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In 1921 both the United States and Great Britain passed their first significant pieces of anti-dumping legislation. This paper is intended as a comparison of those two particular laws, the U.S. Anti-dumping Act of 1921[1] and the British Safeguarding of Industries Act of that same year.[2]

The first section of this paper will examine the legislative antecedents of the 1921 Bills. Here we will see how both Bills represented the culmination of a long struggle by advocates of protection to pass effective anti-dumping legislation.

The second section of the paper focuses on the political origins of these two Acts. The similarities here are quite striking. Both Bills had their beginnings in political promises. Both found support in wartime documents which were written by politicians, filled with anti-German sentiments, and which ignored contemporary economic thinking on dumping. And both came about even though the malady complained of--dumping--was, by all accounts, non-existent in 1921.

The third and final section of this paper looks directly at the legislation itself. The organization of both Bills was remarkably similar. But there the similarity ends. The U.S. statute is clear and readily enforceable. The British one is vague, fraught with exceptions, and procedurally cumbersome--in a word, unenforceable. So why did these statutes, so similar in origin and structure, come out so differently? The final part of this section provides the answer--protectionist forces in America were simply in a better position to exercise political will than their counterparts across the Atlantic.

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[1]Act of May 27, 1921, ch. 14, Title II; 42 Stat. 11 (1929).

[2]Safeguarding of Industries Act, 1921, 9 & 10 Geo. 5, ch. 47.

I. PREDECESSORS OF THE 1921 LEGISLATION

Both the U.S. Anti-Dumping Act and the Safeguarding of Industries Act had a long period of development. In the U.S., the Congress had been attempting to legislate against the dumping of cheap imports since the late 19th-century. These early attempts treated dumping as a manifestation of unfair competition and prescribed judicial or quasi-judicial remedies.[3] The Sherman Anti-trust Act,[4] for example, outlaws every contract or combination in restraint of both interstate and foreign commerce. Section 73 of the Wilson Tariff Act of 1894 proscribes combinations or conspiracies of persons or corporations wherein the object is to restrain trade or to increase the market price in the United States of any imported article.[5]

Both of these statutes punished violators with civil and criminal penalties. Both could only be enforced as against predatory dumpers, since the Government had to prove that foreign dumpers were seeking to drive competitors out of the U.S. market. Further, the Supreme Court restricted application of the Sherman Act, *de facto,* to non-dumping cases when it held that conspiratorial activity in restraint of trade which occurred outside of the United States could not form the basis of an anti-trust prosecution.[6] Although the Court in American Banana limited its holding to the Sherman Act, and thus did not reach the issue of the extraterritorial applicability of the Wilson Tariff, there had been only one prosecution under section 73 at the time the 1921 Anti-dumping Act was promulgated. For Jacob Viner at least, in the context of anti-dumping, the Wilson Tariff was an act "without practical significance".[7]

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[3]J. Viner, *Dumping: A Problem of International Trade* (Chicago: University of Chicago Press, 1923), p. 239.

[4]Act of July 2, 1890, chap. 647, sec. 1; 26 Stat. 209 (1890).

[5]Act of August 27, 1894, ch. 349, sec. 73; 28 Stat. 570 (1894).

[6]*American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 53 L.Ed. 826 (1908).

[7]J. Viner, *op.cit.*, p. 241.

In 1913 Republicans in the U.S. House of Representatives made their first attempt to attack the problem of dumping through administrative, rather than anti-trust provisions. On April 21 of that year House Majority leader Oscar W. Underwood (D-AL) introduced a provision for inclusion within the Tariff Bill of 1913.[8] Paragraph R of the Bill provided for the imposition of a 15% *ad valorem* duty, in addition to any tariffs otherwise levied, on goods where "the export or actual selling price to an importer in the United States" was less than "the fair market value of the same article when sold for home consumption." The provision specifically exempted goods "whereon the duties otherwise established are equal to 50 per centum *ad valorem*".

Protectionists justified the provision on the basis that the new Act was going to reduce tariffs "to a revenue basis", and that American manufacturers accordingly had a right to expect "reasonable and fair competition at normal prices".[9] The Bill passed the House but was challenged in the Senate. Free Trade Democrats believed that it "was capable, under an unfriendly administration, of being used as a means of increasing the duty upon dutiable articles 15 per cent, and of putting articles upon the free list under a duty of 15%".[10] They were afraid that a post-Wilson Republican administration would use this statute as the basis for development of an even more protectionist policy. The House version was dropped by the Conference Committee.

In 1916 section 801 of the Revenue Act included a provision which made it unlawful to import goods "at a price substantially less than the actual market value or wholesale price of such articles".[11] Like the Sherman Act, this provision was criminal in nature. At the insistence of the Wilson administration, the Bill was divorced from

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[8]H.R. 3321, 63rd Cong., 1st sess. (1913). As enacted, this Bill became the Act of Oct. 3, 1913, ch. 6; 38 Stat. 114 (1913).

[9]H.R. REP. NO. 5, 63rd Cong., 1st Sess., LIII (1913).

[10]S. REP. NO. 80, 63rd Cong., 1st sess., 31 (1913).

[11]Act of Sept. 8, 1916, ch. 463, sec. 801; 39 Stat. 798 (1916).

customs legislation and penned in the rubric of unfair competition, as the President was determined that the Act "should not be employed to build up sentiment for an upward revision of the existing tariff act".[12] Like its predecessors, the Act was difficult to enforce, since the Government had to prove beyond a reasonable doubt that the defendants were acting "with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States".[13] Republicans, led by Congressman Joseph W. Fordney (R-MI) wanted a law with teeth.

In 1919 Fordney, now Chairman of the House Ways and Means Committee, made several attempts at passing a more potent anti-dumping measure. His H.R. 9983 and H.R. 10071[14] never made it to the House floor, but hearings before the Ways and Means Committee laid the groundwork for future anti-dumping legislation. His Committee heard the testimony of George C. Davis and Otto Fix, two experienced agents of the Customs Service who were to testify in future anti-dumping legislation.[15] Fordney noted the lack of extrajudicial application of previous anti-dumping provisions. He brought to the Committee's attention the zeal with which Canada was enforcing its anti-dumping provisions (and with no detriment to the overall trading relation between the U.S. and Canada). And most importantly, the hearings identified the "bogeymen" who were responsible for the dumping: Belgium, France, Japan, and especially, that familiar enemy, Germany: "Germany has

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[12]J. Viner, *op.cit.*, p. 242.

[13]Act of Sept. 8, 1916, *supra*, section 801.

[14]H.R. 9983 and H.R. 10071, 66th Cong., 1st sess., 58 CONG.REC. 7044, 7299 (1919).

[15]See section II of this paper.

practised this discrimination of undervaluation more than any other country in the shipment of goods to this country".[16]

Fordney had slightly more success with H.R. 10918.[17] in the next session. The Ways and Means Committee Report recommended passage, with three major justifications. First, the Report cited the prevalence of anti-dumping laws throughout the world,[18] and the fact that the Canadians had achieved some success with their anti-dumping statute. The drafters also found justification in the Tariff Commission's report,[19] which criticized the Revenue Act's dumping provision as ineffective due to the inclusion of the specific intent requirement. Finally, the Committee found support in the Alien Property Custodian's Report of 1918, compiled by one A. Mitchell Palmer.[20]

H.R. 10918 passed the House and was subsequently taken up by the Senate Finance Committee. The Bill was reported out of committee, but not without a strong Minority dissent. The authors of the Minority Report, Senators Charles S. Thomas (D-CO) and John F. Nugent (D-IN), were unconvinced that dumping was a problem in the post-war period: "We have listened to many assertions of its existence, but have been favoured with little positive evidence to support them." Even if dumping

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[16]*Hearings Before the Committee on Ways and Means, House of Representatives, on H.R. 9983 and H.R. 10071,* 66th Cong., 2d sess. 31 (1919) (Statements of George C. Davis and Otto Fix, U.S. Customs Service).

[17]H.R. 10918, 66th Cong., 2d sess., 59 CONG.REC. 214 (1919).

[18]Canada, South Africa, and Australia had all enacted anti-dumping provisions by this time.

[19]UNITED STATES TARIFF COMMISSION, INFORMATION CONCERNING DUMPING AND UNFAIR FOREIGN COMPETITION IN THE UNITED STATES AND CANADA'S ANTI-DUMPING LAW (Comm. Print 1919).

[20]H.R. REP. NO. 479, 66th Cong., 2d sess. 2-3 (1919). More on Palmer's report in the next section.

were occurring, they noted, it would benefit the American consumer "in these days of exorbitant prices and expensive living". And those Republicans who insisted that Germany and the other commercial nations of Europe had been stockpiling goods during the conflict "for dumping purposes" thereafter, the Minority accused of ignorance. The Great War was a total war, the Report insisted, one which so exhausted the participants that "recovery and resumption of civil pursuits must be slow, and will doubtless extend over a period of several years".[21] With so vigorous a dissent, it is not surprising that the Bill died on the Senate floor.[22]

Although not so long as its American counterpart, British anti-dumping legislation was in the works well before 1921. On 19 November 1919, Sir Auckland Geddes (Unionist), then president of the Board of Trade, introduced the Imports and Exports Regulation Bill in the House of Commons.[23] The Bill provided for the collection of a dumping duty to be assessed when there was probable cause to believe that "produced or manufactured" goods from outside the United Kingdom were being sold or were about to be sold "at prices below the foreign value" (Clause 2, 3). The Board could order Customs and Excise to collect this duty, the difference between the "import price" and the "foreign value" of the goods, (1) if the production or manufacture of similar goods within Britain was or was likely to be adversely affected by the dumping, and (2) if the Trade Regulation Committee, as created in clause one, approved.[24]

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[21]S. REP. NO. 510, 66th Cong., 2d sess. 1-2 (1919).

[22]The Bill was considered by the Senate sitting as a Committee of the Whole but was never voted upon (59 CONG.REC. 6620-6625 {1920}).

[23]Imports and Exports Regulation Bill, 1919, 9 & 10 Geo. 5, Bill 211.

[24]The Trade Regulation Committee was composed of Parliamentary members and prominent civil servants pursuant to Clause 1, subsection 1 of the Bill.

The Bill ran into immediate difficulties. There was a delay before second reading, much to the chagrin of MPs from all parties.[25] Frederick Banbury (Conservative) challenged the Bill on a point of order, insisting that as a revenue provision, it should have originated in the Committee of Ways and Means.[26] A.T. Davies (Conservative) was concerned that the Trade Regulation Committee had been given "plenary powers" in anti-dumping enforcement and wanted to expand its membership to include "members of the chambers of commerce, employers, and trade unions".[27] Lieutenant Commander Hilton Young (Liberal) raised an even more disturbing point: he wanted to see some statistics in support of the dumping allegations. Replied an embarrassed Auckland Geddes:

"One of the chief difficulties in dealing with the important problem of dumping is that we have at present no machinery for discovering either the cost of production or foreign value of imported goods and therefore cannot have any statistics of the nature specified by the hon. and gallant member." (Hansard, CXXII, 8 Dec. 1919, col. 937).

It is not surprising, then, that the Bill was withdrawn before second reading.[28] Undaunted, tariff reformers continued to press for adoption of an anti-dumping provision. There were repeated calls for the introduction of new legislation.[29] In response to Terrell's repeated protests of government inactivity, Sir Philip Lloyd-Graeme (Conservative), Parliamentary Secretary, said that the Board of Trade was

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[25]See, for example, Hansard, *Parl.Deb.* (Commons), 5th ser. CXXI, 20 Nov. 1919, col. 1141 (speech of George Lambert {Liberal}), as well as Hansard, *Parl.Deb.* (Commons), 5th ser. CXXI, 20 Nov. 1919, col. 1124; Hansard, CXXII, 3 Dec. 1919, col. 389-90 (speeches of George Terrell {Unionist}).

[26]Hansard, CXXII, 2 Dec. 1919, col. 212.

[27]Hansard, CXXI, 8 Dec. 1919, col. 882.

[28]Hansard, CXXII, 22 Dec. 1919, col. 1234.

[29]Hansard, CXXVII, 12 April 1920, col. 1378 (Terrell); CXXXIII, 25 Oct. 1920, col. 771 (Thorne {Liberal}, Bottomley {Liberal}).

anxious to proceed, "but {that} it is quite obvious that we have not control of Parliamentary time".[30] Finally, after months of defending himself at Question Time, Board of Trade president Robert Horne (Conservative) admitted that it would not be possible to introduce anti-dumping legislation during the present session.[31] But the protectionists kept up the pressure. When Major Joseph Nall (Conservative) publicly reminded Lloyd George that this legislation had been one of his campaign pledges, the Prime Minister promised that an anti-dumping provision would be "the first Bill to be dealt with in the next session".[32]

II. POLITICAL ORIGINS OF THE BILLS

A. The Fulfilment of Campaign Promises

Both the Safeguarding of Industries Act and the U.S. Anti-dumping Act sprung directly from campaign pledges made by the leader of the national government. In the Coalition Manifesto of 1918, Prime Minister David Lloyd George promised to preserve and maintain "key industries" (Part I of the Act) and to prevent unfair competition engendered by "the dumping of goods produced abroad and sold on our market below the actual cost of production".[33] The defeat of the first anti-dumping measure in the Commons in 1919 did not mean that Lloyd George had abandoned his campaign promise, in public at least. Throughout the latter part of 1919 and 1920, Lloyd George or other appropriate Government representatives insisted that new

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[30]Hansard, CXXXIII, 25 Oct. 1920, col. 1303.

[31]Hansard, CXXXIV, 18 Nov. 1920, col. 2087.

[32]Hansard, CXXXVI, 16 Dec. 1920, col. 736.

[33]*British General Election Manifestos 1900-74*, ed. F.W.S. Craig (1975), p. 29.

legislation would be brought forth to keep the anti-dumping commitment.[34] When the anti-dumping Bill was finally introduced in 1921, there was no doubt that its origins lay in the 1918 manifesto.[35]

The American anti-dumping provision grew at least in part out of the 1920 campaign promises of President Warren G. Harding. Republicans had a long history of espousing protectionism, and Harding, the party's nominee in the 1920 Presidential election, was no exception.[36] The Republican party platform advocated strong protection,[37] although Professors Samuel McCune Lindsay (Columbia) and Jacob H. Hollander (Johns Hopkins), staff director and associate staff director, respectively, of the Republican national committee's advisory committee on policies and platform, did their best to "soften" the Republican stance.[38]

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[34]Hansard, CXXXVI, 16 Dec. 1920, col. 736; CXXXIV, 11 Nov. 1920, col. 1362.

[35]Hansard, CXLII, 6 June 1921, col. 1557, 1591.

[36]Says one Harding biographer: "One of the most tenacious ideas for this old tariff-American war horse was that the basic reason for the existence of the Republican party was to protect the American standard of living from foreign competition" {R.C. Downes, *The Rise of Warren Gamaliel Harding 1865-1920* (Columbus: Ohio State University Press, 1970), p. 610}.

[37]W.M. Bagby, *The Road to Normalcy: The Presidential Election Campaign and Election of 1920* (Baltimore: Johns Hopkins University Press, 1962), p.82.

[38]Downes, *op.cit.*, p. 610.

Harding, however, overruled Lindsay and Hollander and committed his party fully to high-tariff restoration. Although "Harding made no pretence at being an expert on the tariff",[39] he told his campaign audiences time and time again that dumping would drive America to economic catastrophe. "If you allow foreign nations to dump their products in the United States in the aftermath of war", he reminded his supporters in Hammond, Indiana, "you paralyze American productivity and destroy our own good fortune."[40] Naturally, as soon as he became President, Harding "placed the weight of his administration" behind the anti-dumping provision and signed the Bill into law as soon as it was passed in May, 1921.[41]

B. Wartime Documentary Support: Written by Politicians, Fraught with Anti-German Sentiment, and Out of Touch with Contemporary Economists' Thinking

Both the American and British proponents of the legislation relied for support on government reports compiled during or shortly after the First World War. The Notes[42] on the Safeguarding of Industries Act indicate that the Bill was enacted to comply with the recommendations of the Committee on Commercial and Industrial Policy, the so-called Balfour of Burleigh Committee. Also, the Report was mentioned

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[39]R.K. Murray, *The Harding Era* (Minneapolis: University of Minnesota Press, 1969), p. 206.

[40]Quoted in R.C. Downes, *op.cit.*, p. 616. This statement was made one month before the election.

[41]R.K. Murray, *op.cit.*, p. 207.

[42]Public Record Office {hereafter PRO}: BT 132/1 p 3.

many times during the Commons debates as justification for the anti-dumping measure.[43] Lord Balfour, the Chairman, was a former Conservative MP who had served, *inter alia*, as First Lord of the Admiralty (1915-16), as Secretary of State for Foreign Affairs (1916-1919), and as Prime Minister (1902-1905).

Prime Minister Asquith established this Committee in 1916 "to consider the commercial and industrial policy to be adopted after the war, with special reference to the conclusions reached at the Paris Economic Conference" (June, 1916). One of the resolutions adopted there, Resolution (B) (4), provides as follows:

"In order to defend their commerce and industry against economic aggression resulting from dumping or any other mode of unfair competition, the Allies decide to fix by agreement a period of time during which the commerce of the enemy powers shall be submitted to special treatment and the goods originating in their country shall be subjected either to prohibitions or to a special regime of an effective character." (PRO: BT 132/1 p 3).

The Final Report of the Balfour Committee came out in 1918. The Report starts with a general overview of British industry in 1913. The Committee noted that certain branches of production had come entirely under German control. These included all the items which later became the subject of duties under Part I of the Act, including tungsten, chemicals, dyes, magnetos, and optical glass. The Report noted, however, that German domination had come about here not as a result of dumping, but was "due largely to persistent scientific work and organizing skill".[44]

The Committee also catalogued problems in other areas of pre-war British manufacturing. In the consumer goods industries, foreign competition "had become increasingly acute". The industries affected included glassware (from Germany),

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[43]e.g. Hansard, CXLVI, 12 Aug. 1921, col. 881.

[44]BPP 1918, XIII, *Final Report of the Committee on Commercial and Industrial Policy After the War*, Cd. 9035, p. 21.

leather goods (from the United States), artificial jewellery (from Austria-Hungary and France), and toys and games (from Germany, France, and Japan). The Committee attributed the foreigners' success to a variety of causes--"in some cases to certain natural advantages in respect of raw materials; in others, to cheapness of labour. . . or to the low cost of production per unit resulting from large scale production, specialisation and standardisation, or to ingenuity in the creation of new demands in the consuming market".[45] Dumping, apparently, was not a factor here; better efficiency, more investment, and aggressive marketing had won the day for overseas businessmen.

When the Committee does turn its attention to dumping, its approach is superficial at best. The Committee began its discussion by accepting without question the veracity of Resolution (B) (4), made two years' previous: "The fact that this Resolution had been accepted by His Majesty's Government made it unnecessary for us to discuss the principle of the differential treatment of imports from the present enemy countries after the war."

Given the self-imposed limitations on its terms of reference, it is hardly surprising that the Committee's status report on dumping is quite sparse. No dumpers are named. Neither are the representatives "among the Departmental Committees appointed by the Board of Trade" who favour "some measures" to prevent dumping. Dumping is bad, the Committee goes on to say, because it "produces a feeling of insecurity in the corresponding industry of this country, which diminishes the incentive to development".[46] Further, the Committee notes, in certain cases--they don't say how

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[45]*Ibid.*, p. 21.

[46]Balfour didn't let this lack of information stand in the way of his own anti-dumping legislation. In 1920, he introduced in the House of Lords the Protection of Industries Bill (11 and 12 Geo. 5, chap. 47), which contained an anti-dumping provision drafted in accordance with the recommendations of his Committee. The Bill was rejected on its second reading after a spirited debate (Hansard, *Parl.Deb* (Lords),

many--dumping has been "the expression of a persistent policy aiming at the depression of some British industries". Note the drafters: "It is of course impossible in every case to prove the truth of this latter suggestion; but we see no reason to doubt that there is at least a prima facie ground in support of it."[47]

But the Committee went on to add that any measure enacted to thwart German competition was justified for three reasons. First, Germany seized plant and equipment in the occupied territories largely to delay "the economic recovery of the Allies after the War". Second, the Germans, who had maintained a strong position in the British market before the war, would adopt "every possible measure" to oust their British competitors and "re-establish their position". And finally, British industry needed as much security as possible to complete the transition from a war to a peacetime economy. Anti-dumping legislation was justified, then, not because of the facts and effects of dumping, but because the Hun didn't play fair and deserved to be punished for what he did during the war.[48]

One American government report used to justify anti-dumping legislation was the Alien Property Custodian Report of 1918.[49] Like the Balfour Committee's report, this document was compiled at the height of the country's involvement in World War

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5th ser. XXXIX, 22 April 1920, col. 938-974).

[47]*Final Report*, op.cit., p. 44.

[48]One other document, though not compiled in wartime, is of note here. After the introduction of the Import and Export Regulation Bill, the Ministry of Reconstruction published its own Report on anti-dumping. This Report, which was supposed to consider the recommendations of the Balfour Committee and to provide input as to the appropriate anti-dumping legislation, deferred to the Balfour Committee's "findings" on dumping (BPP 1919, XXIX, *Final Report on Anti-dumping Legislation*, Cmd. 455, p. A2).

[49]Although he didn't allude to it in the 1921 debate, Representative Fordney cited this work in the Majority Report to H.R. 10918, the failed legislation of 1919. See H.R. REP. NO. 479, 66th Cong., 2d sess. 2-3 (1919), as noted earlier.

I. The Alien Property Custodian (APC) was a creation of the Trading with the Enemy Act of 1917. This Act empowered the APC to seize and administer "all property located or having its situs within this country, which is owned by, held for, or owing to persons, partnerships or corporations resident or doing business" in any of the Triple Alliance powers.[50]

Property could be seized only after an investigation, and then "only if the President shall so require", thus giving to the Executive the fullest discretion as to what enemy property shall be taken and what shall be left in the hands of its "private custodians" (APC Report, p. 7). An Executive Order dated October 12, 1917 delegated this decision-making authority to the APC, one A. Mitchell Palmer. In sixteen months the APC seized over $500,000,000 worth of privately-owned offices, inventory, plant and equipment, homes, bank accounts, corporate securities, and other personal assets. This property came from those "whose loyalty to the allied nations has been doubted" (APC Report, p. 8).[51]

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[50]ALIEN PROPERTY CUSTODIAN REPORT (Comm. Print 1919). This report is found in its entirety at S. DOC. NO. 435, 65th Cong., 3d sess. (1919). The current reference is to page 2 of same. The Report will hereinafter be referred to as the "APC Report, p. __".

[51]Palmer, as it turned out, made a career out of flogging members of "subversive" groups. His success as APC earned him an appointment as the nation's top law enforcement officer in 1919. As head of the Justice Department, Attorney General Palmer spearheaded the infamous "Palmer Raids," one of the most notorious abridgments of civil rights in American history. Fear of Bolshevism had replaced anti-German hysteria after the war, and Palmer exploited these sentiments for political gain. On New Years' Day, 1920, Palmer supervised the internment of some 6,000 suspected radicals; many were imprisoned and/or deported with precious little due process. He issued Departmental guidelines authorizing federal law enforcement agencies to use torture, if necessary, to extract confessions from suspected subversives--much to the delight of "red-baiting" American newspapers. Palmer then parleyed his new-found popularity into a run for the Democratic nomination for President in 1920. Although he lost out to James M. Cox, who was defeated by Harding in November, Palmer came to the national convention with the greatest number of committed delegates (W. Bagby, *op.cit.*, pp. 18-22, 71-73; 110-115; 164).

The Report of the Alien Property Custodian of 1918 was the major publication of A. Mitchell Palmer. Most of the other documents that came out of his office were press releases printed in the U.S. *Bulletin*. Bombastic, inflammatory, and self-aggrandizing, the releases are pure Palmer:

"Tells how German wealth in the United States is being turned into liberty bonds and used in war against its owners, millions so invested, APC in address at bond mass meeting {Liberty Hut, Washington, D.C. 1918} gives details of vast sums taken over, German plans to control U.S. industries exposed and thwarted." (In Public Information Committee, Official U.S. *Bulletin*, October 9, 1918)

"Tells how German industrial autocracy has been blocked in designs upon America, far reaching plans to control manufacture and commerce thwarted by Americanization of alien property, says Custodian Palmer, addressing University Extension Society of Philadelphia {November 7, 1918}; blow already felt as indicated by Berlin's cringing protest." (In Public Information Committee, Official U.S. *Bulletin*, November 12, 1918) *Catalogue of the Public Documents of the 65th Congress and of all Departments of the Government of the United States for the period from July 1, 1917 to June 30, 1919,* vol. 14 (Washington, G.P.O., 1925), p. 102.

His Report was just as bad. Not unlike Lord Balfour and his Committee (who were admittedly much more understated), Palmer saw the Germans as power-mad, ruthless, and incapable of fair play. German investment in the U.S. was rooted in her desire to achieve "the industrial conquest of this Continent--a conquest which she believed in 1914 she was in a fair way to accomplish" (APC Report, p. 15). Germans who came to the U.S. to seek their fortunes were soldiers in her "great industrial army" (APC Report, p. 14): Julius Schreyer, a lumberman who owned two saw mills and 80 miles of logging road on Florida's Gulf Coast,[52] was part of a "Pan German" conspiracy whose goal was the "commercial penetration of every quarter of the globe". Even the workers were expected to do their part: "It seems to have been

[52]These assets were seized, along with the rest of Schreyer's business, by the APC, who subsequently shortened the name of Schreyer's enterprise from the "German-American Lumber Company" to the "American Lumber Company" (APC Report, p. 140). In his introduction to the narrative, Palmer tells us that the story of the seizure "reads like a romance."

regarded as the duty of a good German chemist in the United States to preach the doctrine of the invincibility of the German chemical industry" (APC Report, p. 35).

Germany's business practices reflected this philosophy of conquest. Cartelization was her attempt "to secure world monopoly" (APC Report, p. 31). Deceit was an important factor in her ability to maintain the upper hand:

"Understanding, as we now understand, from experience, German methods and ideals in business, it was natural to expect to find concealed ownerships {in the Bosch Magneto Co., U.S.} behind the apparent stockholdings and attempts to conceal and cover up by apparent transfers the real interests." (APC Report, pp. 109-110).

And the weapons she used to despatch her most stubborn competition: "the ruthless if legal tactics of dumping and destructive underselling" (APC Report, p. 34).

The Report of the APC is 278 pages long, with appendices covering an additional 328 pages. It surveys a number of different manufacturing industries--chemicals, metals, wireless communications, textiles, toys, pianos and musical instruments, knitting machines, and jewellery, just to name a few. But, like the Balfour Committee, Palmer is hard-pressed to come up with concrete examples of dumping. In fact, he can only list three--all in the chemical industry--and two of these may not meet the accepted definition of dumping.[53] Regarding aniline oil and oxalic acid, Palmer describes how the Germans would undercut the opposition and then raise prices after the competition was squeezed out of business. But Palmer does not delineate the German domestic prices for either of these two products. If the domestic price was the same as that which the Germans were charging their foreign customers, there has been no dumping under Viner's definition.

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[53]Viner defines dumping as "price discrimination between national markets (emphasis mine) (J.Viner, *op.cit.*, p. 3).

While the legislators might have taken what Balfour and Palmer said to heart, they seemed to ignore the real experts in the field of anti-dumping. Nowhere, in all the debates, does any legislator cite the views of a political economist. Nowhere is there a reference to a single piece of anti-dumping scholarship. The result is that the men who muddled through the legislative process to create these two Bills disregarded (inadvertently or not) contemporary academic thinking on dumping issues.

Most of the economists who studied the issue concluded that dumping was not necessarily harmful. Thomas W. Page, then chairman of the U.S. Tariff Commission, told the American Bankers' Association that the anxiety about German dumping related back to wartime propaganda.[54] Robert Giffen insisted that the injuries purportedly caused by dumping were exaggerated, and he described dumping as "no other than an artifice of competition".[55] S.J. Chapman wrote that dumping "need not result in discontinuity of production and unsteady employment".[56]

The harm, if any, occasioned by dumping was rooted in its duration. F.W. Taussig, in a 1904 address to the American Economic Association, saw nothing wrong with permanent dumping: "If this sort of thing goes on indefinitely, I am unable to see why it can be thought a source of loss to the dumped country.[57] Rather, he added, "it is the temporary character of dumping that gives valid ground for trying to check it."[58]

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[54]T.W. Page, "Difficulties of Tariff Revision", *Journal of the American Bankers Association,* XIII, no. 10 (1921), p. 656.

[55]R.W. Giffen, "Notes on Imports versus Home Production, and Home Production versus Foreign Investments", *Economic Journal*, XV, no. 60 (1905), p. 489.

[56]S.J. Chapman, "Notes and Memoranda: The Report of the Tariff Commission on the Iron and Steel Trades", *Economic Journal*, XIV, no. 56 (1904), p. 621.

[57]F.W. Taussig, *Some Aspects of the Tariff Question* (Cambridge: Harvard University Press, 1931), p. 204.

[58]*Ibid.*, p. 205.

H.B. Lees Smith believed that the most dangerous effects of dumping were "the sudden fluctuations which dislocate industry".[59]

Jacob Viner, writing in 1923, echoed some of the foregoing sentiments. He believed that dumping is a problem "only when it is reasonable to suppose that it will result in injury to domestic industry greater than the gain to the consumers". In the case of dumping of a "very long" duration, Viner continues, "the advantage of the dumping to the consumer in the importing country must be accepted as in the long run more important than the injury to the domestic producer". Intermittent or short-run dumping--where the activity is engaged in steadily for some months or years and is then discontinued--is the "chief menace", as it can cause "serious injury or even the total elimination of the domestic industry". "Casual or sporadic dumping," he added, "may prove to be troublesome to the domestic producer in so far as his profits are concerned, but it cannot appreciably affect his volume of production or his continuance in business."[60]

Most experts agreed that dumping was occurring before the war, but the amount of that which was predatory was open for debate. Noting the difficulties of selling at a loss for long periods, Pigou believed that the existence of predatory dumping was "exceedingly improbable".[61] Dietzel maintained that "persistent trust-dumping on a large scale is only conceivable under exceptional circumstances".[62]

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[59]H.B.L. Smith, "Review of 'The Zollverein and British Industry'", *Economic Journal*, XIV, no. 55 (1904), p. 419.

[60]Viner, *op.cit.*, pp. 138-140.

[61]A.C. Pigou, *The Riddle of the Tariff* (1904), p. 43.

[62]H. Dietzel, "Free Trade and the Labour Market", *Economic Journal*, XV, no. 57 (1905), p. 5.

Regarding predatory dumping, Viner cites a couple of examples, quoting from secondary sources published during the war, of German cartels trying to run out English and Swiss competition. He concedes that it is "even probable" that predatory motives "were a more important factor in German dumping than in the dumping of other countries". But as far as the post-war era, Viner adds, those who thought that the Germans were preparing to dump a vast accumulation of stocks on world markets, to regain "in the field of economic warfare what she had lost on the military battlefield", were sadly mistaken: "Germany found herself at the end of the war without goods, financial means, or trade connections for a large-scale dumping campaign."[63]

All this made no difference to the people writing the anti-dumping laws. With one or two exceptions,[64] legislators on both sides of the Atlantic universally regarded dumping as an evil. They made no effort to distinguish between sporadic, intermittent, or continuous dumping; the legislation drafted punished all dumping without regard to its duration or frequency of occurrence. There was never any attempt--not in the drafting, committee, or floor stages--to limit the application of this legislation in any way. And as we shall see in section III, these legislators were very much convinced that the Germans of both the pre- and post-war eras operated with predatory intent.

C. The Absence of Dumping

It is clear that the politicians were going to proceed with these Bills no what matter what any experts might have to say, including their own. Government agencies on

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[63]J.Viner, op.cit., pp. 61, 64-65.

[64]See speeches of MP Gerald A. France (Liberal) (Hansard, CXLII, 6 June 1921, col. 1559), and Senator A. Owsley Stanley (D-KY) (61 CONG.REC., part 2, 1194 (1921).

both sides of the Atlantic could not prove the existence of any dumping in 1921, but this did not stop the passage of the legislation in either country.

In the U.S., the Tariff Commission (USTC) acknowledged as early as 1919 that they did not know the extent of dumping in the U.S. Whatever information they had was anecdotal and usually came from those who had a vested interest in the outcome.[65] The only thing the Commission could say for sure was that, "in the absence of governmental machinery devoted to its detection, conclusive proof of dumping is difficult to obtain".[66]

The findings of the USTC certainly could not be used as empirical support for the proposition that the U.S. needed to strengthen its anti-dumping law. But if the USTC's results were a disappointment for America's protectionists, what followed two years later was an absolute catastrophe. During hearings before the Senate Finance

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[65]In an attempt to ascertain the prevalence of dumping at this time, the Commission sent letters to the secretaries of 39 associations, including "manufacturing establishments, importing and exporting houses, and organizations such as the U.S. Chamber of Commerce, the Home Market Club, and the American Free Trade League", requesting that these groups provide the names and addresses of those association members familiar with foreign dumping practices in the United States. 27 associations replied, submitting the names and addresses of 562 manufacturers, exporters, importers, and other business firms. The Tariff Commission sent these individuals a questionnaire, "inviting the statement of personally known instances, within 10 years, of unfair competition in articles of foreign origin exported to the United States." 281 replies were received, and of this number, 135 said they had no knowledge of any unfair foreign competition or dumping in the United States. Of the 146 who replied in the affirmative, only 23 had first-hand knowledge of dumping. UNITED STATES TARIFF COMMISSION, INFORMATION CONCERNING DUMPING AND UNFAIR FOREIGN COMPETITION IN THE UNITED STATES AND CANADA'S ANTI-DUMPING LAW (Comm. Print 1919).

[66]*Ibid.*, p. 18.

Committee, two senior agents for the United States Customs Service testified that since the end of the First World War, dumping had practically ceased to exist in the United States. George Davis, special agent in charge of New York customs, said that the American importer was paying higher prices for German goods than was the German consumer. German dumping, while it might have been a problem before the war, was now occurring in only one out of every thousand cases.[67] Otto Fix, another New York agent and veteran of 32 years with the Service, echoed Davis' sentiments. He provided the Committee with a list of consumer goods whose export prices were well above the ones charged at home for the same item.[68]

Democratic reaction to this testimony was swift and furious. Senator Furnifold M. Simmons (D-NC) and Senator Peter G. Gerry (D-RI) blasted their colleagues for bringing forth an anti-dumping bill when there was no dumping going on.[69] When Simmons pressed the issue, Senator Porter J. McCumber (R-ND), did what comes naturally for a politician: he blamed someone else. McCumber explained that the Emergency Tariff Bill was intended to cover agricultural products only, and that the

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[67]*Emergency Tariff and Anti-dumping Hearing before the Committee on Finance, United States Senate, on H.R. 2435*, 67th Cong., 1st sess. 36, 38, 54 (1921) (Statement of George C. Davis, U.S. Customs Service)

[68]*Ibid.*, p. 60 (Statement of Otto Fix, U.S. Customs Service). But one should also consider the possible bias of the Customs Service here. This Bill, especially as originally drafted (see section III), would have meant a lot more work for Customs. Both Davis and Fix argued that the Service was woefully understaffed. Davis himself complained that there was only one agent available to gather data for all of Germany (*Ibid.*, p. 41).

[69]61 CONG.REC., part 2, 1099-1100; 1103-1105; 1120-1122 (1921).

House of Representatives, "in its wisdom", had attached the provisions related to dumping.[70] McCumber was afraid the Bill wouldn't make it through the Conference Committee without the anti-dumping provisions. He "personally regretted" what the House had done. He admitted that dumping was not a problem at the present time.[71] But the farmers needed this Bill, he argued, and as far as the anti-dumping section was concerned:

"I can see no possible harm that can come from it, even though it may not be of any particular use at this time, and if the majority of the Members of the House feel that it is proper legislation I have no objection to inserting it here, because of the fact that I think it will do neither harm nor good. I speak most candidly upon that proposition." (*Ibid.*, p. 1021).

The Bill passed the Senate by a vote of 63-28.[72]

Like the Americans, the British really had no idea just how much foreign dumping was occurring within their home markets. In 1919, the same year that the USTC report came out, Sir Auckland Geddes, head of the Board of Trade, was likewise pleading ignorance of the magnitude of dumping on the floor of the House of Commons.[73] Two years later, the situation was not much better. The Notes to the Bill reveal that the sponsors, like the Americans, had drafted a law to combat a problem that did not exist:

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[70]61 CONG.REC., part 1, 1021 (1921).

[71]"I do not think there are any cases of dumping in the present time, and under the present situation over the world I do not think there is any danger of it" (*Ibid.*, p. 1021).

[72]61 CONG.REC., part 2, 1308-09 (1921).

[73]See Section I of this paper.

When we turn to the necessity of legislation against dumping it may be said at once that very few cases of actual dumping have been brought to the notice of the Government; though there is a good deal of allegation, more or less vague, that dumping is taking place (PRO: BT 132/1, p 12).

Fortunately for the Bill's proponents, there was no "smoking gun"--a la George Davis--whose testimony might force the Government to withdraw or radically alter the bill. Instead the Government simply elected to downplay the information. The Free Traders, however, wouldn't let the Government off the hook so easily. Dr. Donald Murray (Liberal) and George Barker (Labour) were convinced that there was no such thing as dumping in 1921.[74] Oswald Mosley challenged the Government to "bring forward some proof that this dumping is actually in existence or is feared in the very near future".[75] And Asquith, in a final attempt to stave off passage, launched into a long, eloquent attack which lambasted the Government for failing to prove its case:

"In the whole of these discussions, not a solitary case has been produced to show that British industries as a whole, or indeed, any important industries of any kind, are suffering at the present moment from dumping in the ordinary intelligible sense of that word." (Hansard, CXLVI, 12 Aug. 1921, col. 848).

When the American bill got into trouble on the Senate Floor, its sponsors talked about how tough things were "down on the farm". Now British legislators were looking to save their Bill with their own "sacred cow". They chose a time-tested alternative--patriotism--and Austen Chamberlain, Leader of the House, was one of the principal spokesmen.

Harking back to the Great War, Chamberlain reminded Asquith that as Prime Minister he "had been too careless of our national security, and that we had {all} learned a

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[74]Hansard, CXLIII, 30 June 1921, col. 2440; CXLII, 6 June 1921, col. 1639.

[75]Hansard, CXLII, 6 June 1921, col. 1592.

lesson which we must never forget".[76] He told the House that the Government was only following the recommendations laid down by the Balfour Committee. That Committee, continued Chamberlain, "was appointed by the Rt. Hon. Gentleman, praised by the Rt. Hon. Gentleman, and its report was welcomed by the Rt. Hon. Gentleman; but, when it comes to action, my right hon. friend has no use for it".[77] Chamberlain's tactic was successful. Asquith and company were put on the defensive, and the Bill was passed.

III. COMPARING THE STATUTORY LANGUAGE

A. The Tripartite Organization of both Bills

As originally drafted, both the Safeguarding of Industries Act and the Emergency Tariff Bill had a tripartite organization--a schedule of protected goods, a provision to neutralize the effects of depreciating foreign currencies, and of course, the actual anti-dumping legislation--aimed at protecting domestic economic interests from foreign, particularly German, competition.

The Safeguarding of Industries Act enumerated precisely the kinds of industries the British government wanted to protect. Part I of the Act set out a number of "key" industries. In order to "safeguard" these industries, which were listed in a Schedule appearing at the close of the Bill, duties of 33⅓% were to be levied against foreign manufacturers. The duties were applicable for a period of five years.

The "Scheduled" items were all high-tech manufactured goods with significant wartime applications. They were also products which one nation--Germany--had successfully exported before the war. Optical glass, the first item on the list, was important to the manufacture of navigation aids, gun sights, and aerial photographic equipment. When

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[76]Hansard, CXLVI, 12 Aug. 1921, col. 852.

[77]*Ibid.*, col. 854.

war broke out, German supplies were cut off, "and there was practically no stock in the country". Constant research is necessary in this field, and manufacture "is not a paying proposition".[78] The same justification was given for powerful arc lamp carbons (an essential component in searchlights, as "no other source of artificial light gives such a very high candle power concentrated in such a small area")[79] and synthetic chemicals (which included drugs and antiseptics such as novocaine, chloroform and aspirin, as well as photographic chemicals).

The Safeguarding of Industries Act also contained a provision to deal with "exchange dumping". Clause 2 of the Act provides that when imported goods are sold within the United Kingdom at prices which, by reason of depreciation, are below the prices at which similar goods can be profitably manufactured in Britain, the government is entitled to levy a 33.3% duty, "in addition to any other duties of customs chargeable thereon" (Clause 3). This provision would apply to the imports of any country whose currency "in relation to sterling is less than thirty-three and one-third percent, or upwards, than the par value of exchange" (Clause 2(b))--that is, to imports from Germany.[80]

In its original version, the Emergency Tariff Bill,[81] like its British counterpart,

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[78]PRO: BT 132/1, pp 31-32.

[79]*Ibid.*, p 45.

[80]While the drafters of the Notes observed that other countries were also capitalizing on a depreciating currency, "German competition is remarkable chiefly by reason of the very wide field covered--complaints relate not only to many of the articles in the Schedule of Key Industries, but also to diverse articles such as iron and steel, chemicals of all kinds, fabric gloves, toys, paper, cheap jewellery, hollow-ware, leather, pianos, etc." While this Bill is "not designed to check German exports as a whole", the Board of Trade admitted that it was indeed an attempt "to prevent an undue portion {of same} from coming to the United Kingdom to the serious detriment of British industries" (PRO: BT 132/1, pp 16-19).

[81]The Anti-dumping Act was carried in the House version as sections 201-216 of the Emergency Tariff Bill of 1921 (H.R. 2435). Under the Senate version it became

contained a provision to neutralize the trade advantages of countries experiencing significant currency devaluation. Section 214 of the House Bill proposed to amend existing U.S. tariff law to mandate that appraisers at the Customs Service, in the execution of their responsibilities as estimators and liquidators of import duties, "shall not in any case estimate the depreciation in currency at more than 66⅔%".

Though phrased inversely from the British law, the effect--an administrative determination to value goods from countries with depreciating currencies at a minimum of one-third of their normal value--was the same. And like their British counterparts, the Americans had a particular target in mind here. The goal of the U.S. Anti-dumping Act, in the words of Representative John Q. Tilson (R-CT), was to stop "to a considerable extent, the stream of certain goods from Germany which are now flooding this country, to the utter ruin of those particular lines of industry".[82] The U.S. Senate, however, balked at the exchange dumping provision. During hearings before the Finance Committee, importers lobbied hard for its deletion,[83] and a new section entitled "Assessment of *Ad Valorem* Duties" (Title III), subsequently adopted by the Conference Committee, was inserted in its place.

Like the British, the Americans packed the first part of their Bill with tariff duties. Unlike the British levies, these duties were aimed at protecting the country's agricultural--not manufacturing--interests. Wheat, flax, corn, beans, potatoes, peanuts, and dairy products were just some of the items on the protected list. Agricultural prices were low, and rural incomes falling, in a country where almost

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Title II of same. For purposes of this paper, references to the Emergency Tariff Bill are the same as for the Anti-Dumping Act of 1921.

[82]61 CONG.REC., part 1, 279 (1921).

[83]*Emergency Tariff and Anti-dumping Hearing, supra*, pp. 81-96 (testimony of Thomas J. Doherty); pp. 135-43 (testimony of John R. Rafter); pp. 159-65 (testimony of John G. Duffy); pp. 165-170 (testimony of W.D. Schmits).

30% of the people lived on the farm.[84] Proponents of the tariff talked ominously of declining property values and rural bank failures.[85] Wheat, wool, beans and rice were all over-supplied on the American market, the result of cheap foreign imports. These foreigners "were unregulated in their own country", and thus able to "take advantage of a monopoly" (sic).[86] Warned the apocalyptic Representative George M. Young (R-ND):

"If the American public permits class after class of American farmers to be driven out of their industries by competition from one source or another, the whole country will be impoverished gradually but surely. The farmer will not be the only sufferer; the whole public will go down with him. This is the teaching of history." (*Ibid.*, p. 5).

But the deletion of section 214 did not mean that Germany had ceased to be a target of this legislation. Like their counterparts in the House of Commons, the Senators were concerned about the welfare of the domestic chemical industry. They translated that concern into Title V of the Act, an amendment which prolonged the life of the War Trade Board. A creation of the Trading with the Enemy Act, the Board had had the wartime responsibility of issuing import licences for "coal-tar dyes and certain chemicals". It was supposed to die with the cessation of hostilities, but the Senate provision transferred departmental control of the Board from State to the Treasury and funded it for six additional months--"in order that the Congress may have ample time to enact into law permanent tariff legislation covering importation of dyes and chemicals" (Title V).

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[84]P. Fearon, *War, Prosperity and Depression: The U.S. Economy 1917-45* (Oxford: Philip Allan, 1987), p. 29.

[85]61 CONG.REC., part 1, 256 (1921).

[86]H.R. REP NO. 1, 67th Cong., 1st sess. 2-5 (1921). No misprint here--the word appears this way twice on page 3.

As in the United Kingdom, U.S. legislators perceived the German chemical industry as a threat to the national well-being. As in England, physical as well as economic security issues entered into the debate. Senator Philander C. Knox (R-PA) harkened back to the start of the Great War, when the "importation of dyes from Germany was cut off", and he reminded the Committee that "the most important {the so-called 'high'} explosives of the present day are either coal tar products or the result of chemical processes requiring the use of coal tar".[87]

But Germany's command of high explosives technology was only the beginning of the horror. Senator George H. Moses (R-NH) recalls the final days of the war:

"In the last great retreat an examination of the huge ammunition dumps of the German army showed that over 50% of their projectiles, instead of being charged with high explosives which merely exploded the projectile and scattered its fragments, were filled with poisonous gases which mingled in the air and asphyxiated and destroyed thousands even though not within their immediate range" (61 CONG.REC., part 2, 1190 (1921).

Moses wasn't through, however. He appended to his remarks a news article from the New York *Herald* (May 7, 1921) entitled, in part, "WORLD MASTERY LIES IN 'DEW OF DEATH'--POISON GAS FROM AIRPLANES WILL DECIDE NEXT BIG WAR". The article describes how the Japanese could stage a successful gas attack on the Philippine Islands.[88] Needless to say, the Senate passed Title V by a wide margin.[89]

B. Different Draftsmanship

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[87]*Emergency Tariff and Anti-dumping Hearing*, *supra*, p. 178.

[88]61 CONG.REC., part 2, 1191 (1921).

[89]*Ibid.*, p. 1302. The final vote on this provision was 61-25.

Since both the Emergency Tariff Bill and the Safeguarding of Industries Act were organized along the same lines and directed at a common enemy, one would expect the actual statutory language of the anti-dumping provisions to be quite similar. In reality, however, the anti-dumping legislation contained within the British and American Bills could hardly have been more different.

First of all, dumping duties were assessed in completely different ways. Following the Canadian example, the British levied duties of 33⅓% on dumped goods, "in addition to any other duties of customs chargeable thereon" (Clause 3(1)).[90] This exorbitant levy doesn't seem to correlate with the Government's public explanation for the bill--to secure full employment.[91] It does, however, corroborate what was said in private. The Notes indicate that the drafters felt that dumping duties should be penal in nature:

"It is felt that dumping is really of the nature of an offense and in some quarters it has been suggested that the penalty ought to be forfeiture of the goods. Such a penalty, however, is no doubt too heavy, and it is believed that the 33⅓% duty will act as a deterrent on dumping and will in fact be sufficient to countervail any actual dumping that may take place." (PRO: BT 132/1, p 11).

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[90]The Canadian duty, however, was 15%, and any goods with an *ad valorem* duty in excess of 50% were exempt from dumping levies (Statutes of Canada (1904), 4 Edw. VII, ch. 11, sec. 19).

[91]Stanley Baldwin: ". . .{T}he object of this Bill is to prevent, in this country, unfair competition which may lead to serious unemployment" (Hansard, CXLVI, 12 Aug. 1921, col. 916).

The Americans, by contrast, assessed duties with the idea that dumping statutes were not intended to punish, but to make sure that all traders were competing on a level playing field. Duties under the Act were calculated by taking the difference between the "foreign market value" of the goods and their domestic purchase price.

A second difference in the two statutes is the way in which dumping is defined. The Americans set up a disjunctive, three-part test to determine whether goods are being dumped. If the price of goods--let's say, German magnetos--is higher on the German wholesale domestic market than it is for the American importer, there is dumping. If the magnetos are not sold in Germany, then the finder of fact must look to the prices importers from other countries are paying. If the Danish price is higher than that paid by the Americans, dumping is occurring. Finally, if neither of the above is available, it is the cost of production which becomes the benchmark for the dumping determination. The statute defines cost of production as "the cost of materials, plus the cost of fabrication, manipulation, or other processes employed in the production of these items". Overhead, packaging, shipping, and insurance costs are added in, plus a minimum 8% addition for profit (Section 206, subsections (1) through (4)).

The British statute, by contrast, is much more enigmatic. As in the American law, dumping occurs when goods are sold "at prices below the cost of production" (Clause 2(1)(a)). Unlike the Americans, the British never set out a formula which might establish an approximate actual cost of manufacture. Instead they arbitrarily determined the cost of production to be the item's "wholesale price for consumption in the country of manufacture, less five per cent".[92] Obviously, a good's wholesale cost is not the same as its production cost. The Government recognized this but inserted the provision anyway, claiming that there is "great difficulty in ascertaining the actual cost of production, and no system based on it is really practicable". Besides

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[92]The five per cent deduction was added by Government amendment (Hansard, CXLIV, 13 July 1921, col. 1368).

being difficult to ascertain, the drafters noted, "there is no consensus of opinion as to what cost of production is".[93]

If the goods are not available to the consumer in--using the magneto example again--Germany, the finders of fact can look to what the Germans are charging importers in other countries. This is akin to the American provision. But they can also look to German domestic prices "for goods as may be similar when so sold", and compare them with the dumped items. This provision would seem to present immediate enforcement problems at the outset. If Brand A magnetos are not sold to German consumers and are only exported to Britain, and Customs want to levy based on the fact that Brand B magnetos are sold for more in Germany than the English importer pays for Brand A at home, importers would have little difficulty in coming up with reasons why A and B are not "similar" items. They might argue one has different components. They would insist that there is a significant difference in quality between the two. They may argue that the two magnetos have dissimilar uses or applications (or they might engineer one brand to give a slightly different use, so as to end-run the statute).

These arguments may or may not be effective, depending upon the circumstances of each case. But what is important is that under this law the Government would seem to have the burden of rebutting every evidentiary offering and establishing that the products are in fact similar. This would take money and manpower, cause delay in the levying of the tariff, and provide a loophole through which a sympathetic referee, Committee panel, or Parliamentary voting bloc could abate the duty altogether.

This example typifies a basic substantive difference between these two statutes: the British law is much easier to avoid. Before an anti-dumping duty may be obtained, for example, U.S. authorities must prove that dumping has occurred and that, as a

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[93]PRO: BT 132/1 pp 14-15.

result of that activity, an industry in the United States "is being or is likely to be injured, or is prevented from being established" (section 201(a)). The injury requirement, as contemplated by the drafters, was supposed to be easily satisfied.[94] In Britain, on the other hand, enforcement authorities must prove that "employment {in a particular industry} is likely to be affected" by the dumping. That would seem to be a much harder standard to meet.

But the Government's burden does not end there. Any anti-dumping order meted out against a foreign offender must violate no British treaty obligations (Clause 2(2)). Further, and more significantly, no anti-dumping penalties may be assessed unless "the industry manufacturing similar goods in the United Kingdom is being carried on with reasonable efficiency and economy" (Clause 14). This question, if answerable at all,[95] might tie up an enforcement authority for months. Every time the Government wishes to enter a single anti-dumping duty on a single product manufactured by a single company, it must first conduct an efficiency study for an entire industry. This is unworkable.

Another example illustrative of the ease with which one could avoid prosecution under the British law is the number of statutory exemptions set out in this Bill. If an importer can show that the goods "have already been sold in the United Kingdom at a price not less than the cost of production", the duties are remitted (Clause 4(1)). If he pays the duty, and there then occurs "a change in the market conditions" in the country of origin, "not less than the amount which would on the date of sale have

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[94]In *Imbert Imports v. U.S.*, 331 F.Supp 1400 (Customs Court, 2nd Div., App. Term, 1971); *aff'd* 475 F.2d 1189 (C.C.P.A. 1973), the Court found that the injury requirement was satisfied where the Government established that dumping was likely to result in "price repression". Decreasing prices, the Court reasoned, would case "diminished utilization of productive capacity" in the corresponding domestic industry, and the situation is aggravated where the dumper "has the capacity and incentive for making future sales" (*Id.* at 1405).

[95]And if not, the dumper wins.

been the cost of production in that country of similar goods", he is entitled to a refund.

The British Bill does not apply to goods in transshipment. Further, if the goods are shipped from country A, a dumper, to country B, a non-dumper, and the "processes of manufacture" in country B add at least 25% to the value of the goods, those goods are exempt from duty if they are subsequently sent on to the United Kingdom (Clause 3(2)). Finally, dumped goods leaving their country of origin within seven days of the entry of an enforcement Order in Great Britain are also statutorily exempted from that Order (Clause 6).

The American law, by contrast, has no exemptions.

But the differences between these two statutes are most pronounced in their respective procedures for anti-dumping enforcement. A reasonable set of procedural rules is important if any law is going to be rigorously enforced. The American law has such a set; the British law does not.

Enforcement under the U.S. Anti-dumping Act, as written in 1921, begins with a complaint to the Secretary of the Treasury.[96] Treasury investigates, makes findings, and directs Customs to proceed accordingly. If aggrieved, a defendant may appeal administratively to the Board of General Appraisers and judicially to the Court of Customs Appeal (section 210).

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[96]In the House version, Customs, as agent for the Secretary, was responsible for checking every incoming commercial shipment for signs of dumping. After vigorous protests by the Service, the Senate amended the statute to bring in the threshold requirement of a full Treasury investigation, although the Service may still act *sua sponte* where it believes dumping is going on and no investigation has as yet been ordered (section 201(b); *Emergency Tariff and Anti-Dumping Hearing*, *supra*, pp. 38-54.

The British version is far more complicated. As in the United States, enforcement begins with a complaint. The complaint goes to the Board of Trade, which determines if there is a prima facie case of dumping which is affecting employment (Clause 2(1)). If there is, the complaint is forwarded to a Trade Committee. The Committee is composed of five persons "of commercial and industrial experience" (Clause 7). The Committee then conducts its own investigation. If the members approve the findings of the Board, and if they determine that the British industry in question is being reasonably efficient, the Committee will direct the Board of Trade to enter an Order against the offender.[97]

But this is not the end of the story. Before the Order can be executed, it must be sent to the House of Commons for approval. If the House is sitting, it must pass a resolution approving the Order, "either without modification, or subject to such modifications as may be specified in the resolution" (Clause 2(3)). If the House is out of session, the Order goes into effect, but it dies within 30 days of the next Commons meeting if the House doesn't pass the approving resolution. Only after approval has been secured by a vote of the full House of Commons may the Board of Trade, through the Customs Office, attempt to enforce the Order. Again, before a single anti-dumping duty can be levied on a single product and against a single offender, three separate reviewing authorities--including the most powerful political body in the land--must pass judgment. This too is unworkable.

C. Why the differences?

Why were these two pieces of legislation so different? One reason could be that the British were just not as good at drafting anti-dumping legislation. The Americans, after all, had been trying to put together an administrative anti-dumping bill since

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[97]Of course, no Order may be entered if any of the aforementioned exemptions apply, a determination also made by the Committee.

1913, and they had included an anti-dumping provision in their anti-trust legislation as early as 1890. For the British, however, this was only their second attempt at an anti-dumping statute.[98]

America's Congressmen had a lot of help in putting together this legislation. Hearings of the Senate Finance Committee revealed that the Legislative Drafting Service (LDS) had played a major role in the production of this Bill. The LDS was made up of professional civil servants, including a number of attorneys, whose job was to assist in the preparation of legislation. Senator Boies Penrose, chairman of the Finance Committee, thought so much of this newly-created organization that he took the time to publicly congratulate John Walker, an LDS employee and the principal draughtsman here, on a job well done.[99]

By contrast, the British Bill appears largely to have been the work of Sir Philip Lloyd-Graeme. He personally admitted to writing several of the Bill's provisions. Though called to the bar in 1908, and presumably somewhat versed in legal draftsmanship, Lloyd-Graeme, as Parliamentary Secretary to the Board of Trade and a major Conservative functionary, was not someone who could devote the endless hours required to properly craft a bill. Further, Lloyd-Graeme had only been Parliamentary Secretary since August, 1920, after being elected to Parliament from Middlesex (Hendon) only two years earlier.[100] It is doubtful that he had the experience in trade issues, or the administrative support of something akin to the LDS, to put together the best possible anti-dumping bill.

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[98]The third, if you count Lord Balfour's offering in the House of Lords.

[99]*Emergency Tariff and Anti-dumping Hearing*, *supra*, pp. 29-30.

[100]*Who's Who of British Members of Parliament*, vol. III, ed. M. Stenton and S. Lees (Brighton: Harvester Press), p. 85.

Another alternative, put forth by Richard Dale,[101] is that the Government, which was led by a Coalition Liberal (Lloyd George), deliberately sabotaged the legislation. After all, it was the Government which failed to come up with a decent definition for cost of production because it was "too difficult". Further, Lloyd George expressly affirmed in the House that treaty obligations would preempt anti-dumping enforcement. And it was the Government which created the numbers of statutory exemptions and the burdensome administrative procedure, which included review by the House of Commons. What were the drafters thinking when they wrote in those provisions? The Notes to the Bill provide no clue. Nor do the private papers of Lloyd Graeme or Stanley Baldwin. Neither makes any mention of his role in promulgating this legislation.

In fairness, though, one must note that there was much apprehension in Parliament, as there was in the U.S. Congress, about delegating plenary powers to revenue-raising authorities in the civil service.[102] The Government absolutely had to cut Parliament in on the review process, or the legislation might never have been passed.[103] Further, while the Government created some statutory exemptions, it successfully opposed the inclusion, by the Liberals, of many more.[104]

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[101]R. Dale, *Anti-dumping Law in a Liberal Trade Order* (1980), p. 13.

[102]Even the Balfour Committee had recommended that all Trade Regulation Committee Reports "be laid before Parliament immediately upon being made" (Final Report, *op.cit.*, p. 52).

[103]A letter from C. Patrick Duff, of the Board of Trade, to A.J. Sylvester is instructive here. In the letter, a copy of which Lloyd George himself had requested, Duff told Sylvester that, pursuant to the Government version of the Bill, Parliament would have absolute power of review over all Committee Orders. Assured the Board of Trade representative: "It is difficult to conceive how the possibility of abuse of this part of the Act could be more completely safeguarded" (HLRO: Lloyd-George Papers, Series F/Box 3/Folder 1/No. 13/ p. 6).

[104]e.g. Hansard, CXLVI, 11 Aug. 1921, col 692 (motion to exempt allies from anti-dumping duties); CXLVI, 10 Aug. 1921, col. 513-514 (motion to exempt goods used in shipbuilding from anti-dumping duties); CXLVI, 10 Aug. 1921, col. 575-76 (motion to exempt raw materials and machinery); CXLVI, 10 Aug. 1921, col. 595-

The difference in the Bills might also be explained by the fact that both countries were steeped in their own traditional commercial thinking and were unable to adjust to the changes that were occurring in the world economy.

In the decades after 1890, American trade expanded rapidly, and the U.S. displaced Great Britain as the world's greatest exporter. The First World War exacerbated this trend, as the U.S. captured markets that had traditionally been the domain of British and European merchants.[105] American manufactured products were in demand the world over. Thus the U.S. seemingly had an interest in free trade, in making sure that the markets for her steel, automobiles, etc. stayed open. But America had a strong protectionist tradition which dated from well into the 19th-century, and that tradition died hard. Old tariff thinking still prevailed, even though times had changed. That thinking had manifested itself in the enactment of a vigorous anti-dumping statute.

Britain was just the opposite. Britain perceived that dumping injuries needed to be redressed if she were to regain her pre-war economic position. However, this meant that the United Kingdom had to turn its back on almost 70 years of free trade tradition. When it came time to write the actual legislation, strong free trade sentiment prevented the Government from actually writing a hard-hitting anti-dumping law.

The numerous debates between, in the House of Commons, the advocates of tariff reform and the "Wee Frees", and in Congress, the protectionists versus those who supported "tariffs for revenue only", would seem to support the idea that legislators were grappling with old and new ideologies during a time of significant economic

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596 (motion to exempt agricultural implements from such duties).

[105]B.W. Poulson, *Economic History of the United States* (New York: MacMillan, 1981), p. 495.

change. But this would be taking all those eloquent speeches at face value and ignoring the political reality present behind the facade.

The fact is that the anti-dumping laws in America and Britain were so different because the Government was able to use political power to steamroller the opposition on one side of the Atlantic but was unable to do so on the other. When Representative Fordney first tried to get an anti-dumping bill passed in 1913, the Democrats, traditionally free traders, controlled the House (290-127), the Senate (51-44), and the White House.[106] Woodrow Wilson was still President in 1919, when Fordney tried again, but now the Republicans were the majority party in the House (239-190). In the Senate, however, where the Bill bogged down, the Republicans held only a 48-46 advantage.[107]

The Election of 1920 brought overwhelming victory to the Republicans. In the Presidential election, Harding rolled up 60.3% of the popular vote, the greatest victory (up to that time) in Republican history.[108] In the Senate, the Republicans held every seat and gained ten more at the expense of the opposition--a clear majority (58-37). And in the House, the GOP won 300 seats, increasing their advantage over the Democrats to a whopping 169 votes.[109] Clearly, after the election of 1920, with

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[106]*Official Congressional Directory*, 63rd Cong., 1st sess. (Washington, GPO, 1913), p. 140.

[107]*Official Congressional Directory*, 66th Cong., 2d sess. (Washington, GPO, 1919), pp. 129-31.

[108]Richard Nixon won the 1972 election over George McGovern with 60.69% of the vote, the greatest Republican majority ever. Harding's percentage eclipsed that of even Ronald Reagan (58.8%), whose 525 electoral votes in 1984 were the most ever for a Republican presidential candidate. *Presidential Elections Since 1979*, 5th ed., ed. Carolyn Goddinger (Washington, Congressional Quarterly, 1991), pp. 124,132,140.

[109]*Official Congressional Directory*, 67th Cong., 1st sess. (Washington, GPO, 1921), pp. 129-131.

Fordney, Penrose, and President Harding all behind the legislation, Senator Simmons and his ilk could bluster all they wanted about the virtues of free trade and the lack of dumping going on in the world. This Bill was going to pass.

The situation was quite different in Great Britain. Of course, the Coalition Government controlled 473 out of 707 seats in the House of Commons.[110] But this "Coupon" Coalition was made up of Conservatives, interested in tariff reform, Liberals, who had traditionally been free traders, and even a few members of the Labour Party.[111] The Board of Trade typified this polyglot of political opinion: it was run by Conservatives (Baldwin, Lloyd-Graeme), but reported directly to the Prime Minister, a Liberal. With this divergence of political opinion, rancour was always present, both within and without the Coalition. J.M. Kenworthy, a Liberal and vocal opponent of the anti-dumping provision, wrote that Parliament at this time embodied "hatred and hostility in the mass".[112] Clearly this was not an environment where consensus, particularly over an issue as volatile as trade policy, could be easily reached.

An indication as to just how tough it was to get this Bill through Commons is found in the personal papers of Lloyd-Graeme. In 1925, now president of the Board of Trade, Lloyd-Graeme was involved in discussions as to how to amend the tariff provisions of the Act, which were soon to expire. The correspondence between Baldwin (then Prime Minister), Churchill (Chancellor of the Exchequer), and Lloyd-Graeme reveals much about the divisiveness provoked by this Bill.

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[110]*British General Election Manifestos, op.cit.*, p. 27.

[111]B.B. Gilbert, *Britain Since 1918* (1967), p. 16.

[112]Quoted in K.O. Morgan, *Consensus and Disunity: The Lloyd George Coalition Government 1918-22* (Oxford: Clarendon Press, 1979), p. 4.

In their correspondence, all parties agreed that new duties should not be imposed by amending the Safeguarding of Industries Act. In areas where there was genuine concern about the effectiveness of the tariff, these men favoured the establishment of Parliamentary Committees to investigate the problem. Their recommendations would form the basis for new tariff levies which would be attached as riders to a Finance Bill, and the Safeguarding of Industries Act could be ignored. Trying to amend the Act, Churchill argued, would once again generate an enormous amount of controversy:

"On our own side the ardent tariff reformers will be greatly excited and feel it their duty to press for everything which widens the bounds. In this they will run up against free trade opinion, Lancashire, and the PM's pledges about no general tariff. Meanwhile, the Opposition, Liberal and Labour, will of course attack all along the line. Think it over very carefully, I beg you, and do not get yourself drawn into a series of unfavourable debates through which we mean one thing, and friends and foes alike mean another." (Swinton Papers II, 270/2/5, 30 December 1924).

Baldwin too wanted to avoid a painful repeat of 1921, Churchill added in later correspondence. The Prime Minister, said the Chancellor, "was keenly alive to the awkwardness of a Special bill, and he would be most glad to know there was some way of avoiding it".[113]

In this paper I have sought to compare two statutes--one British, one American--whose evolution reveals that, in 1921 at least, political rhetoric was far more important than sound economic advice when it came to the writing of anti-dumping legislation. Both these laws represented the fulfilment of political promises. Both were organized in the same tripartite fashion, directed at a common enemy, and included provisions designed to preserve national security. Both originated in wartime documents which were written by politicians, fraught with anti-German sentiments, and not necessarily in accordance with the views of contemporary economists. And both were passed even though the problem they intended to address--dumping--did not exist in 1921.

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[113]Swinton Papers II, 270/2/5, 4 Jan. 1925

And yet these two laws, whose origins were so much the same, had very dissimilar lives. The U.S. Anti-dumping Act was vigorously enforced. Its Constitutionality upheld in 1933,[114] the Act became the basis for numerous anti-dumping prosecutions and a model for future anti-dumping legislation, such as Article VI of the General Agreement on Tariffs and Trade (GATT).[115] The British law, by contrast, was singularly unenforced until its quiet repeal in 1957.[116]

What accounts for the difference here, to some degree at least, was the way in which the legislation was drafted. The American Anti-Dumping Act was written so as to be enforceable; the British statute was not. The reasons for this are not clear, but we can speculate that proponents on the American side were lobbying in a more propitious time. The Republican landslide of 1920 gave men like Joseph Fordney and Boies Penrose the mandate to push through the kind of aggressive protectionist measures they had long advocated. By contrast, anti-dumping supporters on the other side of the Atlantic, men like Terrell and Lloyd-Graeme, could only watch as their Bill was chewed up in the grist mill of political compromise. For them, effective anti-dumping legislation would have to wait for another time and another place.

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[114]See *Kleberg & Co. v. U.S.*, 71 F.2d 332 (C.C.P.A. 1933); and *C.J. Tower & Sons v. U.S.*, 71 F.2d 438 (C.C.P.A. 1934).

[115]W.A. Wares, *The Theory of Dumping and American Commercial Policy* (Lexington, Mass: D.C. Heath, 1977), p. 2.

[116]R. Dale, *op.cit.*, p. 13.

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[1]Throughout this paper, I have cited United States cases, statutes, and legislative documents in accordance with *A Uniform System of Citation*, 14th ed. (Cambridge: Harvard Law Review Association, 1986), considered to be the premier reference guide for American legal scholarship. I have also cited British and Canadian statutes on the basis of the aforementioned text, as the Appendix to "M.Sc. in Economic History, Notes for Students, 1991/92," does not provide any satisfactory examples of statutory citation. The remainder of the work--books, periodicals, Hansard, Parliamentary Papers, and personal papers--has been annotated pursuant to the guidelines in the aforementioned Departmental Appendix, as well as those appearing in *Economic History Review*.

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