

Chapter 2

The History of Dumping and Antidumping Actions

2.1 Introduction

The concept of “dumping” in international trade has a long history.¹ Dumping, under one name or another has been part of the rhetoric of political economy for a long time.² Jacob Viner, the first scholar to pull together previous writings on the subject of dumping, noted a sixteenth-century English writer who charged foreigners with selling paper at a loss to smother the infant paper industry in England.³ Viner also noted an instance in the seventeenth century in which the Dutch were accused of selling at low prices in the Baltic regions in order to drive out French merchants. He further noted statements made by Alexander Hamilton in debates in the USA in 1791 warning about foreign country practices of underselling competitors in other countries so as to “...frustrate the first efforts to introduce a business into another by temporary sacrifices, recompensed, perhaps by extraordinary indemnifications of the government of such country...”⁴ Hamilton further declared that the greatest obstacle encountered by new industries in a young country was the system of export bounties, which foreign countries maintained in order to “enable their own workmen to undersell and supplant all competitors in countries to which these commodities are sent.”⁵ He drew attention to the possibility that unofficial bounties were being given by combinations of producers:

¹ According to Jackson and Vermulst the first use of the term “to dump” seems to have been 1868, in the *Commerce and Financial Chronicle* (VI. 326/l) where it was said “...new stock secretly issued (was) dumped on the market for what it would fetch”. They suggest that for the purposes of tracking down the genesis of the term “dumping” in international trade, focus should be on the United States congressional debate in 1884. They also recommend a further reading of the *Supplement to the Oxford English Dictionary* Volume 1, A-G, 884 1972. See Jackson and Vermulst in *Antidumping Law and Practice: A Comparative Study* (1989) 4.

² Finger *Antidumping: How it Works and Who Gets Hurt* (1993) 13.

³ Viner *Dumping: A Problem in International Trade* (1923) 38.

⁴ Hamilton “Report on Manufacturers 1791”. Cited by Viner *ibid*.

⁵ *Ibid*.

“...combinations by those engaged in a particular branch of business in one country to frustrate the first efforts to introduce it into another by temporary sacrifices, recompensed, perhaps by extraordinary indemnification of the government of such a country, are believed to have existed and are not to be regarded as destitute of probability.”⁶

Viner further records that Adam Smith not only disapproved of the practice by which governments stimulated exports at prices lower than those current in their domestic markets through the grant of official bounties, but that he also gave an instance from personal observation of the grant of bounties on exports by a private combination of producers in order to reduce the supply available for the domestic market.⁷ Other instances of allegations of dumping by British manufacturers into the new American market are reported, and public discussion of this problem as well as various legislative attempts to deal with it were reported during most of the nineteenth century.⁸ Jackson and Vermulst⁹ record that one of the first laws of the USA dealing with international trade was concerned with dumping.¹⁰ In the early twentieth century dumping was widespread in Germany.¹¹ During and after World War 1, the US Congress enacted several antidumping statutes.¹² It is important to note that trade between industrialised nations did occur for at least half a century before the adoption of these antidumping measures. During that period, dumping

⁶ Hamilton see fn 4.

⁷ See *Wealth of Nations*, Book IV, Chapter V: “I have known the different undertakers of some particular works agree privately among themselves to give a bounty out of their own pockets upon the exportation of a certain proportion of goods which they dealt in. This expedient succeeded so well that it more than doubled the price of their goods in the home market, notwithstanding a considerable increase in the produce.” Cited by Viner *Dumping* 36.

⁸ Viner *Dumping* 38-39.

⁹ Jackson and Vermulst *Antidumping Law and Practice* 4.

¹⁰ Viner states that the Tariff Act of 1816 was the “first distinctly protectionist tariff of the United States, and it has been claimed that the threat to American industries from English dumping, and especially Brougham’s frank utterances with respect thereto, was an important influence contributing to this as well as to subsequent, protectionist legislation.” See Viner *Dumping* 40-44. See further Taussig *The Tariff History of United States* (1966) 68.

¹¹ Viner *Dumping* 51-66.

¹² The Revenue Act of 1916 Ch 463, Sections 800-801, 39 Stat. 798 which is commonly referred to as the Antidumping Act of 1916. The latter is “An Act imposing temporary duties upon certain agricultural products to meet certain emergencies, and to provide revenue, to regulate commerce with foreign countries, to prevent dumping of foreign merchandise on the market of the United States of America (USA), to regulate the value of foreign money and for other purposes.”

was pervasive, and its dynamics and effects were widely reported and discussed.¹³ Many countries, including the USA, were relatively unaffected by dumping because high tariff walls severely limited import competition. A typical example of a fully industrialized country that elected to avoid any policy action against dumping and to remain in effect an “open dumping ground” for a protracted period is Britain.¹⁴

2 2 Dumping by Germany

There is general agreement that before 1914, export dumping was more widespread and more systematically practised in Germany than any other country.¹⁵ The resort to export dumping by Germany seems to have been facilitated by the high tariffs and by the complete organisation of large-scale industry into cartels or industrial selling and buying combinations. These two factors monitored price competition in the domestic market. Cartels monitored price competition from outside Germany and the combinations monitored the German producers themselves. In concert, they made it possible for many of the cartels to adopt as a definite price policy the maintenance of domestic prices at the foreign level plus the full amount of the German import duties and the sale for exports at best prices obtainable, even if these should be substantially below domestic prices.¹⁶

It is obvious that systematic and continued dumping is not likely to arise if the dumping concern must share the higher domestic prices with the competitors and must bear by itself the cost of the export dumping.¹⁷ The cartel method in Germany provided the machinery whereby, without the loss of individuality of the separate concerns, the benefits and burdens of export dumping could be equitably

¹³ Howell and Balantine “Dumping: Still A Problem in International Trade”. Available at <http://www.dbtrade.com/publications/howell.pdf> (accessed 12-04-06).

¹⁴ *Ibid.*

¹⁵ Viner *Dumping* 51.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

distributed among the domestic producers.¹⁸ The effects of the protective tariff were such that foreign competitors were prevented from sharing in the high domestic prices resulting from the price fixing activities of the cartels.¹⁹ However, export dumping by German industries and especially by the iron and steel trade began in the nineteenth century, long before the establishment of cartels.²⁰ Since 1914, writers have always made the charge hostile to Germany and all her works that much of the German dumping was actuated by predatory motives. Some writers have gone so far as finding "a manifestation of a deep laid conspiracy between the German government and industry to destroy the competing industries of foreign countries."²¹

2 3 Dumping in the United States of America

Since the late eighties of the nineteenth century, export dumping on a continued and systematic scale has been a common practice of American manufacturers. There is according to Viner, immeasurable evidence available both in official and non-official sources, which is conclusive in this respect, and which further demonstrates beyond doubt that a substantial fraction of the American export trade in manufactured commodities had, before 1914, been developed and maintained on the basis of sale at dumping prices.²² The abundance of evidence is more significant and convincing because American exporters who resorted to dumping generally endeavoured to conceal their export prices from the general public. Export price lists and quotations were carefully kept out of domestic circulation. In 1902, a

¹⁸ *Ibid.*

¹⁹ Viner *Dumping* 52. Provided only that the cartels did not endeavour to make the German prices exceed the prices in foreign markets by more than the cost of transportation to Germany plus the duty on foreign imports.

²⁰ Walker "The German Steel Syndicate" XX 1906 *Quarterly J of Economics* 391. Cited by Viner *Dumping* 53.

²¹ Viner quotes Hauser *Germany's Commercial Grip on the World* (1917) 98. In the preface of this work, Hauser states: "Dumping, export bounties, import bonuses, combined sea-and-land transport rates, emigration measures - these are various measures which were employed by Germany not as the normal procedure of economic activity, but as means of strangling, crushing, and terrorizing her adversaries." See Viner *Dumping* 61.

²² Viner *Dumping* 80.

Committee of the Democratic Party seeking campaign material succeeded in obtaining from a foreign subscriber a copy of the discount sheet of an American journal, which contained the lowest export prices.²³ A New York Tariff Reform pamphlet, published in 1890, presented many instances of dumping.²⁴ What followed was a build up of evidence of the prevalence of dumping.²⁵ In the USA, the systematic and continued practice of dumping appears to have been largely either confined to the dominant concerns (trusts) of the staple industries or to manufacturers of specialties. In other countries, and especially Germany, even the smallest concerns participated in exportation at reduced prices through their membership in cartels or producer's combinations and through the use of export bounties.²⁶

2 4 The rise and fall of British industry

2 4 1 How dumping affected Britain

As noted above, Britain avoided any policy actions meant to curb the practice of dumping and rather remained an open territory for the practice. The latter's rationale for supporting free trade in the face of widespread dumping in its domestic and overseas markets was based on many of the lines of reasoning that are used today by those who advocate for the complete eradication of antidumping

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ The Industrial Commission in the course of its investigations, inquired both by questionnaire and by personal examination of witnesses into the practice of dumping by American manufacturers, The Commission sent its questionnaires to a total of 2000 Concerns (a concern is commonly referred to as a trust) of whom 416 replied and 75 admitted to dumping products abroad. See the minority report of Philips Industrial Commission Final Report, XIX 1902 663. Viner contends that among those concerns which failed to respond, there were many who engaged in the practice of dumping and those who engaged in this practice were less likely to reply than those who did not. The Industrial Commission was impressed by the outcome of the survey and it consequently recommended in its final report that import duties be remitted on goods of a kind exported by American producers at dumping prices, in order to protect the American consumer against the exorbitant domestic prices which the practice of dumping appeared to imply. See further Final Report XIX 651. Cited by Viner *Dumping* 81-82.

²⁶ Viner *Dumping* 84.

measures.²⁷ Britain's industrial and commercial performance during that period was disheartening, and it witnessed a competitive decline in those industries which were seriously affected by dumping.²⁸

The year 1870 saw Britain accounting for more of the world's manufacturing output than any other nation.²⁹ British industries boasted the lowest costs, and the most advanced means of production were attributed to them. Furthermore, its banks and shipping firms thoroughly dominated world commerce. The beginning of the 1870s saw a rapid growth of the manufacturing industries in Germany and the USA. Both Germany and the USA organised a commercial assault on traditional British markets. Also, both the USA and Germany were boldly and openly protectionist, and by 1880 both national markets were surrounded by extremely high tariff walls. In both the USA and Germany, highly organised and sophisticated anticompetitive industrial combinations were formed for the purpose of reducing competition and exploiting their partial or complete monopoly power.³⁰

The USA made use of the so-called "trusts" which regulated output and prices in many major manufacturing industries, while, on the other hand, Germany's manufacturing industries were dominated by cartels.³¹ It was the standard practice of both the American trusts and the German cartels to engage in large-scale dumping as a deliberate export strategy.³² The result of these high tariff walls meant that the British industry could not respond to this kind of challenge and therefore could not penetrate the American and German markets that had been lost to them. They also lacked both the protected home market and the organised character

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Viner *Dumping* 57.

³⁰ *Ibid.*

³¹ A cartel is a combination of independent business organisations formed to regulate production, pricing and marketing of the goods by the members. Definition available at www.dictionary.com (accessed 12-04-06).

³² Witness No.11, Report of the Tariff Commission, Vol.1 1904 Paragraphs 795, 806. Cited by Howell and Balantine see fn 13.

needed to partake in dumping on an American or German scale.³³ The USA and Germany not only seized sales from British firms, but also began surpassing British industry at the level of industrial technology, productivity, and economies of scale. The erosion of Britain's competitive position, which was attributed to two vigorous and forceful protectionist powers of the USA and Germany, began to cultivate dissent from the prevailing free trade orthodoxy.³⁴

In 1895, the issue was moved to the country's political arena by the Conservative Unionist Party, it being the governing party at that time.³⁵ The then government's Colonial Secretary and self-proclaimed imperialist, Joseph Chamberlain, started a crusade against free trade, and in favour of an imperial customs union that would establish a wall of protective tariffs around Britain and the Empire. Chamberlain's scepticism about free trade was shared and supported by the Conservative Unionist Prime Ministers,³⁶ who were concerned about mounting evidence of Britain's economic decline relative to that of Germany and the USA. They were, however, unwilling to commit their party to a complete eradication of free trade. Balfour instead sought a middle ground, namely, the selective imposition of retaliatory tariffs against trading partners that practised restrictive trade which injured the British markets. It was argued that the imposition of these tariffs was justified since the practice of dumping was injuring or destroying significant industries on which Britain's economy and security rested. Joseph Chamberlain used the sugar industry as an example when he stated that:

"Free imports have destroyed sugar refining...one of the greatest staple industries of the country, which it ought always to have remained...Sugar has gone, let us not weep for it, jam and pickles remain."³⁷

³³ Howell and Balantine see fn 13.

³⁴ *Ibid.*

³⁵ See generally Friedberg *The Weary Titan: Britain and the Experience of Relative Decline 1895-1905* (1988) 45-79.

³⁶ Lord Salisbury (1895-1902) and Arthur Balfour (1902-1906).

³⁷ Cited in Smart *Return to Protection: Being a Re-Statement of the Case of Free Trade* (1906) 154.

Further arguments to the effect that the practice of dumping placed domestic industries at a cost disadvantage, eroded producer's profits and jeopardized "the provision of adequate capital for carrying on great modern industries"³⁸ were brought to the fore. The free traders argued that British industry was faring well under free trade. They drew considerable support from a substantial study conducted by Sir Robert Giffen.³⁹ The study contended that the trade data showed trends that were quite favourable, thus that Britain's exports were growing faster than those of Germany, meaning that British trade status was sound, and there were no trade hindrances in the United Kingdom upon either the import or export trade of the world.⁴⁰ Giffen is said to have reached these conclusions by using statistics for Germany only for the period between 1890 and 1892. This therefore led to erroneous results when the country was experiencing a period of great recession. Because of the fact that Giffen was a "high authority", the defenders of free trade seized upon his study.⁴¹

The free traders further contended that the industries complaining of dumping were seeking to lay blame on imports for their own advantage. To them, dumping was actually a positive good because it provided cheap inputs for many industries and these cheap inputs consequently lowered their costs. The free traders had this to say about dumping:

"By dumping in Britain, the Germans are in a way our benefactors, and last year they supplied to us sugar to the extent of £9 400 000 at less than its cost, not to speak of other articles outside the class of food products".⁴²

³⁸ Speech by British Prime Minister Arthur Balfour, 26-06-1903. Cited by Howell and Balantine see fn 13.

³⁹ Giffen (1837-1910). He was a British Statistician and Economist. His high reputation as a financial journalist and statistician led to his appointment in 1886 as head of the statistical department in the Board of Trade in Britain.

⁴⁰ Giffen "Foreign Trade Statistical Tables Relating to The Progress of Foreign Trade in the United Kingdom and Other Foreign Countries" 1878 *J of the Royal Statistical Society of London* 1-20.

⁴¹ Howell and Balantine see fn 13.

⁴² *Manchester Guardian* 27-07-1896. Cited by Hoffman in *Great Britain and German Trade Rivalry* (1933) 247.

It is important to note that, from the perspective of the free trade proponents, the practice of dumping was in a way a positive act. It is evident that in the period 1880-1914, British industry was moving on a path of decline relative to the industries of the USA and Germany. Britain's decline during this time has been extensively examined. Its causes however, remain an enigma.⁴³ Paul Kennedy writes that:

"The slowdown of British productivity and the decrease in competitiveness in the late nineteenth century has been one of the most investigated issues in economic history. It involved such issues as national character, generational differences, the social ethos and the educational system as well as more specific economic reasons like low investment, out-of-date plant, bad, labour relations, poor salesmanship and the rest".⁴⁴

Dumping in British markets by foreign cartels was therefore not the sole or even the primary proximate cause of Britain's relative industrial decline.⁴⁵ This however does not mean that the practice of dumping did not contribute to this decline at all.⁴⁶ It also does not mean that Britain was better off for having permitted unrestricted dumping.⁴⁷ The practice of dumping was identified by many contemporary partisans in the trade debate as a significant factor contributing to erosion of the cost competitiveness of Britain.⁴⁸

The debate in Britain over the practice of dumping can be traced back to the iron and steel industry. Britain's particular experience with dumping in this industry was more pervasive in its extent and effects than in most other industries and also because of the central role played by the steel industry in Britain's economy and national defense. The slump of this industry in Britain as a steel producer in the 1890s was alarming. Although the free traders continued to reiterate that there was insufficient evidence that dumping was substantially injuring domestic producers, the weight of evidence from this period makes it clear that by the mid-1890s, British

⁴³ Howell and Balentine see fn 13.

⁴⁴ Kennedy *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to Present* (1987) 133.

⁴⁵ Howell and Balentine see fn 13.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

steel makers were under attack from low-priced German and American steel, and that the two countries were seriously injuring Britain, and consequently justifying the loss of business experienced by the latter.⁴⁹ The US Federal Trade Commission noted that in respect of steel:

“The British home market may at any time be made a dumping ground by foreign producers...The iron and steel bar manufacturers of England have to contend with a great deal of dumping on both home and foreign markets...German iron and steel goods have gained a foothold in the markets previously regarded as British preserves⁵⁰ and have materially affected the British trade”.⁵¹

2 5 Antidumping

2 5 1 Introduction

For almost one hundred years, international trade policy makers have proceeded on the view that “dumping” is a practice that “is to be condemned”, and have allowed an importing country to take certain countermeasures, at least when the dumped goods cause “material injury” to competing industries in the importing country.⁵² Antidumping is a well-known legal instrument that purportedly counteracts the practice of dumping by a foreign exporter. The rationale for this remedial action appears to make perfect sense: If an exporter engages in unfair pricing in a foreign market with the aim of driving out incumbent producers, it should be counteracted by a reciprocal antidumping duty that will neutralise the effect.⁵³

⁴⁹ *Ibid.* See also US Tariff Commission Study of 1916.

⁵⁰ This was achieved through the use of export bounties paid by the German Steel Cartel.

⁵¹ Federal Trade Commission “Cooperation in American Export Trade” Washington DC: Federal Commission 1916 215, 219 and 222.

⁵² Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 251. Jackson states that some economists believe that dumping may have beneficial effects in certain circumstances where the ability to dump allows a certain scale of production and subsequent cost reduction which, without the ability to dump, could not have been achieved. See for example Robinson *Economics of Imperfect Competition* (1969) 204-205. See further the speech of Friedman “In Defense of Dumping” reported in 1987 *International Trade Reporter* 935.

⁵³ Sohn “Treatment of Non-Market Economy Countries Under the WTO Antidumping Regime” 2005 *J of World Trade* 763-786. For a further example of a predatory scheme, see Hoekman and Kostecki *The Political Economy of the World Trading System* (2001) 321.

According to Finger, as the substitution model of economic development used to be the rhetoric of developing country protection, foreign dumping is the rhetoric developed countries use to excuse contemporary protection.⁵⁴ Finger further contends that this rhetoric provides antidumping with the aura of being a special measure to undo a special problem, an aura that though it functions by restricting or threatening to restrict imports, it is not really perceived as protection but as something that will, in the end, bring the world economy to function more effectively.⁵⁵ It is hard to find a basis for this view in the history of antidumping regulation. Little in that history suggests that antidumping ever had a scope more particular than protecting home producers from import competition, and much suggests that protection was the intended scope.⁵⁶ Antidumping has been from its inception part of the rhetoric and part of the mechanics of ordinary protection.⁵⁷

While consumers of an importing country initially may be considered beneficiaries of price discrimination, due to lower prices for imports, the primary concern of governments, which invoke antidumping measures against such imports, is that in terms of the outcome of international competition, the importing country may not reflect the underlying competitive positions of the domestic industry and its workers. This may lead to the domestic industry of the importing country being adversely affected.⁵⁸ Because of this, antidumping regulations are employed as a means of providing protection to the domestic industries and their workers from the injurious effects of unfair international price discrimination. The use of antidumping measures dates back to the origins of the GATT, and has been by far the most frequently used means of protecting domestic industries in the developed world from international competition.⁵⁹

⁵⁴ Finger *Antidumping* 13.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Stewart *et al Antidumping: The GATT Uruguay Round: A Negotiating History* (1986- 1992) 7.

⁵⁹ Moore "Antidumping Reform in the United States: A Faded Sunset" 1999 *J of World Trade* 1-

Antidumping provisions have received many criticisms with some labelling them as “protectionist”, but the desire of sovereign states to protect their domestic industries and workers from unfair international trade practices such as dumping is widely held to be a legitimate concern.⁶⁰ The 1916 submissions by the United States Attorney – General, Samuel Graham, remain valid and relevant in so far as justifying the imposition of antidumping duties is concerned:

“...generally accepted principles of political economy hold that it is not sound policy for any government to permit the sale in its country by foreign citizens of material at a price below cost of production...for the reason that such a system , in its final analysis and on a sufficient scale spells bankruptcy”.⁶¹

Although antidumping regulations were instituted in most countries prior to the First World War, actual antidumping measures were the exception until the 1980s. After having lowered the general import duties in the various GATT rounds, dumping measures became one of the most important restrictions in global trade.⁶² Until the late 1980s, the main users of antidumping laws were the USA, the EC, Australia and Canada. Other developed countries such as Japan, Switzerland, Norway, Sweden and Finland have antidumping laws on their books, but have seldom invoked them.⁶³ Since then a number of developing countries, beginning with Mexico have adopted antidumping laws and have started using them.⁶⁴

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⁶⁰ According to Stewart, at least 22 signatories to the Antidumping Code of the GATT had antidumping laws in force as of October 1990. See Stewart *et al Antidumping: The GATT Uruguay Round* 58. See also Stewart “Administration of the Antidumping Law: A Different Perspective” in Boltuck and Litan (eds) *Down in the Dumps: Administration of the Unfair Trade Laws* (1991) 288-330.

⁶¹ See letter to the Editor written by Graham *New York Times* 04-07-1916. Cited by Stewart *et al Antidumping :The GATT Uruguay Round* 8.

⁶² Conrad “Dumping and Antidumping Measures From A Competition and Allocation Perspective” 2002 *J of World Trade* 563-575. In the USA, European Union, Canada and Australia more than 1000 antidumping proceedings took place in the 1980s compared to 1958 when only 37 antidumping proceedings were initiated.

⁶³ Vermulst “Adopting and Implementing Antidumping Law: Some Suggestions For Developing Countries” 1997 *J of World Trade* 5-23.

⁶⁴ In March 1993 Mexico initiated an antidumping investigation against China covering more than 1000 Harmonized System (HS) headings and imposed definitive duties of up to 1,105%, 19 months later.

2 5 2 The history of antidumping regulation

As noted above, at the end of the nineteenth century, global industrialisation led to increased concern for the domestic effects of international trade, and international tariff structures faced limits in their application and efficacy.⁶⁵ Antidumping legislation arose as a policy alternative. This is evidenced in the ideas of Canada's father of antidumping legislation, Finance Minister William S Fielding who in 1904 claimed that it was unscientific to meet special and temporary cases of dumping by general and permanent raising of the tariff wall, and that the appropriate method was to impose special duties upon dumped goods.⁶⁶

Widespread adoption of antidumping legislation occurred in the early twentieth century. Canada was the first country to initiate general antidumping measures under the Customs Act of 1904. Several other Commonwealth countries followed thereafter. New Zealand initiated hers in 1905, Australia in 1906,⁶⁷ and South Africa in 1914.⁶⁸ While instances of dumping certainly occurred before these countries adopted antidumping legislation, the rise of Germany as an industrial power had a tremendous impact on the increased appeal of antidumping legislation. In numerous sectors, German industry developed into a cartel structure, particularly in industries such as chemicals, in which Germany held scientific superiority and expertise.⁶⁹ The chemical industry was susceptible to dumping, due to its capital-intensive nature, which resulted in barriers to entry and fixed costs. The cartel organisation provided "machinery whereby, without the loss of the individuality of the separate concerns, the benefits and burdens of export dumping could be equitably distributed among domestic producers."⁷⁰

⁶⁵ Stewart *et al* *Antidumping: The GATT Uruguay Round* 8.

⁶⁶ Viner *Dumping* 193. Citing House of Commons Debate Canada 07-06-1904 col.4365.

⁶⁷ Australian Preservation Act 1906, V Austl.C.Acts 19 1906.

⁶⁸ Customs Tariff Act 1914, Statutes of the Union of South Africa 198 1914.

⁶⁹ Viner *Dumping* 51-66.

⁷⁰ Viner *Dumping* 52.

Market power allowed German chemical companies to flex their muscles internationally, and dispose of surplus stocks.⁷¹ Countries other than Germany were known to resort to dumping practices, but German actions received the greatest scrutiny, particularly as political tensions increased in the Pre - World War 1 period. German export sales below home market prices were aided by a protective tariff and cartel organisation which combined to allow a high domestic price due to lack of competition.

2 5 3 Antidumping and the GATT

The GATT resulted from a round of negotiations held in Geneva in 1947 to create an International Trade Organization. A major goal of the GATT was to reduce and eliminate barriers to trade, and two of its most fundamental principles and policies were and are the Most Favoured Nation principle (MFN) and tariff bindings. According to the MFN principle, whatever forms of protection a member country maintains should be imposed on a non discriminatory basis to imports from other countries. Tariff bindings prohibit a country from later raising tariffs that it has reduced. The US antidumping law was seemingly at odds with this goal and these two principles. By insisting that foreign firms selling in the US market not differentiate in pricing or receive subsidies from their governments without demanding the same of US firms selling in the US market, and by imposing added duties on imports from firms engaging in these practices, the USA was in fact imposing trade barriers.⁷² Antidumping duties varied from country to country, thereby violating the MFN principle. Furthermore, by changing from year to year in response to foreign behaviour they would violate tariff bindings.⁷³ The original GATT agreement, however, included an exception to allow for antidumping duty law

⁷¹ Stewart *et al* *Antidumping: The GATT Uruguay Round* 9.

⁷² The Congress of the United States Congressional Budget Office "How the GATT affects US Antidumping and Countervailing Duty Policy" 15. Available at <http://www.cbo.gov/ftpdocs/48xx/doc4848/doc44.pdf> (accessed 09-08-06).

⁷³ *Ibid.*

subject to certain restrictions.⁷⁴ On its face, Article VI is clearly at odds with the GATT goal and principles.⁷⁵ Some analysts believe that at least part of it may be necessary in order to maintain political support for an open international trading system.⁷⁶

Much of the history of the GATT negotiations is in fact the history of negotiating a charter for an international trade organisation.⁷⁷ The GATT began as a makeshift accord to implement the first set of tariff reductions. At that time the prospect was that the international trade organisation would ultimately be the institutional framework for coordinating national trade policies.⁷⁸ When the international community could not agree on the terms for establishing the international trade organization, the GATT became the framework for international trade regulation. The USA provided the basic working documents for the international trade organization deliberations and the suggested charter contained most of the provisions on antidumping that are now in GATT Article VI.⁷⁹ Through GATT's first two decades, antidumping was a major instrument of trade policy in Australia, Canada and South Africa. But it was a minor concern on the international scene.⁸⁰

2 5 4 The Kennedy Round

The biggest leaps forward in international trade liberalisation have come through multilateral trade negotiations or "trade rounds" under the patronage of GATT.⁸¹ Most of GATT's early trade rounds were devoted to continuing the process of reducing tariffs. Although the GATT came into force in 1948, the contracting parties

⁷⁴ See Article VI of the GATT.

⁷⁵ See fn 72.

⁷⁶ Jagdish *Protectionism* (1988) 34-35.

⁷⁷ Finger *Antidumping* 13.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ In 1954, Italy brought to the GATT a complaint about Sweden's antidumping procedures but Sweden changed them and the issue was solved without a formal decision.

⁸¹ ANON "The Roots of the WTO". Available at <http://www.econ.iastate.edu/classes/econ355/choi/wtoroots/htm> (accessed 09-08-06).

did not canvass themselves about the use of antidumping until 1958. Antidumping first became a noteworthy GATT issue at the Kennedy Round of 1964-1967.

One reason why many countries did not enforce antidumping laws was that high tariffs adequately protected their firms.⁸² As subsequent GATT rounds reduced tariffs, however, more countries began enforcing such laws, which then led to complaints and disputes.⁸³ The antidumping dispute in the Kennedy Round brought forth arguments that were later on discussed in both the Tokyo and Uruguay Rounds. Not surprisingly, the Kennedy Round was the first to tackle the issue of Non-Tariff Measures and in that context, antidumping and countervailing duty practices of contracting parties. The USA had its own objectives in the antidumping negotiations of the Kennedy Round. While the USA was a frequent user of antidumping law, American exporters regularly faced accusations of dumping. They found judgments in many countries on USA dumping to be inexplicable because the relevant facts and reasoning were not made public; hence the USA sought to improve transparency in the administration of other countries' antidumping laws. On the other hand, many countries viewed various aspects of USA antidumping laws as unfair.⁸⁴

The result of the antidumping negotiations in the Kennedy Round was the "Agreement on the Implementation of Article VI".⁸⁵ The Antidumping Code was created as a separate document from the General Agreement, and the contracting parties remained free to sign the Code or refrain from doing so. The Code was only applicable to those contracting parties who signed it, and signatories had to agree to

⁸² See fn 72.

⁸³ Stewart *et al* *Antidumping: The GATT Uruguay Round* 84.

⁸⁴ The USA was a major target of criticism because of the importance of its market to the world economy, the advanced state of development and specificity of its antidumping law, and transparency of its antidumping proceedings, which made the workings of the system visible for all to see and criticize. See "Evolution of U.S Laws: An Economic Perspective" fn 72.

⁸⁵ This Agreement is often referred to as The Antidumping Code. It came into force on 1 July 1968.

stand by its regulations and review their national legislation to bring it in line with the specifications of the Code.⁸⁶ The Antidumping Code included such items as the definition of dumping, the determination of injury, antidumping investigation and management procedures, antidumping duty and temporary measures, as well as the question of adopting antidumping measures on behalf of a third country.

2 5 5 The Tokyo Round

The seventh GATT round, the Tokyo Round of Multilateral Trade Negotiations, was conducted between 1973 and 1979. This Round adopted a new “Agreement on Implementation of the General Agreement on Tariffs and Trade”, called “Antidumping Regulation 1979”.⁸⁷ It continued GATT’s efforts to progressively reduce tariffs, and was indeed a more sweeping attempt to extend and improve the system. Antidumping law was again an issue, and the increasing use of subsidies led to subsidies and countervailing duty law becoming issues as well. The negotiations on these issues resulted in some modifications to the Antidumping Code. Among the changes to the Antidumping Code was no longer to require that dumping be the principal cause of injury to meet the material injury requirement for imposing duties.⁸⁸ The Tokyo Round Agreement revised the Antidumping Code, so that it was no longer necessary to show that dumping was the principal cause of injury when other contributing factors existed.⁸⁹ The first part of the Code reiterated the basic principles of Article VI of the GATT, and elucidated a series of important concepts that have close correlation with the understanding and implementation of antidumping measures. The second part elaborated the consultation, conciliation and dispute settlement procedures for establishing a committee on antidumping

⁸⁶ Stewart *et al* *Antidumping: The GATT Uruguay Round: A Negotiating History* 84.

⁸⁷ The aim of the Antidumping Code 1979 is:

“...to interpret the provisions of Article 6 of the General Agreement on Tariffs and Trade and elaborate rules for their application in order to provide greater uniformity and certainty in their implementation; ...and to provide for the speedy, effective and equitable resolution of disputes arising under this Agreement.”

⁸⁸ See fn 72.

⁸⁹ See Article 3.3 of the ADA.

practices. The third part elaborated some related legal procedure, such as acceptance, accession, reservation and the use of force. Indeed, practice proved that the Antidumping Code 1979 was an important step in the development of antidumping regulation under the GATT. However, it still had limitations. It could not solve the problems of implementing antidumping measures, and could also not solve new problems which arose in antidumping actions. Generally, domestic antidumping laws - on fair price, determination of injury and determination of all kinds of tenable data - lacked transparency.⁹⁰ This gave administering authorities too much discretion.⁹¹

2 5 6 The Uruguay Round

The seeds of the Uruguay Round were sown in November 1982 at a ministerial meeting of GATT members in Geneva. As negotiations unfolded in the Uruguay Round, it turned out that many contracting parties were dissatisfied with GATT regulation of antidumping procedures and substantive rules.⁹² The USA and the EU were, on the other hand, concerned about gaining GATT acceptance for the use of certain devices to prevent the circumvention of antidumping duties.⁹³ The latter were also interested in regulating more closely the various procedures employed in antidumping actions in light of the increased use by Mexico and other developing countries of antidumping laws.

On the other hand, many of the countries commonly targeted by antidumping actions pressed for changes in the substantive rules applied in antidumping cases, so as to make them less susceptible to use for protectionist purposes.⁹⁴ The result of the negotiations was something of a compromise. The procedural rules were

⁹⁰ Stewart *et al* *Antidumping: The GATT Uruguay Round* 84.

⁹¹ *Ibid.*

⁹² Jackson *et al* *Legal Problems of International Economic Relations: Cases, Materials and Text* (1995) 685.

⁹³ *Ibid.*

⁹⁴ Countries in East Asia and Scandinavia serve as examples.

tightened, while there was some rather minimal tightening of the substantive rules. The Uruguay Round Antidumping Agreement came about as a result of this round. Also, in consequence of winding up of the Tokyo Round and the enactment of the new Antidumping Code,⁹⁵ the Committee on Antidumping Practices was established in accordance with Article 14.⁹⁶ In addition to being responsible for carrying out assignments given to it by the Agreement or the Parties, the Committee provided the parties with the opportunity to consult on any matters relating to the operation of the Agreement and furtherance of its objectives.⁹⁷ The 1994 Antidumping Code has indeed, brought about considerable progress in making the rules to be followed by national authorities when conducting antidumping procedures more precise.⁹⁸ Together with the fact that they are binding on WTO members, this should considerably improve legal security and predictability for parties to such procedures and reduce the risk of protectionist application.⁹⁹

2 6 Conclusion

The discussion in this chapter has indicated that the history of antidumping actions dates back to at least one century ago, when Canada for the first time took such an action (1904). It has also demonstrated that in due course countries such as Australia, Great Britain and the USA also put in place antidumping legislation within the municipal framework. The Uruguay Round brought about the biggest reform of the world's trading system since GATT was created at the end of the Second World War. It covered more issues and involved more countries than any previous round.¹⁰⁰ Its Final Act prescribes, among other things, that tariffs on industrial

⁹⁵ This agreement entered into force on the 1 of January 1980.

⁹⁶ Minutes of the Meeting of 22 January 1980, GATT Doc.No.ADP/M/1 March 6 1980 1. Cited by Stewart *et al* *Antidumping: The GATT Uruguay Round* 80.

⁹⁷ Article 14.1 of the ADA.

⁹⁸ Khan *et al* *EC Antidumping Law: A Commentary on Regulation 384/96* (1998) 98.

⁹⁹ *Ibid.*

¹⁰⁰ It took seven and a half years, almost twice the original schedule. By the end 123 countries were taking part. It covered almost all trade, from toothbrushes to pleasure boats, from banking to telecommunications, from the genes of wild rice to AIDA treatments. It was quite simply the largest negotiation ever and most probably the largest negotiation of any kind in

products be reduced, and that a new body, the WTO, be established to facilitate the implementation of multilateral trade agreements and to serve as a forum for future negotiations.

The GATT contracting parties have had four opportunities to develop antidumping law: (1) in 1947 when the GATT was drafted; (2) between 1964 and 1967 when the Kennedy Round Antidumping Code came into existence; (3) between 1974 and 1979 when the Tokyo Antidumping Code was produced; and (4) between 1986 and 1994 when the Uruguay Round Antidumping Code¹⁰¹ came into being. Inasmuch as GATT prescribes the rules for countering the practice of dumping, this study will demonstrate how these rules are manipulated and abused by administering authorities in an endeavour to achieve protectionist outcomes.

¹⁰¹ history. See Understanding the WTO Basics “The Uruguay Round”. Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (accessed 10-01-08). The ADA.