report commented:[30]

> [the] question is whether the instrument itself will represent an effective legal mechanism for combating protectionism or whether, on the contrary, it will provide the legal framework for a general and widespread proliferation of restrictive measures against the exports of developing countries and lay the foundation for a system of "organized markets" serving to freeze the present pattern of world trade . . .

The proposed code, therefore, encompasses the demands of the developing countries for an effective legal instrument and the demands of some developed countries for a selective safeguard provision. By controlling the use of safeguard measures and especially selective measures, the code offers a way forward which will be acceptable to all. Its acceptance would pave the way towards the elimination of measures which are contrary to Article XIX, and enhance the effectiveness of GATT as an instrument for the regulation of international trade.

## APPENDIX I

### ARTICLE XIX

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph I of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension

30 UNCTAD TD/227 — "MTN" — Evaluation and further recommendations arising therefrom", 25.

is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1(b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

# International trade and material injury: An economic and comparative study of anti-dumping legislation

W. K. Hastings*

*Anti-dumping law, like all fair trading legislation, attempts to prohibit unfair trade practices. It does this by requiring prosecutors of anti-dumping actions to prove dumping, material injury to domestic industry, and causation between the two. Often however the law is used by domestic producers to protect their own markets from more efficient foreign competition at the expense of consumers. Domestic producers are able to do this because of an ambiguity in the object of the law caused by unclear definitions of terms.*

*This article examines the economic conditions in which dumping takes place. It argues that these conditions indicate that the object of anti-dumping law should be the preservation of efficient competition rather than the protection of domestic producers. It also argues that these conditions indicate the criteria to be examined to determine material injury. Finally, the article suggests ways in which the revised GATT Anti-dumping Code and Part VA of the Customs Act 1966 could be reformed.*

In April 1986, the New Zealand Customs Department withdrew its anti-dumping case against Carlton and United Breweries. The case was brought on a complaint from the Brewers Association of New Zealand that Foster's lager was being sold in New Zealand at a price lower than the price it sold for in Australia. In withdrawing the case, Customs Minister Margaret Shields stated that "the point being overlooked is that . . . *it was not dumping*. It works out at a sum which equates to about one cent per can. You cannot say that material injury results from a cent a can".[1]

This article will explore definitional problems inherent in anti-dumping law, and particularly the concepts of dumping and material injury.[2] These concepts are distinct and separate. Not all dumping causes material injury to domestic industry. And there are some trade practices which are not dumping but which do cause material

* Lecturer in Law, Victoria University of Wellington.

1 *National Business Review* Wellington, 2 May, 1986, p.26.

2 It will not explore concepts such as "export price", "like products" or "domestic industry" although it is acknowledged that these have bearing on any consideration of "dumping" and "material injury".

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injury. New Zealand is somewhat limited in the means it can adopt to deter materially injurious dumping by Article VI of the General Agreement on Tariffs and Trade (GATT). It will be argued that the GATT system and New Zealand law should be changed to remove ambiguities in the definitions of "dumping" and "material injury", and that the law should encourage specific selective penalties directed at companies engaging in trade practices which discourage efficient competition.

## I. ANTI-DUMPING THEORY

### *A. The Problem: What does Anti-dumping Law Try to Achieve?*

Dumping has been defined as "price discrimination between purchasers in different national markets".[3] In other words, dumping is the sale of goods at a lower price abroad than exists in the exporter's home market. All anti-dumping law, but in particular the revised Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade[4] and Part VA of the New Zealand Customs Act 1966, embodies a peculiar mix of two inconsistent objectives which results in ambivalence in the interpretation of material injury. On one hand, the law tries to protect domestic producers of goods identical with, or similar to, those imported at dumped prices, from past, present and future material injury.[5] Yet procedural safeguards[6] indicate some desire to preserve a competitive market place in which efficient production and consumer satisfaction are enhanced by permitting an economic distribution of goods at competitive prices. Anti-dumping law falls somewhere between these two objectives. Examined from extreme ends of the spectrum, the former objective of protecting domestic producers from material injury will be referred to as the "tariff approach". This objective protects competitors at the expense of competition.[7] The latter objective of ensuring competition and an efficient allocation of resources will be referred to as the "competition approach". This preserves an open market at the expense of inefficient competitors.[8]

This ambivalence of objective is illustrated in three aspects of anti-dumping law.[9] To impose dumping duties, a separate finding of dumping causing material injury must be made for each foreign producer and product. This indicates a penalty rather than a tariff, imposed to deter specific anticompetitive acts by specific

3 Jacob Viner *Dumping: a problem in international trade* (University of Chicago Press, Chicago, 1923) 4.

4 Hereafter called the Revised GATT Anti-Dumping Code, or the Code, which can be found at (1980) B.I.S.D. 26S/171.

5 See para. 1 of Article VI, which has been reproduced as Appendix A.

6 These procedural safeguards require three findings before anti-dumping duty may be imposed: first, that dumping has occurred; second, that material injury or retardation has been suffered; and third, that a causal connection exists between the two.

7 Note "The Anti-dumping Act — tariff or anti-trust law?" (1975) 74 Yale L.J. 707, 713; Barcello "Antidumping laws as barriers to trade — the United States and the international anti-dumping code" (1972) 57 Cornell L.J. 491, 513; Ehrenhaft "Protection against international price discrimination: United States countervailing and anti-dumping duties" (1958) 58 Colum.L.Rev. 44, 47; Stegemann "Anti-dumping policy and the consumer" (1985) 19 J.W.T.L. 466.

8 Idem.

9 Note, supra n.8, 709.

producers, yet the duty imposed is tariff in form. Second, the requirement of material injury reflects a tariff objective of protecting domestic industry from competition with less expensive foreign imports. Yet the law does not penalise all imports injurious to domestic producers as a tariff would. It penalises only those which are sold at discriminatory prices, indicating a competition approach of ensuring fair market competition among both domestic and foreign firms. Third, the law can only be invoked by a domestic complainant[10] if the imported goods sell at a lower price than that prevailing in the exporter's home market. This is notwithstanding the fact that a domestic producer may be injured by any lower priced competitive import, even if that import carries an export price higher than that prevailing in the exporter's home market. While this suggests that the main objective of the law is aimed at the discriminatory nature of dumping rather than its injurious effects, a competition approach, it could be argued that the requirements of material injury need only be to a domestic industry, and not prima facie to competition in the domestic market, a tariff approach.

The ambiguity resulting from the requirement of separate findings of dumping, material injury and causation is therefore unnecessary. If the tariff approach is to be embraced, there is no need to find material injury: duty would be imposed against all imports sold at prices below their normal domestic value. If the competition approach is to be embraced, there is no need to find dumping has taken place before a finding of injury is made. Duty would be imposed against any injurious import, regardless of whether it sells at a price below normal value. If the necessity of finding material injury is to be given a meaning, its object is, by necessary implication, competition. If injury merely to individual competitors is required, a finding of dumping becomes irrelevant, since any lower priced import will injure, to a certain extent, an individual domestic producer of competitive goods, even though the lower priced import may enhance competition. The premise of this article is that domestic industry is better protected by permitting fair competition and encouraging efficiency than by cossetting it with tariffs. If both approaches are embraced, as is presently the case in the GATT Code, the law becomes vulnerable to inconsistent application.

This paper will focus first of all on the economic conditions in which injurious dumping takes place. These will be shown to dictate that the law should focus primarily on factors preserving healthy competition, rather than on protecting competitors. This "competition" approach to finding material injury is also preferable because usually only two kinds of dumping are inherently injurious in that they harm both domestic industry, or individual manufacturers, and domestic competition: intensely disruptive temporary dumping and dumping with predatory intent.[11] The indicia of market disruption in the importing country will then be

10 Or, in New Zealand, by the Comptroller of Customs (s.186A(1), Customs Act 1966).
11 Viner, supra n.3, 145-147; Wares *The theory of dumping and American commercial policy* (Lexington Books, Toronto, 1977) 115; Huysser *Théorie et pratique du dumping* (Editions Ides et Calendes, Neuchatel, 1971) 13-18; Viner *Memorandum on Dumping* (League of Nations, Economic and Financial Section, submitted to the Preparatory Committee for the International Economic Conference, Geneva, 1926) 10, paras. 13, 19, 27.

examined for clues as to the legal test for material injury. Thus the legal criteria for finding material injury should be derived solely from the economic and market conditions permitting these types of materially injurious dumping.

Finally, the anti-dumping legislation of GATT and New Zealand will be examined to determine if the legal criteria of material injury reflect the economic and market conditions in which materially injurious dumping occurs. First, however, it is necessary to outline the types of dumping and the motivations for each type in order to put into context the effects of materially injurious dumping and the economic conditions permitting it to take place.

### B. *The Types of Dumping: Which Ones Injure Competition?*

Jacob Viner, author of the seminal work on dumping, classified, in general terms, three kinds of dumping which have been criticised rarely over sixty years.[12] The first, sporadic dumping, may be completely unintentional, resulting from the receipt of a lower price on a foreign sale than was expected, or it may be motivated by the desire to dispose of unplanned inventories in foreign markets rather than selling them at home with the consequent risk of lowering domestic price by increasing supply. It is not motivated by an intention to destroy competition. The second, short-run or intermittent dumping, may be designed to develop trade connections in a new foreign market, or it could be motivated by a desire to retain a certain share in a foreign market when prices in that market have become temporarily depressed. Intermittent dumping may also have a more predatory objective. It could be motivated by a wish to eliminate competition and acquire monopoly power in the foreign market, or to prevent the development of competition in the foreign market by preserving the exporter's monopoly position there. Its purpose could also be to retaliate against dumping by foreign competitors in the exporter's home market.[13] The motives for the third type of dumping, long-run or continuous dumping, are twofold. The exporter could dump either to achieve economy of scale by increasing production without cutting price, or to maintain full production from existing capacity without reducing price, thereby maintaining economy of scale. For economic reasons, it is unlikely that this sort of dumping would be materially injurious to competition.

12 Viner, supra n.3, 23. While Viner acknowledged other methods of classification, his temporal classification has been accepted and adopted by Ehrenhaft, supra n.8, 46-48 (but note that the author fails to mention that Viner classified some types of non-predatory intermittent dumping); Baier "Substantive interpretations under the Anti-dumping Act and the foreign trade policy of the United States" (1965) 17 Stan.L.Rev. 409, 448; de Jong "The significance of dumping in international trade" (1968) 2 J.W.T.L. 162, 171 (the author implicitly adopts Viner's classification without acknowledging its source); Comment "Anti-dumping Act — determination of injury — purposeful importation at depressed market price held prohibited under continuation of injury theory" (1970) 3 N.Y.U.J. Int'l L. & Pol. 376, n.10; Myerson "A review of current anti-dumping procedures: United States anti-dumping law and the case of Japan" (1976) 15 Colum.J.Transnat'l L. 167, 168; Coudert "The application of the United States anti-dumping law in the light of a liberal trade policy" (1965) 65 Colum.L.Rev. 189, 192. Only Wares, supra n.11, thoroughly scrutinises Viner's classification, which emerges relatively unscathed.

13 Viner, supra n.3, calls this "reverse dumping". It is defined as "the quotation of lower

From the above classification, it becomes apparent that dumping per se indicates nothing about material injury. Dumping by itself is usually only injurious when it is either intermittent and predatory, that is, when it is intended to monopolise a foreign market, or when it is intermittent and very intense, in which case it abets, perhaps unintentionally, the destruction of competition in the foreign market.[14] A practical hurdle arises, however, in the application of anti-dumping law to materially injurious dumping. It is difficult to distinguish, at the time of dumping, whether the dumping is sporadic, intermittent, injuriously intermittent, or long-run.[15] Because dumping can occur under economic circumstances which may or may not cause material injury, and because under the same economic circumstances, that injury may or may not have a deleterious effect on competition in the domestic market of the importer, it is important to identify those economic conditions under which domestic injury caused by dumping will be sufficiently material to cause harm to competition in the domestic market. In other words, under which economic and market conditions will injurious dumping occur?

## II. ECONOMIC THEORY

### *A. The Exporter's Point of View: Which Economic Circumstances Make Injurious Dumping Attractive?*

Perfectly competitive firms will engage in sporadic dumping because the disposition of surplus inventory in the home market would cause a lowering of prices because of an oversupply and a consequent decrease of marginal revenue.[16] In a perfectly competitive market, optimal price and output occurs where marginal

prices to domestic than to foreign buyers". It occurs when the domestic market is unimportant when compared with the foreign market, and when goods are produced mainly for export to that foreign market. It is used to circumvent ad valorem customs duties if the duties are assessed on the exporter's home market price regardless of invoice prices. If the domestic market is small, the exporter enjoying a monopolistic or oligopolistic position at home will establish an artificially low price in his home market, to be used as a basis for assessment of duties on exports to the importing country. Viner, 7. Cf. Berglund "The ferroalloy industries and tariff legislation" (1921) 36 Pol.Sci.Q. 270.

14 With regard to intense intermittent dumping, Viner stated, "[t]here is surely even a stronger case for the temporary protection of an established industry with a long record of successful survival of the test of foreign competition, if such industry is threatened by foreign competition of an abnormal and temporary character". (Supra n.3, 145.) With regard to predatory intermittent dumping, Viner stated, "[w]here dumping is activated by predatory motives, the suppression of such dumping is clearly and unqualifiedly consistent with free-trade principles, just as the suppression of unfair competition in domestic trade is wholly reconcilable with the general argument for free and unhampered competition in such trade". (Ibid. 147.)

15 See Kohn "The Anti-dumping Act: its administration and place in American trade policy" (1962) 60 Mich.L.Rev. 407, 411; Viner, supra n.3, 139; Baier, supra n.13, 452.

16 A definition of terms is in order: *Marginal revenue* is the change in total revenue resulting from the sale of an additional unit of output, i.e. the revenue produced from the sale of the last item manufactured. *Marginal cost* is the cost of producing the last unit of output. *Total revenue* is the total amount received by the seller for his goods. *Average revenue* is the amount of revenue per unit sold. *Total cost* is the cost of production at any given level of output. *Average cost* is the cost per unit produced. Both average and total cost are divided into *fixed costs,* which do not vary with output, and

revenue equals marginal cost, as this is where profit is maximised.[17] Market demand determines price. Where the price of the goods produced by a firm equals the marginal cost of producing those goods, a firm would decrease its profits if it either increased or decreased its production.[18] Therefore, market conditions give a perfectly competitive firm no incentive to dump abroad intermittently or continuously because it cannot raise its home price by restricting supply and dumping the surplus, it cannot eliminate competition in the foreign market by price cutting, and it cannot lower home price by expanding production and selling the surplus in the foreign market at a price above its home price but below the foreign market price.[19] The producer in a perfectly competitive market must bear alone the sacrifice involved in export at a reduced price, and share with its domestic competitors the advantages from any reduction in domestic supply caused by dumping.[20] It is therefore unlikely that continuous dumping could be maintained long enough to cause material injury.

It is important to note, however, that a presumption of injuriously intermittent dumping may be made if a firm deliberately takes itself out of equilibrium, thereby reducing its profits, in order to engage in price discrimination with predatory intent. While profits may decrease in any of the above three situations, the firm will still produce a profit as long as average revenue is equal to or greater than average cost, even where marginal revenue is below marginal cost. Even though the last items produced by a firm may not increase the firm's revenue, the revenue generated from sales of all the items produced will exceed the total cost of producing those items. Therefore, where average revenue falls between the two different sale prices in the home and export markets, and average revenue at least equals average cost, a firm will make a profit notwithstanding the fact that the lower dumped export price falls below average cost. Thus, it is only when the dumped export price is below marginal cost that home market sales are in effect offsetting, or subsidising, the price of the dumped exports.[21]

While theoretically this is the most certain test for injuriously intermittent dumping, it may be practically impossible to obtain information indicating that the export price is below marginal cost. Other indicators exist, however: "[I]t is

*variable costs,* which increase as output increases. *Equilibrium* is the point at which the optimal price meets the optimal output for maximum profit. For a concise but thorough outline of the basics of economic theory, see Lipsey, Sparks and Steiner *Economics* (Harper and Row, New York, 1973). The above definitions appear at 232, 288, 288, 186, 186 and 186 respectively.

17 See Chart 1, Appendix B.

18 See Commentary to Chart 1, Appendix B.

19 The latter is technically not dumping, (although it could as easily cause material injury to competition in the foreign market) but a form of "reverse dumping". Any of these situations will take the firm out of equilibrium on Chart 1, Appendix B, decreasing its profits.

20 Viner, supra n.3, 95.

21 See Barcello, supra n.7, 506, and Myerson, supra n.12, 169. There is no reason to deliberately lower profits when dumping unless the dumper intends to eliminate competition in the foreign market and then raise its price to a monopoly level. See text before note 28.

the power to influence the home price that makes dumping a potentially advantageous policy."[22] A producer with some control over domestic price will set its price above marginal cost.[23] Profit maximisation will still occur where marginal revenue equals marginal cost, and as in a perfectly competitive market, the amount of profit will depend on whether average cost is less than average revenue. Where average cost is equal to or greater than average revenue, no profit will be made even if marginal revenue equals marginal cost. The difference is found in the fact that a firm with control over domestic price does not equate price with marginal cost. It is therefore possible that varying demand conditions will cause the firm to vary its prices while maintaining the same production level, because profits can be earned whenever average cost is less than average revenue without having to risk its position in its home market. If demand in the firm's home market is relatively inelastic (i.e. a decrease in price will not cause a sufficient increase in sales to cover the cost of the price decrease), compared with a more elastic demand in a foreign market (a price decrease will cause an increase in sales sufficient to meet or exceed the price decrease), dumping in more elastic foreign markets will maximise short-run profits when the export price exceeds marginal cost while remaining below the firm's home price.[24] The more elastic the foreign market, the higher the price it will support. Therefore, price discrimination does not always indicate that the lower export price is unprofitable or subsidised by a higher home price. Instead, the price differentials could merely be adjustments made by an exporter "playing the markets" to maximise its profits in the various markets in which it sells. Such conditions are not evidence of predatory intent, but they do indicate the presence of intense temporary dumping according to market elasticity and degree of domestic price control.

A firm which operates to some extent under monopolistic conditions can determine its level of output for any given price. Such a firm may dump for three reasons. It may dump to maximise short-term profit if foreign prices decline to a level between domestic price and marginal cost. It may dump defensively to protect domestic price from declining because of oversupply if the domestic price is very high. Or it may dump to break into, or increase its share of, a foreign market.[25] The exporter is limited, however, in the degree of dumping in which he can engage. If there are no barriers to the re-entry of the dumped product into the exporter's home market, the maintenance of price above marginal cost in the home market will be threatened. The exporter will not be able to lower its foreign selling price by more than twice the transport costs to the foreign market, taking into account customs duty on re-entry. Any export price lower than this limit will leave the exporter vulnerable to the resale of its own dumped goods in its home market.[26]

22 Wares, supra n.11, 10.
23 Ibid. 9. See Chart 2, Appendix B.
24 Wares, supra n.11, 10.
25 de Jong, supra n.12, 171.
26 Ibid. 168; Myerson, supra n 12, 169; Jack *International Trade* (Sir Isaac Pitman and Sons Ltd., London, 1931) 100.

Thus the presence of intermittent or long-run dumping merely indicates the presence of a monopoly or oligopoly in the dumper's domestic market. The stronger the dumper's monopoly, the greater the incentive to maintain home prices, the more frequently will foreign prices fall between the dumper's domestic price and the marginal cost of production, and the larger will be the profits used, if necessary, to offset any losses abroad.[27] The more monopolistic the dumper's position in its home market, the more conducive to dumping is the condition of that market. Therefore, an export price below marginal cost is conclusive of a deliberate policy of subsidisation of foreign sales with domestic prices, and consequently of lost profit, indicating injuriously intermittent dumping caused by predatory intent. An export price exceeding marginal cost but below a monopolistic exporter's home price, in a market more elastic than the exporter's home market, is fairly conclusive evidence of intense intermittent dumping disrupting foreign markets as the exporter "shops" for the most elastic market in which to dump his goods. These factors will increase the dumper's opportunity of monopolising the import market as it has done its own,[28] and they will increase its opportunity for maximising profit with temporary dumping in various markets according to their elasticities of demand, severely disrupting efficient domestic production of competitive goods.[29] These, then, are the economic conditions under which injuriously intermittent dumping will occur, and are consequently the economic conditions to which the law should direct itself in any determination of injury.[30]

### *B. The Importing State's Point of View: How to Tell When Dumping is Materially Injuring the Market Place*

Unlike an examination of the economic conditions permitting injuriously intermittent dumping, the economic effects of such dumping on the domestic market, which should also dictate the legal indicia of material injury, are relatively simple and can be interpreted from two contrasting economic points of view, one reflecting the competition approach, the other reflecting the tariff approach. The central question is "whether the advantages of temporary cheapness to domestic consumers are greater or less than the disadvantages which attend the disorganisation

27 Which would indicate predatory intermittent dumping. Wares, supra n.11, 87.

28 It is only because she is to a greater or lesser extent, able to control her domestic price that she was able to dump in the first place.

29 Viner states that "the evil of dumping from the point of view of the importing country is its uncertain duration" (supra n.3, 139), both because of its disruptive effort on the production of domestic competitive goods, and because the temporary dumping of raw materials or semi-finished goods may cause industries to spring up where they would not have otherwise survived existing competition: "An industry rests on an unstable foundation if its existence is dependent upon the continuance of artificially cheap price for its raw materials." (Ibid. 137.) See also Jack, supra n.26, 104.

30 It should be noted that while an export price exceeding marginal cost but below the exporter's domestic price is evidence of intense temporary dumping, predatory intent cannot be conclusively inferred in such a situation. Predatory intent likely exists but it can only be *proved* when the export price is below marginal cost. See Wares, supra n.11, 87.

of the domestic industry."[31]

The free trade argument would balance these concerns by permitting all dumping on the basis of long-run comparative economic advantage.[32] Consumers will be better off in the long run because by promoting competition, inefficient producers with more expensive products are removed from the market, allowing a more efficient allocation of world resources. A country applying a "competition" approach in theory would be protected from dumping because, under normal conditions, the prices of all competitive domestically produced goods should be lower than elsewhere.[33] The competition approach to the application of anti-dumping law recognises the merits of the free trade argument. The contrary view would prohibit all dumping except the dumping of goods not domestically produced in the importing country.[34] The protectionist argument takes the position that the prohibition of dumping prevents "the departure of commerce from its normal and economically desirable channels."[35] Such channels lead, in theory, towards as much domestic self-sufficiency as possible. Therefore, the tariff approach is most cognitive of the merits of the protectionist argument. Yet both arguments would not tolerate the presence of intense temporary dumping and predatory dumping; the protectionist argument because it prohibits the dumping of all competitive goods; the free trade argument because it recognises that such dumping constitutes unfair competition and may have decidedly anti-competitive effects in the increased opportunity for monopolisation, and in the increased chance of artificial disruption of the import market. Where the tariff approach in applying anti-dumping law departs from the mainstream of both economic arguments is that it fails to recognise that domestic self-sufficiency is enhanced by efficient production, and that efficient production can be encouraged by other than injuriously intermittent dumping. Such a consequence could not be said to be a "departure of commerce from its normal and economically desirable channels," even on a nationalistic protectionist analysis. Nevertheless, a tariff standard of injury does not recognise the distinction between injurious dumping and dumping that may

31 Jack, supra n.26, 103. It is interesting to note that courts in Canada for example have traditionally refused to answer this question in the context of anti-combines legislation, on the ground that the courts are not sufficiently trained in economic theory to decide between conflicting economic policies. Yet it is difficult to see how the law may be effectively applied without a basis of economic criteria and an enunciated economic policy decision. Witness the comments of Spence J. in *R.* v. *Howard Smith Paper Mills Ltd.* [1954] O.R. 543, 571 [aff'd. [1955] O.R. 713 (C.A.), aff'd. [1957] S.C.R. 403]:

> Surely the determination of whether or not an agreement to lessen competition was "undue" by a survey of one industry's profits against profits of industry generally, and a survey of a movement of the prices in that one industry against movement of prices generally, would put the Court to an essentially non-judicial task of judging between conflicting political theories. It would entail the Court's being required to conjecture — and by a Court it would be nothing more than mere conjecture, since a Court is not trained to act as an arbitrator of economics — whether better or worse results would have occurred to the public if free and untrammelled competition had been permitted to run its course . . .

32 Viner, supra n.11, 9. Baier, supra n.12, 449. Lipsey et al., supra n.16, c.17.

33 Dietzel "Free trade and the labour market" (1905) 15 Eco. J. 1, 3.

34 Viner, supra n.11, 8. Baier, supra n.12, 449.

35 Viner, supra n.3, 144. See also Lipsey et al., supra. n.16, c.17.

cause short-run injury to individual producers, but which is, in the long-run, healthy for competition and hence all producers.[36]

For example, the harm to the producer competing with sporadically dumped goods is usually so short lived that it is more than offset by the gain to consumers. After eliminating its surplus inventory, the dumper will adjust its production downward to reflect the lower demand in its home market.[37] Indeed, an "occasional spell of dumping might give needed stimulus to improvement and efficiency to the domestic industry . . . "[38] However, the tariff standard of injury, which presupposes that dumping is injurious,[39] would result in the imposition of anti-dumping duties anyway. The competition standard of injury would look for signs of the absence of predatory intent and temporary intensity. In doing so, it would examine whether the dumper has any monopoly control in his own market, whether the export price is below marginal cost, and whether the export market is more elastic than the dumper's home market. In the cast of sporadic dumping, and by examining only market conditions, the competition standard would likely not find injury and would not impose anti-dumping duties.

Likewise, continuous or long-run dumping may have beneficial effects the tariff standard of injury would overlook. If the dumping is of raw materials or semi-finished goods, the regular availability of materials at low prices may enable small firms producing finished products to compete with larger firms controlling the domestic source of supply, enhancing competition and benefitting some domestic producers.[40] Competing producers in theory would adjust their production levels accordingly to meet the new foreign and domestic competition, provided the dumped import is in the market for a long time. Even if domestic producers cannot meet the competition and are forced to withdraw from the market, the economy of the importing country will suffer no harm if the dumped goods fill in the market gap, provided that labour and capital withdrawn from the victim industry flow into other industries in which the importing country has a comparative natural advantage.[41] These benefits are more pronounced when the importer's domestic

36 The shallowness of the tariff standard is illustrated thus: If goods are dumped at a price substantially below the domestic price of such goods in the importing country, and below the exporter's domestic price, injury would have been caused and anti-dumping duties imposed. Yet if the dumper has sufficient monopoly power to lower his domestic price to the price he charges the importing country, or if he raises the price he charges in the importing country above his domestic price but still below the price prevalent among other producers in the importing country, the same injury will occur, but anti-dumping duties could not be imposed. Thus the tariff standard of material injury, which can be invoked by mere fact of dumping below domestic price, does not sufficiently protect domestic producers and domestic competition. See also, Note, supra n.7, 718-719.

37 Myerson, supra n.12, 170.

38 Viner, supra n.3, 144.

39 Since any lower priced import will harm individual domest'c producers of competitive goods.

40 Myerson, supra n.12, 170; Note, supra n.7, 713; Viner, supra n.3, 137, 141; Jack, supra n.26, 104.

41 Myerson, supra n.12, 170; Barcello, supra n.7, 508; de Jong, supra n.12, 171; Lipsey et al., supra n.16, 287-290.

market is dominated by a monopoly or oligopoly. The entry of dumped goods could have a twofold effect of forcing the monopoly to lower its prices to a competitive level, and of reducing the barriers to competing domestic firms. Under a tariff standard of injury, the injury to the domestic monopoly would provide sufficient ground for the imposition of anti-dumping duties without any consideration of the possible beneficial effects of such dumping.[42] The competition approach would focus on whether the dumping in this case constitutes a threat to the continuation of competition in the marketplace[43] by examining the above criteria for evidence of predation or temporary intensity. The higher competitive standard of injury would force domestic firms in the importing country to meet the dumped price whenever possible by increasing efficiency of production, rather than allowing them to invoke anti-dumping legislation to reduce price competition.[44]

It is only the case of intermittent dumping where the competition standard tests for predation and temporary intensity may falter. For example, where there are cross-elasticities of demand among products (that is, where products with a similar end-use may be substituted for one another), intermittent dumping may injure industries whose products are not directly competitive with the dumped product. The competition standard tests do not consider conditions of a market which is not directly competitive with that in which goods are being dumped.[45] Whether the dumper has monopoly control in its own market over a line of products is not relevant if that line competes with a different line of products in the export market which may not have a cross-elasticity in the dumper's home market. Likewise, whether or not export price is below marginal cost may indicate predation in one line of goods but not in another line sharing the same end-use, nor will a consideration of whether the export market is more elastic than the dumper's home market, be of any use if the goods are in many respects not comparable with the dumped goods.[46] Furthermore, intermittent dumping may result in the domestic production of the dumped goods being eliminated or prevented from expanding. This may be beneficial if the capital and labour could be more efficiently utilised elsewhere, but the competition standard tests do not focus on conditions in the dumper's target market, nor on the economic ability of domestic competitors in the target market to withstand the dumping. Therefore, such tests would also not concern themselves with intermittent dumping forcing third country producers to withdraw from the market in which the dumped goods are sold. Thus, the

42 Note, supra n.7, 713; Viner, supra n.3, 134-135.
43 Idem.
44 Note, supra n.7, 713. See also Wares, supra n.11, 4. Viner, supra n.3, 142, states that domestic producers "often use alleged foreign dumping as a pretext for higher import duties where what they really seek is a greater measure of tariff protection against foreign competition".
45 Myerson, supra n.12, 171, gives the example of radios and TVs. The resolution of this problem in many ways hinges on the definition to be given to "like goods".
46 Cross-elasticity is not important from a legal point of view in cases of sporadic dumping because of the short-lived effect of such dumping, and is not important in cases of continuous dumping, because such dumping shows no signs of predation or temporary intensity, and has the effect of long-run comparative economic advantage anyway.

economic effects of the dumping on the target market and domestic producers may indicate whether intermittent dumping is injurious (that is, whether it is predatory or of temporarily disruptive intensity), but only if combined with the competition standard tests. Otherwise, examining economic effects alone will give no indication of whether domestic production is being injured because it is merely inefficient, or because it is a genuine victim of injuriously intermittent dumping.

Therefore, while not diminishing the importance of the three competition tests of 1) the degree of the dumper's monopoly power in his own market, 2) whether export price is below marginal cost, and 3) the relative elasticities of demand in the export and dumper's home markets, in the cast of intermittent dumping the following economic criteria would indicate the degree to which the dumping in question would threaten to reduce competition in the target market. These criteria would also tend to indicate whether the dumping was sporadic, intermittent or continuous at the time of dumping. The intensity of a temporary market disturbance, and therefore the degree of injury caused by intermittent dumping varies directly with the rate of change in price and sales trends in the target market compared with the normal rate of change. The more rapid the decline in sales and prices of domestic producers of competitive goods, the more intense and injurious the dumping, provided the decline of sales is matched by an appropriate increase of sales by the dumper. Predation, or even a change in market structure that threatens to reduce competition, can be evaluated in the absence of a satisfactory application of the competition tests, by examining the abnormality in the growth of the dumper's target market share in comparison with overall growth and decline of the market, and in comparison with the change in the market shares of other competitors, both domestic and foreign. To ensure the rate of change in market shares is due to dumping, trends in profits, capacity utilisation, unit cost, production levels, and employment levels of all firms in competition with the dumper, as well as those of the dumper, would be examined.[47] These criteria are not as conclusive of injury as the competition tests with which they are used in conjunction, but they do indicate the type of dumping by the degree of change. Also, by comparing the rates of change with those of the dumper, the criteria take into account profit and sale opportunities foregone by domestic industry because of the dumping.[48]

## III. THE LAW

To sum up, the primary focus of the law should therefore not be on whether dumping has occurred, but on whether material injury has occurred. Merely comparing prices in the export market with those in the exporter's market says nothing about material injury. The law should concentrate on the economic factors prevailing in the exporter's home country which encourage materially injurious dumping:

47 Wares, supra n.11, 117.
48 Cf. Marchant "The determination of anti-dumping duty under the *Anti-dumping Act, 1968*: a draft exposition" (Unpublished paper, Osgoode Hall Law School Library, November 1973) 64.

1. The degree to which export price is less than marginal cost;
2. If export price exceeds marginal cost, but is still less than the exporter's domestic selling price, the degree of elasticity of demand in the target country; and
3. The degree of monopoly power the dumper possesses in her own country.

The law should also focus on the market factors prevailing in the importing country which indicate material injury:

1. Whether the rate of decline of domestic producers' sales and prices is by the same rate of increase in the dumper's sales and prices;
2. Whether the rate of decline of domestic producers' market shares is matched by a similar increase in the market share of the dumper; and
3. To shore up the second market indicator, rates of change of profits capacity utilisation, unit costs, output and employment levels of domestic competitors should be compared with those of the dumper.

Examination of these factors should help to prevent the law becoming a tool to protect specific industries, and should shift its focus towards protecting competition, possibly (and inconsequentially) at the expense of inefficient domestic producers.

*A. GATT*

New Zealand is a party to the GATT, and is thus bound by Article VI. It has just become a party to the revised Code on the implementation of Article VI.[49] New Zealand is therefore legally tied to the general principles of Article VI, as well as to the specific provisions regarding the application of anti-dumping law in the Code.

Article VI does not condemn dumping. It condemns dumping only if it "causes or threatens material injury to an established industry . . . or materially retards the establishment of a domestic industry" (paras. 1 and 6(a)). Article VI does not define "material injury". It does however require a state not to impose anti-dumping duty even if material injury exists in only one situation. If there is a system of domestic price maintenance in the dumper's home country, and dumped exports are materially injuring domestic industry in the importing country, the importing country must not impose anti-dumping duty if it can be shown that "the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market" and that the system is operated so as not to stimulate unduly exports or otherwise seriously prejudice the interests of other state parties to GATT (para. 7).

By not condemning all dumping, Article VI is prima facie competition-oriented. New Zealand must only penalise the import of those dumped goods which cause material injury. Ideally, it ought to be able to penalise only the import of those goods which cause material injury regardless of whether or not

49 See n.4 and Appendix A.

they are dumped, but the requirement of a finding of dumping will not cause the law to veer whole-heartedly towards a tariff approach provided its main focus is on material injury. Domestic legislation implementing Article VI will stray from the perfect competition ideal only if it pays insufficient attention to the need to find material injury, or if it ignores economic indicators, or if its focus is on protection of specific domestic industries rather than on protection of a competitive domestic market place. Unfortunately, the lack of guidance in Article VI with respect to the definition of material injury could well permit this to happen.

*B. New Zealand*

The legislative history of New Zealand anti-dumping law indicates a strong tendency towards a protectionist tariff approach. The first anti-dumping provision appeared as section 11 of the Customs Amendment Act 1921. It gave the Minister a discretion to impose anti-dumping duty if the import price of the goods was less than the domestic price of similar goods, if the import price of the goods was less than their cost of production, or if the imported goods were the subject of a special transport concession, subsidy or rebate. Only in the last situation was the Minister required to find that such a concession would "have an effect prejudicial or injurious to any industry or business established or carried on in New Zealand". The further requirements of prejudice or injury could scarcely be said to preserve competition, since even increased competition itself could be said to prejudice the interests of a domestic business. The law was ideally designed to prevent new foreign entrants into the New Zealand market. It contained nothing to hinder the chances of a New Zealand industry achieving monopoly power regardless of how inefficient it was by world standards.

It was not until the Customs Amendment Act 1965 that even a minor change in anti-dumping law occurred. Section 3 of that Act retained the original three circumstances in which anti-dumping duty could be applied, but it broadened both the scope and application of the "prejudicial or injurious" requirement. That requirement now applied to all three circumstances, and it was redefined to require the Minister to find that the import "has or is likely to have any effect prejudicial to any industry carried on in New Zealand . . . or to the establishment of any industry in New Zealand . . . " By amending the law to require findings of dumping and prejudice across the board, it was no doubt intended that the law should have less of a protectionist tariff effect. The Minister could no longer trigger anti-dumping duty merely on a price comparison. But by removing the word "injury" and by extending the "prejudice" requirement to include likely prejudice to an industry or the establishment of an industry, any move towards a more competition standard approach was nullified.

The Customs Amendment Act 1971 retained the undefined "prejudice" requirement and extended the number of circumstances in which anti-dumping duty could be applied from three to four. Added was the case where the dumper and the importer entered into a business association or compensatory arrangement whereby the imported product was sold at a loss or a lower than normal profit. Although a discussion of how to calculate the normal value of a product is beyond

the scope of this article, it is difficult to see the advantage of trying to identify and provide for specific dumping circumstances when reproducing paragraph 1 of Article VI would be of sufficiently general application to remove the need to legislate for uncertain but specific future contingencies.

The anti-dumping provisions of the Customs Act were last amended by the Customs Acts Amendment Act (No. 2) 1983 which inserted Part VA entitled "Dumping and Countervailing Duties". The original four circumstances in which dumping could be found are retained in modified form, but the "prejudice" requirement has been finally removed. The wording of section 186A is much closer to that of Article VI. It requires the Minister to find that the importation of dumped goods "causes or is likely to cause material injury to any industry in New Zealand . . . or materially retards the establishment of any industry in New Zealand . . . " before deciding to impose anti-dumping duty. The abandonment of the vague "prejudice" criterion in favour of a "material injury" requirement arguably removes the possibility that domestic industries could invoke the law to protect themselves from any foreign competition. If "injury" is to be "material", mere "prejudice" caused by increased competition will not be enough. "Material injury" requires not just harm to domestic industries, but harm to domestic industries caused by unfair competition, as argued above. Although "material injury" is not defined in the Customs Act, the close identity of the provisions of section 186A(2) with Article VI creates the opportunity of defining the term with reference to general economic standards, the revised GATT Code implementing Article VI, and a wealth of international jurisprudence on the subject. Now that New Zealand is a party to the GATT Code, provisions of the Code relating to material injury are far from irrelevant, especially given the similarity of the material injury provisions of section 186A with Article VI.

### *C. The GATT Code*

To find material injury, Article 3.1 of the Code requires an examination of "the volume of dumped imports and their effect on prices in the domestic market for like products" as well as the impact of these imports on domestic producers. There must be a "significant increase" in the volume of dumped imports, either in absolute terms, or relative to production or consumption in the importing country. Obviously, relating the increase in volume to a decrease in production or consumption is preferable to merely asserting that there is an increase in volume of imports. Increasing even dumped imports is as likely to benefit competition as harm it, unless of course the increase is so fast and large as to indicate predation. Matching the imports' rate of increase to a decrease in domestic production or consumption is more likely to indicate the degree of power each competitor has in the market, thereby at least laying the groundwork for a finding of unfair competition or injurious dumping. Indeed, the "matching" process would indicate a causal connection between dumping and material injury without the "significant increase" requirement. The fact that this requirement was inserted reinforces the view that "injury" to a domestic industry is not enough. It must be sufficiently material to affect competition in that industry.

With respect to the effect of the increased volume of dumped imports on prices of like products in the domestic market, the Code suggests domestic authorities investigate whether there has been "significant price undercutting" by the dumped imports as compared with domestic selling prices in the importing country, or whether the imports have either significantly depressed domestic prices or significantly prevented price increases which would otherwise have occurred. This step in the Code is superfluous for two reasons. Domestic producers would not complain to the enforcement authority unless there already existed some form of price squeeze, thus making the need to investigate this aspect nonexistent. Secondly, such an investigation indicates nothing about whether competition is being made more or less efficient as a result of the price undercutting. Material injury does not result if the undercutting is caused by a new market entrant which forces domestic oligopolies to become more efficient. Nor does material injury result if the dumper is undercutting without its domestic prices subsidising the venture into a new market. Yet the Code makes no inquiry into these factors at this stage, thus making suspect the object of any material injury finding.

Finally, when assessing the impact of these dumped imports on domestic producers, (the last prong of the Code's test for material injury) Article 3.3 requires an "evaluation of all relevant economic factors and indices having a bearing on the state of the industry . . . " The Code lists such factors as market share, actual and potential decline in output, and actual and potential negative effect on employment. The list merely offers guidance. It is not claimed to be exhaustive. Although it is not clear from the Code, if these factors are to have meaning, the trends discovered in each must be compared with similar trends in the dumper. Article 3.4 requires the investigating authorities not to attribute to the dumped imports injuries caused to domestic industry by "other factors". Such "other factors" include the volume and prices of imports not sold at dumped prices, the productivity of the domestic industry and competition between foreign and domestic producers.

Article 3.3 it notable for factors not on the list, such as the relation between the dumper's export price and marginal cost, the elasticity of demand in the importing country, and the degree of monopoly power of the dumper in its own country, which would almost certainly indicate injurious dumping better than those factors on the list. Nevertheless, the list purports not to be exhaustive, and there is nothing in it which would prohibit an examination of other factors. Indeed, Article 3.4's direction not to take into account factors which preserve healthy competition would seem to encourage examination of items which best indicate harm to domestic producers through unfair competition and injurious dumping, rather than items which merely indicate injury to domestic producers. Of these items on the list, changes in output, sales and market shares, when examined in light of the above additional factors, would seem to be the most relevant.

The Code is not perfect, but it is closer to the mark than Part VA of the Customs Act. Unlike Part VA, it offers guidelines on how to find materially injurious dumping. The guidelines could focus on more relevant factors, and could do without simplistic price comparisons, as this confuses the intent of the Code,

but the guidelines recognise the essential grounding anti-dumping law must have in economic theory. Part VA reflects past Customs Acts' concern with valuation for tariff purposes in its elaboration of normal value and export price. But it pays virtually no attention to the basic question, of which the definitions of normal value and export price form a subsidiary part, of how to determine when materially injurious dumping has taken place.

## IV. CONCLUSION

There is little doubt that Part VA requires reform. That it should be reformed to correspond more closely to an improved Code also leaves little doubt. Now that section 186A has been redrafted to better fit within the principles of GATT Article VI, there is no reason why the New Zealand Customs Department should not take advantage of the wealth of economic theory and determinations of material injury emanating from agencies of New Zealand's GATT partners, such as the U.S. International Trade Commission operating under the Trade Agreement Act of 1979,[50] the Canadian Import Tribunal operating under the Special Import Measures Act,[51] or even the European Commission operating under Council Regulation 2176/84.[52]

That the Customs Department did not take advantage of this information became evident in the Foster's case.[53] The Department's investigation never seemed to reach the material injury stage. Where it foundered was in the preliminary calculation of the margin of dumping. It thought Foster's was being imported on a special concessionary shipping rate, which is one of the four circumstances in section 186A(2) under which the Minister may impose dumping duty provided a finding of material injury is also made. The concession would have been added back to the export price under section 186C(1)(a).[54] The concession was subsequently found to be freely available, rather than solely to Carlton as originally thought. The Department also did not take into account Carlton's advertising costs in Australia, thereby artificially lowering the normal value of the lager in the alleged dumper's home country. These two factors would have inflated the Department's calculation of the dumping margin. That alone however would indicate nothing about whether competition in the New Zealand domestic industry (leaving aside the question of what constitutes the New Zealand domestic industry) was being materially injured. And without evidence of material injury, the action could not succeed.

The Department behaved admirably in admitting its mistakes. The mistakes were facilitated by an ambiguous and incomplete statute. It is to be hoped that

50 As subsequently amended by the Trade Remedies Reform Act of 1984, Pub.L. 98-725.
51 S.C. 1983-84, c.25.
52 O.J. (1984) L 201/1.
53 Details of the Department's investigation, and where it went wrong, are found in Nikitin Sallee's article in the National Business Review, supra n.1, and in the judgments of Richardson and Cooke JJ. in *The Brewers Association of New Zealand Incorporated* v. *Carlton and United Breweries Limited* (unreported, 1986, C.A. 34/86).
54 The amount of the concession would also have determined the maximum amount of dumping duty to be applied under s.186A(3)(c).

the pending investigation into dumped tugboats from Australia and Japan[55] will be more thorough and will pay closer regard to international standards which preserve efficient competition at the expense of less efficient domestic complainants.

## APPENDIX A

### Article VI of the General Agreement on Tariffs and Trade
### Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy, determined to have granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

55 *National Business Review* Wellington, 2 May 1986, p.1. Note that with respect to any anti-dumping action taken against an Australian import, Article 15 of the Australia New Zealand Closer Economic Relations Trade Agreement becomes applicable. This article, consistent with both countries' GATT obligations, requires findings of dumping, injury and a causal link between the dumped goods and the injury before anti-dumping duties are applied. It also requires each state to give the other "prompt written notice" that it is initiating formal investigations so that the other will have an opportunity to consult with the investigating state. Specific information relating to the investigation must be exchanged (paras. 5, 6, 7).

The ANZCERTA must be read in conjunction with Annex IV of the Proposed Arrangements for a Closer Economic Relationship between Australia and New Zealand, which discussed the two states' anti-dumping procedure as part of a larger fair competition policy. This indicates further that it was the intention of the framers of ANZCERTA that both countries move away from protectionist tariff policies to more open pro-competition policies. It is questionable whether Part VA of the Customs Act 1966 is able, in spirit, if not in writing, to support this intention.

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subjected to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The Contracting Parties may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping of subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The Contracting Parties shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the Contracting Parties; *Provided* that such action shall be reported immediately to the Contracting Parties and that the countervailing duty shall be withdrawn promptly if the Contracting Parties disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(b) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

## NOTE TO ARTICLE VI

*Paragraph 1*

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

*Paragraphs 2 and 3*

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

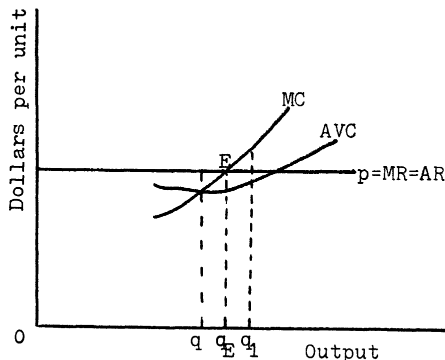
*Paragraph 6(b)*

Waivers under the provisions of this sub-paragraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

## APPENDIX B

**Chart 1.**

Chart 1




From Lipsey et al., supra n.16, 233.

**Commentary**

At any point left of q1, price is greater than marginal cost, and profits would be increased by increasing output. At any point right of q1, price is less than marginal cost, and therefore profits would be increased by decreasing output.