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Fair or Unfair Trade: Does it Matter

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FAIR OR UNFAIR TRADE: DOES IT MATTER?*

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Like almost everyone else interested in an open trading system, I was delighted when the Tokyo Round finally came off. Given all the tugs and pulls, and the dangers that threatened on every side, it was in the end more important that the seventh Multilateral Trade Negotiations (MTN) could be called a success than that any given issue—whether safeguards or subsidies or government procurement or even cheese—came out right. I want to start, therefore, by saluting those who made it possible, and in particular Ambassador Robert Strauss, who proved that skill at deal-making is more important than an appreciation of the fine points of the law of GATT or the economics of international trade.

I make these initial remarks not only because I believe them to be true and worth recognizing, but because I am anxious that what follows will not be regarded as churlish. I *do* think the Tokyo Round was worthwhile, indeed essential. I do *not* think any country, including the United States, gave more than it got. I am afraid, however, that the fundamental problems of our mature industrial societies were deflected rather than squarely addressed in the MTN, and I am concerned that excessive expectations will lead to excessive let-down, or excessive cynicism.

I

I believe the Tokyo Round was sold to all the participants—and certainly to Americans—as a way of restoring fairness in international trade. "Of course we can and want to compete," went the slogan. "What needs to be done is to separate fair and unfair trade, and then we can all benefit from the advantages of an open market system, from specialization, comparative advantage, and rational allocation of resources." The analogy, in a

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real sense, is to the antitrust laws in the United States. Everyone is for an open market and against special shelters, so long as it is clear that no one is able to engage in predatory conduct, to abuse a dominant position, or to prevent potential rivals from entering a market. My question is whether we really mean all of that in the context of international trade.

The effort to separate fairness from unfairness in international trade has taken, let's face it, some rather odd paths. Under the heading of "dumping"—the premier sin of international trade—we make detailed inquiries about what an exporter charges for a product in his home market.[1] Do we really care about that? Is it of any concern to the American worker fearful for his job in Detroit what a Toyota costs in Nagoya? Is it any comfort to him if, in response to an investigation or a lawsuit initiated in the United States, the manufacturer in Japan lowers his domestic price? Oh yes, I have heard the theory that excessive mark-ups in the home market may "subsidize" exports.[2] I'm not sure anyone really believes that; I am sure that no inquiry into dumping in this country or elsewhere undertakes to prove it. The fact is that dumping as the GATT (and U.S. law) define that term is hardly *malum in se*. And it is *malum prohibitum* only if another element is added—injury to the importing country's industry or a portion of that industry.[3] And so we shift back from looking at *conduct* in the exporter's country to looking at the *effect* in the importer's country.

We have had repeated episodes in the United States where an exporter in country *A* is not "selling at less than fair value" because his home market price (after all the mysterious debits and credits and currency conversions) is not determined to be above his export price.[4] Then exporter *B*, matching *A*'s prices, is determined to be dumping, because his home market prices

1. *See, e.g.*, Antidumping Act of 1921, Pub. L. No. 67-10, § 201, 42 Stat. 11, *as amended by* Trade Act of 1974, § 321, 19 U.S.C. § 160 (1976) (superseded by Trade Agreements Act of 1979, § 101, 19 U.S.C.A. §§ 1673-1673i (West 1980) (adding new §§ 731-740 to the Tariff Act of 1930, ch. 497, 46 Stat. 687)); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *done* June 30, 1967, art. 2, 19 U.S.T. 4348, 4349-50, T.I.A.S. No. 6431, at 3-4 [hereinafter cited as 1967 Antidumping Code]; General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, Art. VI(1), 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194, 212, *reprinted in* 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter cited without cross reference as GATT].

2. *See* K. DAM, THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 169 (1970). Professor Dam characterizes this theory as a "common fallacy." *Id.*

3. *See, e.g.*, Trade Agreements Act of 1979, § 101, 19 U.S.C.A. § 1673 (West 1980) (adding new § 731 to the Tariff Act of 1930, ch. 497, 46 Stat. 687); 1967 Antidumping Code, *supra* note 1, arts. 3-4, 19 U.S.T., at 4351-53, T.I.A.S. No. 6431, at 5-7; GATT Art. VI(1).

4. *See, e.g.*, The Wire Rod Cases: Steel Wire Rods From Japan, 28 Fed. Reg. 4,636 (1963) (Treasury determination that hot-rolled carbon steel wire rods from Japan not sold at less than fair value within the meaning of § 201(a) of the Antidumping Act of 1921).

are higher.[5] Finally, there is no remedy because *A* has taken enough of the market so that *B*'s participation is not deemed to be causing injury.[6] I am able, with some effort (and a massive Documents Supplement) to explain that recurring situation to my well-prepared law students.[7] Try to explain it to the domestic competitor or his worker and you will see how hard it is. Or, if the case comes out the other way, try to explain to the worker in *B*, say Belgium, or to his employer, why, if his products sell in the United States for the same price as *A*'s products, one can and the other cannot continue to be sold at that price.

So much for the moment for dumping, the sin we thought we knew most about. In the Tokyo Round the main achievement, we are told, was the joint assault on subsidies.[8] Again, one might suggest that if the taxpayers of Patria are content to contribute their sweat to the low prices in Xandia, Xandians ought to be thankful and not upset. But nearly everybody today is too smart for that little gambit. We understand that the concern is not for the customer but for the competitor; that tariffs are the one accepted currency of international trade; and that a subsidy at the exporter's end undoes the tariff at the importer's end. The U.S. Congress, as far back as 1897[9] and up to the 1974 Trade Act,[10] was clear enough about the point to authorize (and require) measures against subsidized products only if the products were subject to import duties to begin with.[11] In other

5. *See, e.g.,* Steel Wire Rods From France, 28 Fed. Reg. 5,392 (1963) (Treasury determination that hot-rolled carbon steel rods sold for less than fair value); Steel Wire Rods From West Germany, 28 Fed. Reg. 3,364 (1963) (same); Steel Wire Rods From Luxembourg, 28 Fed. Reg. 2,927 (1963) (same); Steel Wire Rods From Belgium, 28 Fed. Reg. 2,747 (1963) (same).

6. *See, e.g.,* Hot-Rolled Carbon Steel Wire Rods From France, 28 Fed. Reg. 7,368 (1963) (Tariff Commission determination of no injury or likelihood of injury); Hot-Rolled Carbon Steel Wire Rods From West Germany, 28 Fed. Reg. 6,606 (1963) (same); Hot-Rolled Carbon Steel Wire Rods From Luxembourg, 28 Fed. Reg. 6,476 (1963) (same); Hot-Rolled Carbon Steel Wire Rods From Belgium, 28 Fed. Reg. 6,474 (1963) (same).

7. The cases cited in notes 4-6 *supra,* as well as the relevant statutes and international agreements, are reprinted in A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 163-75 and Documents Supplement (1979).

8. This assault resulted in the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, GATT Doc. MTN/NTM/W/236 [hereinafter cited as Subsidies Code], *reprinted in* AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, 96th Cong., 1st Sess. 257 (1979) [hereinafter cited without cross reference as H.R. DOC. NO. 153].

9. *See* Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151 (repealed by Tariff Act of 1909, Pub. L. No. 61-5, § 28, 36 Stat. 11).

10. *See* Trade Act of 1974, § 303(a)(2), 19 U.S.C. § 1303(a)(2) (1976) (amended 1979).

11. Section 303 of the Tariff Act of 1930 applied only to "merchandise . . . dutiable under the provisions of this Act." Tariff Act of 1930, ch. 497, tit. III, § 303, 46 Stat. 687 (amended 1974). The Tariff Act of 1974 amended section 303 to apply also to articles not subject to ordinary duties. *See* 19 U.S.C. § 1303(a)(3) (1976) (amended by Trade Agreements Act of 1979, Pub. L. No. 96-39, § 103, 93 Stat. 144). The 1974 Act required an injury determination

words, if protection against *fair* trade was not needed—either because the United States had a real cost advantage or because the product was not made in the United States in sufficient quantity—then there was no need to protect against *unfair* trade. And so the importing country's remedy against subsidy was born—a duty on top of another duty imposed by the importing country equal (again assuming one could calculate it) to the subsidy bestowed by the exporting country.

The rest of the world did not agree that subsidies were *malum in se* either, or in any event were worse than dumping. The framers of the GATT not only decided that subsidies should be countervailed only in case of material injury;[12] in the one real prohibition on subsidies, the 1957 declaration that in 1962 became Article XVI(4) of the General Agreement,[13] the subscribing countries pledged to refrain only from subsidies that resulted in an export price lower than the home market price, *i.e.,* a standard parallel to the dumping standard. In the Tokyo Round, as everyone in the field knows, the major achievement was acceptance by the United States of an injury requirement before imposing a countervailing duty on imports of subsidized products.[14] It is rather interesting that this was thought of as a major achievement by the Europeans. My own impression is that (at least until 1974) the United States practically never imposed countervailing duties except in the case of a complaint by an industry that kept nagging the Treasury, and the nagging was not so different from what will now be required in a more formal demonstration of injury.[15] It is true that we did not have the two-step process of determination first by the Treasury and then by the Tariff Commission or International Trade Commission. But the idea that the United States was going around punishing conduct that it but not others considered bad even though it did no one any real harm, *i.e.,* that the United States was going around enforcing laws against victimless crimes, was always much more theoretical than real.

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in the case of these previously nondutiable products to comply with GATT Article VI. The U.S. exemption from the requirement of GATT Article VI did not apply to legislation enacted after the United States became a member of GATT. *See* Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. A-2051 (1947), *reprinted in* 4 BISD at 77.

12. GATT Art. VI(6)(a).

13. *See* GATT Art. XVI(4), BISD (9th Supp.) 32 (1961). *See also id.* at 185 (report of the working party that developed the Declaration).

14. *See* Subsidies Code, *supra* note 8, arts. 2(1), 4(3), & 6, H.R. Doc. No. 153, at 261-62, 267, 272-75. The corresponding amendment to U.S. law appears in the Trade Agreements Act of 1979, § 101, 19 U.S.C.A. § 1671 (West 1980) (adding new § 701 to the Tariff Act of 1930).

15. *See* Trade Agreements Act of 1979, § 101, 19 U.S.C.A. §§ 1671a-1671d (West 1980) (adding new sections 702-705 to the Tariff Act of 1930).

What did the United States get in return for its "concession?" Well for one thing, the prohibition on subsidies with respect to industrial products from developed countries was made explicit, and was linked to a quite useful illustrative list of prohibited devices.[16] For another, provision was made for a two-track complaint procedure, so that the countervailing duty was not the only remedy and an importing country was not the only party that might take action against a prohibited subsidy.[17] A third change, largely overlooked in the commentary that I have seen, was the elimination of the comparison between home market and export price for subsidized products.[18] I think these steps taken together represent improvement, though a rather small step from the point of view of the American position, because subsidies on production, in contrast with subsidies on exports, were merely recognized but not forbidden.[19]

But having gone through these finger exercises with you, let me repeat my earlier question. Does it really make any difference to the United States as an importing country whether a home-market price is higher or lower or the same as an export price? The fact that that question will continue to be asked with respect to dumping[20] but will no longer be asked with respect to subsidies suggests that we are not sure. I had always thought that business or labor in a domestic industry upset by imports didn't draw any distinction between dumping and subsidies—that was the concern of lawyers or bureaucrats. So long as one could label the competition as "unfair," one might secure protection against it without offending against the overall perceived advantages of an open trading system.

Putting that point another way, our ambivalence toward free trade on one side and protection on the other is neatly coped with when we can shift the focus from the importing to the exporting country. The real concern however, is with the impact in the importing country, whether we call it

16. *See* Subsidies Code, *supra* note 8, art. 9 and Annex, H.R. Doc. No. 153, at 278.

17. *Id.* arts. 12-13, 17-18, H.R. Doc. No. 153, at 282-83, 288-91.

18. Of course, signatories to the Subsidies Code never intended it to be an amendment to the GATT. Nevertheless, the Code contains no statement comparable to the directive of GATT Article XVI(4):

> [C]ontracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product *which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market.*

(emphasis added).

19. *Compare* Subsidies Code, *supra* note 8, art. 8(3), H.R. Doc. No. 153, at 277, ("any subsidy") *with id.* arts. 8(2) and 9, H.R. Doc. No. 153, at 277, 278, ("export subsidies"). *See also id.* art. 11, H.R. Doc. No. 153, at 279-81 (list of six potential objectives achievable through the use of subsidies other than export subsidies).

20. *See, e.g.,* 1967 Antidumping Code, *supra* note 1, art. 2(a), 19 U.S.T. at 4349, T.I.A.S. No. 6431, at 3.

"material injury," "market disruption," or whatever. Whether the competing exporter lowers his home country costs or prices, whether his taxes are direct or indirect, remitted or lowered, is on the whole beside the point, except to some Olympian economist or econometrician who works out a truly rational allocation of resources. In the Smith/Ricardo model, the effort to measure true (as contrasted with distorted) costs is important, because the resources dedicated to the comparatively higher cost industry in the importing country will be shifted to other products. The English vintners will grow flax and produce linen, and the Portuguese weavers will turn to the vineyards.[21] I violate no confidence in suggesting that outside of college economics texts, people don't act according to that model, except over quite a long term.

From the time we began to engage in sectoral trade negotiations for steel, pulp and paper, aluminum, chemicals, and textiles during the Kennedy Round, and even more in the Tokyo Round, we recognized that we no longer, at least wholeheartedly, believe in comparative advantage as framed by Smith, Ricardo, and Mill. No one says that Japanese should build all the cars and TV sets and Americans should grow all the rice and soybeans. We do in fact think in terms of comparative efficiency, product-by-product, not comparative advantage as if factors of production in all countries were mobiles on a chart. We may compare Toyota with Chrysler or Ford, but certainly not with Pillsbury Mills or Boeing. I think that means we—and I refer to all industrial nations—are concerned about market share, import penetration, and similar terms looking to the importing, not to the exporting country.

II

It is very interesting that the one exercise that was supposed to address the question of market share in the Tokyo Round, the so-called Safeguards Code,[22] failed to be carried to conclusion, though one still hears that negotiations will resume.[23] The public story is that the Safeguards Code failed for lack of agreement about selectivity, *i.e.,* whether importing countries

21. *See* D. RICARDO, PRINCIPLES OF POLITICAL ECONOMY AND TAXATION, ch. VII (1817).

22. The draft of the Safeguards Code is reprinted in A. LOWENFELD, *supra* note 7, at DS-560 to DS-571.

23. A draft of the Safeguards Code, with many critical points left blank, was circulated in January, 1979 as part of the consultations initiated by President Carter pursuant to § 102(e) of the Trade Act of 1974. *See* 44 Fed. Reg. 1,933, 1,936 (1979). *Cf.* GATT Doc. GATT/1234 (April 12, 1979) (signatories agreed that the negotiations should continue "with the objective of reaching agreement before 15 July 1979"), *quoted in* Graham, *Results of the Tokyo Round,* 9 GA. J. INT'L & COMP. L. 153, 174 (1979).

could depart from Most-Favored-Nation (MFN) status to protect themselves against imports that didn't qualify under the definition of unfair competition.[24] I have a feeling that while the selectivity issue was real enough, the failure ran deeper. Discussion of a Safeguards Code—*i.e.*, a set of rules about protection against "fair" imports—raises the issues of market share, and of levels of tolerance for imports, that no one has been prepared to face, except ad hoc. The Trigger Price Mechanism (TPM) for steel in the United States,[25] the Simonet-Davignon Plans for the same products in the European Community,[26] the international aspects of the Common Agricultural Policy,[27] and the various textile agreements[28] are all manifestations of a concern about imports in a greater amount than is acceptable, or at prices inconsistent with targets set for reasons other than the economists' dream of prices approaching costs of the most efficient producers. Neither in automobiles nor, for the most part, in grains or textiles are practices by exporters "unfair" within the accepted rules. The crises are real enough, but they turn on the value of imports, not on the difference between fair and unfair conduct by the exporters.

Take the trigger price mechanism established in the United States at the beginning of 1978 to control imports of steel.[29] The alleged statutory authority under U.S. trade law was the antidumping law.[30] But with respect to imports from Japan, no effort was made to prove that imports were coming in at prices below those charged in Japan. With respect to imports from the European Coal and Steel Community, as well as from other countries, no effort was made to exclude imports that were coming in below foreign prices—the traditional (and statutory) definition of dumping—so

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24. *See, e.g., id.*

25. *See* "Trigger Prices" for Imported Steel Mill Products, 43 Fed. Reg. 1,464 (1978), *reprinted in* A. LOWENFELD, *supra* note 7, at DS-490.

26. *See* Common Steel Policy, 19 O.J. EUR. COMM. (No. C 303) 3 (1976); Commission Decision No. 3017/76/ECSC of 8 Dec. 1976, 19 O.J. EUR. COMM. (No. L 344) 34 (1976).

27. *See* Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, arts. 38-47, 298 U.N.T.S. 3, 30-36.

28. *See, e.g.*, Arrangement Regarding International Trade in Textiles, BISD (21st Supp.) 3 (1975).

29. *See* note 25 *supra*. *See generally* A. LOWENFELD, *supra* note 7, at 255-65 and DS-490 to DS-518; A Comprehensive Program For the Steel Industry: Report to the President (submitted by Anthony M. Solomon, Chmn., Administration Task Force, Dec. 6, 1977) [hereinafter cited as A Comprehensive Program For the Steel Industry], *reprinted in Administration's Comprehensive Program For the Steel Industry: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 3-38 (1978) [hereinafter cited as *Steel Industry Hearings*].

30. Antidumping Act of 1921, Pub. L. No. 67-10, § 205, 42 Stat. 11, *as amended by* Trade Act of 1974, 19 U.S.C. § 164 (1976) (repealed 1979). *See also* A Comprehensive Program for the Steel Industry, *reprinted in Steel Industry Hearings, supra* note 29, at 17.

long as the price was above the trigger price set by the U.S. government.[31] And how was that price set? U.S. government officials were careful to point out that the trigger price was not like the target price for grains in the EEC's Common Agricultural Policy, because it was determined by external and not internal factors.[32] That was indeed an important difference. An exporter seeking to sell grains to the Community could not gain greater access by lowering his prices; the variable levy would simply be increased correspondingly. By contrast, a Japanese exporter (or at least all Japanese exporters) might, by reducing their costs, be able to reduce the trigger price, which was based on the computed costs of the Japanese steel industry.[33] If during a recession, Japanese mill-owners were prepared to keep producing and exporting with a four percent profit, was that an unfair trade practice? I know of no rule in GATT or elsewhere that prescribes a given margin of profit.

In fact, the TPM was the perfect straddle. There was enough of an aura of unfairness about lower-priced imports to take the onus, or some of the onus, off the American steel industry that for a variety of reasons had lost some of its competitive strength. There was also sufficient evidence of unemployment, plant closings, rising inventories, and falling profits to make out a case for special treatment for steel without going through the elaborate procedures of an escape clause action.[34] To me, the motive was clear. Domestic industry and labor were to be given some shelter, but not complete protection. A rough calculation seems to have been made of what was a tolerable level of capacity utilization by the domestic industry, and what was an acceptable level of imports.[35]

The corresponding program in the European Community, known usually as the Davignon Plan, was even more clearly based on calculation of a

31. *Cf. id.* at 21 ("The implementation of the trigger price mechanism may not prevent less efficient producers from selling steel products at less than "fair value" within the meaning of the Antidumping Act."). The report clearly stated, however, that an affected U.S. industry was free to "pursue the traditional remedies under the Antidumping Act if that appeared appropriate." *Id. See also id.* at 229 (testimony of Robert H. Mundheim, General Counsel for Tariff Affairs, Treasury Dept.) ("Treasury would not self-initiate [an investigation] where sales were above the trigger price mechanism because under those circumstances there was no external reason for Treasury to believe injury would result.").

32. *See* A. LOWENFELD, *supra* note 7, at 266-67.

33. Note, however, that the U.S. Government added to its already difficult calculations of actual costs a seven percent mark-up for overhead and eight percent of all non-capital costs for profits. *See* Revisions By Treasury Steel Trigger Price Task Force, 43 Fed. Reg. 32,710 (1978).

34. Trade Act of 1974, §§ 201-284, 19 U.S.C. §§ 2251-2394 (1976) *See generally* Jacobs & Hove, *Remedies for Unfair Import Competition in the United States,* 13 CORNELL INT'L L.J. 1, 21-23 (1980).

35. For a discussion by the person who actually performed the calculations of the trigger price for steel, see Crandall, *Competition and "Dumping" in the U.S. Steel Market,* CHALLENGE, July-Aug. 1978, at 13.

share of the domestic market. Condensing for the sake of brevity a series of measures that were not all taken at once, the European Commission set prices for given products some twenty percent above market prices, imposed and allocated production quotas for steel mills within the Community, and then looked for a way to prevent imports (not only from Japan but from Spain, Australia, and most important, the East European countries) from interfering with the domestic program. The remedy hit upon was to publish a reference price (using incidentally, the calculations made by the United States for its TPM) below which products would be considered to be dumped.[36]

To be sure, an exporter might have brought a complaint proceeding under Article XXIII of the GATT,[37] or even under the Community's own procedures.[38] Meanwhile, however, the "antidumping duties" would be in place. But if the exporting country would agree to an orderly marketing agreement, with prices four to six percent below the Community's reference price and a volume restraint nine percent below 1976 shipments, the Community would suspend the antidumping proceedings.[39]

In short, an accusation of unfair trade was made in order to develop a fast-track remedy against interference with a domestic support program. But the threat of imposing the remedy was used to exact an agreed "safeguard," *i.e.,* a solution normally reserved for disruptive effects of *fair* trade.[40]

I bring these cases up not to point a finger at the United States or at the European Community, but to point out how indistinct the difference between fair and unfair trade has become. Just to mention one more episode, still developing as these remarks are being made, I found it fascinating that the European Community, after complaining for weeks about subsidization

36. The various phases of the Davignon Plan were announced in successive issues of the Official Journal of the European Communities. *See, e.g.,* Commission Decision No. 3004/77 ECSC of Dec. 28, 1977, 20 O.J. EUR. COMM. (No. L 352) 13 (1977); Common Steel Policy, 19 O.J. EUR. COMM. (No. C 303) 3 (1976); Commission Decision No. 3017/76/ECSC of 8 Dec. 1976, 19 O.J. EUR. COMM. (No. L 344) 24 (1976). No comprehensive statement of the Plan was ever published. *See* A. LOWENFELD, *supra* note 7, at 278-304 for a chronology and more detailed description of the Davignon Plan.

37. GATT Art. XXIII.

38. *See generally* Van Bael, *Ten Years of EEC Antidumping Enforcement,* 13 J. WORLD TRADE L. 395, 395-401 (1979).

39. *See* A. LOWENFELD, *supra* note 7, at 292. The European Community entered into such agreements with Australia, Czechoslovakia, Hungary, Japan, South Africa, Spain, and, under slightly different terms, with all of the steel-producing countries of the EFTA (Austria, Finland, Portugal, Sweden, and Switzerland). *Id.* at 292-93.

40. In fact, even before the steel crisis became acute in Europe, the EEC seems to have used the antidumping laws more as a form of pressure to secure restraint agreements than as a means of actually policing unfair trade. *See* Van Bael, *supra* note 38, at 397-98.

and other unfair practices in the United States with regard to petroleum-based synthetic fibers, took action to restrain imports not under the Subsidies Code (or Article VI) but under Article XIX of the GATT. There may be several explanations. Subsidies, especially export subsidies, might be hard to prove or a countervailing duty may not have been thought as effective as an immediate import quota. But when you come right down to it, whether United States exporters were competing fairly or unfairly was far from the prime concern of the authorities in London or Brussels, let alone in Belfast. It would sound good to scream "foul!," but the claim was largely irrelevant. The real focus, quite clearly, was on the importing, not the exporting country.

III

What *is* the acceptable level of market penetration for foreign goods? Obviously the answer is different for different countries, different products, different times. It is easy, indeed, to say that this is a political question. I would not deny that. But I don't think it follows that either economists or lawyers can afford therefore to shrug their shoulders and turn away. For the lawyers, the task remains of turning shared perceptions into more or less articulate formulas. Typically, the lawyer's response will be to replace substance by procedure, say a requirement that this or that "fact" be determined by a commission, perhaps national, perhaps international, or that this or that party will have the "burden of proof," or that factors "including but not limited to" the following shall be considered in making the determination. Economists may add some additional advice, such as the period of time in which (1) to measure an increase in imports to see whether it is excessive, or (2) to give breathing room to the endangered industry to make it shape up.

In fact, the list of criteria in the 1967 Antidumping Code[41] and the 1979 Subsidies Code[42] would do quite well for an inquiry into injury caused by increased imports that can not be characterized as unfair. The only difference, perhaps, is the adjective that modifies the word injury—"material," "substantial," "serious"—or in the Subsidies Code, no adjective at all.[43]

41. 1967 Antidumping Code, *supra* note 1, arts. 3(b)-(d), 19 U.S.T. at 4351-52, T.I.A.S. No. 6431, at 5-6.

42. Subsidies Code, *supra* note 8, arts. 6(2)-(5), H.R. Doc. No. 153, at 272-74.

43. Although Article 6 of the Subsidies Code refers only to the word "injury," a footnote to Article 2(1) explains "that the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry." Subsidies Code, *supra* note 8, art. 2(1), H.R. Doc. No. 153, at 262 n.1.

I understand that these adjectives have been fought over with great tenacity, both in Geneva and in Washington. Having never been directly bloodied by one of these battles, I am perhaps not as sensitive to the fine distinctions as I should be. Let me take you through another brief finger exercise, however, the escape clause in the United States trade legislation, which as you know is the starting point for "import relief" in cases where unfair competition cannot be shown. In the Trade Agreements Act of 1951, as amended in the course of the 1950's,[44] the criterion for import relief was that [1] any product on which a concession has been granted under a trade agreement, is [2] "as a result in whole or in part of the duty . . . reflecting such concession, [3] being imported into the United States in such increased quantities, either actual or relative, as to [4] cause or threaten serious injury to the domestic industry producing like or directly competitive products."[45] Point [4] was explained further by a statement in the statute that [5] "[i]ncreased imports . . . shall be considered as *the* cause [of injury] . . . when the Commission finds that [they] have *contributed substantially* towards causing or threatening serious injury to such industry."[46]

In the Trade Expansion Act of 1962,[47] criterion (1), limiting relief to products on which a trade agreement concession had been granted, remained intact; criterion (2) was changed to read "as a result *in major part,*" rather than "in whole or in part" of the concession; criterion (3), describing the increase in imports as either actual or relative was eliminated; criterion (4) about causation remained intact.[48] Criterion (5), however, was changed from "increased imports that have *contributed substantially*" to "*have been the major factor*" in causing, or threatening to cause serious injury.[49]

These changes were seen at the time as a victory for international trade and defeat for the forces of protection.[50] Later, of course, as it was realized that adjustment assistance and orderly marketing agreements were linked to the same criteria, there was something of a change of heart in Congress, and perhaps also in the Executive Branch.[51] In the Trade Act of 1974,[52]

44. Trade Agreements Extension Act of 1951, Pub. L. No. 82-51, 65 Stat. 72, *as amended by* Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673.

45. *Id.* § 6(a) (repealed by Trade Expansion Act of 1962, Pub. L. No. 87-794, § 257(e)(1), 76 Stat. 872).

46. *Id.* § 7(b) (emphasis added).

47. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (current version codified in scattered sections of 19 U.S.C.A. (West 1980)).

48. *Id.* § 301(b)(1).

49. *Id.* § 301(b)(3) (emphasis added).

50. *See, e.g.,* Metzger, *The Trade Expansion Act of 1962,* 51 GEO. L.J. 425, 442-48, 466-69 (1963).

51. *See, e.g.,* Metzger, *Adjustment Assistance,* in 1 UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 334-38 (Comm'n on Int'l Trade and Investment Policy ed. 1971).

criterion (1) (the link between increased imports and a trade agreement concession) was eliminated; criterion (3) was changed back so that an increase in imports could again be either absolute or relative; and criterion (5) describing the causal connection between imports and injury was changed back to "a substantial cause of serious injury or threat thereof."[53] These were clearly changes in the direction of protection. If the principal cause of the increased imports was lower costs and therefore lower prices in the exporting country, import relief might still be granted, regardless of what had happened to tariffs. Moreover, even if an American industry's troubles could be laid largely to a fall in domestic demand attributable to a recession, import relief could be granted, as in the Specialty Steel Case, if increased imports were also an "important cause of injury and not less in importance than the recession."[54]

In the Trade Agreements Act of 1979,[55] the provisions of U.S. law dealing with import relief for "fair" trade were not changed. With respect to "unfair" trade, however, Congress was quite active in the three-cornered negotiations with Ambassador Strauss and the European Community. After much haggling, the criterion for imposing either antidumping or countervailing duties was finally agreed to read "material injury."[56] The legislative history and popular understanding suggest that this standard is different from the escape clause standard, at least in the quantum of injury needed to authorize relief.[57] I am not sure the words of the statute fully bear out this understanding, except that price seems to play a somewhat greater role in the dumping/subsidies context.[58]

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52. Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1976) (amended 1979).

53. *Id.* § 201(b), 19 U.S.C. § 2251(b)(1) (1976).

54. *See* INT'L TRADE COMM'N, STAINLESS STEEL AND ALLOY TOOL STEEL: REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-5, at 13, U.S.I.T.C. Publ. 756 (1976). President Ford's action on that Report is recorded in Procl. 4445, 41 Fed. Reg. 24,101 (1976), *corrected in* 41 Fed. Reg. 29,089 (1976).

55. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of 19 U.S.C.A. (West 1980)).

56. 19 U.S.C.A. § 1671(a)(2) (West 1980) (adding new § 701(a)(2) to the Tariff Act of 1930). The statute now defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C.A. § 1677(7) (West 1980) (adding new § 771(7) to the Tariff Act of 1930).

57. *See, e.g.*, H.R. REP. No. 317, 96th Cong., 1st Sess. 47 (1979), where the House Comm. on Ways and Means stated:

> [T]he Committee does not view overall injury caused by unfair competition, such as dumping, to require as strong a causation link to unfairly competitive imports as would be required for determining the existence of injury under fair trade conditions.

See also S. REP. No. 249, 96th Cong., 1st Sess. 58 (1979).

58. For example, § 201(b) of the Trade Act of 1974, 19 U.S.C. § 225(b)(2) (1976) (amended 1979), contains no provision corresponding to the new § 771(7)(c)(ii) of the Tariff Act of 1930, 19 U.S.C.A. § 1677(7) (West 1980).

It is interesting to compare side-by-side the criteria for import relief under section 201 of the Trade Act of 1974 ("fair" competition) and section 771(7) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 ("unfair" competition):

1974 Act

* * * *

(2) In making its determinations under paragraph (1), the Commission shall take into account all economic factors which it considers relevant, including (but not limited to)—

(A) with respect to serious injury, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry;

(B) with respect to threat of serious injury, a decline in sales, a higher and growing inventory, and a downward trend in production, profits, wages or employment (or increasing underemployment) in the domestic industry concerned; and

(C) with respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers.

. . . .

(4) For purposes of this section, the term "substantial cause" means a cause which is important and not less than any other cause.[59]

1979 Act

* * * *

(C) EVALUATION OF VOLUME AND OF PRICE EFFECTS.—For purposes of subparagraph (B)—

(i) VOLUME.—In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

(ii) PRICE.—In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iii) IMPACT ON AFFECTED INDUSTRY.—In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices, and

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.[60]

It may be that there is 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 contrib-

59. 19 U.S.C. § 2251(b)(2) (1976) (amended 1979).

60. 19 U.S.C.A. § 1677(7)(C) (West 1980).

utory negligence in an automobile accident, simply does not exist in determinations of the kind we are talking about.

I don't want, in raising the question of burden of proof, to be distracted to a side issue. The central point I want to make is that for both "fair" and "unfair" trade we now have very similar (if not quite congruent) criteria which look to the importing and not to the exporting country. I understand that in close cases, the International Trade Commission in the United States is more likely to find injury after there has been a finding of dumping or subsidization by the executive branch (formerly Treasury, now Commerce).[61] Certainly a lawyer retained to seek import relief for a domestic industry will make every effort to frame his petition in terms of unfair foreign practices—typically dumping or subsidization—if at all possible. But at bottom, the concern is the impact of the imports on the domestic industry, *i.e.,* on the question of injury.

IV

How does the GATT fit into all this? I had thought that the power to take emergency action against particular imports under Article XIX by suspending the importing country's GATT obligations[62] retained the link that the United States has now discarded between increased imports and tariff concessions. The link does not seem to be exclusive, however, and other kinds of obligations under the GATT may provide the causal element, provided they result in unforeseen threats of serious injury. Professor Jackson suggests in his treatise that the obligation that caused or threatens injury may be the promise not to impose quotas, and the unforeseen developments may be the increased imports themselves.[63] If that is so, there really is no requirement of causation at all other than the fact of an increase in imports; the only real condition for invoking Article XIX is the existence of injury. I find it hard to believe that the word "serious" before injury in Article XIX is powerfully different from the word "material" before injury in Article VI.[64]

61. In a recent case, the International Trade Commission divided on the question of causation and injury. *See* Perchloroethylene from Belgium, France, and Italy, U.S.I.T.C. Publ. 969 (1979), 44 Fed. Reg. 22,217 (1979). It seems unlikely that in such a borderline case, import relief would have been available on the basis of an injury standard alone, without the added insight of a Treasury finding of "unfair competition," (sales at less than fair value within the meaning of the Antidumping Act).

62. GATT Art. XIX.

63. J. JACKSON, WORLD TRADE AND THE LAW OF GATT 559-60 (1969).

64. *See* note 43 *supra* and accompanying text. No adjective modifies "injury" in the Subsidies Code. Subsidies Code, *supra* note 8, art. 2(1), H.R. DOC. No. 153, at 261-62.

In all events, I think it is clear that the GATT deals with the problem of import penetration, however we define it, quite inadequately. The Safeguards Code might have helped fill out the concept of market disruption, again partly by setting forth some agreed definitions as to cause and effect, partly by providing some procedures for making the required determinations, and partly by prescribing what remedies may or may not be imposed and for how long. I would have liked to go one step further and create an independent role for the Director General of GATT—if not as a universal attorney general, at least as a public monitor of both unilateral remedies against market disruption and of bilateral or multilateral "settlements."[65] But again to follow this through would be a distraction from the limited point I want to raise here.

I think we make a mistake in focusing as heavily as we did in the past year in Geneva and in Washington on the difference between fair and unfair trade. I think the real focus is on acceptable vs. unacceptable levels of trade or market share or import penetration, however the concept is formulated. So long as we are not willing to legislate world-wide uniformity in wage scales, exchange rates, environmental controls, debt/equity ratios, depreciation, interest rates, and accounting techniques, and indeed comparable relations between government and industry, what is fair and what is unfair is in large part coincidence. I would like to see a Safeguards Code (with or without selectivity), because I think such a Code might achieve or record a degree of common understanding about how people and nations really feel about trade in products that both importing and exporting countries are able to produce. If we achieve such a Code, the need for Subsidies or Antidumping Codes may well recede. Until there is agreement on a Safeguards Code—by whatever name—the work of the Tokyo Round is, in my view, far from complete.

65. *Cf.* ATLANTIC COUNCIL OF THE UNITED STATES, GATT PLUS—A PROPOSAL FOR TRADE REFORM 43-44 (1976) (recommending public scrutiny and approval or disapproval by a Trade Council of all measures limiting import competition, whether voluntary or not, and whether by industry-wide agreements or by governmental arrangements).