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A History of GATT Unfair Trade Remedy Law — Confusion of Purposes

John J. Barceló III

1. INTRODUCTION

THIS paper presents an analytical history of anti-dumping and anti-subsidy law in GATT and its member countries. In recent years this body of 'unfair trade remedy' law has flourished in the western trading system. Important trading countries have adopted new or expanded anti-dumping and anti-subsidy laws and imposed trade-blocking remedies under them more frequently than ever before. I try to explain in this essay how and why these laws — which I view as protectionist — have prospered and become so rooted in GATT and its member countries.

To understand the significance of unfair trade remedy law it helps to distinguish it from fair trade relief — known in GATT as 'safeguard' action and in the United States as 'escape clause' relief. Safeguard action, if taken, must be imposed against *all* imports of a particular kind, not just unfairly traded imports. Availability of safeguard relief turns on whether imports as a whole, from whatever country, are causing or threatening serious injury to domestic producers. Questions of pricing fairness or foreign subsidies do not arise. The relief — which may include increased tariffs, quantitative restrictions, or other trade barriers — must be temporary and the invoking country must compensate affected exporting countries (or such countries may retaliate).¹ In the United

JOHN J. BARCELÓ III is A. R. Noll Professor of Law, Cornell University Law School. Copyright © 1991 by John J. Barceló III. All rights reserved. Cornell Law School graduate, Michael D. Schechter (J.D. 1990), provided valuable research assistance. This paper is a shortened version of a longer paper which is available from the author. The longer paper will be published by the London Trade Policy Research Centre in a volume on 'Regulatory Trade Protection'.

¹ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, Art. XIX, 61 Stat. A-11, TIAS No. 1700, 55 UNTS 194 [hereinafter GATT].

States the President has broad discretion to refuse to grant the remedy, even if executive agencies recommend it.

Unfair trade relief, by contrast, applies selectively against only dumped or subsidised imports — on the theory that dumping and subsidisation are unfair practices. The remedy is an increased duty offsetting the margin of dumping or the amount of subsidy. It lasts as long as the targeted practices continue, and the exporting country has no claim to compensation. Most importantly, the triggering level of injury to domestic producers is lower than that needed for safeguard relief, and in the United States the President has no authority to block relief.

United States' lawyers representing domestic producers almost always prefer the unfair trade remedy laws to a safeguard proceeding. The same seems true in the European Community and other countries. An industry losing market share to imports simply has a better chance of effective relief under unfair trade remedy law.

The popularity of unfair trade remedy laws with domestic producers seems to support this paper's basic premise that these laws serve largely protectionist ends. Some students of the global economy assert, however, that dumping and subsidies are fundamentally 'unfair' practices. They seem to believe that these practices in themselves, or at least when they injure foreign producers, impair social welfare and undermine free trade goals. They claim that anti-dumping and anti-subsidy laws actually advance the cause of free trade.² I have joined this debate elsewhere arguing for the opposite view — that anti-dumping and anti-subsidy laws, as currently enforced, clash with free trade goals (Barcelo 1979, pp. 53-93, 1982 and 1984; and Sikes, 1989, analysing countervailing duties as a form of anti-subsidy law). In this paper taking that position as a premise, I inquire into the antecedents, understandings, and assumptions that allowed these trade-restricting laws to grow and prosper in an evolving trade system that paradoxically stresses in other areas ever more complete removal of trade restrictions.

2. GATT AND NATIONAL ANTI-DUMPING LAW

a. Analytical Framework: Unfairness and Predation

This is not the place for an elaborate analysis of the coherence of anti-dumping policy, but a statement of this paper's basic appraisal of the problem should aid understanding of its conclusions and historical analysis. Dumping

² See J. F. Beseler and A.N. Williams, *Anti-dumping and Anti-subsidy Law: The European Community* vi (Preface) (1986) (assertion limited to anti-dumping law).

occurs when a private firm sells for export below its home market price, a form of price discrimination. As with anti-price-discrimination law in general, anti-dumping harmonises with basic antitrust policy only if enforcement is carefully tailored to restrain solely predatory pricing tactics. The theory of what one wants to oppose is easy to understand — underselling by a dominant rival to drive out all competitors so that the surviving firm, having ‘cornered the market,’ can raise prices to monopoly levels. The danger to the competitive process inherent in overzealous enforcement of anti-price discrimination policy is also easy to picture: firms afraid to engage in healthy price competition for fear of a lawsuit or criminal prosecution.

The literature on price-discrimination in the United States has tried to capture these conflicting tendencies in the distinction between injury to *competition* and injury to *competitors*. If anti-price discrimination law is so bluntly enforced that price cutting is proscribed whenever it takes customers away from competitors (the injury to competitors test), then firms will always be wary of competing on price. Under an injury to competition standard, something more would be required. A complainant might have to show that the price cutting arose out of genuinely predatory motives — for example, that it involved below-marginal-cost prices (money-losing even in the short run) by a dominant firm in a concentrated industry. It is not the purpose of this paper to explore this distinction in any detail, but rather to capture the essence of it so that the equivalent dilemma in the enforcement of anti-dumping laws can be understood.

In anti-dumping policy an injury-to-competitors standard is essentially indistinguishable from a safeguard test of injury. Countries apply safeguard remedies to favour domestic over foreign producers, not to protect the competitive process. Theoretically this is to give domestic producers a longer breathing space for adjustment to severe foreign competition — competition that is perfectly fair but that nevertheless causes serious injury to domestic producers.

An anti-dumping policy aimed solely at predatory dumping would apply an ‘injury-to-competition’ test of dumping injury, in line with antitrust goals. Thus, dumping ‘unfairness’ would refer to predatory actions threatening the competitive process itself. This author has never found anything else about international price discrimination that could logically be found unfair (Barcelo, 1972 and 1979, pp. 53-54).

Historically, however, as we will see later, GATT anti-dumping law has not acknowledged his basic distinction between injury-to-competition and injury-to-competitors. Instead it is a hybrid of antitrust and safeguard policies, awkwardly resting on a confused notion of ‘unfairness.’ Early commentators on dumping seemed automatically to associate the practice with predatory motives, but in modern application anti-dumping measures have almost exclusively burdened

nonpredatory dumping. There seems to be no recorded case of anti-dumping action taken against genuine predation.

b. Pre-GATT History

Canada enacted the first national anti-dumping law in 1904.³ That early law took the now classic form of assessing an additional anti-dumping duty equal to the amount of any price discrimination on imports. Although the desire to combat United States dumping of steel into Canada was a stated purpose (Viner, 1923, p. 88; and Trendelenburg, 1927, p. 13), the law was apparently motivated more by the goal of finding an alternative to higher across-the-board tariff increases being forcefully urged by Canadian producers (Grey, 1973; and Viner, 1923, pp. 192-93).

Modelled on the Canadian statute,⁴ the United States' Antidumping Act of 1921 was a critical development in United States' law and, because of later United States influence, also in GATT law. The 1921 Act signalled a significant shift in United States' anti-dumping policy. The first United States' anti-dumping law, enacted in 1916,⁵ was an antitrust law extending to foreign commerce the anti-price discrimination provisions of the 1914 Clayton Act.⁶ The 1916 law focused on predatory behaviour by requiring that the dumping be done 'commonly and systematically' at a price 'substantially less' than the home market price and 'with the intent of destroying or injuring an industry in the United States . . . or of restraining or monopolizing any part of trade or commerce . . .'.⁷ The 1916 Act provided for criminal penalties and treble damages relief, hallmarks of the domestic antitrust laws.

The 1921 Act introduced into United States' law the basic confusion of anti-trust and protectionist purposes that has marked anti-dumping policy in modern times. As with all anti-dumping law, the 1921 Act was consistently justified as combatting an unfair practice, namely predatory dumping. The arguments never adequately explained, however, why the 1916 Act or the domestic antitrust laws were not sufficient for that task — or at least why the predatory pricing concept in these laws did not remain the touchstone of anti-dumping law.

³ An Act To Amend the Customs Tariff, 1897, 4 Edw. 7, ch. 11, § 19 (Can. 1904); see J. Viner, *Dumping: A Problem in International Trade* (1923 and reprint 1966) [hereinafter 'Viner, Book'] 192-204.

⁴ See H. R. Rep. No. 1, 67th Cong., 1st Sess. 23 (1921). The US Tariff Commission conducted a study of both the United States Antidumping Act of 1916 and Canada's anti-dumping law. The report favoured enacting a new law following the Canadian approach. See US Tariff Commission, *Dumping and Unfair Foreign Competition* 30-34 (1919).

⁵ Revenue Act of 1916, ch. 463, § 801, 39 Stat. 756, 798 (codified at 15 USC § 72 (1982)).

⁶ Clayton Antitrust Act, ch. 323, 38 Stat. 730 (1914). See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F.Supp. 1190, 1213-23 (E.D. Pa. 1980) (discussing the origin of the 1916 Act).

⁷ 15 USC § 72 (1982).

Instead, the operative language of the 1921 Act assailed any dumping that injured domestic producers, not just predatory dumping. If one speculates that Congress may have considered injurious dumping, even if non-predatory, to be unfair, one must ask why Congress did not think the same about domestic price discrimination. The 1914 Clayton Act, both before and after the 1936 Robinson-Patman Act amendments,⁸ employed only an injury to competition standard. The most plausible conclusion is that the 1921 Act was confused and ambiguous and could be made to serve either antitrust or safeguard ends.

The legislative history of the 1921 Act mirrors this same confusion. In the Congressional reports and floor debates one can find those who thought predatory dumping was the only evil to be remedied.⁹ But there were also those who spoke for and understood that some of the chief features of the 1921 Act — namely, converting to a duty remedy, dropping the required proof of predatory intent, and substituting a mere ‘injury to industry’ test — added significant protectionist potential.¹⁰

Some tried to argue that the 1921 Act was needed because the 1916 Act was ineffective, pointing to the absence of prosecutions under it.¹¹ But the nonexistence or extreme rarity of predatory behaviour could also explain the absence of prosecutions. Although the 1916 Act has remained on the books with an attractive lure — treble damages — and modern notions of court jurisdiction and the antitrust law’s reach would pose no problems, only one serious private suit, brought in 1970, has been filed under the 1916 Act for predatory dumping.¹² Moreover, that case was ultimately dismissed on summary judgment

⁸ Clayton Antitrust Act, ch. 323, 38 Stat 730 (1914) amended by Robinson-Patman Price Discrimination Act, ch. 592, Sec. 1, 49 Stat. 1526 (1936) (codified at 15 USC Sec. 13(a) (1982)).

⁹ See H. R. Rep. No. 1, 67th Cong., 1st Sess., 23 (1921) (stating that the legislation will protect ‘our industries and labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value if necessary until our industries are destroyed.’). See also 61 Cong. Rec. 1292 (1921) (Statement of Sen. New).

¹⁰ The previous Congress passed the same bill that later became the 1921 Act, but outgoing President Wilson vetoed it. The minority report of the Senate Finance Committee denounced the bill as not designed to counter predatory dumping, but to ‘suppress importations.’ S. Rept. 510 pt. 2, 66th Cong., 2nd Sess. 2-3 (1920). See also 61 Cong. Rec. 328 (1921) (Statement of Rep. Green); 61 Cong. Rec. 339 (1921) (Statement of Rep. Madden); 61 Cong. Rec. 283 (1921) (Statement of Rep. Mondell).

¹¹ US Tariff Commission, *supra* note 5, at 18, 33.

¹² See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F.Supp. 251 (ED Pa. 1975) (holding 1916 Act not void for vagueness), 494 F.Supp. 251 (ED Pa. 1980) (granting defendants’ summary judgment motion), *rev’d sub nom.* In re Japanese Electronic Products Antitrust Lit., 723 F.2d 319 (3rd Cir. 1983), *improperly before the court during argument on parallel case* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 579 n.3 (1985). There was apparently one prior civil suit filed in 1931 under the 1916 Antidumping Act, but it never reached the merits. See *H. Wagner & Adler Co. v. Mali*, 74 F.2d 666 (2nd Cir. 1935). See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F.Supp. 1190, 1211-1212 (ED Pa. 1980) (noting that the *Mali* case was the only civil suit under the 1916 Act brought prior to 1970 and that there were only four criminal actions, none of which yielded a reported decision).

because the plaintiffs did not offer to prove facts that would support a plausible theory of predatory behaviour.¹³

Despite the protectionist potential of statutes like the 1921 Act, increased anti-dumping activity did not occur immediately. In a 1927 study for the League of Nations, Trendelenburg reported that although a few other countries had enacted anti-dumping laws, only Canada, Australia, and South Africa actually took any effective action against dumping.¹⁴ The next important step in anti-dumping history occurred with the creation of GATT.

c. Origins of GATT Article VI

At the formative conferences for the GATT between 1946 and 1947 it seems that the drafting countries¹⁵ readily reached general agreement on the need for anti-dumping law, essentially along the lines proposed in the United States' working document: a 'Suggested Charter for an International Trade Organization of the United Nations.'¹⁶ The anti-dumping provisions in that document followed very closely the 1921 Act. There was concern with possible 'abuse' of anti-dumping laws. But abuse was thought of in ways similar to abuse of a safeguard law — too frequent resort to duties in the absence of real price discrimination or import-caused material injury. Thus, the negotiators focused on defining price discrimination; on limiting the anti-dumping duty to the margin of dumping; and on guaranteeing that the dumped imports were causing 'material injury' (Brown, 1950, p. 110 and 213; and Jackson, 1969, p. 404).

The negotiators seemed generally unaware of, or uninterested in, anti-dumping law's potential to function like a selective safeguard law having nothing to do with real predation. The conference participants would not have been alerted to this central issue through a study of Viner, then the leading

¹³ The plaintiffs grounded their predatory pricing claim on several domestic antitrust statutes in addition to the 1916 Antidumping Act: § 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, and § 73 of the Wilson Tariff Act. Technically the District Court dismissed the 1916 Act claim because the defendants' products sold at home were not comparable to those sold for US consumption. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F.Supp. 1190 (ED Pa. 1980). The Court of Appeals' reversal of that decision in *In re Japanese Electronic Products Antitrust Lit.*, 723 F.2d 319 (3rd Cir. 1983), was not actually contested in the petition for Supreme Court review. See *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 US 574, 579 n.3 (1986). Nevertheless, the Supreme Court's approval of summary judgment on the domestic claims also applied to the 1916 Act claim because the latter rested on a predatory pricing theory.

¹⁴ See Trendelenburg (1927) at 7.

¹⁵ The following nations attended the meeting of the Preparatory Committee: Australia, Belgium, Brazil, Canada, China, Cuba, Czechoslovakia, France, India, The Netherlands, New Zealand, Union of South Africa, United Kingdom, and the United States. *Official Report of the United States Delegation to the First Meeting of the Preparatory Committee for the International Conference of Trade and Employment* 1 (Oct. 15, 1946).

¹⁶ Dept. of State Pub. No. 2598, Commercial Policy Series 93 (1946).

dumping scholar,¹⁷ or the prior League of Nations' studies devoted to the dumping problem. Viner considered the 1921 United States' Act a model law¹⁸ and never seemed to appreciate the critical confusion of antitrust and safeguard purposes in the act.

d. Anti-dumping Codes of 1967 and 1979

(1) The 1967 Code. In the Kennedy Round GATT negotiations from 1963-1967, anti-dumping laws themselves were put on the negotiating table as potential non-tariff barriers to trade. The negotiators were concerned with three general problems: (1) the lack of an injury test in the Canadian law; (2) the potential for abuse through weak tests of the substantive anti-dumping concepts (e.g. material injury, industry, and causation); and (3) the potential for abuse through administrative-procedural delays, uncertainties, and arbitrariness. European countries particularly associated the risk of delays and harassing procedures with the United States' system (Dam, 1970, pp. 174 and 176; and Kelly, 1967, pp. 298-299); whereas the United States complained about the potential for arbitrariness in the more discretionary, less rule-governed character of the European laws (Kelly, 1967, p. 300). No one argued for an injury-to-competition test to return anti-dumping law to its original anti-predation purposes.

The Canadian problem was resolved in the Kennedy Round through Canada's adherence to the Anti-dumping Code and amendment of its domestic law to add an injury test (Grey, 1973, pp. 8-9). The other two problems required elaborate Code provisions guaranteeing notice and procedural fairness and setting out rules and standards for deciding price discrimination, material injury, and causation.

The 1967 Code was fully implemented, at least formally, only in Europe, where the new EEC anti-dumping regulation of 1968 conformed faithfully to the Code language.¹⁹ In the United States an executive-legislative dispute crippled the Code. The executive branch sought to implement the Code through administrative interpretation of the 1921 Antidumping Act without asking

¹⁷ Viner's work on dumping includes: J. Viner, Book, *supra* note 3; Viner, Article on 'Dumping' in *The Encyclopedia of Social Sciences* reprinted in J. Viner, Book, *supra* note 3 [hereinafter Viner, Dumping Article]; Viner, 'A Memorandum on Dumping' for the League of Nations (1926) reprinted in J. Viner, Book, *supra* note 3 [hereinafter Viner, Dumping Memorandum].

¹⁸ Viner described the United States' anti-dumping law of 1921 as 'a model of draftsmanship.' Viner, Book, *supra* note 3, at 262.

¹⁹ Reglement (CEE) No. 459/68 du Conseil, Journal Officiel Des Communautés Europeennes, April 17, 1968, at 1. The regulation covers dumping from non-EEC countries into the community area, and should not be confused with the regulation of intra-EEC dumping. For a discussion of the EEC regulation of third country dumping, see Beseler, 'EEC Protection Against Dumping and Market Subsidies from Third Countries,' 6 *Common Market Law Review*, 327 (1969).

Congress for implementing legislation. Urged on by protectionist opponents of the Code, Congress balked and passed a 1968 law instructing the United States Tariff Commission, the regulatory agency with authority for anti-dumping injury questions,²⁰ to consider itself bound only by the 1921 Act. Although the 1968 law did not technically prevent the Tariff Commission from interpreting certain broad Act language to conform to the narrower Code requirements, in practice the Tariff Commission applied substantive injury and causality standards at variance with the Code and repeatedly found injury based on very weak tests.²¹

(2) The 1979 Code. In the Tokyo Round GATT negotiations, from 1974-1979, the parties agreed to a new Anti-dumping Code²² that reproduced most of the 1967 Code's provisions with a few amendments. The most important change was a weakening of the Code's causality standard by dropping the prior Article 3 'principal cause' formula and substituting a simple 'causing' test. A second change expunged the one specific example of antitrust thinking that had found its way into the 1967 Code. The earlier Code required anti-dumping officials to investigate the presence of 'restrictive business practices' in the local industry. This presumably meant no injury should be found if domestic oligopolists held prices artificially high.²³ The 1979 Code dropped all reference to 'restrictive business practices.' It listed instead a group of injury indicators (decline in output, sales, market share, profits, and so on) that one would find in any safeguard law.

It seems that the EEC and the United States wanted these Code changes not because of increased predatory, or even ordinary, dumping, but because the changes meant they could take safeguard-type action against selective countries during a recession. The EEC, in particular, urged a weaker causation test because the stronger test had prevented it from awarding anti-dumping relief to cushion

²⁰ Now called the International Trade Commission.

²¹ For example, the majority of the Tariff Commission wrote in *Whole Dried Eggs From Holland* that as opposed to the material injury test of the 1967 Code 'a showing of anything more than a trivial or inconsequential effect on the domestic industry' was sufficient to trigger anti-dumping duties. 35 Fed. Reg. 12500, 12501 (Tariff Commission 1970). The Tariff Commission also rejected the principal cause language of the Code and accepted a very weak test based on the injury being 'attributable in part' to the alleged dumping. *Ferrite Cores From Japan* 36 Fed. Reg. 1934 (Tariff Commission 1971).

²² Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade, GATT Doc. MTN/NTM/W/232 [hereinafter Tokyo Round Texts], reprinted in President's Message to Congress Transmitting the Texts of the Trade Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations, HR Doc. No. 153, 96th Cong., 1st Sess. 257, 311 (1979).

²³ Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Art. 3(b), June 30, 1967, TIAS No. 6431, ('The valuation of injury — that is the evaluation of the effects of the dumped imports on the industry in question — shall be based on examination of all factors having a bearing on the state of the industry in question, such as: . . . market share . . . prices . . . and restrictive trade practices.')

the effects of the 1977-78 oil price recession.²⁴ Without a principal cause test, anti-dumping relief would be available even if a non-dumping factor, like a recession, were the dominant cause of business injury.

In the years since adoption of the 1979 Anti-dumping Code the principal users of anti-dumping remedies have been the United States, Canada, the EEC, and Australia.²⁵ Japan has not had an active anti-dumping program, but it may have accepted the 1979 Code's weakened injury standards because of a potential future need for anti-dumping protection (Jackson, Louis and Matsushita, 1984). The law being applied in this area no longer has anything to do with antitrust notions. It is an alternate safeguard law, triggered by price discrimination per se, based on weakened injury standards, and applied on a selective basis.

3. GATT AND NATIONAL ANTI-SUBSIDY LAW

*a. Analytic Framework: Unfairness and Public Goods*²⁶

The unfairness concept motivating anti-subsidy policy may have resembled originally, as we shall see, the anti-predation motive of anti-dumping policy. The earliest countervailing duty laws were responses to foreign export bounties that were thought of as aggressive, potentially predatory actions. Today in GATT law, however, countervailing duties may offset domestic subsidies granted entirely for internal economic or social ends. The unfairness concept in this context is more attenuated.

Anti-subsidy policy often skates over a number of difficult theoretical issues. Anti-subsidy policy abhors government interference in the market and generally considers only market outcomes to be fair. Yet according to the theory of market failure, 'public goods' — those consumed in a sense by society as a whole — will be under-supplied if one relies exclusively on the private market. Indeed, the very *raison d'être* of government is to supply public goods (including services),

²⁴ See J. Beseler and A. Williams, *supra* note 2, at 13-14. Beseler and Williams note that despite the tough injury standards, EEC resort to anti-dumping remedies rose dramatically after the 1977-78 recession. *Id.* at 13 and n.76.

²⁵ The GATT Committee on Anti-dumping practices has reported figures from which it appears that between July 1980 and June 1989, Australia had initiated 26 per cent; Canada, 21 per cent; the EEC, 20 per cent; and the US, 28 per cent of all anti-dumping actions. All other countries combined initiated only five per cent of all of the reported anti-dumping actions. Contracting Parties to the General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents* 70-71 (30th Supp. 1984) [hereinafter BISD]; *id.* at 289-90 (31st Supp. 1985); *id.* at 188-90 (32nd Supp. 1986); *id.* at 210-12 (33rd Supp. 1987); *id.* at 201-03 (34th Supp. 1988); *id.* at 359-61 (35th Supp. 1989); *id.* at 435-39 (36th Supp. 1990).

²⁶ See generally, J. Barceló, 'The Conceptual Framework for EEC Regulation of State Aids,' 1986-87 *Italian Yearbook of International Law* 50.

such as police and fire fighting protection, national security, a system of laws, courts, and magistrates, and so on. These would be under-supplied if only market ordering were available. Thus any given subsidy could be corrective of a prior market failure, and, rather than abhorrent, supply a needed public good.

Yet at the same time, governments are not infallible; they may also fail. Any given subsidy could actually burden aggregate welfare for the benefit of a well-organised, articulate special interest group. Measured by overall societal welfare, such a policy would be a 'mistake'. Whether government has in fact 'failed' in adopting any particular subsidy would of course be a very complex question.

This analysis suggests two rationales for anti-subsidy policy: (i) to encourage cooperation among subsidising governments (in the private context, 'collusion') to reduce the cost of public goods and (ii) to check or constrain the lobbying power of special interests. The collusion rationale posits that governments use subsidies to 'purchase' local production because of public good byproducts stemming from that production — such as, fuller employment, self-sufficiency (in agriculture, for example), technological growth, development of depressed or underprivileged geographic areas, eased adjustment to international competition, and so on. These are goals that are likely to be shared by many governments. Simultaneous, unrestrained pursuit of them by all or most governments, however, will drive up the subsidy cost dramatically — because subsidised foreign imports will supplant local production unless the latter is subsidised further. A classic market solution to this problem is available: governments could compete with one another and drive up the price (subsidy cost) of maintaining local production until only a few governments were willing to pay the price. Of course the governments involved — functioning like a group of monopsonistic buyers of public goods — could improve their aggregate welfare through 'monopsonistic collusion' to limit the price (subsidy cost) they would pay for local production. The 'collusion' would take the form of agreed limits on subsidies.

The second rationale looks to international consensus as a check against the internal political process. If governments occasionally are the victims of organised lobbying efforts by special interests, they can protect themselves to an extent by entering international agreements prohibiting certain kinds of inefficient or 'mistaken' subsidies. Thus, subjecting subsidy policy to international scrutiny can help to avoid 'senseless' subsidy policies that burden aggregate welfare for the benefit of the organised few. The challenge is to draft rules to achieve this that are not hopelessly openended at one extreme or slavishly tied to market principles at the other.

A rational approach to fairness in subsidies thus seems to require as a starting point some agreed set of rules and principles governing subsidies. Most of the public rhetoric, including the metaphor of the 'level playing field', rests on a very simplistic view that all government intervention is 'unfair' — essentially

because it contradicts the market. This view skates over the complexities introduced by market failure, public goods, and government failure ideas. Government can only take these complexities into account, it seems, through government to government negotiation and consensus. If consensus could be achieved, countervailing duties might then play a rational role in disciplining violations. But GATT members do not currently share very much common ground concerning subsidies. In the absence of consensus, countervailing duties applied unilaterally — like anti-dumping duties — look very much like selective safeguard actions.

b. Anti-subsidy Law — Pre-GATT History

The first countervailing duty laws were enacted by the United States in 1890 and Belgium in 1892 and were aimed at offsetting bounties paid by Continental European countries primarily on the export of sugar, but also on other products, such as flour and beverage alcohol (Viner, 1923, pp. 168-69). Viner suggested that these bounties on exports were not originally intended to promote exports but resulted from complex, clumsy tariff and excise tax laws that yielded excessive rebates of taxes and drawbacks of duties — that is, rebates and drawbacks greater than the taxes or duties actually paid (Viner, 1923, pp. 90-91 and 163-66). But other countries emulated the excessive rebate system, either out of general rivalry or the desire to maintain export markets.

The initial 1890 American law imposed a countervailing duty (a fixed amount per pound) only on refined sugar coming from countries paying an export bounty.²⁷ The Belgian law was more general, applying to any import benefiting from an export bounty (Viner, 1923, p. 169). In 1897 Congress completely rewrote the countervailing duty statute, applying it to all imports, or rather all that were dutiable.²⁸ The law was mandatory. Although the Treasury Secretary had to decide the existence and amount of any export bounty — which the countervailing duty was exactly to offset — neither the Secretary nor the President had any discretion to waive the duty.

None of the early American countervailing duty statutes contained an injury test. The initial 1890 law, applicable only to bountied sugar, operated during a period in which the United States was subsidising its own domestic sugar production.²⁹ An argument for an injury test would hardly have been compelling, because Congress had already decided to assist American sugar producers. Any

²⁷ McKinley Tariff of 1890, ch. 1244, 26 Stat. 567.

²⁸ Tariff Act of 1897, § 5, ch. 11, 30 stat. 151.

²⁹ J. Viner, Book, *supra* note 3, at 178 n.1. Interestingly, beet and cane sugar producers in the United States and Europe are still receiving subsidies (in the United States through price supports and a quota system on imports). See *New York Times*, June 3, 1988, at A12, col. 3.

increase in bounty-fed sugar imports pitted the foreign bounty program against the American program. When Congress broadened the law in 1897 to apply to all imports, it also restricted it to dutiable imports. This restriction could be seen as an implicit injury test, or a presumption of injury, because industries already receiving some protection were presumably those sensitive to import competition.

This broadened, generalised 1897 law is the true forerunner of the modern American countervailing duty law. There is no evidence that Congress broadened the law because it feared bounties would spread to many different products. The chief concern was still bountied sugar imports, and the chief beneficiary seems to have been the powerful American Sugar Refining Company, a sugar trust that controlled perhaps as much as 80 per cent of American sugar production.³⁰ Congress may have favoured the generalised provisions to disguise the protection it was giving the sugar trust. Protectionist sentiment also clearly favoured across-the-board nullification of any foreign effort to scale American tariff walls through export bounties.³¹ The Senate debate on the proposed law contains a full range of protectionist (producer oriented) and free-trade (consumer oriented) arguments for and against the countervailing duty law.³²

In the inter-war years, international attention turned increasingly to threats of what was loosely called 'dumping,' partly because the expected post-war increase in industrial output raised fears of market flooding. The government practice of bountying exports was known in this period as 'bounty dumping' (Trendelenburg, 1927, pp. 6-7). Bounty-countervailing duty laws were then more

³⁰ See 30 Cong. Rec. 1694 (1897) (statement of Sen. Lindsay). 30 Cong. Rec. 2203 (1897) (statement of Sen. Gray) ('We all know that this [§ 5 of Tariff of 1897] is intended primarily, and perhaps exclusively to apply to sugar . . .'). On the legislative influence of the sugar trust, see 30 Cong. Rec. 2207 (1897) (statement of Sen. Caffery). Tying the countervailing duty to the amount of the foreign bounty — as opposed to the prior fixed amount — apparently had the effect of tripling the bounty-countervailing duty on sugar. See 30 Cong. Rec. 2204 (1897) (statement of Sen. Gray).

³¹ See 30 Cong. Rec. 2224 (1897) (statement of Sen. Caffery). Another motive may have been to meet the argument, particularly pressed by Germany, that the American countervailing duty on sugar violated the most-favoured-nation clause of existing commercial treaties. See 30 Cong. Rec. 2203-05, 2218 (1897) (statement of Sen. Gray).

³² Even those claiming to be free-traders argued that it was the export bounty that violated free trade principles, not the countervailing duty. One spokesman distinguished the case of cheap foreign labour as a 'natural' condition (like climate or soil) that should not be equalized, from the 'artificial' condition created by export bounties, that should be neutralised through countervailing duties. See 30 Cong. Rec. 2226 (1897) (statement of Sen. Caffery). He also argued that foreign bounties were 'destructive' and had a 'trade war' quality to them. *Id.* at 2226. Some claimed bounties on exports were 'unfair competition.' See 30 Cong. Rec. 2225 (1897) (statement of Sen. Lindsay). Staunch free-traders in opposition to the law did not find the distinction between artificial and natural conditions persuasive, emphasising that the consumer benefitted in either case from the low-priced imports. See 30 Cong. Rec. 2218 (1897) (statement of Sen. Gray).

prevalent than laws against private-initiated dumping (Trendelenburg, 1927, p. 6).

Some of these laws, including the United States' statute of that time, applied to both production and export bounties. The United States' law had been amended in 1922, without any evident discussion in the legislative history, to add production bounties to the list of countervailable practices.³³ Given the potential significance of this change, it is curious that the public record seems silent on what motivated it. Production subsidies were known practices of course, and as Viner speculated, it must have been a matter of indifference to domestic producers whether an 'artificial' stimulus to foreign competition came from a production or an export bounty (Viner, 1923, p. 170). In any event, in 1927 Trendelenburg (p. 7) concluded that despite the relatively widespread existence of bounty-countervailing duty laws they were rarely used in practice, if at all.

c. GATT and Countervailing Duties — Article VI

The GATT Article VI provisions on countervailing duties closely parallel those on anti-dumping duties and have the same origin in the early United States proposals and suggested International Trade Organization (ITO) charter. Apparently the drafting countries readily agreed to include countervailing along with anti-dumping duties in the early drafts that ultimately became GATT Article VI, despite the distinct differences between the two regimes. The only controversy in the early discussions concerned the need for an injury test in countervailing duty law (Brown, 1950, pp. 110-11). Although, as already mentioned, the United States had no such test in its own law, it included one in the 1945 Suggested Charter. Use of the Protocol of Provisional Application to bring GATT Part II (including Article VI) into force, however, had the effect of allowing the United States legally to continue to enforce its countervailing duty law even though it was inconsistent with GATT.³⁴

Because of the possibility of abuse, it seems surprising that Article VI authorises GATT parties to countervail against domestic as well as export subsidies and contains almost no definition of what constitutes a subsidy. The GATT refers only to a 'bounty or subsidy bestowed, directly or indirectly, upon

³³ Tariff Act of 1922, ch. 356, 42 Stat. 858, 935. See 61 Cong. Rec. 4196 (1921); House Journal 67th cong., 1st Sess. 372 (1921) (House voted on the change along with 190 minor amendments en masse without debate). The United States countervailed against a production (domestic) subsidy for the first time in the 1973 Michelin tire case. X-Radial Steel Belted Tires from Canada, 7 Cust. B. & Dec. 24, 38 Fed. Reg. 1,018 (1973). See note 38 *infra*.

³⁴ The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A2051 (1947), 55 UNTS 308 (1950), brought Part II of GATT into force subject to existing legislation.

the manufacture, production or export of any merchandise.³⁵ GATT's failure to link countervailing duties to the direct regulation of subsidies in Article XVI compounds the unboundedness of the Article VI language. An importing country may countervail even if the subsidy involved does not violate Article XVI.³⁶ Perhaps this passive approach to countervailing duties can be explained by the relative infrequency of resort to such laws. In 1958 the GATT Secretariat reported that only the United States had separate anti-dumping and countervailing duty laws, and only the United States and Belgium made any noticeable use of countervailing duties.³⁷ Other countries focused on price discrimination in the export sector, whether caused by private initiative or government bounties. Moreover, the United States did not actually countervail against a *domestic* subsidy in another country until as late as 1973.³⁸ Countervailing duties did not receive any serious GATT attention until negotiation of the 1979 Tokyo Round Subsidies and Countervailing Duty Code.

4. GATT AND SUBSIDIES — ARTICLES XVI AND III

Despite GATT's legal decoupling of countervailing duties and direct regulation of subsidies, the two are closely connected. The decoupling was presumably a form of compromise. It allowed an importing country to apply its own unilateral definition of a subsidy to justify a countervailing duty, while not imposing a direct restraint on the subsidising government's practices. Some restraint on subsidies was still necessary, however, because a subsidy can have two other trade effects not remediable through countervailing duties: (i) reduction of imports into the subsidising country and (ii) displacement of non-subsidised exports to a third country. An injured country's only unilateral remedy would be a competing subsidy, but that could be quite expensive. The drafters of the International Trade Organization Charter (Havana Charter) and GATT thus gave considerable attention to the preferred remedy — direct, multilateral controls on the use of subsidies.

³⁵ GATT, *supra* note 1, art. VI(3). The GATT does bar countervailing against export rebates of 'duties or taxes borne by the like product when [consumed at home] . . .' *Id.* Art. VI (4). Ad Art. VI also provides that multiple currency practices may constitute a countervailable subsidy.

³⁶ Contracting Parties to the General Agreement on Tariffs and Trade, *Antidumping and Countervailing Duties, Report of the Group of Experts*, 20-21 (1961).

³⁷ Contracting Parties to the General Agreement on Tariffs and Trade, *Antidumping and Countervailing Duties*, 12, 14 (1958).

³⁸ X-Radial Steel Belted Tires from Canada, TD 73-10, 7 Cust. B. 24, 38 Fed. Reg. 1018 (1973). Eugene Rossides, the Assistant Secretary of the Treasury who approved the application of the countervailing duty law in the *Michelin* case, *see id.* at 26, called it a landmark decision. E. Rossides, *US Import Trade Regulation 248* (1986). Another commentator noted that through 1969 the Treasury Department had never countervailed against a production subsidy. D. King, 'Countervailing Duties — an Old Remedy with New Appeal', 24 *Bus. Law* 1179, 1181 (1969).

The early United States' proposals and the 1948 final draft of the never-to-be-adopted Havana Charter³⁹ drew two basic distinctions that are still a part of GATT — one between domestic and export subsidies and a second between primary (agricultural) and non-primary product subsidies. The drafting nations viewed export subsidies as particularly pernicious and illegitimate, because they were likely to lead to trade wars (presumably because other countries would see them as predatory or 'beggar-thy-neighbour' policies). They were also less self-limiting, because a given subsidy budget would go much further if applied only to exports (Brown, 1950, pp. 117-19 and 214-15). Thus, the draft Charter completely prohibited all export subsidies, which it defined as subsidies that produced a lowered price on exports.⁴⁰ The United States argued for more lenient treatment of domestic subsidies partly on the ground that they were preferable to import duties as a form of protection.⁴¹ For domestic subsidies, the Havana Charter required nothing more than notification to the ITO and consultation (concerning the possibility of limiting the subsidy) with any member country seriously injured.⁴²

The second distinction — that between primary and non-primary products — was based on political reality, not principle. It came about because the United States and other important industrial countries all had elaborate and entrenched farm subsidy programs they were unwilling to alter. Under certain complex conditions, a country could continue to grant export subsidies on primary products — provided, however, that such subsidies were not to be used to obtain 'more than an equitable share of world trade in [the relevant] commodity.'⁴³

GATT Article XVI contains the same two distinctions (i) between export and domestic subsidies and (ii) between primary and non-primary product subsidies, but its provisions are noticeably weaker than those just described in the Havana Charter. This apparently came about largely because the United States' delegation to the GATT drafting sessions considered itself without authority to enter any undertakings concerning export subsidies.⁴⁴

³⁹ Havana Charter for an International Trade Organization, March 24, 1948, [Never in Force], Arts. 25-28 [hereinafter Havana Charter] reprinted in C. Wilcox, *A Charter for World Trade*, 262-65 (1949).

⁴⁰ Havana Charter, *supra* note 39, Art. 26(1).

⁴¹ See Brown (1950, p. 117). For a discussion of why domestic subsidies are more efficient than trade sector intervention, see generally, G. Denton and S. O'Cleireacain, *Subsidy Issues in International Commerce* 8 (1972), H. Johnson, 'Optimal Trade Intervention in the Presence of Domestic Distortion', in *Trade, Growth and the Balance of Payment* (Baldwin, et al. eds. 1965) at 9-10; J. Bhagwati, *The Theory and Practice of Commercial Policy: Departures from Unified Exchange Rates* 14-22 (1965).

⁴² Havana Charter, *supra* note 39, Art. 25; Brown (1950, pp. 215-216).

⁴³ Havana Charter, *supra* note 39, Art. 28(1); Brown (1950, pp. 215-216).

⁴⁴ UN Doc. E/PC/T/C.6/46, at 2 (1947) cited in Jackson (1969, p. 370).

The three basic limits on subsidies in the current GATT Article XVI developed in three separate steps (Jackson, 1969, pp. 368-99; and Dam, 1970, pp. 132-47). *First*, the original 1947 version of Article XVI contained only what is now Section A requiring countries to notify GATT of any subsidies (export or domestic) and to discuss with seriously prejudiced member countries the possibility of limiting a harmful subsidy. *Second*, in the 1955 Review Session, after it was clear that the Havana Charter would not come into force, Section B of the current GATT was added, dealing only with export subsidies. Section B weakly constrains such subsidies on primary products to a level that will not give the subsidising country 'more than an equitable share of world export trade in [the subsidised] product . . .'⁴⁵ For non-primary product export subsidies, Section B only bars introduction of new subsidies before a specific date (December 31, 1957), which was subsequently extended. *Third*, a limited number of countries, including all the major developed countries, accepted a special 1960 declaration completely prohibiting all non-primary product export subsidies.⁴⁶

GATT Article III, which also bears on subsidies, obligates members not to apply internal taxation or regulation discriminatorily against imports. Article III (8) (b) provides, however, that payment of subsidies exclusively to domestic producers is not violative of Article III's nondiscrimination principle. This treatment of course harmonises with Article XVI, which subjects domestic subsidies only to the general reporting and consulting requirements.

These minimal provisions on subsidies and countervailing duties in the original GATT remained more or less unchallenged until early in the Tokyo Round (1974-79). A key development then was passage in the United States of the Trade Act of 1974. That Act altered the United States' countervailing duty law in ways that encouraged its use. From 1959 to 1967 there were no outstanding United States' countervailing duty orders.⁴⁷ By the end of calendar year 1974, there were 30 such orders (Marks and Malmgren, pp. 365-66), and the trend increased even more dramatically thereafter.⁴⁸

Prior to 1974 the Treasury Department, which then administered the countervailing duty law, had apparently followed a practice of deliberately delaying politically sensitive cases, such as those challenging agricultural imports subsidised under the European Common Agricultural Policy (Marks and Malmgren, pp. 358-59). Cases could drag on for years, and the United States law at the time did not allow a domestic producer judicial review of adverse

⁴⁵ GATT, *supra* note 1, Art. XVI B(3).

⁴⁶ See Declaration Giving Effect to the Provisions of Article XVI(4) of the General Agreement on Tariffs and Trade, Nov. 19, 1960, 3 UST 2605, TIAS No. 5227, 445 UNTS 318.

⁴⁷ D. King, *supra* note 38, at 1179.

⁴⁸ Marks and Malmgren, pp. 365-66. Between January 1975 and August 1979 108 Countervailing Duty Cases were initiated in the United States. Ehrenhaft, 'What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for US Trade Policy', 11 *Law & Policy International Business* 1361, 1404 (1979).

Treasury decisions. The 1974 Act changed all this: first, by requiring the Treasury to reach a final decision on each countervailing duty case within twelve months⁴⁹ and second, by providing for judicial review of negative decisions.⁵⁰ And although the 1974 Act extended the United States' law to apply to non-dutiable goods (with the addition of an injury test), there was still no injury test on dutiable goods. Furthermore, during this period, perhaps in response to Congressional pressure, Treasury decided for the first time to countervail against a domestic subsidy in a foreign country: Canadian regional subsidies to a Michelin tyre plant in Nova Scotia.⁵¹

5. SUBSIDIES AND COUNTERVAILING DUTY CODE OF 1979

a. Subsidies Code Tracks I and II

In the Tokyo Round subsidy-countervailing-duty discussions most of the United States' trading partners sought primarily inclusion of an injury test in the United States' law (Lowenfeld, 1980). The United States for its part wanted greater discipline on the use of subsidies. The Subsidies and Countervailing Duty Code of 1979 (Subsidies Code) achieved both purposes. What has come to be called Track I deals with countervailing duties in much the same way as the earlier Anti-dumping Code deals with anti-dumping duties. The provisions define substantive concepts (material injury, domestic industry, causation) and ensure procedural and administrative openness and fairness.⁵² But Track I strikingly omits any definition of the central concept of 'subsidy.' Part II of the Code, sometimes called Track II, takes up that issue, but still apparently decoupled from Track I. Thus, although Track I requires an injury test, it allows an importing country to apply its own unilateral definition of a 'subsidy.' At least there is nothing in the Code that specifically links the Track II subsidy definition language to the use of countervailing duties under Track I.⁵³

⁴⁹ Trade Act of 1974, Ch. 3, Sec. 303(a) (4), 88 Stat. 2049, 19 USC Sec. 1303(a) (4), *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, Title I, Sec. 103(b) (1), 93 Stat. 190. The 1979 Act required that the final determination be made within 160 days of the filing of the complaint provision. Trade Agreements Act of 1979, Pub. L. No. 96-39, Title I, Sec. 705(a) (1), 93 Stat. 159, 19 USCA Sec. 1671d(a) (1) (West Supp. 1988).

⁵⁰ Trade Act of 1974, Ch. 3, Sec. 516(c), 88 Stat. 2052, 19 USC 1516.

⁵¹ See *supra* note 38.

⁵² Tokyo Round Texts, *supra* note 22, at 257, 261-75.

⁵³ The United States has generally argued for the decoupled theory stated in the text, whereas the European Community has urged that Track II definitions should be read into Track I. See Simon, 'Can GATT Export Subsidy Standards be ignored by the United States in imposing Countervailing Duties,' 5 *Northwestern Journal of International L. Bus.* 183 (1983). In view of the prior understanding that GATT Article XVI definitions would not be read into GATT Article VI, (see *supra* note 35 and accompanying text), one might expect the Code to be very specific about any intended change of this understanding. But the Code contains no such provision.

Track II of the Code extends and elaborates the GATT Article XVI provisions and adds a special dispute settlement mechanism. It maintains Article XVI's two basic distinctions: (i) between export and domestic subsidies and (ii) between primary and non-primary product subsidies. Track II makes illegal only the use of export subsidies on non-primary products. An Annex to the Code contains an illustrative list of prohibited export subsidies that derives from the effort of a GATT Working Group in 1960 to give more detail and substance to Article XVI.⁵⁴ The Code retains the weak Article XVI constraint on export subsidies for primary products, limiting such subsidies to a level that will not give the subsidising country 'more than an equitable share of world export trade' in the product.⁵⁵ It adds, however, more detail on what 'equitable share' should mean. The Code does not prohibit any domestic subsidy, but recognises that such subsidies may cause injury to an industry in another country. The dispute settlement procedure allows a country adversely affected by a subsidy, whether legal or illegal under Track II, to bring a complaint to a Committee of Signatories, which may authorise countermeasures.⁵⁶

If the Code advances the understanding of 'unfairness' at the core of anti-subsidy law, it does so only in Track II. By barring export subsidies on non-primary products the Code falls in line with the Havana Charter sentiment that such subsidies are pernicious and have a 'beggar-thy-neighbour' character. The exception for primary product export subsidies merely continues to reflect the political reality of widespread government intervention in agriculture and ensures that the topic will remain on future negotiating agendas.

The common element in the Code's illustrative list of export subsidies is not the dual pricing test of Article XVI, but rather the condition that availability of the subsidy turns on export performance. That definition strikes at government policies aimed at placing products in foreign markets. Domestic subsidies, by contrast, reflect policies of a more internal character not linked to product destination — like boosting output in depressed regions, or improving employment.

The Code treats domestic subsidies with straightforward ambivalence. Article 11(1) acknowledges that legitimate social and economic policy goals underlie various domestic subsidy programs (regional assistance; sectoral restructuring; maintaining employment; encouraging research; promoting development; dispersing industry for anti-congestion and environmental reasons).⁵⁷ At the same time, Article 11(2) urges the parties to 'seek to avoid causing [certain

⁵⁴ Tokyo Round Texts, *supra* note 22, at 278, 295. For the earlier GATT effort, see BISD, *supra* note 25, at 32-35, 184-201 (9th Supp. 1961).

⁵⁵ Tokyo Round Texts, *supra* note 22, Art. 10, at 278-79.

⁵⁶ *Id.* Art. 18(9), at 291.

⁵⁷ *Id.* Art 11(1), at 279.

effects] through the use of subsidies.' The effects to be avoided are listed as 'injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or . . . [nullification or impairment of] benefits accruing to another signatory under the General Agreement, *in particular where such subsidies would adversely affect the conditions of normal competition.*'⁵⁸ This last language implies the existence of criteria for evaluating domestic subsidies, but the Code leaves them unarticulated. What does 'adversely affect the conditions of normal competition' mean in this context? Until such criteria are elaborated — either in a subsequent negotiating round or through ad hoc decisions under the dispute settlement procedure — the Code test will probably take on a safeguard-like quality. That would mean that generally no domestic subsidy should cause material business injury to an industry in another country (either through increased imports *into* or decreased exports *from* the adversely affected country).

The Code's treatment of countervailing duties similarly resembles a safeguard approach. Under Track I an importing country is free to impose countervailing duties against any domestic or export subsidy that causes material injury to one of its domestic industries. Thus, the Track I concept of 'unfairness' is not particularised as to the nature, amount, or circumstances of the subsidy and seems implicitly to conflict with Track II's acceptance of domestic subsidies for certain social and economic goals. In this posture without guidance from a strong or clear concept of unfairness, countervailing duties, like anti-dumping duties, seem aimed primarily at shielding domestic production from import competition.

For a different conclusion about countervailing duties, particularly when used against domestic subsidies, one must find inherent unfairness in a subsidising government's pursuit of legitimate domestic goals — at least when the subsidy policy takes sales away from producers in a foreign market. Such an 'unfairness' argument could only rest upon a notion of 'market infallibility,' because it stigmatises all market corrective government actions. This was apparently the position of the United States delegation in the Tokyo Round; whereas the EEC took the view (reflected in the Track II provisions on the legitimacy of certain domestic subsidies) that many domestic subsidies are entirely legitimate and should be countervailed only if they represent disguised export subsidies.⁵⁹ Given that this domestic subsidy issue and the problem of agricultural subsidies remain unresolved, it is not surprising that the subsidies issue has been placed on the negotiating agenda for the current Uruguay Round of GATT negotiations.

⁵⁸ *Id.* Art. 11(2), at 280 (emphasis added).

⁵⁹ J. Beseler and A. Williams, *supra* note 2, at 15-17.

b. Implementation in National Law

Although the leading parties to the Tokyo Round Subsidies and Countervailing Duty Code faithfully conformed legislation on the books to the Code's requirements, the United States has in fact been the only major industrial country in recent years to have an active countervailing duty program. From mid-1982 to mid-1989, for example, only seven countries (or customs territories) reported use of countervailing duty laws to the Subsidies Code Committee of Signatories: Australia, Canada, Chile, the EEC, Japan, New Zealand, and the United States. Of the 314 countervailing duty investigations initiated by all countries (or customs territories) in that period, 85 per cent were initiated by either the United States or Chile.⁶⁰ The United States alone initiated 61 per cent or 192 investigations. Japan initiated only one.

5. UNFAIR TRADE REMEDY LAW AND REGIONAL AGREEMENTS

a. US-Canada Free Trade Agreement

In contrast to GATT, one finds a strikingly different approach to unfair trade remedy law in regional arrangements like the recently formed US-Canada Free Trade Agreement and the European Economic Community. The US-Canada Free Trade Agreement, which both the United States and Canada have now implemented,⁶¹ contains implicit sentiment in favour of reducing or eliminating anti-dumping and countervailing duty remedies. In view of Canada's role as the historical originator of anti-dumping law, it is ironic that Canada is the chief proponent of this view. Although Canada and the United States are each the others most significant trading partner, bilateral trade is a much higher proportion of Canadian than of United States' GNP. Thus, United States' unfair trade remedy action against Canadian goods has a greater effect on Canadian internal affairs than the reverse pattern has on United States' affairs.

The US-Canada Free Trade Agreement provides that over a five to seven year period the two parties will seek to negotiate a new regime for anti-dumping, countervailing duties, and subsidies.⁶² According to the Canadian government: 'The goal of any new regime . . . will be to obviate the need for border remedies, as are now sanctioned by the GATT Antidumping and Subsidies Codes, for example, by developing new rules on subsidy practices and relying on domestic

⁶⁰ BISD, *supra* note 25, at 44-45 (30th Supp. 1984); *id.* at 264-65 (31st Supp. 1985); *id.* at 165-66 (32nd Supp. 1986); *id.* at 204-05 (33rd Supp. 1987); *id.* at 191-92 (34th Supp. 1988); *id.* at 384 (35th Supp. 1989); *id.* at 451-56 (36th Supp. 1990).

⁶¹ See United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 STAT. 1851 (1988) (US implementing act); SC 1988 c. 65 (Canadian implementing act).

⁶² Free Trade Agreement, initialled Dec. 10, 1987, Canada — United States, Department of External Affairs, Canada Dec. 10 1987, arts 1906-07, at 279.

competition law.⁶³ It seems that Canada would like to see anti-dumping policy return to its original antitrust purposes in bilateral trade and believes that existing national antitrust law is adequate to this end.⁶⁴ Canada also seems to favour replacing countervailing duty laws with agreed bilateral limits on subsidies. If such an agreement could be reached and were faithfully observed, countervailing duty laws would be redundant.

The current agreement takes only a modest step toward the Canadian goal. It sets up a series of binational panels to serve as final review boards for the respective national agencies that make anti-dumping and countervailing duty decisions.⁶⁵ While the panels are instructed to apply the respective nation's domestic law and standard of review, the device of intense international (or at least binational) surveillance of these decisions could be very useful in future agreements.

b. European Economic Community

These developments in the US-Canada free trade context appear to follow haltingly the regime applied internally within the European Economic Community. During the EEC's formative 'transition period' the Commission could authorise a member state to take countermeasures against dumping from another member state.⁶⁶ Now that the transition period has expired (as of December 31, 1969), anti-dumping countermeasures are no longer permissible for intra-EEC trade.⁶⁷ The EEC treaty clearly contemplates that any dumping practices surviving the elimination of internal trade barriers will be dealt with under the Community antitrust rules and procedures.⁶⁸

Countervailing duties, on the other hand, were never authorised within the EEC. Instead, from the outset the EEC treaty sought direct regulation (prohibition) of impermissible subsidy practices through treaty rules applied and elaborated in practice by the Council, the Commission, and the Court of Justice.⁶⁹ The emerging regime is considerably more discriminating than the

⁶³ *Id.* Explanatory note to chapter nineteen, at 268.

⁶⁴ For a discussion of the adequacy of the antitrust laws to deal with dumping see J. Barcelo, 'The Anti-Dumping Law: Repeal it or Revise it', *1 Mich. YB International Legal Stud.*, 53 (1979).

⁶⁵ Free Trade Agreement *supra* note 62, arts. 1901-1911.

⁶⁶ Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, Art. 91(1), 298 UNTS 11 [hereinafter Treaty of Rome]; 3 H. Smit & P. Herzog, *The Law of the European Economic Community* 3-374.1 (1986).

⁶⁷ J. Beseler and A. Williams, *supra* note 2, at 32-33.

⁶⁸ See generally Treaty of Rome, Arts. 85 & 86 (Art. 85(1) (d) forbidding agreements that distort competition through applying 'dissimilar conditions to equivalent transactions' and Art. 86(a) forbidding abuses such as 'unfair purchase or selling prices.'). See also J. Beseler and A. Williams, *supra* note 2, at 33; 2 H. Smit and P. Herzog, *supra* note 89, at 3-231, 3-269, 3-270.

⁶⁹ Treaty of Rome, Arts. 92-94; J. Beseler & A. Williams, *supra* note 2, at 33.

GATT system in its treatment of various subsidies, but one can detect among officials in the central regulatory institution, the Commission, a distinctly pro-market suspicion of most member government subsidies. This may reflect a Commission view that government failure is a larger problem in the subsidy field than market failure. Or it may reveal a Commission fear that greater toleration of member government subsidies would lead to burdensome and wasteful runaway competition in subsidies. The significant point, however, is that the EEC institutions are steadily improving and refining their understanding of what is fair or unfair about particular subsidies.⁷⁰ That task lies ahead for both the US-Canada free trade area and the GATT.

6. CONCLUSION

The lesson here seems to be that as nations strive for a more integrated trading area they become less willing to tolerate safeguard-like use of anti-dumping and countervailing duty laws. They resort instead to general antitrust law to deal with predatory price cutting and seek mutually beneficial consensus on the use of subsidies. If this perception is accurate, one can expect this approach eventually to spread to the GATT level; perhaps not as soon as the Uruguay Round,⁷⁰ but eventually.

The current vigour of GATT unfair trade remedy law does not seem tied to coherent notions of unfairness concerning international price discrimination or subsidies. That is at least one basis for the prediction in the previous paragraph that these laws will eventually be altered or replaced if the GATT countries continue to evolve toward greater economic integration. Anti-dumping laws grew up originally out of unfounded fears of predatory dumping but now function like quasi-safeguard laws. Countervailing duty laws also arose originally out of fears of predatory 'bounty dumping' and have grown, particularly in the United States, into laws combatting indiscriminately most forms of government intervention in the market. As ordinary trade barriers have come down through GATT negotiations, producers have clearly turned increasingly to unfair-trade-remedy law for protection. The rationale that GATT

⁷⁰ As of this writing, the Uruguay Round negotiations are still in progress. The author has seen drafts of working proposals for GATT anti-subsidy and anti-dumping law as of late 1990. The anti-subsidy proposals advance significantly in the direction predicted and advocated in this article: tying countervailing duty action to agreed regulation of subsidies and a definition of 'actionable subsidies' that seems to allow domestic subsidies within agreed standards or limits: for example, to aid an economically depressed geographic region or to assist a restructuring of output away from declining industries. The anti-dumping proposals, however, are not as progressive. They still concentrate on avoiding abuse of procedures or substantive concepts that retain a safeguard-like character. They do not advance toward an antitrust understanding of anti-dumping policy.

countries need these remedies to combat unfair practices seems unconvincing and unlikely to last.

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