A wide gap separates the rhetoric from the reality of protection in industrial countries. Antidumping is the current reality of that protection. Protectionist interests stretch the definition of dumping as far as they may to shelter actions against imports under the antidumping umbrella.

This article is about antidumping, in particular about the history of antidumping regulation and its evolution under the GATT system into a major instrument of protection. The thesis is straightforward: antidumping is the fox put in charge of the henhouse—ordinary protection with a good public relations program. There is little in its history to suggest that the scope of antidumping was ever more particular than protecting home producers from import competition, and there is much to suggest that such protection was its intended scope.

The article has three sections. The first looks into the origins of antidumping regulation, the second examines contemporary regulation (antidumping under the GATT), and the third summarizes the significance of the first two.

Twenty years ago Bela Balassa began the preface to his path-breaking study, The Structure of Protection in Developing Countries (Balassa and associates 1971), by noting that import substitution was the rationale for the trade policies of many developing countries. But, Balassa noted, the gap between the rhetoric and the reality of developing country protection was large:

The existing system of protection in many developing countries can be described as the historical result of actions taken at different
times and for different reasons. These actions have been in response to the particular circumstances of the situation, and have often been conditioned by the demands of special interest groups. The authorities have generally assumed a permissive attitude toward requests for protection and failed to inquire into the impact of the measures applied on other industries and on the allocation of resources in the national economy. (p. xv)

The rhetoric of protection in developing countries was import substitution, the reality was ordinary protection. Recognizing the difference was an important step toward the many liberalization programs now under way in developing countries.

The gap between the rhetoric and the reality of contemporary protection is equally large in industrial countries. Antidumping is the current reality of that protection. According to Horlick and Oliver (1989, p. 5), two of Washington's top trade lawyers, such trade remedies "have become the usual first choice for industries seeking protection from imports into the United States." The United States is not alone. Although the EC '92 program is carrying the European Community (EC) toward more liberal internal policies, antidumping actions are the principal face of its trade policy toward the rest of the world. Australia, for several years in the mid-1980s, had more antidumping cases than any other country and seems to have regained that position in 1990-91. In Canada, antidumping has been a major instrument of trade policy for almost a century. Although antidumping provides the legal avenue used by protectionist interests to force the government to act against imports, almost half of such cases reach a negotiated, out-of-court settlement—a voluntary export restraint or a voluntary export price minimum—rather than a formal legal end.

Foreign dumping is the rhetoric industrial countries use to excuse contemporary protection. This rhetoric gives antidumping the aura of being a special measure to undo a special problem—it suggests that somehow, although antidumping restricts or threatens to restrict imports, it is not really protection, but something that will, in the end, allow the world economy to function more effectively.

But the presence of dumping, objectively defined, does not determine when an antidumping action will or will not be taken, any more than the strictures of the import substitution development model determined when a developing country did or did not restrict imports. When the politics of the matter compel the government to take action against imports, the legal definition of dumping can be stretched to accommodate that action. In a practical sense, the word "dumping" has no meaning other than the one implicit in antidumping regulations. Its operational definition is the following: dumping is whatever you can get the government to act against under the antidumping law.

122  
The World Bank Research Observer, vol. 7, no. 2 (July 1992)
The Origins of Antidumping Regulation

Dumping, under one name or another, has been part of the rhetoric of political economy for a long time. Jacob Viner (1923), the first scholar to pull together previous writing on the subject, notes a sixteenth-century English writer who charged foreigners with selling paper at a loss to smother the infant paper industry in England. Viner also notes an instance in the seventeenth century in which the Dutch were accused of selling in the Baltic regions at ruinously low prices in order to drive out French merchants. Alexander Hamilton, in his Report on Manufactures of 1791 (cited in Viner 1923, p. 37), used much the same argument against English manufacturers who were exporting to America. But, as in the pre-twentieth-century incidents described by Viner, Hamilton was not arguing for action specifically against foreign dumping. He was arguing for a high and protective American tariff behind which the manufacturing industry could prosper in the new country.

The history of antidumping in Canada provides an explicit lesson as to what antidumping is—ordinary protection. Its history in the United States provides an explicit lesson as to what it is not—an extension of antitrust regulation.

The First Antidumping Law: Canada, 1904

The Liberal Party government in Canada was in a bind in 1904. Cursing the tariff was an important tactic for getting votes from farmers; keeping it high was an important way of obtaining contributions from manufacturers to carry the party's campaign to the public. The Liberal Party owed its majority to the support of Canada's farmers, and its failure to reduce the tariff as promised was threatening to alienate that support, propelling a movement to break from the Liberal Party and create an independent farmers' party (Viner 1923, p. 193).

At the same time, Canadian steelmakers were pressing for higher tariffs on steel rails. As Canada's western plains were opened to immigrants, Canada's first transcontinental railroad, completed in 1885, was earning attractive profits, and railroad building began to surge. The U.S. Steel Corporation, recognizing an opportunity, set out aggressively to sell steel rails to Canadian railroaders. Canadian steelmakers alleged that U.S. Steel was unfairly aggressive and was dumping rails into the Canadian market (Easterbrook and Aitken 1988, pp. 438ff).

The Canadian government would have found it very hard to limit any tariff increase to steel rails alone. In Canada as in other countries, determining tariffs was not a discriminating process. Once the tariff was opened for revision, all producers to which the government owed a political debt would come forward; the increased tariff would spread to other iron and steel products, to textiles, to farm equipment, and on and on. (See Schattschneider's 1935 study of the log-rolling dynamic of setting tariffs in the United States.)

J. Michael Finger
The Canadian minister of finance, W. S. Fielding, in presenting his proposed solution in June 1904, explained the situation as follows (quoted in U.S. Tariff Commission 1919, p. 22):

We find today that the high tariff countries have adopted that method of trade which has now come to be known as slaughtering, or perhaps the word more frequently used is dumping; that is to say, that the trust or combine, having obtained command and control of its own market and finding that it will have a surplus of goods, sets out to obtain command of a neighboring market, and for the purpose of obtaining control of a neighboring market will put aside all reasonable considerations with regard to the cost or fair price of the goods; the only principle recognized is that the goods must be sold and the market obtained..... This dumping, then, is an evil, and we propose to deal with it.

Fielding's argument was not novel. Such alleged evildoing by foreigners, real or imagined, had for several centuries been a familiar justification for a higher tariff. It was a target of opportunity for interests seeking protection. The difference this time was that Mr. Fielding proposed to make antidumping an instrument of opportunity.

The substance of the proposed antidumping regulation, which is quoted in U.S. Tariff Commission (1919, p. 21), was contained in the proposal's first paragraph:

Whenever it appears to the satisfaction of the minister of customs... that the export price... is less than the fair market value thereof, as determined according to the basis of value for duty provided in the Customs Act... such articles shall, in addition to the duty otherwise established, be subject to a special duty of customs equal to the difference between such fair market value and such selling price.

The invention of antidumping was not a signal departure from what was standard practice at the time. Canada had a long history of making clever changes in the procedures for customs valuation to achieve increased protection. McDiarmid (1946, pp. 8-9), in his history of Canadian commercial policy, concludes that “Canada’s principal contribution to the technique of trade restrictions has been in giving the executive and administrative branches of government a wide measure of control over the effective rate of duties through artificial valuation of goods for duty purposes.” Any pretext administrators could find to increase the customs value of a product would now have a double impact on the cost of importing the good. As with any trick of customs value, the regular tariff, assessed at an ad valorem rate, would be higher, and increases in the special antidumping duty would match dollar for dollar any increases in the customs value.

Canadian manufacturers at first opposed the antidumping law: making dumping illegal would vitiate one of their more effective arguments for a higher
tariff. But as soon as the law was passed, U.S. Steel raised its prices in Canada by the amount required, and this example of the law’s potential did not escape the attention of other manufacturers. The government held hearings in 1905-06 at which Canadian manufacturers supported the antidumping law: “We heartily approve the principle embodied in the tariff legislation of 1904, but we are of the opinion that steps should be taken by the government to give more practical effect to the legislation” (quoted in U.S. Tariff Commission 1919, p. 25). They went on to offer suggestions for making enforcement more effective.

Soon afterwards Canada, Australia, and New Zealand passed antidumping laws, and a series of such laws was passed in the United States. By 1921, the United States, France, Great Britain, and most of the countries of the British Commonwealth had antidumping laws in place.

Dumping, of course, was not a new issue, so the explanation of why the time was ripe for passage of antidumping laws lies in several other factors.

**Hostility Toward Germany.** Hostility toward Germany, combined with the popular conviction that German enterprises were particularly vicious dumpers, was certainly a factor. Viner (1923, p. 65) quotes a propagandist who insisted, as World War I neared its end, that “the German government was accumulating vast stocks of goods in order to dump them on the markets of the world... and regain in the field of economic warfare what she was losing on the military battlefield.” Viner then comments that “these accusations have an interesting parallel in the similar charges brought against England after the Napoleonic Wars and the War of 1812, but they appear to have had even less basis.”

**The Halo Effect of Trust-Busting.** Trust-busting was in the political air at the end of the nineteenth century and the beginning of the twentieth. This provided a step up for any law that proposed to do something about the evil trusts. The emotion of trust-busting could be even more intense when directed at a foreigner. Frank Taussig, Harvard professor and first chairman of the U.S. Tariff Commission, once noted that “competition of any sort is unwelcome enough; competition from foreigners seems always to be regarded with particular dread” (Taussig and White 1931, p. 196).

Although emotion did lead to overstatement, the concern with regulating the evils of predatory trusts was not trivial, and price undercutting, employed just often enough to make its threat credible, was used by captains of industry to build and expand trusts. Driving the independent enterprise out of business was not, however, the trust’s usual objective. Too much money would be lost and too many assets run down by price cuts severe and enduring enough for that purpose. A quick merger, profitable to both companies, would be better. John S. McGee (1958) explains the logic of this approach and documents that it was the way things usually went. Officers of the independent company usually became officers of the trust (see Yergin 1991, ch. 2, for examples).
HIGH TARIFFS EVERYWHERE. Every country except Great Britain had a high tariff in those days. These tariffs gave national firms the opportunity to price monopolistically at home and at the same time protected them from reimports of goods they sold competitively in world markets. In the United States, an important part of the populist argument against the tariff was that it allowed and protected domestic monopolies. Cordell Hull was Franklin Roosevelt's secretary of state and the father of the U.S. Reciprocal Trade Agreements Program. In his memoirs, Hull (1948, p. 52) writes about the first speech he made as a U.S. congressman:

I made a vigorous attack on the high tariff and the monopolies and trusts that had grown up behind it. No kind of effort to curb and suppress trust violators [can] succeed unless such effort strikes at the main source of their constant creation—the protective tariff.

A NEW WAY TO DO IT. Canada had invented a new way to regulate foreign competition. The mechanics of enforcement under the Canadian law were seductively straightforward and familiar. Other high-tariff countries used valuation procedures similar to Canada's, and many of Canada's innovative uses of such procedures were soon copied by other countries. Where there is a way, there will soon be a political will.

The Evolution of U.S. Antidumping Law

In the early twentieth century the tariff was, for most countries, the major instrument for regulating imports. And in the United States, as in other countries, the evils of foreign trusts first entered trade politics as an argument for higher tariffs. But antidumping has a different history in the United States than in Canada. In Canada, policing the evils of monopoly power (trusts) was never more than rhetoric. In the United States at the early stages of antidumping regulation, the mechanics more closely matched the rhetoric—early U.S. antidumping regulations were, in substance, extensions of antitrust law. But these laws did not restrict imports, which is what the motivating politics demanded, and the pressure for change continued. The evolution of the U.S. antidumping law provides a graphic illustration of how different antidumping regulation is from antitrust law once antidumping has become a useful instrument for regulating imports.

THE SHERMAN ANTITRUST ACT OF 1890. The Sherman Antitrust Act of 1890 prohibits, under severe penalties, every contract or combination that restrains interstate or foreign commerce and every monopolization of or attempt to monopolize such commerce. Application of the act to sales of imports was severely limited by the Supreme Court, which refused to apply it to any sales contract that had been made in the exporting country rather than in the United States.
SECTION 73 OF THE WILSON TARIFF ACT OF 1894. The U.S. Congress, in section 73 of the tariff act of 1894, attempted to extend the scope of the Sherman act to imports by making unlawful every conspiracy or combination that was (a) engaged in importing and (b) intended to restrain trade or to increase the U.S. price of an imported article. Up until the time of Viner's writing (1923), the law had been invoked only once, against an association of U.S. bankers and importers plus the Brazilian state of Sao Paulo, to limit Brazilian exports and thereby rig the price of coffee on the U.S. market.

ANTIDUMPING LAW OF 1916. During World War I, the rise of anti-German sentiment and the widespread popular conviction that German enterprises were particularly vicious perpetrators of predatory dumping led to considerable pressure for revising the tariff upward. But the U.S. administration of President Woodrow Wilson, like the Canadian government in 1904, chose not to risk opening the tariff for revision and instead proposed legislation aimed specifically at foreign dumping. In line with the Wilson administration's recommendations, the U.S. Congress, in sections 800-801 of the revenue act of 1916, made it illegal to import goods at a price substantially below the “actual market value” in the producing country or in countries to which the goods were commonly exported providing there was an intent to injure, destroy, or prevent the establishment of an industry in the United States or to restrain competition.

This law is still on the books, but John J. Barcelo (1991), in his review of antidumping laws and actions, found that despite the attractive lure of triple damages, only one serious private suit had been brought under the law: a 1970 suit by Zenith Radio Corporation against Matsushita Electrical Industry Company. The suit was dismissed on summary judgment when Zenith did not provide facts to support a plausible theory of predatory dumping.

THE U.S. TARIFF COMMISSION STUDY OF 1919. In 1916, the U.S. Tariff Commission, at its own initiative, began investigating foreign competition in the U.S. market and Canada’s experiences with its antidumping law. The key questions in its investigation of foreign competition sought “personal knowledge of unfair competition through the selling in the United States of articles of foreign origin at less than the fair market value when sold for home consumption in the country of origin” (U.S. Tariff Commission 1919, p. 12). The commission contacted 562 U.S. business enterprises directly. In addition, thirteen associations of producers or traders circulated the commission's questions to their membership. Thus, every enterprise in the United States against which imports provided some degree of competition was informed of the investigation and had the opportunity to respond.

The commission's survey of virtually every business enterprise in the United States found twenty-three that claimed knowledge of foreign dumping. Almost six times as many reported that they had no knowledge of unfair foreign competition or dumping. Of the complaints of foreign competition, the commission
classified by far the largest share as "severe competition." An example demonstrates the tenor of these complaints (U.S. Tariff Commission, p. 15):

*Patent leather.* After the enactment of the last tariff bill, Germany began to ship in grain-finished patent leathers made from cowhides and kid skins and these leathers were sold at a lower cost than we could produce the same article in our country, although we were the originators of grain-finished patent leathers.

Several of the complaints classified by the commission as dumping had a similar tone (U.S. Tariff Commission 1919, p. 14):

*Japanese army equipment leather.* Our representative in the East reports the sale of Japanese leather at prices that barely cover the cost of the green hide, to say nothing of the cost of manufacture.

These statements are similar to those that Schattschneider (1935), in his study of the U.S. politics of protection in the 1920s and 1930s, quotes from statements made before tariff committees to justify a higher tariff rate. They are all based on the cost-equalization formula, the principle of protection that dominated the tariff politics of the day. (The 1908 Republican Party platform statement of the formula is quoted on page 140.)

We see, then, that advocates of antidumping regulation presented no singular reasons for this unique form of import protection. As in Canada in 1904, the voice that called for antidumping action was the voice of ordinary protection.

**ANTIDUMPING LAW OF 1921.** Where there is a way, there is a will. The 1916 antidumping act did little to diminish pressure for a Canadian-style antidumping law, and proposals for such a law were soon introduced before the Congress. And although most of the complaints about foreign competition brought forward by the 1919 U.S. Tariff Commission's study were not about foreigners selling at a lower price in the United States than in their home markets, the commission nonetheless recommended Canadian-style antidumping legislation.

Congress passed such an antidumping law in 1921, and the present law can be traced to it. The law empowered the secretary of the treasury (whose department included the customs service) to determine when a U.S. industry is being or is likely to be injured or prevented from being established by imports of a product at a price below its fair value in the exporting country or in other export markets. It also empowered the secretary to impose a special dumping duty in such a case. Congress has since reassigned the determination of injury to the U.S. International Trade Commission (originally the U.S. Tariff Commission) and pressed the president to assign the determination of dumping to the U.S. Department of Commerce. Numerous amendments have expanded its technicalities, but the form of the law has remained basically unchanged.
Changes in U.S. Law from 1890 to 1921

Initial U.S. regulations against "unfair imports" were, in substance, extensions of antitrust law. They brought forward the criteria and depended on the mode of enforcement and standards of proof of antitrust law. The sequence of revisions from 1890 to 1921 brought changes in both these dimensions. Trust-busting remained the rallying cry, but the object of the regulation shifted from trusts to imports, the instrument from law to bureaucracy.

CRITERIA FOR DEFINING THE OFFENSE. The major shift of criteria was from an antitrust standard to an injury-from-imports standard. The 1916 act, as table 1 shows, eliminated the need to identify a conspiracy or combination of sellers organized to commit some act toward some end. The offense under the 1916 act is simply to sell imports below the actual market value of the goods. The 1916 act states that this pricing is illegal if the intent is to restrain competition, but it also contains a second and more easily proven condition—the intent to injure a U.S. industry. The 1921 act completes the shift of criteria. Any mention of antitrust criteria—conspiracy, combination, or restraint of competition—is gone. Antitrust's injury-to-competition standard has been replaced by a diversion-of-business standard—the sort of diversion that is a normal part of the competitive process. A trade restriction is allowed if the pricing to win customers is undertaken by a foreign enterprise and the customers are domestic.

STANDARDS OF PROOF. The 1921 law differs from the 1916 law in two ways:

- The injury criterion of the 1921 law is not prefaced by the words "intent to."
- Enforcement is an administrative, not a legal, matter.

Proponents of antidumping action often point to the word "intent" to explain why the 1916 law has engendered no import restrictions. Intent, they argue, is difficult to prove: if the concept of effect had been used instead, the law would have worked.

Others, such as Barcelo (1991), argue that the lack of action against foreign predation under the 1916 and previous laws is a sound indicator that there was no such predation, or at least much less of it than the political rhetoric insisted. The 1916 antidumping act was, after all, the third attempt to legislate the basis for such prosecution, not counting proposals introduced but not passed into law. Technical glitches would have been worked out by then.

There are several other grounds for arguing that dropping the word "intent" was not a significant change. Like the 1921 antidumping act, section 316 of the tariff act of 1922 did not qualify its injury clause with the word "intent." The difference between the two was that enforcement of section 316 was in the strict legal tradition of antitrust laws. Viner (1923, p. 250), citing this aspect, concluded that section 316 would not be effective.
Table 1. Elements in Early U.S. Laws to Regulate Unfairly Traded Imports, 1890–1922

<table>
<thead>
<tr>
<th>Act and date</th>
<th>Principal elements</th>
</tr>
</thead>
</table>
| Sherman Act, 1890 | Conspiracy or combination  
Restraint, monopolization, or attempt to monopolize interstate or foreign commerce  
Criminal statute, strictly construed  
Fine, imprisonment; triple damages |
| Section 73, Wilson Tariff Act, 1894 | Conspiracy or combination engaged in importing  
Intent to restrain trade, increase the price in the United States  
Criminal statute, strictly construed  
Fine, imprisonment; triple damages |
| Antidumping Act, 1916 | Importing below actual market value  
Intent to restrain competition or to injure a U.S. industry  
Criminal statute, strictly construed  
Fine, imprisonment; triple damages |
| Antidumping Act, 1921 | Importing below fair value  
Injury to a U.S. industry  
Administrative determination by the secretary of the treasury  
Special duty, equal to the difference between the fair value and the import price |
| Section 316, Fordney-McCumber Tariff Act, 1922 | Unfair method of competition and unfair acts in importation  
Effect or tendency to destroy or substantially injure  
Tariff commission, with court review of questions of law only  
Additional duty to offset such act or method |

Sources: Dale 1980, ch. 1; Viner 1923, ch. 13; U.S. Tariff Commission 1919, appendix.

Another argument is suggested by inserting (hypothetically) the word “intent” into the injury clause of the 1921 antidumping act. It seems unlikely that the additional word would change the way the clause is interpreted today. Anyone who offers goods for sale does so with the intent of winning the sale from someone else. So, in an administrative context, free from the precedents of the legal system, it is unlikely that the word “intent” would have limited the circumstances under which injury would be found.

We are left, then, with the conclusion that the limited effect of the 1916 law stemmed from its being a legal remedy, a part of criminal law and therefore subject to the strict rules of meaning and proof that apply to the law. The courts took antitrust law to be the relevant legal context for giving meaning to
the terms in the law, and in this context the 1916 act was interpreted to demand the injury-to-competition standard.

Dissatisfaction with the 1916 act was political, not legal, and in politics, this dissatisfaction was relative to what a Canadian-style administrative remedy would provide. The rule of law, not any particular word in the law, was blocking action. Enlarging the scope for action against imports would require a shift from a legal to an administrative approach or, to use the pejorative synonym, a bureaucratic approach.

**ANTIDUMPING AS A BUREAUCRATIC, NOT A LEGAL, PROCESS.** The Australian antidumping law explicitly abandoned a legal for an administrative standard. When referring matters to the High Court, Australia's 1906 law stated that the court proceedings were to be informal and not subject to the rules of general jurisprudence or evidence (Viner 1923, p. 209). The United States and Canada made the same change by building antidumping regulation out of pieces—administrative functions—not subject to such standards.

Andreas F. Lowenfeld (1980, pp. 217–18), after comparing the standards of proof required for relief under the "fair" and "unfair" sections of U.S. trade law (both having administrative standards), concluded that there may be "a difference in the burdens of proof placed on the parties, although my impression is that burden of proof in the sense that lawyers are familiar with the term, in, say, determining the issue of contributory negligence in an automobile accident, simply does not exist in determinations of the kind we are talking about."

Perhaps the most straightforward expression of this soft standard of proof is the "facts available" or "best information available" clause, which is part of every country's antidumping regulations. In the GATT antidumping code (GATT 1990, par. 8), this clause reads as follows:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, [decisions], affirmative or negative, may be made on the basis of the facts available.

The import of this clause is that the threshold level of information necessary to open an investigation is sufficient to complete one. In almost every case, threshold information is provided by the party seeking import relief.¹

The importance of the shift from a legal to an administrative standard of proof and evidence should not be underestimated. It not only broadened the scope of action against imports but also made the criteria for such action much more malleable. Under the softer standard of interpretation and proof, administration of the law could follow changing political pressures for protection much more quickly than a more rigorous, rule-of-law standard would allow. Thus it prepared the way for the eventual emergence of antidumping as the main vehicle for import-competing interests to press for protection—and for governments to respond to those pressures.

---

¹ J. Michael Finger

131
**Early Use of Antidumping**

The passage of antidumping laws did not mean that antidumping became a major instrument of import regulation right away. In the United States, the tariff remained the dominant instrument throughout the interwar period. The year after passing the 1921 antidumping bill, the U.S. Congress passed an extensive upward revision of tariff rates, the Fordney-McCumber Tariff. The tariff had been revised downward during the 1913–21 administration of President Woodrow Wilson—Wilson had vetoed the same bill that eventually became the 1921 antidumping bill—and the Fordney-McCumber Tariff pushed rates back up to or above the rates that had been in force at the end of the nineteenth century.

In Australia, South Africa, and especially Canada, antidumping actions soon became a prominent part of trade controls. Amendments to the Canadian antidumping clause adopted in 1921 and 1930 allowed the law to be interpreted with even greater flexibility, and Canadian administrators exploited that flexibility. The amendments established that fair market value would never be “less than the actual cost of production of similar goods...plus a reasonable advance for selling cost and profit” (quoted in McDiarmid 1946, p. 308). The minister of customs was able to find many degrees of freedom in both actual cost and reasonable profit, sufficient to bring McDiarmid to conclude that “the implication of this new conception of the potentialities of dumping duties is clear. The power of the executive to fix prices at which imports could be sold in Canada was practically unlimited.... The decision of the minister of customs and his civil service advisers became the final arbiter of ‘fair market value”’ (McDiarmid 1946, pp. 310–11).

**Summing Up**

The arguments made in this section can be summed up in three points:

- Antidumping has long been part of the rhetoric of protection.
- Manipulation of customs valuation has long been part of the arsenal of anti-import weapons.
- Antidumping is, in substance, another clever way to use customs valuation procedures as a weapon against imports. Antidumping preserves all the old tricks against the discipline that GATT brought to customs valuation. Actions that were once questionable practices of customs valuation are now routine antidumping calculations. Moreover, antidumping makes these tricks even more powerful. As increases of the dumping margin, they are fully added (at a rate of 100 percent) to import charges; as increases of the customs value, they would be added at the ad valorem tariff rate, which even in high-tariff countries is seldom as high as 100 percent.
The ingenuity and the magic of antidumping are how it harnesses the righteousness of trust-busting to propel the bureaucratic of customs administration in the service of restricting imports.

Contemporary Antidumping

The history of how antidumping expanded to become the principal means for controlling imports in four important trading entities—Australia, Canada, the European Community, and the United States—illustrates its inherent flexibility as a weapon against imports. Ultimately, antidumping regulations have come to label as dumping circumstances broad enough to encompass every instance in which domestic output is displaced by import competition—in the language of the regulation itself, any instance of “injury from imports.”

Antidumping and the GATT

The accepted reading of the GATT’s negotiating history is that no country delegation strongly insisted on including a provision for antidumping (see, for example, Barcelo 1991 and Jackson 1969). Nonetheless, despite concern that antidumping laws, if overused, might compromise the objectives of the agreement, the drafting committees concluded without controversy that provisions for antidumping and countervailing duties were needed.

During GATT’s first two decades, antidumping was a minor issue. Although the GATT came into force in 1948, the contracting parties (as GATT member countries are called) did not canvass themselves about the use of antidumping until 1958. The resulting tally showed that, as of May 1958, thirty-seven antidumping decrees were in force across all GATT member countries, twenty-two of them in South Africa (GATT 1958, p. 14). At the end of December 1989, a comparable tally, covering only Australia, Canada, the United States, and the European Community, counted 530 such decrees (Low 1991, p. 22). The GATT report (1958, p. 14) notes, however, that “this table does not contain figures for Canada and New Zealand, since in those countries the customs authorities can take action without decree and therefore an enumeration comparable with that given by the other countries is impossible.”

Antidumping first became a significant GATT issue at the Kennedy Round of 1964–67, perhaps more by dint of diplomatic manipulation than by clear intent. As Kenneth Dam (1970, p. 174) explains, “The United States, having introduced the subject of nontariff barriers into the negotiations, was chagrined to find that the nontariff barriers most often singled out by other countries for priority of action were those maintained by the United States, of which one of the most often mentioned was the U.S. antidumping statute.” The attack on U.S. antidumping was clearly a strategy in which offense was considered to be the best defense of the European nontariff barriers that the United States had
wanted brought to the negotiating table. From passage of the U.S. antidumping law in 1921 through 31 December 1967, the U.S. government conducted a total of 706 antidumping investigations, all but 75 of which ended with a negative determination (Seavey 1970, p. 65).

Nevertheless, the U.S. delegation to the Kennedy Round adopted a strategy of accommodation rather than of explanation or defense. When the administration realized that Congress would not legislate the changes required by the code, it insisted that the executive branch had the power to implement these changes by modifying investigation and enforcement procedures. Congress disagreed.

The resulting scrimmage between the administration and Congress was one of many through which the Congress reasserted its control over U.S. trade policy. Antidumping, countervailing duties, and safeguards—the major trade remedies—were often at the center of these affrays. Broadening and strengthening these trade remedies were, to Congress, much more than a means of taking control of trade policy back from the president. They were an important congressional objective on their own. Adding this or that technical amendment—tailor-made to fit the situation of a particular and powerful constituent—soon became another vehicle for constituent service, the lifeblood of congressional politics.

The reasons antidumping emerged as a major policy instrument in the EC were not all that different from those in the United States. Slower growth made European governments sensitive to the displacement of domestic production by emerging exporters from Asia. The EC antidumping mechanism—essentially the GATT Tokyo Round antidumping code translated into operational language (Eymann and Schuknecht 1991)—proved a doubly convenient means for responding to that challenge. As economics, it was flexible enough to cover all problems. As politics, it was a community instrument. The EC Commission, with the instinct of any organization for demonstrating its usefulness and thereby expanding its turf, pressed forward with antidumping action to preempt member state governments from serving the increased demand of industries for protection. Those who might have opposed either the illiberality of such actions or the shift of regulatory practice to Brussels were slow to see through the camouflage of propriety that cloaks antidumping actions.

The growth of unfair trade regulation in national policies is taken up elsewhere (for example, Finger and Messerlin 1989 and Low 1991). In this article I want to provide an overall sense of how antidumping came to expand. That story is, in essence, the cumulation of many small changes, each of which was made because antidumping, if expanded in a particular way, could fix a pressing political problem. The dominant question was always “How can antidumping be applied to this problem?” The question was never “Is this really a problem caused by dumping?”

In the end, dumping is just the cumulation of circumstances in which the politics of the immediate problem have exploited the flexibility of the underly-
ing structure to rationalize taking action against imports. Dumping became, in law as well as in practice, anything you could get the government to act against under the antidumping law.

**Extension to Pricing below Full Cost**

Perhaps the most significant step transforming antidumping into a weapon to be used against all imports was its extension to imports not priced at full cost. This extension not only broadened the substantive scope of the instrument itself; it also brought its administrative focus in line with its political focus: keeping prices high enough to prevent injury to domestic companies. And, as has been true for many expansions of substantive scope, this extension significantly increased the administrative discretion needed to implement the standard. The extension to below-cost pricing also illustrates the role played by power politics, at both the national and international levels, in the emergence of antidumping as an all-purpose weapon against imports. Each of these effects is discussed in turn.

**SUBSTANTIVE SCOPE.** Competitive pricing does not always cover full costs. When demand surges, sellers can collect a premium, but when the market is sluggish, any order that pays enough to cover out-of-pocket (marginal) costs is welcome. As noted earlier, Canada, in amendments passed in 1921 and 1930, extended its antidumping regulations to cover sales priced below fully allocated costs plus a reasonable allowance for overhead and profit. Given the depressed markets of the 1930s, this meant that antidumping action could be taken against almost any import shipment—and, had the same standard been applied to national trade, to almost any sale. The fact that nowhere in the world did the exporter get a better price than in Canada did not matter: antidumping could be used to combat generally low prices, which the Canadian government perceived to be a major economic problem.

But business conditions do not have to be as severe as they were during the depression of the 1930s to activate the below-cost pricing provision. Gary Banks (1990) points out that the below-cost pricing provision in Australia's antidumping law was the basis for the expansion of Australian antidumping in the 1980s and that the government-commissioned inquiry into this expansion recommended repealing the provision in order to bring antidumping under control. Gary Horlick (1989, p. 136), once a high official in antidumping administration, estimates that some 60 percent of U.S. cases involve sales below cost.

**POWER POLITICS: NATIONAL.** Action against below-cost imports came into U.S. antidumping practice through the back door. Antidumping administrators found the necessary legal cover in the law's use of the phrase "in the ordinary course of trade": "The foreign market value of imported merchandise...shall be the price...at which such or similar merchandise is sold...in...the home

J. Michael Finger

135
country...in the ordinary course of trade” (U.S. Code 1677b). (The same phrase appears in GATT article VI.) Sales below full cost, the U.S. administrator interpreted, were not made in the ordinary course of trade. Before data on foreign price could be used, prices had to be compared with the exporter’s cost, and prices below cost could be thrown out.

Action against import sales below full cost thus came into U.S. antidumping policy as a revision of administrative interpretation, not as a legislated change. When the administering agency (the U.S. Treasury Department at that time) first adopted this interpretation, it tried to limit application to instances that could not be explained as reductions of price to meet competition in a temporarily depressed market. But the agency had the bad judgment not to apply the below-cost standard in a case in which doing so was critical to an antidumping request made by a company with a powerful friend. The friend was Senator Russell Long of Louisiana who, as chairman of the Senate Finance Committee, probably wielded more power over trade legislation than any other person in Congress. Pending at the time was the 1974 trade bill, whose main purpose was to authorize U.S. participation in the Tokyo Round of GATT negotiations. Senator Long included in the bill an amendment to the antidumping law that required sales below cost to be considered dumping.

Current U.S. administrative practice for implementing this amendment is that if 10 percent or more of observed foreign sales are below estimated cost; such sales are not included in the calculation of foreign market value. This means that in any investigation, up to 90 percent of the U.S. government’s information on foreign prices—the 90 percent most favorable to the exporter’s case—may be thrown out.

POWER POLITICS: INTERNATIONAL. International sanction for taking antidumping actions against imports priced below fully allocated costs came about in a similarly arbitrary way. In November 1978, before the Tokyo Round antidumping code had reached the approval stage, Australia, Canada, the European Community, and the United States agreed to regard sales below costs as “not in the ordinary course of trade” and to exclude them from the determination of foreign market value. A document announcing this understanding was circulated in the manner in which negotiating proposals or comments on proposals were normally distributed (Koulen 1989, p. 366). Ever since, action against below-cost imports has been an integral part of antidumping policy in each of the parties to the understanding. The code itself does not address the matter.

Administrative Discretion

The story of how antidumping expanded to cover below-cost pricing shows that administrative discretion plays an important role not only in the enforcement of antidumping law but also in its expansion. In particular, three facets of administrative discretion have been influential:
Adjustments (inferences), not observations, are the major input into an antidumping investigation.

The detail of administrative regulation provides complexity, but not precision.

Complexity camouflages opportunity for abuse.

Each is now examined in turn.

ADJUSTMENTS. Comparing home price with export price and then determining if any detected difference has injured an industry in the importing country appears at first glance to be a straightforward operation. But the simplicity disappears quickly under any kind of scrutiny. First of all, the GATT provides that the price of the exported good be compared with the price of a “like product” sold in the home market. The Korean electronics industry exports basic, no-frills television sets, while its home-market sales are concentrated in expensive, top-of-the-line models, with wooden cabinets and all the bells and whistles that can be installed. The intent of the investigation process is to compare apples with apples, not apples with pears, so the investigator must adjust for the different characteristics of the product to make the price of a fancy 27-inch set that retails in the neighborhood of $2,000 comparable to that of a 13-inch set in a metal cabinet that retails for $169.95.

Suppose that the antidumping investigation established from import documents that Sears paid $100 for the sets it retails for $169.95. In the case dealing with Korean televisions, the U.S. government found dumping margins to be about 15 percent, indicating that the “comparable” price of the sets sold in Korea was $115. This means that making adjustments for different characteristics of the product and for different ways of doing business in Korea and the United States reduced the $2,000 retail price to a comparable ex-factory price of $115. In other words, these administrative adjustments provide 95 percent of the information on which the eventual finding is based. The list of such examples is almost endless. Litan and Boltuck (1991) filled a book with them.

COMPLEXITY, NOT PRECISION. The increased scope of antidumping has brought a commensurate increase in administrative detail, but detail does not imply precision. William Carmichael (1986, p. 2), drawing on twelve years of experience as head of the staff of the Australian Industries Assistance Commission, concluded that “the procedures to be followed in antidumping investigations are not amenable to precise and consistent application. This means that the task of administering the legislation is not simply a task of following a set of unambiguous rules.”

COMPLEXITY AS A COVER FOR ABUSE. Considerable expertise is needed even to see which technical alternatives exist, let alone exploit them. The general public and the news media do not possess this expertise: the result is an environment
made to order for special-interest power politics. Extending the provision to cover pricing below full cost illustrates the typical sequence of events: first, pressure is applied to push administrative interpretation to the limit of existing law, then the extended interpretation is added to the law. Each time, the law becomes more detailed and its administration more complex—a medium more and more hospitable to power politics, more and more favorable to the home country petitioner’s case over the exporter’s, and more and more detached from the initial rationale for the regulation.

An Example of Skewed Procedures: Treatment of Selling Costs

Many writers have documented specific examples of changes in law or administrative practice that have worked in the petitioner’s favor. Bierwagen (1990) provides an excellent tabulation; only one example is provided here.

As mentioned above, manufacturing companies often sell or transfer goods to a subsidiary sales company (for example, Sony to Sony-USA) so that the first arms-length transaction occurs when the sales company sells the product. To adjust costs to an ex-factory basis, the expenses of the sales company must be deducted. The following quotation (Bellis 1989, p. 83) relates specifically to practices in the European Community, but other countries treat selling costs the same way:

A producer which sells a consumer branded product at exactly the same price in both domestic and export markets, a situation which to anybody outside an antidumping administration would appear to be a typical case of no dumping, will systematically be credited with a dumping margin corresponding to the indirect selling expenses of his domestic sales organization for which no allowances can be made…. Indirect selling expenses for consumer branded products are substantial, often in the order of 15 to 20 percent of the selling price.

The End Result

My conclusion borrows much from other analysts. N. David Palmeter (1991, p. 66), referring specifically to U.S. practice, describes the situation as follows:

The standards of the day, the procedures it uses, and the implementation of these standards and procedures by the Department of Commerce increasingly ensure that, at the end of the day, an exporter determined to have been selling in the United States below fair value probably has been doing no such thing in any meaningful sense of the word “fair.” On the contrary, rather than being a price discriminator, a dumper is more likely [to be] the victim of an anti-
dumping process that has become a legal and an administrative non-tariff barrier.

The European Community uses different procedures, but the end result is the same. As Angelika Eymann and Ludger Schuknecht (1991) point out, the United States applies protectionist rules, the European Community applies protectionist discretion. The result in both cases is protection. In Brian Hindley's (1988, p. 460) words, “From antidumping law, the Commission and the Council have fashioned a trade-policy weapon of great power. No legal process, either domestic or international, seems likely to place any substantial impediment in the way of the further development and deployment of that weapon.”

Descriptions of worlds like that of antidumping are more often encountered in fiction—weird fiction—than in academic discourse. Note in the following passage by Douglas Adams (1980, pp. 38–39) the relationship between the Hitchhiker's Guide to the Galaxy and the galaxy. The relationship between antidumping law and dumping is the same.

The Hitchhiker's Guide to the Galaxy is an indispensable companion to all those who are keen to make sense of life in an infinitely complex and confusing Universe, for though it cannot hope to be useful or informative on all matters, it does at least make the reassuring claim, that where it is inaccurate it is at least definitively inaccurate. In cases of major discrepancy it's always reality that's got it wrong.

This was the gist of the notice. It said, “The Guide is definitive. Reality is frequently inaccurate.”

This has led to some interesting consequences. For instance, when the editors of the Guide were sued by the families of those who had died as a result of taking the entry on the planet Traal literally (it said “Ravenous Bugblatter Beasts often make a very good meal for visiting tourists” instead of “Ravenous Bugblatter Beasts often make a very good meal of visiting tourists”), they claimed that the first version of the sentence was the more aesthetically pleasing, summoned a qualified poet to testify under oath that beauty was truth, truth beauty, and hoped thereby to prove that the guilty party in this case was Life itself for failing to be either beautiful or true. The judges concurred, and in a moving speech held that Life itself was in contempt of court, and duly confiscated it from all those there present.

**In Defense of Antidumping**

Partly in response to criticism that dumping margins were frequently overstated by contemporary procedures, defenders of antidumping have pointed to what in EC practice is called the lesser-duty rule. The idea behind the rule is expressed in the GATT antidumping code: “It is desirable that the...
[antidumping] duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry” (GATT 1980, art. VIII, par. 1).

EC Commissioner for External Relations Willy de Clercq, in defending the EC's antidumping policy as "incontestably by far the most liberal" (his emphasis), pointed out that “unlike U.S. authorities, the commission is not obliged to apply antidumping measures at rates which reflect the full margins of dumping established. On the contrary, under Community law the rate is restricted to that necessary to remove the injury caused” (de Clercq 1988, p. 29). Jean-François Bellis, a prominent Brussels lawyer and legal scholar—and sometimes critic of EC policy—is an outspoken advocate of the lesser-duty rule:

The EEC justifiably prides itself on the fact that, unlike the U[nited] S[tates], it applies the "lesser duty rule," i.e., it limits antidumping duties to the level necessary to eliminate the injury. This practice should be multilateralized in GATT in the form of a binding obligation.⁵ (Bellis 1989, p. 94)

Bellis also explains how to do it:

In practice, the level of the duty is mainly determined by the level of price undercutting...or by the level of resale prices that would be required to cover the costs of Community producers and provide a reasonable profit. (pp. 84–85)

Compare that statement with the following (quoted in Taussig 1931, p. 363):

In any protective legislation the true principle of protection is best maintained by the imposition of such duties as will equal the difference between the cost of production at home and abroad, together with a reasonable profit to American industries.

The second of these is the statement contained in the 1908 U.S. Republican Party platform of the cost-equalization formula, which the U.S. Congress followed in writing the Smoot-Hawley Tariff.

As to the usefulness of the formula as a guide to policy, E. E. Schattschneider (1935, pp. 84 and 284) argues emphatically that the formula has no operational meaning:

Talk of tariffs written on the cost formula is no more than an elaborate sham and a bluff.... The committees did not generally determine rates according to the formula advertised, and they did not do so for the conclusive reason that they could not.... The difference of cost formula is to be classified more properly as a slogan belonging to the politics of gaining acceptance of [protection] than as a method of determining rates.

Frank Taussig (1931, p. 633) is equally critical of the lack of substance of the formula, but less scathing. He points out that anything can be made within any country if the producer is assured a price high enough to cover all costs of

140 The World Bank Research Observer, vol. 7, no. 2 (July 1992)
production together with a reasonable allowance for profits. “Yet,” he adds, “little acumen is needed to see that, carried out consistently, it [the formula] means simple prohibition and complete stoppage of foreign trade.”

Perhaps it is overkill to recall the wisdom of Schattschneider and Taussig to argue that contemporary antidumping is out of control. It should be sufficient to point out that its own defenders bring forward the economic philosophy of the Smoot-Hawley Tariff as its rationale.

**Summing Up**

The cause that justifies an action is often far removed from the motives that propel its advocates. When push comes to shove, the motives, not the cause, dictate the details of the action. And the details, in turn, dictate the substance. In trade policy, existence precedes essence.

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 limit it to disciplining only the competitive practices that compromise society’s overall interests. Antitrust is in both theory and practice an instrument to defend the public interest. Antidumping is a different matter. Free from the constraints that the rule of law imposes 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 domestic and the apparent victim must be foreign.

Antidumping puts the fox in charge of the henhouse: trade restrictions certified by GATT. The fox is clever enough not only to eat the hens, but also to convince the farmer that this is the way things ought to be. Antidumping is ordinary protection with a grand public relations program.

**Notes**

Michael Finger is lead economist in the Trade Policy Division of the Country Economics Department at the World Bank.

1. Horlick and Oliver were writing about both antidumping and antisubsidy (countervailing duty) measures. In the United States, the number of trade remedies cases is divided roughly equally between the two; in other countries, antidumping is by far the most popular instrument.

2. The Country Party practiced similar politics in Australia in the middle of the twentieth century. For one discussion, see Rattigan (1986).

3. The result brings to mind Frank Taussig’s explanation of pricing strategy of a firm so situated: “The monopolist sells at high prices where he can, and accepts lower prices where he must” (Taussig and White 1931, p. 208). Taussig’s quip reminds one to ask who came out ahead: Canada or U.S. Steel or U.K. exporters.
4. Palmeter (1991) explains that if the provision of best information available were not includ-
ed, the respondent could block an investigation by refusing to cooperate. He points out that the
provision was rarely used until recently. In recent cases, however, information requirements have
been so complex that the respondents were either unable to comply or the estimated costs of
complying were so high that they chose not to.

5. Bellis is, however, critical of how the EC has put the rule into practice.

References

The word "processed" describes informally reproduced works that may not be commonly
available through libraries.
Balassa, Bela, and associates. 1971. The Structure of Protection in Developing Countries. Published
Hopkins University Press.
Country Economics Department, Washington, D.C. Processed.
Bierwagen, Ranier M. 1990. GATT Article VI and the Protectionist Bias in Antidumping Law.
the Gruen Review, Canberra, Australia.
Dam, Kenneth W. 1970. The GATT: Law and International Economic Organization. Chicago:
University of Chicago Press.
sity of Toronto Press.
Community." PRE Working Paper 743. World Bank, Country Economics Department,
Washington, D.C. Processed.
Geneva.
and Trade." In GATT, Basic Instruments and Selected Documents. 26th Supplement, Protocols,
———. 1990. "Compendium of Drafting Proposals for Modifications to the Agreement on Im-
plementation of Article VI of the General Agreement (Antidumping Code)," Attachment to
MTN.GNG/NG8/W/83/ADD.5. Group of Negotiations on Goods, Multilateral Trade Negotia-
World Economy 11 (December): 445–64.
Edwin A. Vermulst, eds., Antidumping Law and Practice. Ann Arbor, Mich.: University of
Michigan Press.


