# SPECIAL COMPETITION AND INTERNATIONAL TRADE SECTION

## MANIFEST REASON AND PROTECTION OF DOMESTIC COMPETITORS

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The opinions of the Canadian International Trade Tribunal (CITT) that dumped imports are materially injuring the domestic industry were at one time virtually unchallengeable. Only if it considered the CITT's opinion to be patently unreasonable would a court set aside the decision. Hence, a key lever in the protective anti-dumping regime was firmly in the grasp of the CITT. Recent developments suggest a loosening of the CITT's grip and greater difficulty for domestic competitors seeking protection from dumped imports.

Decisions of binational panels reviewing CITT decisions under the Canada/U.S. Free Trade Agreement have creatively interpreted the notion of patent unreasonableness in sending decisions back to the CITT. Not that one begrudges creativity in itself; the notion of unreasonableness as patent as distinct from other forms of unreasonableness is itself somewhat creative.

Literally, patent unreasonableness is unreasonableness which is manifest or plainly evident. That which is patent is typically distinguished from that which is latent, namely, that which is hidden or concealed. The problem, of course, is evident to whom? A stranger to baseball, a sandlot player, and a major leaguer watching a major league game will see very different things. So, in property law where the purchaser will be taken to have accepted patent defects but may still go after the vendor for latent defects, the law has had to determine if the standard of what is evident should be measured by the flighty purchaser who looks at nothing but the wallpaper or the diligent purchaser who conducts a normal amount of inspection. Not surprisingly, the law has found that what is patent includes those defects which are discoverable through normal diligence. Like most rules in property law, this one strikes a balance between the interests of the vendor and purchaser so that transactions may take place with a fair degree of certainty as to who is accountable for what.

Standards of judicial review are all about accountability. The greater the degree of deference to the tribunal inherent in the standard of review, the greater the scope of freedom of action of the tribunal. Fifteen years ago, the standard of deference to the opinion of a specialized tribunal, such as the CITT on the issue of material injury, was extremely high. The CITT's interpretation of the relevant legal standard, namely, that dumping must be found to be a cause of material injury, would only be set aside if it was "... so patently

unreasonable that its construction cannot be rationally supported by the relevant legislation".[1] On questions of fact, the CITT's weighing and balancing of the relevant factors in coming to its decision would not be disturbed unless "there was no evidence upon which it could have been made".[2]

Recent decisions have, however, signaled that the judiciary may be concerned that it has set the threshold too high. So, one finds the Supreme Court of Canada speaking in terms of the "logical relationship between the grounds of the decision and premises thought by the courts to be true"[3] and stating that, "[in] some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable, but this can only be understood upon an in-depth analysis."[4] Hence, what earlier would have had to be obvious to surface observation now may depend on an in-depth analysis of the tribunal's record. The Supreme Court of Canada has also moved from speaking about no evidence upon which findings could have been based to speaking of "no evidence ... sufficient to satisfy"[5] the relevant statutory requirement.

It is open to some interpretation as to whether these recent comments by the Supreme Court of Canada mark a sea change in the standard of review.[6] However, binational panels have taken these comments to reflect a significant evolution in the review standard. For example, in the April 7, 1993 *Carpets*[7] case, the majority concluded that it was free to examine not only the findings and observations made by the CITT in its reasons but also the entire administrative record and, if a rational or logical relationship did not exist between the evidence and the decision of the CITT, the decision was to be treated as patently unreasonable.[8]

The majority determined that the CITT was obliged, by virtue of Article 3(4) of the GATT Antidumping Code, to demonstrate that dumping is a cause of injury and that such demonstration required more than conclusory findings, it required an analysis. In addition, the majority determined that, while dumping need not be the sole cause of material injury, dumping must be segregated by other causes of material injury. The majority did not find that the CITT's decision demonstrated the causal link between dumping and material injury nor did it segregate dumping from other causes of material injury. The majority remanded the case back to the CITT with directions as to the further analysis required.

The requirement that the Tribunal provide the analysis which demonstrates the link between dumping and material injury adds a further twist to the standard of review. The standard of causation found in Article 3(4) of the GATT Antidumping Code is itself something upon which the Tribunal is entitled to express itself and the CITT's interpretation must govern unless it is patently unreasonable. So, for example, one might have interpreted the requirement for a demonstration that dumping is causing injury to mean that it must be demonstrated to the CITT that dumping is causing injury, not, as the Panel would have it, that the CITT must demonstrate to the Panel that dumping is causing injury. In fact, what the Panel has done, is review the CITT's decision using its own standard of causation. This arguably makes the Panel's discussion of Canadian jurisprudence on the standard of review superfluous.

The majority requirement that the Tribunal demonstrate with analysis the evidentiary basis for its findings amounts to imposing reasoned decision-

making and substantial evidence standards on the Tribunal. These standards are well known and form the basis for much judicial review in the United States but they are radically different standards from the no-evidence and patently unreasonable standards applicable in Canada. While not expressing themselves in quite these terms, the significance of the majority's approach to review was not lost on the minority who would have found the CITT's finding of injury not to be patently unreasonable.

Concern over the patently unreasonable standard of review also appears to have reared its head in the proposed legislation giving effect to the North American Free Trade Agreement.[9] The Supreme Court of Canada has, in part at least, founded the patently unreasonable standard of review on subsection 76(1) of the *Special Import Measures Act*. That subsection provides that orders or findings of the CITT are "final and conclusive". The proposed legislation would delete this clause. It would appear that this move is designed to support arguments for imposing a stricter standard of review on the Tribunal. This amendment, if passed, may reinforce the approach reflected in the majority Panel decision in *Carpets*.

If the approach adopted by the majority in *Carpets* prevails, then the CITT would appear to have two broad options.[10] First, it may endeavour to achieve the same result with decisions which are papered to meet the approach laid down in *Carpets*. This is, in essence, how U.S. tribunals meet the reasoned decision-making and substantial evidence standards imposed by U.S. courts. It simply requires the dedication of greater resources to achieve the result. It also has the effect of requiring parties to expend greater resources on cases. The other approach is to carry on in the present manner but find that dumping is causing material injury only in the clearest cases. In either case, it will be more difficult for domestic competitors to seek anti-dumping protection against U.S. imports.

## Notes

1 *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corp.*, [1979] S.C.R. 227 at 237.

2 *Re YKK Zipper Co. of Canada Ltd.*, [1975] F.C. 68 (C.A.) at 75; *Sarco Canada Limited* v. *Antidumping Tribunal*, [1979] 1 F.C. 247 (C.A.).

3 *CAIMAW* v. *Paccr of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1018.

4 *National Corn Growers Association* v. *Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1370.

5 *Lester (W.W.)* v. *U.A.J.A.P.P.I., Local 740*, [1990] 3 S.C.R. 644 at 694.

6 The minority in *Carpets*, *infra*, note 7, cite *A.G.C.* v. *P.S.A.C.*, March 25, 1993, for the Supreme Court of Canada's statement that "It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational."

7 In the matter of an inquiry made by the Canadian International Trade Tribunal pursuant to s. 42 of the *Special Imports Measures Act* respecting machine-tufted carpeting originating in or exported from the United States of America; Binational Panel Secretariat File No. CDA-92-1904-02.

8 *Ibid.* at 17.

9 Bill C-115, *An Act to implement the North American Free Trade Agreement*, 3d Sess., 34th Parl., 1991-92-93 (1st reading 25 February 1993).

10 The approach might not prevail if the CITT were able to deal with the remand while also cutting at the assumptions which underlie the Panel's decision.

# DO U.S. ANTI-DUMPING ACTIONS HELP THE U.S. ECONOMY?

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In an address given at American University on February 26, 1993, President Bill Clinton outlined a trade policy that seems strikingly similar to that pursued by U.S. Presidents for the past twenty years: fight for open markets abroad while "enforc[ing] our trade laws and our agreements with all the tools and energy at our disposal." While the benefits of opening foreign markets to U.S. products seem obvious, the value of enforcing U.S. trade laws, as currently written and applied, is not as clear. In noting that "[t]oo many of the chains that have hobbled us in world trade have been made in America," the President, like his predecessors, was probably unaware that protectionist anti-dumping laws in the U.S. and around the world are a heavy burden on U.S. competitiveness.

As customs tariffs have declined as a result of seven GATT rounds of tariff reductions, many countries have turned to their anti-dumping laws as a means to protect their industries from foreign competition. Over 30 countries currently have anti-dumping laws on their books and an additional 12 are in the process of implementing such laws. During the 1980s, 1,456 anti-dumping cases were brought by GATT member countries alone, 144 of which were directed against U.S. exports. As economist Robert Litan has noted, anti-dumping law has become the trade remedy of choice.

The theory of anti-dumping law, though criticized, can be defended. In theory, anti-dumping law attempts to prevent foreign companies from stealing market share by subsidizing cheap exports with monopoly profits gained in a protected home market. In practice, however, the major users of anti-dumping law (the United States, the European Communities, Canada, Mexico and Australia) do not require monopoly power to find that dumping has occurred. For example, the Hong Kong sweater industry was found to be dumping sweaters in the United States despite the fact that the Hong Kong prices were set by nearly perfect conditions of competition (ie. hundreds of producers and no subsidies or import barriers).

Anti-dumping law has become, essentially, a legalized price fixing scheme. That is, domestic producers are encouraged, and are often required, to take concerted action against foreign competitors by filing anti-dumping petitions on behalf of U.S. industries. The outcome of this concerted effort is often increased prices. The Commerce Department finds dumping in 97% of the cases placed before it. Such a determination by Commerce, and a subsequent injury finding by the International Trade Commission, results in the application of punitive duties on all imports of the merchandise under investigation from the subject countries or, in other words, a price hike ultimately paid by the consumer.

The price increase on foreign merchandise invites domestic producers to raise their prices as well. If the imported product is subject to a 20% anti-dumping duty, domestic producers know that they can raise prices by 19.9% and still win sales.

Anti-dumping investigations have become so burdensome that even the threat of a case causes price increases. Exporters cannot afford the time, legal fees, and disruption of trade necessary to ramble

through the weeds of anti-dumping law. For example, in late January, the Big Three threatened to file anti-dumping petitions against car imports. Despite that threat being rescinded in mid-February, however, Honda, Toyota and Mazda announced 1 to 1.5% price increases on their U.S. exports "to head off protectionism." Thus, the Big Three got their price increase without even lifting a finger.

Tough anti-dumping laws are beginning to take their toll on the world economy. In 1990, a U.S. association of computer screen manufacturers filed anti-dumping petitions against flat panel display screens from Japan. Anti-dumping duties were ultimately assessed against two types of flat panels, even though there was no domestic producer of one of them. Since the anti-dumping duties rendered the Japanese screens prohibitively expensive, U.S. computer manufacturers were forced to move their manufacturing operations off-shore since there was no domestic supply. U.S. anti-dumping law does not include a provision that requires an assessment of the public interest prior to the imposition of anti-dumping duties, nor does it allow for the suspension of such duties in the event of short supply. The result was a loss of U.S. manufacturing jobs in order to protect a U.S. industry that does not exist, hardly an outcome that would be sought by a President promising to create jobs.

U.S. exporters also suffer from the application of other countries' anti-dumping laws. When U.S. negotiators fight to make tough anti-dumping laws even more protectionist in the GATT Uruguay Round negotiations, they fail to realize that the protectionist rules that they are fighting to preserve and "improve" will be used against U.S. exporters in foreign markets, and likely without the strict judicial review afforded in the United States.

A company like Caterpillar is a good example of how a U.S. manufacturer can be hit by anti-dumping laws on both sides of the ocean. Caterpillar (the third largest steel buyer in the United States, after GM and Ford) is forced to pay higher prices for steel in the United States since almost every steel product is currently subject to or threatened with an anti-dumping investigation. The higher import prices raise Caterpillar's costs and thus make its product less competitive abroad. If Caterpillar happens to sell heavy machinery abroad at prices lower than its U.S. prices, it will be hit with foreign anti-dumping duties even if it is doing nothing that most businesses would consider "unfair".

With a new administration, the time has come to revamp U.S. trade laws. The United States should return to its original position on anti-dumping laws formulated during the Kennedy Round of GATT negotiations. At that time, the United States proposed a fundamental review of whether the concept of anti-dumping law made sense economically. The request was quashed by the European Communities. In 1989, during the Uruguay Round negotiations, the United States joined the EC in squelching similar proposals tabled by Norway, Sweden, Finland and Hong Kong.

In a bold parting move, former United States Trade Representative Carla Hills (an antitrust lawyer at heart) requested a two-year study by the International Trade Commission analyzing the effect of the U.S. anti-dumping laws on domestic producers, consumers and the U.S. economy. The Commission has requested that the new USTR, Mickey Kantor, reaffirm the administration's interest in this request. The Clinton administration has responded by putting all studies on hold. The administration should seize this opportunity. Only through such a study can it

be determined whether anti-dumping laws serve the U.S. economy best.

In his American University address, President Clinton recognized the value of "[o]pen and competitive commerce" and how "[o]ur exports are especially important to us." Rather than repeating the age old mantra of "tough enforcement of trade laws," the Clinton administration should examine whether these laws actually improve U.S. competitiveness and create jobs. In the President's words, "in the face of all the pressures to do the reverse, we must compete, not retreat."

## WHAT ROLE ANTI-DUMPING?

## A COMPETITION POLICY PERSPECTIVE

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> "The trade remedy laws ... are, in my opinion, generally compatible with efforts to promote economic efficiency and can be used to help restore our nation's competitiveness in world markets."[1]
> A.E. Eckes, then Commissioner, U.S. International Trade Commission

> "The majority of informed opinion seems to believe ... that [the *Special Import Measures Act*] and legislation like it are designed to protect domestic producers at the expense of the public good."[2]

International trade is an important component of any nation's economic well-being. This is certainly true of Canada. Exports have historically been among the major factors contributing to Canada's economic growth. Meanwhile, imports have provided a source of goods and services that Canada's economy cannot efficiently produce on its own. Arguably, most nations have come to understand international trade in light of this most elementary formulation, which formulation in turn provides the motivation for efforts over the latter half of this century to liberalize international trade.[3]

Economic analysis sees trade liberalization as having a beneficial impact upon an open economy.[4] Import competition tends to decrease the relative cost to consumers of goods and services in the Canadian market. Indeed, a reduction in the price of imports almost invariably enhances national economic welfare as measured by aggregate consumer and producer surplus.[5] Competition from foreign producers, meanwhile, forces domestic producers to concentrate their economic resources upon those goods and services where they hold a real comparative advantage over their foreign competitors. By way of summary, one economist has noted "that trade can free dynamic forces and thus be an engine of growth if the right macroeconomic and institutional conditions prevail."[6]

On this view, the litmus test of any national trade policy is whether it contributes to establishing those "conditions" which free international trade to be an "engine of growth". This paper proposes to submit one element of Canadian trade policy, namely anti-dumping, to this test. It concludes that Canadian anti-dumping legislation and administration, as presently articulated, is mostly inimical to trade liberalization and deleterious to the Canadian economy. However, a proposal for reform is offered, modelled on a competition policy standard, whereby anti-dumping law can play a useful role in policing international trade. Special mention is also made regarding the reform of anti-dumping law within the context of the Canada-U.S. Free Trade Agreement (FTA).[7]

**Canadian statutes: the *Special Import Measures Act* (SIMA)[8] and the *Competition Act*[9]**

Dumping is essentially a situation whereby a foreign producer exports goods into Canada under conditions such that the Canadian import price is lower than the price demanded by the foreign producer in its home market. Article VI of the GATT[10] provides that, to the extent that dumped imports (a) cause or threaten to cause material injury to an established domestic industry or (b) materially retard the establishment of a domestic industry, anti-dumping duties are justifiably imposed on the offending imports. Canada's rights under article VI with respect to anti-dumping are implemented by SIMA.

Under SIMA, it is the responsibility of the Deputy Minister of National Revenue (the DMNR) to investigate allegations of dumping into the Canadian market. The focus is on finding the "normal value" and the "export price" of the impugned imports so as to calculate the "margin of dumping" [11] "Normal value" is essentially the home market price demanded by the foreign exporter; "export price", the price charged to Canadian importers; and both can be estimated in several ways.[12] The amount by which normal value exceeds export price is the "margin of dumping".[13] Upon finding a margin of dumping, the DMNR may make a "preliminary determination of dumping"[14], whereupon the matter is referred to the Canadian International Trade Tribunal (the CITT). One commentator suggests that "by far the most important stage of an anti-dumping proceeding is that at which normal value is determined" given the calculus of the margin of dumping.[15]

The role of the CITT in respect of an anti-dumping matter is set out in s. 42 of SIMA:

> 42(1) The Tribunal, forthwith after receipt ... of a notice of a preliminary determination of dumping ... shall make inquiry ...
>
> (a) ... as to whether the dumping ...
> (i) has caused, is causing or is likely to cause material injury or has caused or is causing retardation ...

Essentially, the CITT is required to determine whether dumping is causing material injury or retardation to Canadian producers of like goods.[16] The CITT has taken a broad view of what can constitute material injury:[17] loss of orders, loss of market share, loss of profit, evidence of unused capacity, loss of employment, price deterioration, profit margin erosion, cancelled or postponed expansion, high inventories, increased distribution costs, reduced R&D, declining land values, and instances of bankruptcy.[18] As regards causation, the key issue is the extent to which the dumping is directly responsible for the current state of affairs in the complaining industry:

> [the CITT] certainly ... adheres to a stricter view of causation than is the case with the ITC in the United States. In several cases [it] has found that injury was caused by factors other than dumping and that the dumping was only one, although not the principal, cause of injury. In these cases, [the CITT] rendered negative findings.[19]

If the s. 42 test is met, then the offending imports can be subject to an anti-dumping duty equal to the margin of dumping.

The concept of dumping has been compared to several domestic competition law provisions. Most relevant are those sections of the *Competition Act* relating to regional price predation (sometimes called geographic price discrimination) and to predatory pricing.[20]

Essentially, predation is a scheme whereby a firm first lowers its price in a bid to drive competitors out of the market, so that it may subsequently reap supra-competitive profits by increasing its price unchallenged (so-called "classic predation"). One variant of this scheme is called "strategic predation", whereby an incumbent lowers its price to discipline existing competitors, or to deter entry into the market and so protect its ability to later increase prices. Regional price predation is proscribed by s. 50(1)(b) of the *Competition Act*:

> 50(1) Every one engaged in a business who
> ...
> (b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect ... of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect,
> ...
> is guilty of an indictable offence ...

Predatory pricing is interdicted by s. 50(1)(c):

> 50(1) Every one engaged in a business who
> ...
> (c) engages in a policy of selling products at prices unreasonably low, having the effect ... of substantially lessening competition or eliminating a competitor, or designed to have that effect,
> is guilty of an indictable offence ...

## The policy of anti-dumping law and administration: "Competitors, not competition"

A commentator has stated that:

> In important senses, the underlying philosophy of competition legislation and post-war approaches to liberalization of international trade are very similar. They both operate from the premise of allowing markets to determine the most efficient allocation of resources and to be the means by which the principles of comparative advantage determine economic activities.[21]

However, the treatment of unfairly low prices under domestic competition laws is altogether different from that under international (anti-dumping) trade laws, both in terms of purpose and application: "anti-dumping laws tend to protect competitors while the objectives of competition laws is to protect competition".[22]

SIMA, and anti-dumping laws generally, do not articulate modern economic and competition policy approaches to market pricing. The underlying assumption of anti-dumping law is that the injury dumping causes to domestic producers exceeds the benefits reaped by domestic consumers in terms of lower prices. This assumption is reasonable enough if the impugned dumping is predatory and liable to lessen present and future price competition in a given market. However, SIMA fails to discriminate between healthy price competition and predatory pricing, and instead condemns all export prices which exceed normal value as an unwelcome challenge to domestic producers.

A former Director of Investigation and Research under the *Competition Act* has stated that analysis under anti-dumping law "falls short of what is usually required under competition law to establish [predation]."[23] A telling example of this is the level of scrutiny applied to the price charged by the producer-exporter. Under competition law, that price must be compared to the producer's costs: generally, predation is suspected only if the price charged does not cover the average variable cost of production.[24] Any price above that level is *prima facie* a competition-enhancing price.[25] No such price/cost analysis constrains a finding of dumping.[26] In any given instance where a margin of dumping is found, anti-dumping duties may be imposed regardless of whether the export price is higher or lower than the

average variable cost of production. Indeed, duties may be imposed where the export price exceeds average total cost or even the Canadian producer's market price![27] In effect, the slipshod test adopted in SIMA can operate to punish non-predatory, transborder pricing policies which are in fact pro-competitive and efficiency-enhancing, even as it tries to discipline instances of true predatory pricing. Furthermore, economists and competition law experts generally doubt the very existence of "classical" predatory pricing, or believe that it is so rare as to not be of importance in competition policy.

Classical predation as a "winning" pricing policy requires an unusual combination of circumstances.[28] First, the predator must be able to exercise considerable market power, i.e. to unilaterally affect industry pricing. Such power can be present in an industry marked by a high degree of "horizontal concentration".[29] Next, the industry must present sufficiently high barriers to entry, such that the predator can successfully raise prices after a round of predation without fearing the re-entry of price competitors. Cost advantages available exclusively to incumbents can comprise one such barrier, sunk costs[30] another. If both market power and barriers to entry are present, only then is the analysis of the price/cost relationship undertaken. Finally, under the *Competition Act*, there must be evidence of a "policy" of selling at predatory prices having the effect of substantially lessening competition or eliminating a competitor, or designed to have that effect. Overall, the Director of Investigation and Research is of the view that predatory pricing "of the sort prohibited by the statute has proven to be a rare rather than a common occurrence in Canada."[31] Anti-dumping law, by way of contrast, has no such rigorous approach to analyzing predatory pricing in terms of industry structure, market performance and firm-specific conduct. Yet, each year, anti-dumping duties are routinely assessed against an impressive range of goods. What prices then are typically the target of anti-dumping investigation and enforcement?

The answer is any price charged for a competitive, imported good against which a domestic producer wants to complain. Hutton and Trebilcock note that:

> [one] significant feature of ... Canadian anti-dumping cases ... is that there is some correlation between the market power of the Canadian firms affected and the tendency to bring anti-dumping actions. ... [I]t seems that the anti-dumping regime is often used as a means of protecting [Canadian] market power and inefficient producers from fair [import] competition.[32]

Indeed, domestic producers understand that anti-dumping duties, imposed pursuant to investigations launched by their complaints, are a means of raising a foreign rival's cost of doing business in Canada.[33] The foreign exporter must pay to defend itself from dumping allegations. Naturally, should anti-dumping duties be imposed, the increased export price will render the foreign exporter less competitive in the market. Moreover, to the extent that a foreign exporter attempts to avoid the Canadian anti-dumping regime altogether by moving some aspects of its production into Canada, that exporter becomes exposed to those additional costs attending the over-investment of any producer outside the home market from which springs its comparative advantage.

In effect, anti-dumping laws are essentially (and often unabashedly) protectionist, discriminating against foreign competitors in favour of domestic producers.[34] An analysis of the restrictive interpretation accorded to s. 45 of SIMA buttresses this view.[35] The section provides in part that:

> 45(1) Where, as a result of an inquiry referred to in section 42 ... the Tribunal makes an order ... [and] is of the opinion that the imposition of an anti-dumping [duty] ... *in the full amount* ... would not or might not be in the public interest, the Tribunal shall ...
>
> (a) report to the Minister of Finance that it is of such opinion ... (emphasis added)

Consideration of the "public interest" under s. 45 can be launched upon the representation of any interested party to a s. 42 inquiry, or upon the initiative of the CITT itself. This "public interest" section was introduced into SIMA in response to criticisms that the former anti-dumping legislation was overly focussed upon the concerns of domestic producers, to the detriment of downstream users and consumers who gain from price competition sparked by foreign competitors.[36] However, in the *Grain Corn* case[37], the CITT restrictively interpreted s. 45 on the basis that such public interest inquiries into the benefits of competition are fundamentally at odds with the thrust of an anti-dumping regime which raises the interests of domestic producers above all others.

In practice, the CITT has not proceeded to examine the public interest in any s. 42 inquiry except upon the representation of an interested party, confirming the view that the imposition of full anti-dumping duties in favour of domestic producers is, under SIMA, *prima facie* in the public interest, unless otherwise shown.[38] Furthermore, the CITT has held that there must be "exceptional circumstances" for any public interest factor to militate against the imposition of full duties, and in any event, a recommendation to abate a duty will not be made if such an action would impose any injury to domestic producers.[39]

Thus, anti-dumping law and administration is the very antithesis of competition policy and post-war approaches to liberalization of international trade, to the extent that anti-dumping undermines the principle of allowing markets to determine the most efficient allocation of resources and to be the means by which the principles of comparative advantage determine economic activity.

### "Why is anti-dumping still with us?": Possible justifications for the present state of anti-dumping law and enforcement

A review of recent literature on the tension between anti-dumping and competition law suggests several rationales for the existence of an anti-dumping regime as presently articulated in SIMA. Not all of these rationales, however, are compelling.

1. Inability to effect changes within a multi-lateral context

On this view, reform of anti-dumping — even if it were desirable — is impeded and effectively precluded by the inertia inherent in the existing, complex web of international trade treaties and obligations.[40] To be sure, the obstacles to reforming anti-dumping within the GATT, for example, should not be overestimated. However, this explanation is less than satisfying, for it does not provide any insight into why the present anti-dumping regime was adopted over one relying instead upon the principles of competition policy. As such, it must be discarded.

2. Anti-dumping as a strategic economic tool

Anti-dumping laws are cast by some in the role of a selective, economic planning tool used by governments to protect domestic firms in strategic

sectors that have large, positive effects on other areas of the economy.[41] To put it baldly:

> [i]n certain anti-dumping cases, measures are taken not only to protect the domestic competitors, but also in order to ensure the continued existence of a domestic industry.[42]

This view overlooks the fact that domestic producers, and not only governments, decide by virtue of their dumping complaints, which industry sectors will benefit from the deployment of the anti-dumping "tool" Thus, the scope for directed action according to some government-sanctioned plan seems limited if not illusory.

Nonetheless, there is a more basic criticism. Economic theory generally condemns any artificial intervention in the market to impede or discourage the reallocation of productive resources from inefficient industries to efficient ones. Yet this is precisely what protectionism, under the guise of anti-dumping, attempts to do. Such intervention can only be defended on theoretical grounds if it results in a net welfare gain to the economy, or in other words, if the protection of a given industry makes all consumers and producers within the economy better off. However, one commentator notes that:

> [a]lmost without exception, every credible study on the cost of trade protectionism has demonstrated that the cost to consumers exceeds the benefits to the domestic economy many times over.[43]

The same point can also be made from a "comparative institutions" footing. Intuitively, advocates of free-market economics are justifiably suspicious of any claims by economic planners and trade administrators regarding their ability to "select" strategic industry sectors and so "outperform" the market.[44]

Furthermore, in a liberalized international trading environment, and within an increasingly integrated world economy, the role of "strategic" industry sectors, not otherwise buttressed by real comparative advantages over foreign rivals, is greatly diminished, if not defunct. Such declarations of "strategic" value fly in the face of economic theory, and are vulnerable to characterization as inefficient, protectionist policies hiding behind flag-waving (and perhaps even xenophobic?) sentiment.

3. Domestic political expediency

Nonetheless, some believe that nationalistic pressures form a powerful explanation for the role of anti-dumping. On this view, anti-dumping operates as a "safety-valve" for short term social, economic, and political tensions that mount in times of national economic difficulty or that surface when there are individual, distressed economic sectors.[45] By singling out the "unfair" trade practices of foreign exporters, the anti-dumping regime in fact provides an opportunity for frustrated domestic government and industry actors to air suspicions about the legitimacy or illegitimacy of various competitive advantages which those exporters are said to enjoy. By slapping anti-dumping duties on "dumped goods", the anti-dumping regime saves domestic jobs even as it shelters domestic industry, and no doubt helps to soothe the bruised egos of domestic producers who cannot compete on price and quality with the imports. Without this safety-valve, both government and industry become more vulnerable to criticisms of economic mismanagement of international trade.

The gut-level appeal of this defence of anti-dumping is undeniable and, as with most arguments that proceed from an emotive rather than theoretical perspective, it is difficult to displace. However, the

fact remains that protected industries almost invariably take advantage of that protection to paper over fundamental problems respecting their competitiveness.[46] Moreover, it is arguable that such protectionism merely postpones and even intensifies longer-term industrial dislocation and obsolescence. Anti-dumping, therefore, helps to insulate government and industry from having to make hard but necessary policy decisions about economic restructuring and resource allocation in the face of competition from abroad. The simple appeal of anti-dumping as a domestic political expedient is helpfully exposed by R.Z. Lawrence:

> Foreigners do not vote; accordingly, they do not appear with the same weight in the national [political] utility function.[47]

In the end, the protectionism fostered in part by anti-dumping is a dead end.

4. Temporary relief from the costs of dislocation during a time of economic restructuring

Perhaps some domestic producers are prepared to rise to the challenge posed in their markets by more efficient foreign exporters. To the extent that domestic producers must respond by addressing any fundamental problems respecting their competitiveness, the challenge will result in a greater or lesser degree of industry restructuring. Other domestic producers meanwhile may succumb to imports, in which case some or all of the productive resources they formerly commanded will have to be put to work elsewhere in the economy. And while the prescription of restructuring can seem almost clinical, the pain of restructuring can be immediate and tangible:

> workers are laid off, local economies are depressed and shareholder equity and income are reduced. ... [T]here is a sense that it would be self-indulgent to focus excessively on consumer interest when the basic well-being of established enterprises, their employees, and their surrounding towns, is at stake. ... [Perhaps then] the rationality of the market mechanism is not more important to most of us than dealing compassionately with painful social dislocation.[48]

In other words, Rosenthal acknowledges that economic and competition policy, driven by the bloodless considerations of efficiency, may have to be tempered by more humane concepts of social equity.

One such concept posits a "social contract" between persons in a given society to protect its least advantaged members.[49] Thus, when an import-competing industry must shed workers who cannot easily relocate to a similar job in another town or country, nor readily transfer their skills to a job in another industry, the social contract extends to reducing the discomfort of those workers as they reintegrate into the economy.[50] Another concept embraces an overarching concern for the "community".[51] The goal is to protect "one-industry towns" which otherwise might suffer unduly should that industry stumble and fall before the competition of imports. In either case, the anti-dumping regime is justified upon being characterized as a vehicle for dispensing equitable and distributive, if somewhat temporary, justice. By abating the pressure from imports, it reduces the necessary costs of restructuring forced upon those who can least afford them.[52]

Sykes, for one, proposes a disciplined approach to discern instances where anti-dumping should be called upon in aid of workers in distressed industries undergoing restructuring.[53] He suggests that anti-dumping intervention is merited in two specific

situations, namely, where:

> the labour market in the distressed industry is especially inefficient; or
> workers' industry-specific skills are not readily transferrable to other industries.

The first situation is deserving of further comment. When the demand conditions in a given market (say, for example, the labour market) change, economists speak of a market being in disequilibrium. It is in the interests of demanders and suppliers under the changed conditions to negotiate a new price/quantity mix at which each is satisfied. The market is said to "clear" at the new price/quantity mix, and thereby returns to an equilibrium position. The speed at which the market returns to equilibrium depends upon its relative efficiency: a market that clears quickly is relatively more efficient than one that clears slowly. Sykes suggests that anti-dumping protection should be more readily conferred upon distressed industries whose labour markets are especially inefficient, i.e., which will take longer to clear, for during the protracted negotiations necessary for the market to reach a new point of equilibrium, workers will be left in the lurch. Sykes furthermore suggests two indicators of an inefficient labour market: markets where wages are "inefficiently high" and where employment is "inefficiently low" (i.e. underemployment).[54] By way of conclusion, Sykes asserts that, whether the labour market is inefficient or whether workers have industry-specific skills, anti-dumping relief where properly applied "can delay the contraction of an industry while workers conduct their job search, so that workers can in many cases avoid the considerable financial and psychic costs of extended unemployment."[55]

This justification of anti-dumping has merit, but immediately poses two questions. First, does the anti-dumping regime as presently articulated in SIMA serve as a vehicle for dispensing assistance according to the concepts of social contractarianism or communitarianism? The second question is posed by Sykes himself: "[are] trade restrictions ... ever the best way to deliver such assistance"?[56]

The answer to the first question appears to be a resounding "no". In 1990, Hutton and Trebilcock published an empirical study of Canadian anti-dumping rulings.[57] The authors evaluated all thirty cases decided between October 1984, and February 1989, which resulted in the imposition of anti-dumping duties. They sought to determine whether any of those decisions were based on economic efficiency, social contractarian or communitarian considerations. They concluded that:

> in the vast majority of cases the actual invocation of anti-dumping remedies cannot be justified on *any* of these three normative justifications ... in the sense that none of the three values are present at all ...[58] (emphasis in original)

Given that SIMA espouses the value of protectionism, this conclusion should not come as a surprise. As already pointed out in this paper, the criteria by which the CITT determines "material injury"[59] is completely focused upon the preservation of domestic producers, and deals with the issues of providing relief to disadvantaged workers and communities in an offhand manner, if at all. To operationalize the values of social contractarianism and communitarianism within anti-dumping law, a new definition of material injury would have to be adopted. Some authors would add an additional requirement, namely the reform of the anti-dumping regime.[60] The goal would be to counterbalance the special relationship which exists between domestic

producers and trade remedy administrators by widening the channels of communication in favour of those stakeholder which have justifiable claims to assistance via anti-dumping duties. This recommendation springs from suspicions that domestic producers have in fact "captured" the anti-dumping regime, which in turn has unwittingly assimilated the partisan interests advocated by its constituents.

The answer to the second question, as to whether anti-dumping is the best way to deliver assistance to disadvantaged workers and communities, is somewhat more equivocal. One author asserts that "trade restrictions are generally a far more expensive means of preserving jobs than other adjustments policies".[61] Hutton and Trebilcock, in their 1990 empirical study of Canadian anti-dumping rulings, concluded that:

> those few cases which involved disadvantaged workers or dependent communities could have been more effectively dealt with by programs specially designed to deal with these problems, such as retraining and relocation assistance, or [in the agricultural sector] income stabilization programs.[62]

Yet the issue is not closed. Domestic adjustment programs may not, in all instances, be the lowest-cost means of delivering assistance where the dislocation brought about by disruptive, low-priced imports is especially severe.[63] The problem remains, however, that the Canadian anti-dumping regime, as presently articulated in SIMA, fails to weigh the relative cost of delivering assistance through the imposition of anti-dumping duties rather than through targeted domestic adjustment programs. This failing is critical to the justification of anti-dumping as a vehicle for dispensing equitable and distributive justice.

5. Predatory pricing revisited

As mentioned previously, anti-dumping law as expressed in SIMA cannot be characterized as a law against predatory pricing, for it does not measure up to the analytical standards established by analogous economic and competition policy. Moreover, economists and competition law enforcement authorities doubt the very existence of "classical" price predation as a profitable strategy in a domestic economy. Still, there are those who believe that international trade is different, and that predatory pricing in the guise of dumping is a real threat to domestic industry which must be countered.[64]

These commentators point to the possibility of a foreign exporter, who faces little competition in its home market, engaging in a policy of predatory pricing in the export market, "funded" by supra-normal profits earned back home. The predatory strategy need not achieve the total elimination of the competing domestic industry (i.e. "classical" predation). It would be sufficient for the pricing policy to discipline existing domestic producers and to discourage new entrants into the domestic market (i.e. "strategic" predation), whereby the foreign exporter could later "safely" profit by raising and maintaining export prices above competitive levels.

The key to this scenario, and the threat to the state of competition in the importing country's domestic market, is the market power enjoyed by the foreign producer in its home market:

> Financing low cost exports with *protected* domestic monopoly rents is a form of predation which ... does suggest a situation where what harms producers could also harm consumers (in the longer run).[65] (emphasis added)

As Bourgeois points out, market power could arise in circumstances where:

> the foreign producer's market is characterized by monopoly or oligopoly conditions;
> the foreign producer's market is protected by tariff or non-tariff barriers to entry;
> the relevant foreign antitrust enforcement agency is unable or unwilling to deal effectively with anti-competitive conduct in the exporting country's market; and
> the foreign producer operates within an export cartel tacitly or perhaps even officially sanctioned by the relevant foreign government.[66]

These observations all focus on the international dimension of the predation threat, and tend to substantiate the view that the international trade context better lends itself to credible predatory strategies. To the extent that a foreign exporter is able to influence domestic market pricing, and given that it can choose to exploit its home market power by engaging in successful strategic predation with the result that export prices can ultimately be sustained above competitive levels, one can only conclude that the foreign exporter has the hypothetical means to implement a pricing policy which could conceivably result in a substantial lessening of competition or the elimination of a competitor in the domestic market.[67]

Should an instance of predatory dumping be confirmed, what then? Naturally, the anti-competitive conduct must be reproved. It is on the choice of enforcement instruments to censure international price predation that defenders of the anti-dumping regime stake their strongest claim. Specifically, they observe that domestic competition laws do not have the extraterritorial reach required to strike at the real problem, namely the foreign exporter's protected home market.[68] Conversely, anti-dumping laws were designed specifically to discipline "unfair" export pricing in the international forum.[69] As one American commentator observes:

> The continuing need for [anti-dumping] measures reflects, to a significant degree, [the United States'] inability to ensure conditions of competition in major foreign markets which are comparable to those which prevail in our own.[70]

It is important to note that anti-dumping duties do not work to "dismantle" a foreign exporter's market power, unless trade administrators can use the anti-dumping duties as a bargaining chip in international negotiations to open up the exporter's home market. Instead, the anti-dumping remedy is in the nature of pushing the export price upwards. This type of relief risks deleterious consequences for the domestic competitive process. For example, anti-dumping duties may help to establish a price floor in the domestic market, a result diametrically opposed to the outcome sought under domestic competition law. This criticism, however, does not carry so far as to advocate dismissing the anti-dumping regime altogether. By neutralizing the anti-competitive conduct of a foreign exporter in the domestic market, the process of competition between the remaining domestic producers and foreign suppliers may yet establish competitive market prices. Instead, it brings into focus the basic reforms that must be effected to anti-dumping law as articulated in SIMA.

**What role anti-dumping?**
**Proposals for reform**

It is apparent that an anti-dumping regime can be justified only on two grounds: as a vehicle for dispensing equitable and distributive justice, and as a means of disciplining predatory dumping.

Unfortunately, anti-dumping cannot be all things to all people. The social justice values inherent in the former embodiment of anti-dumping are incompatible with the theoretical economic efficiency values of the latter, and as regards any given instance of dumping, the remedial objectives sought by each value set will rarely coincide. Given that: "domestic adjustment assistance policies are a substitute for any form of trade [relief] in dealing with adjustment costs, and typically entail fewer social costs",[71] anti-dumping law should be placed in the camp of competition policy as a weapon against predatory dumping, and "domestic adjustment assistance policies" should be used to address social justice concerns.

In doing so, anti-dumping law as expressed in SIMA must be reformed.[72] It is not open to serious challenge that SIMA can operate to punish non-predatory, transborder pricing policies which are in fact pro-competitive and efficiency-enhancing, even as it tries to discipline instances of true predatory pricing. Anti-dumping laws must therefore be changed along the lines of modern economic and competition policy thinking on the phenomena of predatory pricing.

Whether Canada should effect that reform on a unilateral, a bilateral, or a multilateral basis with its international trading partners is an issue beyond the scope of this paper. Intuitively, however, the Canadian economy can only benefit from non-predatory import competition. Any means to ensure the role of foreign competition in Canada should be welcomed as a positive development.[73]

A further consideration regarding the reform of anti-dumping should be reiterated. Even if the analytical framework of anti-dumping in Canada was to be completely made over in the image of domestic competition law, the remedy available under each regime in confirmed instances of predation betrays their fundamental difference. Relief from predatory dumping by way of anti-dumping duties affects the relative prices of competitors, and does not necessarily sustain price competition in a domestic market. Put another way, anti-dumping duties increase prices, whereas competition laws penalize predators. In the end, where extraterritorial application is not an obstacle nor a hindrance, domestic competition law should always be chosen ahead of anti-dumping law.[74]

**Concluding remarks: Anti-dumping laws and Canada-U.S. trade**

This choice is a real possibility in the special context of the Canada-United States Free Trade Agreement.[75] One option open to the Working Group established under Chapter 19 of the FTA, is to recommend exempting exports originating in Canada and the U.S. from the operation of each other's anti-dumping regimes:

> [a]ntidumping laws ... become largely unnecessary in a freer trade environment ... This is because the scope for market segmentation between the home and the export markets, (a necessary condition for dumping) is significantly reduced by the removal of tariff and non-tariff barriers which allow dumping to occur.[76]

In effect, the responsibility for policing trans-border predatory pricing would fall to Canadian and American competition (antitrust) law.

Several commentators believe that the hurdles to reach this state of affairs are less formidable than imagined.[77] In fact, there need be little change to applicable Canadian law since the wording found in s. 50(1)(b) concerning "regional price predation" and

s. 50(1)(c) concerning "predatory pricing" of the *Competition Act*, "every one engaged in a business who ... engages in a policy of selling products", may be interpreted to include one who sells into Canada from another country.[78] However, a slight amendment would be necessary to s. 50(1)(b) for the purposes of trans-border sales, so that competition law authorities may compare, where required, a seller's Canadian sale price with a price exacted by it in the U.S. On the administrative side:

> [a]lthough the actual structure of public enforcement may be somewhat different in the U.S. than in Canada, in the final analysis the approach to enforcement is very similar and the attitudes towards competition policy very much the same.[79]

As regards enforcement, one study suggests that very little in the way of modification to the rules governing evidence gathering, jurisdiction over persons, jurisdiction over activities and enforcement of orders, will be required to achieve a smoothly running system.[80] Nonetheless, it will be desirable to clarify which domestic competition law shall apply in any given case, and to ensure access to and the effectiveness of remedies for anti-competitive behaviour. Agreement on these matters could, however, proceed from a well established foundation. In effect, Canada and the United States would be building upon the 1984 "Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws."[81]

The last word on the feasibility under the FTA of replacing anti-dumping with competition law belongs to a representative of the Director of Investigation and Research, *Competition Act*:

> The replacement option ... may not require full harmonization of competition policy rules but rather only a certain degree of compatibility in law and practice as well as the institutional mechanism needed to resolve any differences or disputes. To the extent that amendments to our national laws are needed, these should not be substantive ... with respect to anti-competitive pricing practices.[82]

## Notes

1 A.E. Eckes, "The Interface of Antitrust and Trade Laws Conflict or Harmony? An ITC Commissioner's Perspective" (1987) 56 Antitrust L.J. 417 at 419.

2 S.D. Porteous and A.M. Rugman, "Canadian Unfair Trade Laws and Corporate Strategy" (1989) 3 Rev. Int'l Bus. L. 237 at 261.

3 Consider the movement subsumed within the *General Agreement on Tariffs and Trade* (1948), reproduced in B.I.S.D., vol. IV (1969).

4 Consider the role of import competition acknowledged in the "purpose" clause of the *Competition Act*, R.S.C. 1985, c. C-34, s. 1.1:

> The purpose of this Act is to maintain and encourage competition in Canada ... in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada ..."

Consider also *Competition Act* s. 93(a).

5 See A.O. Sykes, "GATT Safeguards Reform: The Injury Test" in M.J. Trebilcock and R.C. York, eds., *Fair Exchange: Reforming Trade Remedy Laws* (Scarborough, Ont.: McGraw-Hill Ryerson, 1990) 203 at 217.

6 P.A. Messerlin, "The Anti-dumping Regulations of the European Community: The 'Privatization' of Administered Protection" in Trebilcock and York, eds., *ibid.*, 107 at 121. See also J.A. Ordover et al., "Unfair International Trade Practices" (1982-83) N.Y.U. J. Int'l L. and Pol. 323 at 323.

7 *Free Trade Agreement between Canada and the United States of America*, being Schedule - Part A of the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65.

In the FTA, each party explicitly reserved the right to apply its domestic anti-dumping law to goods imported from the territory of the other, so as to "[maintain] effective disciplines on unfair trade practices" However, Chapter 19 of the FTA established a Working Group whose task *inter alia* is to reform the anti-dumping regime that exists between Canada and the U.S. The FTA provides that, should the parties fail to agree to implement a "substitute

system of rules" regulating their bilateral trade before January 1, 1996, either party may terminate the FTA on six-month's notice. See articles 1902, 1906 and 1907. One may fairly doubt the parties' resolve to respect this deadline, given that negotiations leading up to the draft *North American Free Trade Agreement* did not bring any "substitute system of rules" closer to reality.

[8] R.S.C. 1985, c. S-15.

[9] *Supra*, note 4.

[10] *Supra*, note 3.

[11] For a discussion of this investigatory stage of a dumping action, see J.N. Buchanan, "Anti-Dumping Law and the Special Import Measures Act" (1985-86) 11 Can. Bus. L.J. 2 at 15-21; see also J.-G. Castel et al., *The Canadian Law and Practice of International Trade* (Toronto: Emond Montgomery, 1991) at 339-349.

[12] SIMA, *supra*, note 8. With respect to "normal value", consult ss. 15, 19 and 20; as regards "export price", ss. 24 and 25(c)-(e).

[13] *Ibid.*, s. 2(1) "margin of dumping"

[14] *Ibid.*, s. 38.

[15] Buchanan, *supra*, note 11 at 16. In one dumping case, the CITT was moved to say that "Revenue Canada's methods of determining normal values, by their very nature, result in a situation in which dumping is inevitable in some instances": see *Commercial grade soda ash, originating in or exported from the United States of America* (9 June 1988), R-1-88 (C.I.T.) at 2.

[16] The definitions of "material injury" and of "retardation" are found at SIMA, *supra*, note 8, s. 2(1).

[17] G. Skogstad, "The Application of Canadian and U.S. Trade Remedy Laws: Irreconcilable Expectations?" (1988) 31 Can. Pub. Adm. 539 at 564:

> a fundamental feature of ... trade remedy systems ... is the discretion exercised by trade law administrators in interpreting key concepts in trade remedy laws, such as ... like industry/like product, and material injury.

[18] See J.-G. Castel et al., *supra*, note 11 at 358-59. Consider the *Canadian Import Tribunal Rules*, SOR/85-1068, r.36; consider also the *Agreement on the Interpretation of Article VI (Anti-dumping Code) of the GATT* (1979), reproduced in B.I.S.D. 26th Supp. 171 (1978-79), art. III, para. 3.

[19] L.L. Herman, "Injury Findings by the Canadian Import Tribunal: The Decisive Elements" (1987) 1 Rev. Int'l Bus. L. 373 at 395.

[20] For a general discussion of these two provisions, see M.R. Gillen et al., "Canadian and U.S. Antitrust Law Areas of Overlap Between Antitrust and Import Relief Laws" (1987) 12 Can.-U.S. L.J. 39 at 43-44 and 49-54. See also Canada, Director of Investigation and Research, *Competition Act, Predatory Pricing Enforcement Guidelines* (Hull: Supply and Services Canada, 1992).

[21] L.A.W. Hunter, "Antitrust and Trade Policy: A Peaceful Co-existence" (1988) 9:4 Can. Comp. Rec. at 49.

[22] I.R. Feltham et al., "Competition (Antitrust) and Anti-dumping Laws in the Context of the Canada-United States Free Trade Agreement" (1991) 17 Can.-U.S. L.J. 71 at 74. See also Porteous and Rugman, *supra*, note 2, at 260. Regarding the evidence accepted by the CITT respecting "material injury", L.A.W.Hunter states:

> The problem is that such evidence may merely demonstrate vigorous competition. All these factors have one common element: they focus on injury to *domestic competitors* and not injury to the *process of competition*. (emphasis added)

Hunter, *supra*, note 21 at 52.

[23] C.S. Goldman, "Competition, Anti-dumping, and the Canada-U.S. Trade Negotiations" (1987) 12 Can.-U.S. L.J. 95 at 98.

[24] Canada, Director of Investigation and Research, *Competition Act*, *supra*, note 20 at 10-11.

[25] "[P]rice variability is the *sine qua non* of an efficient market economy": see Feltham et al., *supra*, note 22 at 77.

[26] "[T]he notion of defining dumping as merely a price differential between a domestic and foreign market should be considered a test without much economic merit": Hunter, *supra*, note 21 at 51.

[27] Buchanan, *supra*, note 11 at 22.

[28] For a thorough discussion, see Canada, Director of Investigation and Research, *Competition Act*, *supra*, note 20 at i-ii and 5-13. See also Ordover et al., *supra*, note 6 at 324-25. The authors of the latter paper were the first to establish the concept of "contestable" markets, which concept revolutionized competition policy thinking in the area of predatory pricing.

[29] E.g. few firms in the industry, high degree of size inequality among firms, concentration of market share over time in one/a few firms, etc.

[30] Costs which cannot be recovered should the business fail, such as production-specific assets.

[31] Canada, Director of Investigation and Research, *Competition Act*, *supra*, note 20 at 1.

[32] S. Hutton and M. Trebilcock, "An Empirical Study of the Application of Canadian Anti-dumping Laws: A Search for Normative Rationales" (1990) 24 J.W.T. 3:123 at 141.

[33] See Messerlin, *supra*, note 6 at 121-23. See also Porteous and Rugman, *supra*, note 2 at 249.

[34] In fact ... it would appear that the discriminatory motive of these laws has become perhaps their most important selling virtue in the eyes of domestic proponents.

Hunter, *supra*, note 21 at 51.

[35] For a thorough discussion of SIMA s. 45, see Porteous and Rugman, *supra*, note 2 at 258-66.

[36] *Ibid.* at 259.

[37] (1987), 14 C.E.R. 1 (C.I.T.T.), *aff'd* [1989] 2 F.C. 517, *aff'd* (*sub nom. American Farm Bureau Federation* v. *Canadian Import Tribunal*), [1990] 2 S.C.R. 1324.

[38] See J.G. Castel et al., *supra*, note 11 at 370.

[39] *Ibid.*

[40] See for example J.T. Fried, "The Art of the Possible: A Comment" in Trebilcock and York, eds., *supra*, note 5, 286 at 291. See also S. Ostry, *Governments and Corporations in a Shrinking World: Trade and Innovative Policies in the United States, Europe and Japan* (New York: Council on Foreign Relations, 1990) at 41 et seq.

[41] See, for example, the views of B.F. Goodrich Company's then Chairman, J.D. Ong, discussing the "destruction" of the U.S. dynamic random access memory (DRAM) industry by "systematic dumping" from foreign (i.e. Japanese) chip-makers: J.D. Ong, "The Interface of Trade/Competition Law and Policy: A Businessman's Perspective" (1987) 56 Antitrust L.J. 425 at 429-30.

[42] J.H.J. Bourgeois, "Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective" (1989) I.B.L. 58 at 62.

[43] L.A.W. Hunter referring to a 1984 OECD survey report, *Competition and Trade Policies: Their Interaction*: see Hunter, *supra*, note 21 at 56, n.1 and n.3.

[44] Consider this colourful, if pointed, remark:

> The tack that trade policy often takes is the protection of the dinosaur. Trade policy consistently bets on the wrong horse. Not because it doesn't know horses, but rather because [those who would use trade policy to favour domestic producers at the expense of exporters] will promote those horses that cannot win in the open market.

K.G. Elzinga, "Antitrust Policy and Trade Policy: An Economist's Perspective" (1987) 56 Antitrust L.J. 439 at 444.

[45] See, for example, D. Rosenthal, "Interface Between Trade Law and Competition Law in the North American Context" (1987) 12 Can.-U.S. L.J. 107 at 108. See also Hunter, *supra*, note 21 at 49.

[46] Prior work on the political economy of protection suggests that the domestic pressures for protection reach their zenith when import-competing industries are suffering financially.
Sykes, *supra*, note 5 at 209.

[47] R.Z. Lawrence, "A Comment" in Trebilcock and York, eds., *supra*, note 5, 231 at 234.

[48] D. Rosenthal, "Antitrust Implications of the Canada-United States Free Trade Agreement" (1989) 10:1 Can. Comp. Rec. 50 at 52.

[49] Hutton and Trebilcock, *supra*, note 32 at 124.

[50] It is interesting to note that Hutton and Trebilcock would not include "providers of capital" in the class of "least advantaged members of society": *ibid.*

[51] *Ibid.*

[52] When trade relief is granted, consumers pay more for a product, but the loss is less immediate and less intense, and is shared more broadly through the population.
Rosenthal, *supra*, note 48 at 52.

[53] See Sykes, *supra*, note 5 at 213-27.

[54] *Ibid.* at 216.

[55] *Ibid.* at 219.

[56] *Ibid.*

[57] Hutton and Trebilcock, *supra*, note 32.

[58] *Ibid.* at 124.

[59] See especially SIMA, *supra*, note 8, s.42.

[60] See Fried, *supra*, note 40 at 289-91. See also M.J. Trebilcock, "Throwing Deep: Trade Remedy Laws in a First-Best World" in Trebilcock and York, eds., *supra*, note 5, 235 at 248 and 256-57.

[61] Trebilcock cites research which suggests that trade restrictions cost Canadian consumers $35,000 for each Canadian textile industry job saved, whereas the average annual wage in this industry was but $10,000: "Even a 100 percent wage subsidy for all affected workers would have served the purpose of job preservation, but at vastly less cost to consumers". See Trebilcock, *ibid*, at 253.

[62] Hutton and Trebilcock, *supra*, note 32 at 143.

[63] However, anti-dumping duties surely cannot be defended on the ground that they constitute a discrete, "hidden" tax applied over a broad base of consumers, whereas monies appropriated out of the treasury specifically to fund adjustment programs might raise the ire of Canadian taxpayers against "big-spending" government. This approach is fiscally irresponsible, and the only "savings' involved is the expenditure of the government's political will.

[64] Bourgeois, *supra*, note 42 at 62:

> It is ... somewhat simplistic to view the world as one single market which could be assimilated to the internal market of an industrialised country, to apply to it [domestic] regulatory schemes used to enforce competition rules ... and to throw the anti-dumping regulatory scheme out of the window.

See also Eckes, *supra*, note 1 at 423; Ong, *supra*, note 41 at 429-30; Rosenthal, *supra*, note 48 at 52-53; and G.B. Kaplan and S.H. Kuhbach, "The Causes of Unfair Trade: Trade Law Enforcers' Perspective" (1987) 56 Antitrust L.J. 445 at 451-56.

[65] Rosenthal, *supra*, note 48 at 53. See also Eckes, *supra*, note 1 at 423.

[66] Bourgeois, *supra*, note 42 at 62. See also Ordover et al., *supra*, note 6 at 229.

[67] Recall the test in ss. 50(b) and (c) of the *Competition Act*: see *Competition Act*, *supra*, note 4. The above mentioned hypothetical tracks the analytical framework

respecting predatory pricing proposed by the Director of Investigation and Research, *Competition Act*: see *supra*, note 28.

[68] The problems of proscribing anti-competitive conduct originating in a foreign country and having an impact upon Canada are manyfold, and are typical of most trans-border violations of any nation's domestic laws: investigation, collection of evidence, jurisdiction over the offence, jurisdiction over the offender (unless the offender has some legal presence in Canada), enforcement of any rulings or judgements, etc. See Castel et al., *supra*, note 11 at 396-403.

[69] See, for example, the views of Kaplan and Kuhbach, *supra*, note 64 at 452-56.

[70] Ong, *supra*, note 41 at 429. But see Rosenthal, *supra*, note 48 at 51-53.

Rosenthal discusses the *Matsushita* case brought by U.S. colour television manufacturers against Japanese colour TVs exported to the U.S. The Americans claimed that their Japanese counterparts were subsidizing dumped goods with monopoly profits earned in the protected Japanese market. Anti-dumping relief was granted in 1971; antitrust relief on account of predation was, however, finally refused in 1986. Rosenthal expresses agreement with the antitrust outcome, concluding that the evidence could not support a charge of predation. However, Rosenthal does not understand *Matsushita* to mean that an antitrust remedy is not available in circumstances of predatory dumping:

> careful antitrust enforcement which attacks [foreign market conditions] foreclosing United States exports ... and antitrust analyses which look more carefully at [exporters'] customer allocation arrangements and predation ... can begin to build a reconciliation of competition and trade policy. Note however that U.S. attitudes towards the extraterritorial application of American competition laws are notoriously more aggressive than those accepted in Canada.

[71] Trebilcock, *supra*, note 60 at 236.

[72] On the question of reform, Trebilcock, *ibid.*, notes that:

> it is impossible to address one form of ... protection measure without simultaneously addressing all the others because of their close substitutability. In other words, anti-dumping laws, countervailing duty laws, safeguard regimes, and bilateral quantitative restrictions [VERs, etc.] address similar phenomena and concerns; reforming one without reforming the others will simply lead to substitution among regimes.

[73] See *Competition Act*, *supra*, note 4, s. 1.1.

[74] Weighing the problems of extraterritoriality and lack of harmony between various domestic competition laws, one commentator suggests that a supra-national competition authority is the logical (but impossible?) answer: see S. Ostry, "Anti-dumping: The Tip of the Iceberg" in Trebilcock and York, eds., *supra*, note 5, 17 at 20.

[75] *Supra*, note 7.

[76] Hunter, *supra*, note 21 at 52. See also Goldman, *supra*, note 23 at 98.

[77] See Feltham et al., *supra*, note 22 at 81-159. See also Hunter, *supra*, note 21 at 54-55; Rosenthal, *supra*, note 45 at 109-11.

[78] See Feltham et al., *supra*, note 22 at 99-100.

[79] Hunter, *supra*, note 21 at 54.

[80] Feltham et al., *supra*, note 22 at 158.

[81] (1984), 23 I.L.M. 275.

[82] D. Ireland, "The Government Perspective: Effects upon Present Competition Policy" (1991) 17 Can.-U.S. L.J. 189 at 192-93.

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