectionism* (Cambridge, Mass.: MIT Press, 1988).

Boddez, Thomas M. & Trebilcock, Michael J., *Unfinished Business: Reforming Trade Remedy Laws in North America* (Toronto: CD Howe Institute, 1993).

Boltuck, Richard & Litan, Robert, eds., *Down in the Dumps: Administration of the Unfair*

Trade Laws (Washington, D.C.: Brookings Institution Press, 1991).

Bork, R. H., *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).

Canada, *Report of the Board of Inquiry into the Cost of Living*, vol.1 (Ottawa: J. L. Tache, 1915).

Canada, *Royal Commission on Farm Machinery: Special Report on Prices* (Ottawa: Queen's Printer, 1969).

Carbaugh, Robert J., *International Economics*, 4th ed. (Belmont: Winthrop, 1992).

Caves, Richard E. & Jones, Ronald W., *World trade and payments: an introduction*, 2nd ed. (Boston: Little, Brown, 1977).

Dale, Richard, *Anti-dumping Law in a Liberal Trade Order* (London: Macmillan, 1980).

Donald, W. J. A., *The Canadian Iron and Steel Industry* (Boston: Houghton Mifflin, 1915).

Dunlop, B. J., McQueen, D. & Trebilcock, M. J., *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987).

Durling, James P. & Nicely, Matthew R., *Understanding the WTO Anti-Dumping Agreement: Negotiating History and Subsequent Interpretation* (London: Cameron May, 2002).

Edward, Corwin D., *The Price Discrimination Law* (Washington: Brookings Institution, 1959).

Finger, J. Michael, ed., *Antidumping: How It Works and Who Gets Hurt* (Ann Arbor: University of Michigan Press, 1993).

Feltham, Ivan et al., *Competition (Antitrust) and Antidumping Laws in the Context of the Canada-US Free Trade Agreement* (Ottawa: Canadian Chamber of Commerce, 1991).

Gandolfo, Giancarlo, *International Economics I: The Pure Theory of International Trade*, 2nd rev. ed. (New York: Springer-Verlag, 1994).

Gregory, Theodore E., *Tariffs: A Study in Method* (London: C. Griffin & Company, 1921).

Haberler, Gottfried von, *The Theory of International Trade: with its applications to commercial policy*, trans. Stonier, Alfred & Benham, Frederic (London: William Hodge, 1936).

Hart, Michael, *Finding Middle Ground: Reforming the Anti-dumping laws in North America* (Ottawa: CPTL, 1997).

Hindley, Brian & Messerlin, Patrick A., *Antidumping Industrial Policy: Legalized Protectionism in the WTO and What to Do about It* (Washington, D.C.: The AEI Press, 1996).

Hoekman, B. M. & Kostecki, M., *The Political Economy of the World Trading System: from GATT to WTO* (Oxford: The Oxford University Press, 1995).

Jackson, John H., *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill Company, 1969).

_____, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed (Cambridge: MIT Press, 1997).

_____, & Vermulst, Edwin A., eds., *Antidumping Law and Practice: A Comparative Study* (Michigan: The University of Michigan Press, 1989).

Jepma, Catrinus & Rhoen, Andre, eds., *International Trade: a business perspective* (New York: Addison Wesley Longman, 1996).

Kindleberger, Charles P., *The Terms of Trade: A European Case Study* (Cambridge: MIT Press, 1956).

Krugman, Paul R. & Obstfeld, Maurice, *International Economics: Theory and Policy*, 2nd ed (New York: HarperCollins, 1991).

Lawrence, Robert Z., ed., *Brookings Trade Forum 1998* (Washington, D.C.: Brookings Institution Press, 1998).

Lindert, Peter H., *International Economics*, 8th ed (Homewood: Richard D. Irwin, 1986).

Lindsey, Brink & Ikenson, Daniel J., *Antidumping Exposed: the Devilish Details of Unfair Trade Law* (Washington, D.C.: CATO Institute, 2003).

Machlup, Fritz, *The Political Economy of Monopoly: Business, Labor and Government Policies* (Baltimore: Johns Hopkins Press, 1952).

Marceau, Gabrielle Z., *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas* (Oxford: Clarendon Press, 1994).

Marion, M.F. van, *Liberal Trade and Japan: the Incompatibility Problem* (New York: Physica-Verlag, 1993).

Markusen, James R., et al., *International Trade: Theory and Evidence* (New York: McGraw-Hill, 1995).

Mastel, Greg, *Antidumping Laws and the U.S. Economy* (New York: M.E. Sharpe, 1998).

McDiarmid, Orville John, *Commercial Policy in the Canadian Economy* (Cambridge: Harvard University Press, 1946).

Ragosta, John A. & Magnus, John R., *Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief* (Ottawa: CTPL, 1996), online: DB LLP <http://www.dbtrade.com/publications/183619w.pdf> (date accessed: 21 June 2003).

Rawls, John, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

Sandel, Michael J., *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

Scherer, F. M. & Ross, D., *Industrial Market Structure and Economic Performance* (Boston: Houghton Mifflin Company, 1990).

Taussig, Frank William, *Principles of Economics*, vol. 1, 3d ed. (New York: Macmillan, 1921-34).

Tharakan, P.K.M., *Policy Implications of Antidumping Measures* (New York: Elsevier Science Publishing, 1991).

Tirole, Jean, *The Theory of Industrial Organization* (Cambridge, Mass.: MIT Press, 1988).

Trendelenburg, Ernst, *Memorandum on the Legislation of Different States for the Prevention of Dumping, with Special Reference to Exchange Dumping* (Geneva: League of Nations, 1927).

Trebilcock, Michael J., *The Common Law of Restraint of Trade* (Toronto: Carswell, 1986).

_____, & Howse, Robert, *The Regulation of International Trade*, 2nd ed. (London: Routledge, 1999).

United States Industrial Commission, *Report of United States Industrial Commission*, vol. XIII (Washington: Government Printing Office, 1901).

United States, *Selling Foreign Manufactures in the United States at Prices Lower than the Domestic Prices* (Washington: Government Printing Office, 1909).

U.S. Tariff Commission, *Depreciated Exchange and International Trade* (Washington: Government Printing Office, 1922).

Viner, Jacob, *Dumping: A Problem in International Trade* (Chicago: University of Chicago Press, 1923).

Whitwell, Richard, *The Application of Anti-Dumping and Countervailing Measures by Australia* (Rockhampton: Central Queensland University Press, 1997).

WTO, *WTO Analytical Index: Guide to WTO Law and Practice*, 1st ed. (Lanham: Bernan, 2003).

Journals and Articles

Barceló III, John J., "Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code" (1972) 57:4 Cornell L. Rev. 491.

_____, "Subsidies, Countervailing Duties and Antidumping after the Tokyo Round" (1980) 13 Cornell Int'l L. J. 257.

_____, "A History of GATT Unfair Trade Remedy Law – Confusion of Purposes" (1991) 14:3 World Econ. 311.

Belderbos, R. & Holmes, P., "An Economic Analysis of Matsushita Revisited" (1995) 40 Antitrust Bulletin 825.

Bernhardt, D., "Dumping, Adjustment Costs and Uncertainty" (1984) 8 J. Econ. Dynamics & Control 349.

Blair, R. D. & Cheng, L., "On Dumping" (1984) 50 S. Econ. J. 857.

Boscheck, Ralf, "The Governance of Global Market Relations: The Case of Substituting Antitrust for Antidumping" (2001) 24: 1 World Comp. 41.

Brander, James A., "Intra-Industry Trade in Identical Communities" (1981) 11 J. Int'l Econ. 1.

_____, & Krugman, Paul, "A 'Reciprocal Dumping' Model of International Trade" (1983) 15 J. Int'l Econ. 313.

Bronckers, Marco & McNelis, Natalie, "Rethinking the 'Like Product' Definition in WTO Antidumping Law" (1999) 33: 3 J. World T. 73.

Caine, W., "A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930" (1981) 13 L. Pol'y Int'l Bus. 681.

Cheng, Leonard K., Qiu, Larry D. & Wong, Kit Pong, "Anti-dumping measures as a tool of protectionism: a mechanism design approach" (2001) 34: 3 Can. J. Econ. 639.

Clarida, Richard H., "Entry, Dumping, and Shakeout" (1993) 83 Am. Econ. Rev. 180.

Conrad, Christian A., "Dumping and Anti-dumping Measures from Competition and Allocation Perspective" (2002) 36:3 J. World T. 563.

Corr, Christopher F., "Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures" (1997) 18:1 Nw. J. Int'l L. & Bus. 49.

Cumby, R. E. & Moran, T. H., "Testing Models of the Trade Policy Process: Anti-dumping and the 'New Issues'", in Robert C. Feenstra, ed., *The Effect of U.S. Trade Protection and Promotion Policies* (Chicago: University of Chicago Press, 1997) 158.

Das, Satya P., "Market uncertainties and cyclical dumping" (1992) 36 Eur. Econ. Rev. 71.

Davies, Stephen W. & McGuinness, Anthony J., "Dumping at Less than Marginal Cost" (1982) 12 J. Int'l Econ. 169.

Deardorff, Alan V., "Economic Perspective on Antidumping Law", in Jackson, John H. & Vermulst, Edwin A., eds., *Antidumping Law and Practice: A Comparative Study* (Michigan: The University of Michigan Press, 1989) 23.

Easterbrook, F. H., "Predatory Strategies and Counterstrategies" (1981) 48 U. Chi. L. Rev. 263.

Eaton, J. & Mirman, L. J., "Predatory dumping as signal jamming", in A. Takayama, M. Ohyama & Ohta, H., eds., *Trade, Policy, and International Adjustments* (New York: Academic Press, 1991) 60.

Ehrenhaft, P.D., "Protection Against International Price Discrimination: United States Countervailing Duty and Antidumping Duties" (1958) 58 Colum. L. Rev 75.

Eichengreen, Barry & Ven, Hans van der, "U.S. Antidumping Policies: The Case of Steel" in Baldwin, Robert E. & Krueger, Anne O., eds., *The Structure and Evolution of Recent U.S. Trade Policy* (Chicago: University of Chicago Press, 1984) 67.

Ethier, Wilfred J., "Dumping" (1982) 90:3 J. Political Econ. 487.

Fischer, Bart S., "The Antidumping Law of the United States: A Legal and Economic Analysis" (1973) 85 L. Pol'y Int'l Bus. 85.

Flam, Harry, "Reverse Dumping" (1987) 31 Eur. Econ. Rev. 82.

Gilbert, Milton, "A Sample of Differences between Domestic and Export Pricing Policies of United States Corporations" in *Investigations of Concentration of Economic Power* (Washington: US Government Printing Office for the Temporary National Economic Committee, 1941) Monograph 6.

Gruenspecht, Howard K., "Dumping and Dynamic Competition" (1988) 25 J. Int'l Econ. 225.

Hart, Michael, "Dumping and Free Trade Areas", in Jackson, John H. & Vermulst, Edwin

A., eds., *Antidumping Law and Practice: A Comparative Study* (Michigan: The University of Michigan Press, 1989) 326.

Hartigan, James C., "Dumping and Signalling" (1994) 23 J. Econ. Behaviour & Organization 69.

_____, "Predatory Dumping" (1996) 29 Can. J. Econ. 228.

Hillman, Arye L. & Katz, Eliakim, "Domestic uncertainty and foreign dumping" (1986) 19:3 Can. J. Econ. 403.

Hindley, Brain, "The Economics of Dumping and Anti-Dumping Action: Is there a baby in the bath water?" in P. K. M. Tharakan, ed., *Policy Implications of Antidumping Measures* (Amsterdam: North-Holland, 1991).

Hoekman, Bernard M. & Leidy, Michael P., "Dumping, Antidumping and Emergency Protection" (1989) 23:5 J. World T. 27.

Horlick, Gary, "Antidumping at the Seattle Ministerial: With Teargas in my Eyes" (2000) 3:1 J. Int'l Econ. L. 178.

Howell, Thomas R., "Dumping: Still a Problem in International Trade" in Wessner, Charles W., ed., *International Friction and Cooperation in High-Technology Development and Trade: Papers and Proceedings* (Washington, D.C.: National Academy Press, 1997) 325.

Hudec, Robert E., "Mirror, Mirror, On the Wall: The Concept of Fairness in United States Trade Policy", in Hudec, Robert E., *Essay on the Nature of International Trade Law* (London: Cameron May, 1999) 275.

Hutton, Susan & Trebilcock, Michael, "An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Normative Rationales" (1990) 24:3 J. World T. 123.

Irwin, Douglas A., "The Semiconductor Industry" in Lawrence, Robert Z., ed., *Brookings Trade Forum 1998* (Washington, D.C.: Brookings Institution Press, 1998) 57.

Isaac, R. Mark & Smith, Vernon L., "In Search of Predatory Pricing" (1985) 93 J. Political Econ. 320.

Kong, Ying, "Persistent Dumping, Competition and Welfare" (2003) 12:1 J. Int'l T. & Econ. Development 19.

Kostecki, Michel M., "Electronic Trade Policies in the 1980s" (1989) 23 J. World T. 17.

_____, "Marketing Strategies between Dumping and Anti-dumping Action" (1991) 25 Eur. J. Marketing 7.

Kreps, D. M. & Wilson, R., "Reputation and Imperfect Information" (1982) 27 J. Econ. Theory 253.

Kronby, Matthew S., "Kicking the Tires: Assessing the Hyundai Anti-dumping Decision from a Consumer Welfare Perspective" (1991) 18 Can. Bus. L.J. 95.

Kudrle, Robert T., "A 'reverse dumping duty' for Canada?" (1974) 7 Can. J. Econ. 75.

Labys, W., "The Role of State Trading in Mineral Commodity Markets", in Kostecki, Michel M., ed., *State Trading in International Markets* (London: Macmillan Press, 1982) 175.

Lahiri, S. & Sheen, J., "On Optimal Dumping" (1990) 100 Econ. J. 127.

Lazar, Fred, "Antidumping Rules following the Canada-United States Free Trade Agreement" (1989) 23:5 J. World T. 45.

Leclerc, Jean-Marc, "Reforming Anti-dumping Law: Balancing the Interest of Consumers and Domestic Industries" (1999) 44 McGill L.J. 111.

McCalla, A. & Schmitz, A., "State Trading in Grain", in Kostecki, Michel M., ed., *State Trading in International Markets* (London: Macmillan Press, 1982) 76.

McGee, J., "Predatory Price Cutting: the Standard Oil (N.J.) case" (1958) 1 J. L. & Econ. 137.

_____, "Predatory Pricing Revisited" (1980) 23 J. L. & Econ. 23.

Messerlin, Patrick A. & Reed, Geoffery, "Antidumping Policies in the United States and the European Community" (1995) 105 Econ. J. 1565.

Milgrom, P. & Roberts, J., "Predation, Reputation and Entry Deterrence" (1982) 27 J. Econ. Theory 280.

Miranda, Jorge, "Should Antidumping Laws be Dumped?" (1996) 28:1 L. Pol'y Int'l Bus. 255.

Morgan, Clarisse, "Competition Policy and Anti-Dumping: Is it Time for a Reality Check?" (1996) 30 J. World T. 61.

Nicolaides, Phedon, "The Competition Effects of Dumping" (1990) 24:5 J. World T. 115.

Niels, Gunnar, "What is Antidumping Policy Really about?" (2000) 14 J. Econ. Survs. 467.

Ordover, Janusz A. & Willig, Robert D., "An Economic Definition of Predation: Pricing and Product Innovation" (1981) 91 Yale L.J. 8.

Palmeter, N. David, "The Capture of the Antidumping Law" (1989) 14:1 Yale J. Int'l L. 182.

_____, "A Commentary on the WTO Anti-Dumping Code" (1996) 30: 4 J. World T. 43.

Plant, Arnold, "The Anti-dumping Regulations of the South African Tariff" (1931) 31 Economica 88.

Shin, Hyun J., "Possible Instances of Predatory Pricing in Recent U.S. Antidumping Cases" in Robert Z. Lawrence, ed., *Brookings Trade Forum 1998* (Washington, D.C.: Brookings Institution Press, 1998) 81.

Slayton, P., "The Canadian Legal Response to Steel Dumping" (1979) 5 Can.-U.S. L. J.

Staiger, Robert W. & Wolak, Frank A., "The effect of domestic antidumping law in the presence of foreign monopoly" (1992) 32 J. Int'l Econ. 265.

Stegemann, Klaus, "The International Regulation of Dumping: Protection Made Too Easy" (1991) 14:4 World Econ. 375.

Stewart, Terence P., "Administration of the Antidumping Law: A Different Perspective" in Boltuck, Richard & Litan, Robert E., eds., *Down in Dumps: Administration of the Unfair Trade laws* (Washington, D.C.: Brookings Institution Press, 1991) 280.

Sun, Xiaolun, *The Effects of Antidumping Law Enforcement* (D. Phil. Dissertation in Agricultural and Resource Economics, University of California at Berkeley 1995) [Ann Arbor, Michigan: UMI, 2003].

Tarr, David G., "Cyclical Dumping: the case of steel products" (1979) 9:1 J. Int'l Econ. 57.

_____, "Cyclical Dumping of Steel Products: another look" (1982) 12:3 J. Int'l Econ. 377.

Tavares, Jose, Macario, Carla & Steinfatt, Karsten, "Antidumping in the Americas" (2001) 35:4 J. World T. 555.

Tharakan, P. K. M., "Political Economy and Contingent Protection" (1995) 105: 433 Econ. J. 1550.

_____, "Is Anti-Dumping Here to Stay?" (1999) 22: 2 World Econ. 179.

Turnovsky, Stephen J., "Technological and Price Uncertainty in a Ricardian Model of International Trade" (1974) 41:2 Rev. Econ. Stud. 201.

Trebilcock, Michael J., "Competition Policy and Trade Policy: Mediating the Interface" (1996) 30:4 J. World T. 71.

_____, & Quinn, John, "The Canadian Antidumping Act: A Reaction to Professor Slayton" (1979) 2 Can-US L.J. 101.

Vermulst, Edwin, "Adopting and Implementing Anti-dumping Laws: Some Suggestions for Developing Countries" (1997) 31:2 J. World T. 5.

Warner, Presley L., "Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrust" (1992) 23: 4 L. & Pol'y Int'l Bus. 791.

Weinstein, David E., "Competition and unilateral dumping" (1992) 32 J. Int'l Econ. 379.

Willig, Robert D., "Economic Effects of Antidumping Policy" in Lawrence, Robert Z., ed., *Brookings Trade Forum 1998* (Washington, D.C.: Brookings Institution Press, 1998) 57.

Electronic Sources

Aggarwal, Aradhna, "Anti-Dumping Law and Practice: An Indian Perspective", ICRIER Working Paper No. 85 (April 2002), online: ICRIER <http://www.icrier.res.in/pdf/antiDump.pdf> (date accessed: May 25 2003).

Bajwa, Mohammad A., "Antidumping: Trade Law or Game Law?" (11-29 October 1999) WTO On-line Forums, Developing Countries and the Millennium Round, online: Trade & Development Centre <http://www.itd.org/wb/essay4.doc> (date accessed: 10 May 2003).

Blonigen, Bruce A. & Prusa, Thomas J., "The Cost of Antidumping: The Devil is in the Details" (February 2002) Working Papers, online: University of Oregon <http://www.uoregon.edu/~bruceb/ADDetails.pdf> (date accessed: 26 April 2003).

Evenett, Simon J., "Antidumping: Regulating the Price of Imports", online: World Bank Group <http://www1.worldbank.org/wbiep/trade/c_papers/evenett_antidumping.pdf> (date accessed: 30 April 2003).

Finger, J. Michael, Ng, Francis & Wangchuk, Sonam, "Antidumping as Safeguard Policy" (2001) World Bank: Policy Research Working Papers No. 2730, online: World Bank <http://econ.worldbank.org/files/3172-wps2730.pdf> (date accessed: 25 April 2003).

Fitzhenry, Joan & Robertson, David, "Australia New Zealand Closer Economic Relations Trade Agreement" (2001) ITIS Online Articles, online: ITIS <http://www.itis-online.com.sg/doc/Australia-NZ%20FTA.pdf> (date accessed: 10 November 2003).

Gries, Michael & Block, Walter, "Predator" (September 1998), online: Consent Journal <http://www.freedomparty.org/consent/cons29_3.htm> (date accessed: 10 May 2003).

Hoekman, Bernard, "Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements" (31 July 1998) World Bank: Policy Research Working Papers No. WPS1950, online: World Bank <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1998/07/01/000009265_3980928162543/Rendered/PDF/multi0page.pdf> (date accessed: 30 May 2003).

Holden, Merle, "Anti-Dumping: A Reaction to Trade Liberalisation or Anti-Competitive?" (2002) 70:5 S.A.J. Econ. 777, online: ESSA <http://www.essa.org.za/download/papers/004.pdf> (date accessed: 11 April 2003).

Holmes, Peter & Kempton, Jeremy, "Study on the Economic and Industrial Aspects of Anti-dumping Policy", SEI Working Paper No. 22 (July 1997), online: Sussex European Institute <http://www.sussex.ac.uk/Units/SEI/pdfs/wp22.pdf> (date accessed: 17 April 2003).

Kerr, William A., "Dumping—One of Those Economic Myths" (2001) 2:2 J. Int'l L.T. Pol'y 211, online: Estey Centre Journal of International Law and Trade Policy <http://128.233.58.173/estey/j-pdfs/editors2-2.pdf> (date accessed: 11 April 2003).

Krishna, Raj, "Antidumping in Law and Practice", World Bank Working Paper No. 1823 (September 1997), online: World Bank <http://econ.worldbank.org/docs/507.pdf> (date accessed: 25 April 2003).

Loehr, William, "Dumping and Anti-dumping Policy with applications in Lithuania", CAER II Discussion Paper No. 11 (November 1997), online: CAER II <http://www.cid.harvard.edu/caer2/htm/content/papers/paper11/paper11.pdf> (date accessed: 10 May 2003).

New Zealand, "Trade Remedies in New Zealand", Ministry of Economic Development, Discussion Paper (February 1998), online: Ministry of Economic Development <http://www.med.govt.nz/buslt/trade_rem/trinnz/trinnz.pdf> (date accessed: 29 April 2003).

OECD, "Predatory Pricing" (1989) OECD Publications, online: OECD <http://www.oecd.org/pdf/M00007000/M00007601.pdf> (date accessed: 16 May 2003).

Ragosta, John A. & Magnus, John R., "Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief" (August 1996) DB LLP Articles, online: DB LLP <http://www.dbtrade.com/publications/183619w.pdf> (date accessed: 21 June 2003).

Vermulst, Edwin, "Anti-Dumping and Anti-Subsidy Concerns for Developing Countries in the Millennium Round: Key Areas for Reform" (Seoul 8-10 June 1999) UNCTAD Workshop on Development of Positive Agenda, Positive Agenda for AD/CVD, Summary of Presentation, online: SICE <http://www.sice.oas.org/geograph/antidumping/vermulst.pdf> (date accessed: 26 April 2003).

_____, et al., "UNCTAD Training Module on Anti-dumping" (February 2002), UNCTAD/ITCD/TSB/Misc.71, online: United Nations Conference on Trade and Development <http://www.unctad.org/en/docs//itcdtsbmisc71_en.pdf> (date accessed: 17 January 2003).

_____, "UNCTAD Course on Dispute Settlement, WTO, Module 3.6 Anti-dumping Measures" (March 2003), UNCTAD/EDM/Misc.232/Add.14 at 4, online: United Conference on Trade and Development <http://www.unctad.org/en/docs//edmmisc232add14_en.pdf> (date accessed: 20 April 2003).

Waincymer, Jeff, "Impliactions for anti-dumping and countervailing", Australian APEC Study Centre Conference Proceedings, online: Australian APEC Study Centre <http://www.apec.org.au/docs/waincymerfta.PDF> (date accessed: 19 May 2003).

Wolff, Alan Wm., "Role of the Antidumping Laws" (May 1995) DB LLP Trade Group Publications, online: DB LLP <http://www.dbtrade.com/publications/181925w.pdf> (date accessed:10 April 2003).

Wooton, Ian & Zanardi, Maurizio, "Trade and Competition Policy: Anti-Dumping versus Anti-Trust", Discussion Paper No. 2002-6 (June 2002), online: Department of Economics, University of Glasgow <http://www.gla.ac.uk/Acad/PolEcon/pdf02/2002_6.pdf> (date accessed: 19 May 2003).