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the anti-dumping tribunal

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THE ANTI-DUMPING TRIBUNAL

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THE ANTI-DUMPING TRIBUNAL

A Study of Administrative Procedure in the Anti-dumping Tribunal

Prepared for the

Law Reform Commission of Canada

by

Philip Slayton

Notice

This study describes an important part of the federal administrative process. In the course of this description the author identifies a number of problems and suggests solutions for them. These suggestions may be useful for legislators and administrators currently considering reforms in this area. They are, however, solely those of the author, and should not be considered as recommendations by the Law Reform Commission of Canada.

The concerns of the Law Reform Commission are more general and embrace the relationships between law and discretion, administrative justice and effective decision-making by administrative agencies, boards, commissions and tribunals. This study, and its companions in the Commission's series on federal agencies, will obviously play a role in shaping the Commission's views and eventual proposals for reform of administrative law and procedure.

Comments on these studies are welcome and should be sent to:

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Professor Slayton's research was completed in December, 1977, and final revisions of the study were submitted to the Commission prior to February, 1979. The Commission's major objective in publishing studies of federal agencies is to shed light on how an agency functions and the context within which it operates rather than to provide a current statement of the law in a regulated area.

Glossary

The vocabulary of anti-dumping is highly technical. Many terms can only be fully understood in light of treaty and statute provisions, and regulations; the meaning of these terms is discussed in the text of this study. Often there is controversy over interpretation. What follows are simple definitions of some key terms to provide initial guidance to the reader. These simple definitions should be treated with caution, and should be regarded in light of the relevant discussion.

countervailing duty	a special duty levied to offset a direct or indirect subsidy of manufacture, production or export
dumping	the sale for export at prices ("export price") lower than those charged to domestic buyers ("normal value"), taking into account the conditions and terms of sale
export price	lesser of the exporter's sale price and importer's purchase price
final determination	determination by Deputy Minister of National Revenue following receipt of Anti-dumping Tribunal finding
like goods	goods which are identical to, or failing that, closely resemble, the product under consideration
margin of dumping	in general, the difference between domestic price and export selling price (normal value and export price)
normal value	in general, the domestic price charged by the exporter for like goods
preliminary determination	finding by the Deputy Minister of National Revenue that goods have been or are being dumped, in a volume and with a margin of dumping that is not negligible
provisional duty	duty not greater than the margin of dumping, imposed during the period between the preliminary determination and the Anti-dumping Tribunal finding (provisional period)

Acknowledgment

I would like to express gratitude to my friend and colleague, Professor John J. Quinn, for his many helpful comments.

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I

Introduction

A. Organization Analysis

This study of the Anti-dumping Tribunal is one in a series of studies of federal administrative agencies, boards and tribunals, commissioned by the Law Reform Commission of Canada. It seeks to set forth the historical and legal context within which the Tribunal operates; to describe the work of the Tribunal, including its organization, administration, process and procedure; and to discuss and evaluate particular problems associated with the Tribunal's activities.

Pierre Issalys and Gaylord Watkins, in their report on the Unemployment Insurance Commission, set forth a concept of administrative procedure which influences this study.[1] Administrative procedure, as they explain it, is concerned particularly with rules relating to the initiation of the administrative process; the collection of information essential to the decision; public participation in the development of the decision; the machinery for consultation, notice, or prior amendments; the updating of decisions; the avenues of recourse, whether to the originator of the decision or to a higher authority; the machinery for monitoring subsequent to decision; the penalties applicable for failure to carry out the decision; and the formalities and time-frame for each stage of the process. In general terms, the study of administrative procedure can be seen as part of the organizational analysis recently described by the multi-disciplinary team of Doern, Hunter, Swartz and Wilson.[2] Doern *et al.* have emphasized the importance of such considerations as leadership styles and behaviour, internal criteria and processes used to evaluate performance, and the development of preferred communication channels and standard operating procedures. They maintain that an explanation of regulatory and adjudicatory units must take into account, among other things, variables related to politics, history, organizational behaviour, administration, and

economics. It may be necessary to emphasize that the notions of administrative procedure are, notwithstanding the word "administrative", wholly applicable to quasi-judicial organizations; indeed, the study of administrative procedure has been given some of its impetus by a widespread belief "that the decision-making of regulatory agencies is too time-consuming, costly, and cumbersome", and this belief has led to calls for more flexible and efficient procedures.[3]

This study does not consider the full panoply of general considerations outlined by students of administrative procedure. But it attempts to deal with those that are directly relevant, and is written in the spirit of the approach described.

B. Dumping, and the Anti-dumping Tribunal

Dumping,[4] in the international context, is sale for export at prices lower than those charged to domestic buyers, taking into account the conditions and terms of sale. It is international price discrimination, made possible by the separation of markets, by some measure of monopoly power possessed by the seller in his home market, and by protection of that seller's home market using tariff and non-tariff barriers.[5] Occasionally dumping may be unintentional; more likely, it is done to secure foreign exchange, protect a home market, meet competition in a foreign market (when in the domestic market there is a monopoly as a result of efficiencies or tariff barriers, and inelastic demand, permitting high prices), or eliminate competition in a foreign market (so-called "predatory" dumping).[6]

The Canadian anti-dumping system is a creature of the *Anti-dumping Act*,[7] which was passed to fulfill Canada's obligation under the General Agreement on Tariffs and Trade Anti-dumping Code,[8] signed in Geneva on June 30, 1967. The Act provides, in brief, for an anti-dumping investigation by the Deputy Minister of National Revenue, Customs and Excise, initiated by the Deputy Minister himself, or as the result of a complaint; the imposition by the Deputy Minister of provisional duties[9] equal to the margin of dumping (in general, the difference between domestic and export selling prices) after a preliminary determination of dumping and the finding of some evidence of material injury or retardation; following the appropriate determinations by the Deputy Minister, a hearing by the Anti-dumping Tribunal into the effect of the dumped goods on Canadian production; and the imposition by the Deputy Minister of a dumping duty if there is a finding of injury by the Tribunal.

II

Canadian Anti-dumping Law: A Historical Note

The General Agreement on Tariffs and Trade (GATT) was signed at the 1947 Geneva Trade Conference (the "Geneva Round") as part of international financial reconstruction following World War II. The general purpose of the GATT is substantially to reduce tariffs and other barriers to trade, and to eliminate discriminatory treatment in international commerce. These purposes are pursued at multi-lateral conferences, where the principal buyers and sellers of commodities in most cases bilaterally negotiate tariff concessions which then apply to all members.[10]

Article VI of the GATT deals, in a general way, with anti-dumping and countervailing duties.[11] Article VI is in Part II of the General Agreement, so that, according to the Protocol of Provisional Application, it does not invalidate inconsistent provisions of domestic legislation enacted prior to the effective date of the Agreement, or of the protocol of accession in the case of acceding parties.[12] It became clear shortly after 1947 that Article VI, particularly in light of the "grandfather" clause, had done little to remove international discord on the subject of dumping. The United States especially remained the object of severe criticism. It was alleged, for example, that exporters were harassed by the United States Treasury, which investigated dumping charges very slowly while holding goods as "subject to appraisement"; this procedure, with the uncertainty it created, was a substantial disincentive to trade.

Until 1969, dumping in Canada[13] was regulated by section 6 of the *Customs Tariff*,[14] the regulations made under that section, provisions of the *Customs Act*[15] defining value for duty, and decisions of and appeals from the Tariff Board. This system was established in 1904, with the passage of section 6, in response to claims that American and German dumping was injuring Canadian producers. The Canadian approach was not properly in accord with Article VI of the GATT,

since there was no test to determine injury to domestic producers of like goods before anti-dumping duties could be imposed; injury was simply assumed. Foreign critics of Canadian anti-dumping law also argued, as a related matter, that the system was automatic — that any dumped goods "of a class or kind made or produced in Canada"[16] attracted anti-dumping duties. Some (notably British exporters), objected that the *Customs Act* concept of "value for duty, with the margin of dumping defined as the difference between selling price to the importer and fair market value or value for duty, did not take into account that the exporter's domestic price might provide for wholesaling function (direct sale to retailers) performed in Canada by the importers; in other words, different levels of trade were being compared.[17] Canadian critics claimed the system gave no protection against dumping that prevented domestic production in the first place; for duties to be levied, the imported goods had to be "of a class or kind made or produced in Canada . . . ," which in turn, according to subsection 6(10), meant "sufficient to supply a certain percentage of the normal Canadian consumption . . . ". It was said that, in any event, the notion of "class or kind" was interpreted far too narrowly. Finally, anti-dumping duties could be avoided in many ways: for example, by declaring at Customs a false low fair market value, hidden dumping by associated houses,[18] transfer invoicing,[19] use of third country firms,[20] the "no charge" loophole,[21] taking advantage in various ways of export subsidies paid by foreign governments,[22] and so on. Rodney de C. Grey concludes an excellent account of the pre-Kennedy Round System in this way:

> . . . it was unfair to importers and exporters alike in that it did apply dumping to many imports that were not injuring Canadian producers, was inadequate to protect Canadian producers where real injury was caused, and completely failed to deal with dumping adopted as a deliberate technique to prevent the establishment of new production in Canada.[23]

Complaints and controversy led to careful consideration of Article VI. In 1959 the GATT secretariat made a detailed study of anti-dumping regulations in eight countries. In 1959 and 1960 the GATT "Group of Experts" studied and reported on the language of Article VI. These reports were the basis of the Kennedy Round negotiations on dumping; in 1967 the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade" (the so-called "Anti-dumping Code") was signed.[24] In general, the Code makes a number of technical improvements to Article VI concerning in particular the determination of dumping and injury; establishes rules for investigative and administrative procedures; and provides for the levying of anti-

dumping duties and their duration, the taking of provisional measures and their duration, and the retroactive application of anti-dumping duties and the period of such retroactivity.

Substantial legislative changes were necessary for Canada to implement its obligations under the Anti-dumping Code. In 1968 Parliament passed the *Anti-dumping Act*.[25]

III

The Legal Framework

A. Article VI

Paragraph 1 of Article VI of the General Agreement on Tariffs and Trade condemns dumping "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". Dumping is defined as the introduction of the product of one country into the commerce of another country at less than the "normal value" of the product, which, according to Paragraph 1, takes place

> . . . 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.

The price difference computed in this way is defined as the "margin of dumping". Paragraph 2 of Article VI provides for the levy of an anti-dumping duty not greater than the margin of dumping.

Paragraph 3 deals with countervailing duty; this term "shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manu-

facture, production or export of any merchandise". By paragraph 3, no countervailing duty levied may be in excess of such a bounty or subsidy.

Paragraph 6(a) of Article VI permits the imposition of anti-dumping or countervailing duty only when the effect of dumping or subsidization "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". Paragraph 6(b) permits the waiving of the 6(a) requirement in cases where injury is caused or threatened to the industry of a third contracting party exporting to the territory in question.

Article VI has four cardinal features. First, it is phrased in very general language. Second, dumping is only condemned, and anti-dumping duties permitted, when material injury has been demonstrated. Third, there is no mention of administrative machinery and practices that would translate precatory language into practice. Finally, since Article VI appeared in Part II of the GATT, it is not, as I mentioned earlier, by itself binding on the Contracting Parties.

B. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the "Anti-dumping Code")[26]

A detailed analysis of the Anti-dumping Code is beyond the scope of this study. It is, however, necessary to indicate the broad outline of the Code, and draw particular attention to some provisions of interest or difficulty in the Canadian context. In theory at least, the contemporary Canadian anti-dumping system is a creature of Canada's obligations as a Code signatory. The general purpose of the Code was to supply, where necessary, detailed interpretation of Article VI of the GATT, to provide for administrative machinery to implement the rights and obligations created by that Article, and, no doubt, to circumvent the GATT "grandfather clause" which provided exemption from Article VI for many countries.

With respect to the determination of dumping, Article 2(b) defines "like product" as "a product which is identical, *i.e.* alike in all respects to the product under consideration, or in the absence of another product, another product which, although not alike in all respects, has characteristics closely resembling those of the product

under consideration". Other paragraphs of Article 2 deal with the transshipment of goods through an intermediate country (c); calculating the margin of dumping when there is no domestic market or no normal domestic market in the country of export (d); dumping between associated firms, dumping where there is a compensatory arrangement, and the dumping of components (e); and ensuring reasonable price comparability, in particular comparing the same levels of trade. Article 2 is straightforward enough, although difficulties concerning it have arisen in Canada, in particular over the notion of "like product" and the dumping of components. These difficulties are described in Chapter IV of this study.

Article 3 of the Code deals with the determination of injury. Paragraph (a) permits a determination of injury only when dumping is "demonstrably the principal cause" of material injury, threat of material injury, or material retardation. It requires that "In reaching their decision the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry"; the remaining five paragraphs of Article 3 list in some detail the "other factors". The phrase "the principal cause" in Article 3(a) has created difficulty; generally it is considered that so long as dumping is *a* cause (perhaps more significant than any other *one* cause) of injury, and is material, then a determination of injury can be made. The "other factors" described by the rest of Article 3 are of particular interest when considering how Canada establishes a causal relationship between dumping and injury, a problem discussed in Chapter IV.

Article 4 defines "industry": "In determining injury the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products . . . " Article 4(a)(i) deals with producers who are also importers of the allegedly dumped product, and 4(a)(ii) allows producers in a geographically segmented market to be regarded as separate industries for dumping purposes. The question of what constitutes "a major proportion of the total domestic production" has assumed considerable importance in Canada because of particular features of the Canadian economy mentioned later in this study. Grey has observed that "the conclusion of the discussion in Geneva about 'major proportion' was that this appears to mean a substantial proportion and, in practice . . . more than half the production of the goods in question".[27] But, as we shall see, the Ministry of National Revenue, the Anti-dumping Tribunal, and the Federal Court

have taken a different view. The notion of a geographically segmented market, for obvious reasons, is also of interest to Canada; Chapter IV discusses Canadian difficulties in the application of this idea.

Articles 5, 6 and 7 of the Code set forth investigative and administrative procedures. Article 5(b) requires that "the evidence of both dumping and injury should be considered simultaneously . . . " I suggest later that Canada may well be in breach of this obligation. Paragraphs (b), (c) and (d) of Article 6 deal with the problem of confidential information; difficulties in Canada over confidential information are discussed below. Article 7 provides for price undertakings; paragraph (a) states that "Anti-dumping proceedings may be terminated without imposition of anti-dumping duties or provisional measures upon receipt of a voluntary undertaking by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices . . . " I suggest in Chapter VIII that in some respects price undertakings are a more satisfactory solution to dumping problems than the more formal approach taken by Canada.

Article 8 deals with the imposition and collection of anti-dumping duties. Paragraph (d) provides for a basic price system which may automatically trigger a dumping investigation. Paragraph (e) states that where injury has been found in a regional market, as permitted by Article 4(a)(ii), "anti-dumping duties shall only be definitely collected on the products in question consigned for final consumption to that area . . . "

Article 9 requires that an anti-dumping duty remain in force only so long as dumping is causing injury, and that there be available a review process directed to the injury question. Article 10 provides for provisional measures; Article 11, for retroactivity; and Article 12, for anti-dumping action on behalf of the domestic industry of a third country.

C. *Anti-dumping Act*[28]

The *Anti-dumping Act* was passed to fulfill Canada's obligations as a signatory of the Anti-dumping Code. Like the Code, it is a complex and lengthy document. The discussion that follows is intended only to offer a general review of the Act's provisions.

Part I of the Act deals with liability for anti-dumping duty. In general, liability depends upon a Tribunal finding that dumping "has caused, is causing or is likely to cause material injury to the production in Canada of like goods, or . . . has materially retarded or is materially retarding the establishment of the production in Canada of like goods". Section 3 refers to goods that enter after a Tribunal finding; section 4, to goods provisionally entered before a finding; and section 5, to massive importation of goods entered in a 90-day period prior to a preliminary determination of dumping. Duty in all cases is to be equal to the margin of dumping, except that section 4 provides that where provisional duty has been imposed, anti-dumping duty ultimately levied may not exceed that provisional amount.

Section 8 states:

> (*a*) goods are dumped if the normal value of the goods exceeds the export price of the goods; and
>
> (*b*) the margin of dumping of any goods is the amount by which the normal value of the goods exceeds the export price of the goods.

The lengthy section 9 deals with "normal value". Subsection 9(1), the basic provision, reads:

> **9.** (1) Subject to subsection (5), the normal value of any goods is the price of like goods when sold by the exporter
>
> (*a*) to purchasers with whom, at the time of the sale of the like goods, the exporter is not associated,
>
> (*b*) in the ordinary course of trade for home consumption under competitive conditions,
>
> (*c*) during such period, in relation to the time of the sale of the goods to the importer in Canada, as may be prescribed by the regulations, and
>
> (*d*) at the place from which the goods were shipped directly to Canada or, if the goods have not been shipped to Canada, at the place from which the goods would be shipped directly to Canada under normal conditions of trade,
>
> as adjusted by allowances calculated in the manner prescribed by the regulations to reflect the differences in the terms and conditions of sale, in taxation and other differences relating to price comparability between the sale of the goods to the importer in Canada and the sales by the exporter of the like goods but with no other allowances affecting price comparability whatever.

Subsequent parts of section 9 provide for variations on the subsection (1) theme when there are difficulties in the application of its requirements; paragraph 9(5)(*b*), for example, permits the Deputy Minister of National Revenue for Customs and Excise in certain circumstances to

determine the normal value of goods by aggregating the cost of production of the goods and an amount for administrative, selling and all other costs and for profits.

According to subsection 10(1), the "export price" is the lesser of the exporter's sale price and the importer's purchase price. Subsequent parts of section 10 permit the deeming of an export price by formula when there is no, or no reliable, sale or purchase price (in the case, for example, of a sale between associated persons, or where there is a compensatory arrangement). By section 11, the Deputy Minister may prescribe a means of determining the normal value or export price when sufficient information has not been furnished or is not available to apply section 9 or 10. As we shall see in Chapter VI, section 11 is of considerable practical importance.

Part II of the Act deals with procedure. Subsection 13(1) requires the Deputy Minister of National Revenue for Customs and Excise to initiate an investigation into dumping, on his own initiative or on receipt of a written complaint from Canadian producers of like goods, if he is of the opinion that there is evidence that goods have been or are being dumped, and either he believes or the Tribunal advises that there is evidence that the dumping has caused, is causing or is likely to cause material injury to the production of like goods or has materially retarded or is materially retarding the establishment of Canadian production of those goods. If the Deputy Minister does not initiate an investigation because he finds no evidence of injury or retardation, either he or the complainant may refer that issue to the Tribunal (13(3)). (If the Tribunal subsequently advises that in its opinion there is evidence of injury, then the Deputy Minister initiates an investigation; if the Tribunal advises that there is no such evidence, then the complaint is rejected.) An investigation shall be terminated without a preliminary determination of dumping when the Deputy Minister finds insufficient evidence of dumping, or a negligible margin of dumping or volume of dumped goods or no evidence of material injury or retardation (13(6)); either the Deputy Minister or the complainant may refer the issue of material injury and retardation to the Tribunal (13(7)). If the Deputy Minister is satisfied that the goods have been or are being dumped, in a volume and with a margin of dumping that are not negligible, subsection 14(1) requires him to make a "preliminary determination" of dumping. Section 15 requires, where there has been a preliminary determination, either provisional duty or the posting of security in an amount not greater than the margin of dumping.

It is section 16 that sets out the major responsibilities of the Anti-dumping Tribunal. By paragraph 16(1)(*a*) the Tribunal, upon receipt from the Deputy Minister of a notice of a preliminary determination, shall make inquiry as to whether the dumping has caused (or would have caused in the absence of provisional duty), is causing or is likely to cause material injury to the production of like goods, or has materially retarded or is materially retarding the establishment of production. Paragraph 16(1)(*b*) requires the Tribunal to inquire as to whether, in the case of any goods to which a preliminary determination applies, there has occurred a "considerable importation" of dumped like goods that has caused material injury, or whether the importer was or should have been aware that dumping causing injury was taking place, and whether duty should be assessed to prevent any recurrence of this material injury. Subsection 16(2) permits the Tribunal to direct the Deputy Minister to investigate the dumping of goods similar to those that are the subject of a Tribunal inquiry. The Tribunal has 90 days to make an order or finding (16(3)). Section 16.1 requires the Tribunal to inquire into and report to the Governor in Council on any "matter or thing in relation to the importation of goods into Canada that may cause or threaten injury to the production of any goods in Canada that the Governor in Council refers to the Tribunal for inquiry and report."

Subsections 17(1), (2) and (3) require the Deputy Minister to make a final determination following receipt of a Tribunal order or finding and assess the duty payable, or return any provisional duty or security to the importer. Section 18 deals with whether goods entered subsequent to the Tribunal's order of finding are goods of "the same description", appraisal of the normal value and export price of these goods, and appeals from such determination and appraisal to a Dominion customs appraiser, and the Deputy Minister. Sections 19 and 20 deal with "appeals", from the Deputy Minister's final determination (17(1)) or redetermination and reappraisal (18(4)), to the Tariff Board, and then on questions of law to the Federal Court of Canada.[29]

Part III of the Act deals with the Tribunal itself. The Tribunal consists of not more than five members appointed by the Governor in Council, holding office during good behaviour for seven years (subsections 21(1) and (2)), with a Chairman and Vice-Chairman designated by the Governor in Council (21(5)). The Chairman is the chief executive officer and has general responsibility for the Tribunal's work, including the assignment of members to hearings (23(1)). The Tribunal may, subject to the approval of the Governor in Council, make procedural rules (25).

Subsection 27(1) states that the Tribunal is a court of record. Subsection (2) reads:

> The Tribunal has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry upon and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

By subsection 27(3), the Tribunal "for the purposes of section 172 of the *Customs Act*, shall be deemed to be a court of justice."[30] From time to time significant weight has been attached to this section's designation of the Tribunal as a "court of record". That designation has been one of the bases of judicial criticism of Tribunal procedures, and has helped encourage the Tribunal in increased formality. Whether or not, all other things being equal, such formality is desirable is an independent question mentioned later in this study. For the moment, suffice it to mention that the exact meaning of "court of record", and the consequences that flow from that status, is unclear.[31]

Section 28 allows the Chairman to designate one member to receive evidence with full Tribunal powers. By section 29, parties to a hearing may appear in person, or by counsel or agent, and a hearing may be heard *in camera*, or in public at the discretion of the Tribunal or Chairman. Subsection 29(3) states:

> Where evidence or information that is in its nature confidential, relating to the business or affairs of any person, firm or corporation, is given or elicited in the course of any inquiry under section 16, the evidence or information shall not be made public in such a manner as to be available for the use of any business competitor or rival of the person, firm or corporation.

Section 31 permits the Tribunal, after any order or finding, to review, rescind, change or alter the order of finding, or re-hear any matter before deciding it. In the original version of the Act, subsection 30(3) stated that an order or finding of the Tribunal could not be reviewed, restrained, removed or set aside in the Exchequer Court; this privative clause was wholly removed by s. 65 of the *Federal Court Act*.[32]

D. Regulations[33]

The regulations made under the *Anti-dumping Act* deal with such matters as selection of sales at the appropriate trade level and in comparable quantities in the determination of normal value (Regulation 3);

adjustment of the "normal value" of goods for quantity discount (4), because of differences in quality, structure, design, material, etc. (5), because of deferred discounts or discounts for cash (6-7), and on account of the cost of transportation (8); further problems associated with the computation of normal value (9-17), including trade level adjustments (10), rebates of internal taxes and duty drawbacks (11), exchange rates (12), the period for computation (14), and goods that have passed in transit through a third country; and difficulties associated with the notion of "export price", such as costs of export (18) and compensatory arrangements (19A).[34]

Paragraph 3 of Article 6 of the GATT provided for countervailing duty. There is no mention of such duty in the Code.[35] Canada did not provide for a countervail procedure until March of 1977, when the Governor in Council promulgated Countervailing Duty Regulations[36] under section 7 of the Customs Tariff[37] providing for duties to be imposed on subsidized imports threatening material injury or materially injuring Canadian industries. By regulation 3, the Deputy Minister of National Revenue for Customs and Excise shall initiate an investigation "respecting the subsidization of any imported goods of a class or kind made or produced in Canada", on his initiative or on receipt of a complaint from Canadian producers, if he believes that there is evidence of subsidization and that there is *prima facie* evidence of material injury. The Deputy Minister may make a preliminary determination of subsidization, in which case he notifies the Ministers of National Revenue and Finance (4); the Minister of National Revenue, with the concurrence of the Minister of Finance, then applies to the Governor in Council for the declaration of a provisional countervailing duty, and for a reference under section 16.1 of the *Anti-dumping Act* "as to whether the importation of the subsidized goods has caused, is causing or is likely to cause material injury to the production in Canada of any goods of that class or kind" (5). If the Tribunal finds there to be material injury, then the Minister of National Revenue, with the concurrence of the Minister of Finance, applies to the Governor in Council for a declaration of countervailing duty equal to the amount of the subsidy (7). If the Tribunal finds there is no injury, then National Revenue returns any provisional duty collected and bonds posted are cancelled. The April 6, 1977 Department of Finance press release announcing these regulations indicated that consultations with foreign governments, with respect to the effect of countervailing action on their domestic programs, may be undertaken during a countervailing investigation; the result of these consultations will be submitted to the Governor in Council for consideration in conjunction with the reports of the Deputy Minister and the Anti-dumping Tribunal.

E. Rules of Procedure

In October, 1974, pursuant to subsection 25(1) of the *Anti-dumping Act*, the Governor in Council approved rules of procedure[38] devised by the Tribunal. These rules are discussed in Chapter 6. The formal adoption of the 1974 rules was preceded by a period of experimentation, as the Tribunal sought, largely in response to the *Magnasonic* decision (see below), to elaborate and refine its procedures.

F. Jurisprudence

A review of the more important relevant jurisprudence reveals two divergent notions. First, the Federal Court has regarded the anti-dumping activities of the Ministry of National Revenue as largely immune from judicial review and control. But, second, the Court has subjected the Tribunal to close scrutiny. This study suggests later that the Court's approach may have aggravated some undesirable features of the Canadian anti-dumping system.

The Federal Court's view of National Revenue's role is largely found in the *Creative Shoes*[39] and *Sabre*[40] decisions. In the *Creative Shoes* case, the plaintiffs applied for writs of *certiorari* and prohibition to stay proceedings on decisions (resulting in anti-dumping duty) by the Minister of National Revenue, the Deputy Minister and the Tribunal; for a declaration that these decisions were void in whole or in part; and for an injunction against the Deputy Minister. By affidavits, the plaintiffs, all importers, denied that there was dumping, and complained that the Department of National Revenue withheld information, did not advise them of the reasons for its preliminary determination, and did not afford them the opportunity to correct, complete or to contradict the information which it had. Thurlow J., for the Federal Court of Appeal, reversing Walsh J. at trial,[41] considered that the Minister's authority to prescribe the manner of determination of value is a power to legislate — to lay down rules of general application — which does not have to be exercised on a judicial or quasi-judicial basis. (The Deputy Minister must, however, act judicially or quasi-judicially in applying a Ministerial Prescription).[42] In the later *Sabre* case, the Federal Court of Appeal held that a preliminary determination of dumping made under section 14(1) is an administrative decision and is not required to be made on a judicial or quasi-judicial basis. It is therefore not subject to review under section 28 of the *Federal Court Act*.[43]

It was the well-known *Magnasonic* case[44] that set forth the views of the Federal Court on the function and procedures of the Anti-dumping Tribunal. The *Magnasonic* decision has had a substantial effect on the Tribunal's operations; it led, for example, to a major revision of procedures, represented by the 1974 Rules. In *Magnasonic*, the applicant contended that the Tribunal did not give it the opportunity to be heard required by law, and that its decision was therefore invalid and should be quashed. Chief Justice Jackett, speaking for the Federal Court of Appeal, described what took place:

> The "inquiry" in this case consisted, in part, of a public hearing, at which Magnasonic and other parties, all of whom were represented by counsel, adduced evidence and were given an opportunity to make submissions with reference to the evidence presented at such hearing. However, this hearing was conducted on the basis that no person would be required to give evidence against his will if he took the view that it was "confidential". In part, the inquiry consisted in the receipt by a member or members of the Tribunal or by the staff of the Tribunal, otherwise than during sittings, of confidential evidence requested by the Tribunal or sent to it voluntarily by the Deputy Minister or others. Finally, the inquiry consisted in visits paid by one or more members of the Commission or its staff to premises of Canadian manufacturers and one or more interviews also conducted by members or staff, during the course of which visits and interviews evidence and information was obtained.
>
> The feature of this type of "inquiry" which is to be noted is that, while the "parties" had full knowledge of the evidence adduced at the public hearing, they had no opportunity to know what other evidence and information was accepted by the Tribunal and had no opportunity to answer it or make submissions with regard thereto.[45]

The Court concluded:

> Our conclusion is, therefore, that the Tribunal made the decision under attack without having conducted the inquiry required by the statute, in that it acted on information that was not put before it in the course of hearings by the Tribunal or a single member of the Tribunal such as were provided for by the statute, with the result that no opportunity was given to the parties to answer such information (either as obtained or, where based on confidential communications, as communicated to them in some way that complied with subsection 29(3)) and no opportunity was given to the parties to make submissions with regard thereto.[46]

In coming to this conclusion, the Federal Court of Appeal considered that the general rule, to be deduced from the *Anti-dumping Act* and subsection 21(2) of the *Interpretation Act*,[47] is "that an inquiry must be conducted by a quorum of members sitting *in camera* or in public held in such manner as to permit the 'parties' who desire to do so to

appear or to be represented".[48] The Court did not consider that subsection 29(3), dealing with confidential business information, "requires a departure from the pattern of hearings dictated by the other provisions of the statute".[49] Chief Justice Jackett presented the following analysis:

> The sole business entrusted to the Board is to conduct inquiries under section 16 in respect of goods to which preliminary determinations of dumping apply and then to make such orders or findings as the nature of the matters may require (subsection 16(3)). (This statement must be taken subject to subsections 13 (3), (7) and (8), under which certain matters may be referred to the Tribunal. It is significant to note, however, that subsection 13(8) expressly provides that questions so referred are to be dealt with "without holding any hearings".)
>
> For the conduct of such inquiries, the statute has made provision for the system of hearings to which I have referred and has conferred on the "parties" (who must, we should have thought, include the "importer" and other persons who have a statutory right to notice of the preliminary determination) a statutory right to appear at such hearings or to be represented there. In the absence of something in the statute clearly pointing to the contrary, we have no doubt that such a right implies a right of the party to be heard, which at a minimum includes a fair opportunity to answer anything contrary to the party's interest and a right to make submissions with regard to the material on which the Tribunal proposes to base its decision. A right of a party to "appear at a hearing" would be meaningless if the matter were not to be determined on the basis of the "hearing" or if the party did not have the basic right to be heard at the hearing.
>
> Against this view, it is said that the object of the *Anti-dumping Act* is "to protect the Canadian public interest from dumped goods which may materially cause injury or retard production in Canada of like goods" and, therefore, the inquiry is "essentially an investigatory one and does not involve a contest between opposing parties".
>
> We accept it that the object of the Act is to protect the Canadian public interest from dumped goods which may materially cause injury or retard production in Canada and that the inquiry is not, as such, a contest between opposing parties. It appears clear, however, that the reason for the existence of the Tribunal was that Parliament sought, not only a means whereby to keep out dumped goods when their importation would do injury or retard production, but also a means whereby dumped goods would not be kept out when their importation would not do injury or retard production (and would, therefore, presumably provide Canadian consumers with cheaper goods without doing any harm). Otherwise, that is, if Parliament was not concerned about the danger of keeping out dumped goods unnecessarily, the statute would have simply prohibited all importations of dumped goods.
>
> One method that Parliament could have adopted to determine whether the dumping of any particular class of goods should be prohibited would have been to entrust the duty to an executive department

> of government with all necessary powers to gather information and to proclaim its findings. There would then have been no right in any "party" to be heard. Parliament chose instead to set up a court of record to make the inquiries in question and provided for such an inquiry being carried out by hearings where those whose economic interests are most vitally affected on both sides of the question would be entitled to appear. It seems obvious that it was thought that the most effective way of assuring that the right conclusion would be reached was to open the door to such opposing parties, whose economic interests were at stake, so that they could, by adducing evidence and by making submissions, make sure that all sides of the question were fully revealed to the Commission. We can think of no method more likely to ensure that the Commission would not go wrong for lack of information and for lack of proper exposition of the problem. Certainly, our experience in common law countries has shown that such method of inquiry has substantial advantages over the sort of result that can be obtained by individuals going out and gathering information by interviews and inspections.[50]

The *Magnasonic* analysis was reaffirmed by the Federal Court of Appeal in *Sarco Canada Ltd. v. Anti-dumping Tribunal*.[51] In the *Sarco* case, the applicant argued that the Tribunal had failed to conduct the inquiry[52] properly:

> . . . it acted beyond its jurisdiction in that it received and considered material obtained by it in a manner not contemplated by the *Anti-dumping Act* which material was built into the record in such a manner that the applicant was deprived of the right to the kind of hearing afforded to it under the statute and was deprived of its right to test that information so received and relied on by the respondent through its refusal to grant the applicant's request for an adjournment for that purpose and . . . further, that by failing to disclose to the applicant a portion of the material relied on by it, the respondent violated the *audi alteram partem* principle.[53]

Heald J., for the Court, accepted this argument, and set aside the Tribunal's decision, emphasizing that interested parties had to be given "a full and fair opportunity to be heard".[54]

The Impact on the Tribunal of Chief Justice Jackett's *Magnasonic* reasons, recently reaffirmed in *Sarco*, has been quite considerable. The Tribunal's status as a "court of record" has been emphasized.[55] Any Tribunal tendencies towards formality have been encouraged. Justifiably enough, the Tribunal has become cautious and circumspect. How could it be otherwise, particularly since *Sarco*? And, indeed, attention to natural justice has no doubt eliminated some unfairness from the Tribunal's quasi-judicial proceedings. None of this is to say, however, that quasi-judicial proceedings that scrupulously respect natural justice are the best way of dealing with part of the anti-dumping phenomenon. I raise the question of whether it is so later in this study.

IV

Proceedings of the Tribunal

A. In General[56]

In nine years (1969-1977) there have been eighty-four "findings" under sections 13, 16, 16.1 and 31 of the *Anti-dumping Act*. The overwhelming majority — sixty-six — were under section 16. Four were under section 13; three under section 16.1; and eleven under section 31. The workload of the Tribunal has increased dramatically; in 1976 there were seventeen cases, and in 1977, nineteen, compared, for example, to five and seven in 1970 and 1971 respectively. It is interesting to note that, of the section 16 determinations, twenty-five, or thirty-eight percent, were findings of no past or present material injury and no likelihood of material injury.

As we see, most of the Tribunal's proceedings are under section 16 of the Act. Statements of reasons given under this section follow an almost invariable pattern. They begin by reciting the preliminary determination of dumping made by the Deputy Minister of National Revenue, Customs and Excise, and the notification of the preliminary determination sent by the Deputy Minister to the Tribunal's Secretary; then give some details of the Tribunal's procedures (dates and place of hearings, number of *in camera* hearings, etc.); identify the "product" which is the subject of the inquiry; consider what constitutes the Canadian industry; examine the claim of "material injury"; and, finally, offer a conclusion. There are sometimes minor variations on this theme. So, for example, there may be separate discussion of the participants; of the market, both domestic and export; of the "claims of the Canadian industry", "the complaint" or "briefs and submissions"; perhaps a dissent by a Tribunal member, although that is unusual; and so on.

B. Indicators of Material Injury[57]

The key concept in the anti-dumping system is "material injury". Article 3 of the Code offers some general guidance on the meaning of this phrase. Article 3(b) requires that the evaluation of injury be based on such factors as turnover, market share, profits, the price of the dumped goods compared to the price of the domestically produced goods, export performance, employment, volume of dumped and other imports, utilization of capacity, productivity, and restrictive trade practices. Article 3(c) stipulates that in establishing injury, attention must be paid to such factors as volume and prices of undumped imports, competition between domestic producers, and contraction in demand due to substitution of other products or to changes in consumer taste.

Neither the Canadian Act nor the regulations made under the Act specify any indicators of material injury. The major concern of these documents, and in particular the concern of the regulations, is the method of determining normal value and export price. This lacunae in the Canadian law is curious. The GATT and the Code require that, before an anti-dumping duty can be levied, both dumping and injury must be established. And yet the Canadian law appears obsessed with the concept of dumping and relatively unconcerned with that of injury.

Of course, the Canadian *Anti-dumping Act* was passed in large measure to implement Canada's obligations as a Code signatory.[58] It is sometimes argued that accordingly matters found in the Code but ignored in the Act and regulations are nonetheless part of Canadian law and are binding on the Tribunal. But this is a doubtful view. Macdonald has written: "It is safe to say that, generally speaking, our courts have adhered to a dualist approach to conventional law and have required legislation to implement treaties which purport to change domestic law in any way."[59] It probably follows that when legislation implementing a treaty is silent on some treaty matters, those matters do not become part of domestic law.

Notwithstanding the silence of the Act and regulations, the Tribunal has from the beginning developed material injury indicators that compare closely to those mentioned in the Code. Typically, the Tribunal has considered a claim of material injury in light of loss of market share (loss of volume), loss of profit (profit degradation), under-utilization of capacity, loss of employment, price erosion (degradation), cancelled or postponed expansion of production facilities, unusually

high inventories, higher unit distribution costs, and curtailment of research and development.[60] Rule II of the 1974 Rules of Procedure,[61] formalized most of these indicators: the rule requires briefs, written submissions and evidence to contain information relating to

(*a*) the retardation in the implementation of definite plans for production,
(*b*) the loss of orders, markets and profits,
(*c*) the reduced employment of persons, and
(*d*) the reduced utilization of capacity,

by producers in Canada of like goods, and

(*e*) the volume of imported goods that are dumped, where known, and
(*f*) the price erosion resulting from the dumping of the goods.

Rule II does not mention inventories, distribution costs, or the curtailment of research and development, but these indicators continue to be considered by the Tribunal.[62]

It is relatively easy to compile a list of material injury indicators, but it is seldom easy to interpret or apply a given indicator. What, for example, is "capacity"? In the *Tetanus immune globulin* case the Tribunal had to make clear that "the potential use of capacity is related to the requirements of the Canadian market and not to total capacity."[63] How is profitability to be assessed when the Canadian producer is also an importer? In the *Hair accessories* case,[64] the Tribunal said that "where a significant percentage of the sales of a Canadian producer is made up of imports . . . it is almost impossible to determine whether a decline in profitability relates to sales of imported or domestically produced products". Does "production" include assembly of imported parts? In the *Colour television* case,[65] the Tribunal found that assemblers were producers "in light of the numerous steps required in sending to market a functioning receiver . . . " Is the breaking-down, cleaning and repacking of raisins "production"?[66] No, said the Tribunal, observing that production does not include the provision of a service to achieve marketing convenience.

C. The Causal Relationship

It is commonly said that dumping and material injury are necessary conditions for the levying of an anti-dumping duty. It should not be forgotten that they are not sufficient conditions. Dumping must be the *cause* of injury.

The Code is sensitive to the problem of causality, albeit in a rather confused way. Article 3(a) requires that dumped imports be "demonstrably the principal cause of material injury" before duty can be imposed, and refers to "other factors" which may be adversely affecting the industry in question. It states that a determination of injury "shall in all cases be based on positive findings and not mere allegations or hypothetical possibilities". Article 3(b) requires that evaluation of injury "shall be based on examination of all factors having a bearing on the state of the industry in question . . . ". And 3(c) proclaims that "in order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined . . . ". These paragraphs appear to distinguish between concepts of causality and injury evaluation, although the nature of this distinction is not clear. But Article 3 clearly recognizes that there may be many explanations of an industry's tribulations, and that in considering material injury possible causes other than dumping must be fully investigated.

The Anti-dumping Tribunal's main task is to consider whether dumping has caused injury. But it has experienced difficulty in articulating an appropriate theory of causality, however rough or ready. Sometimes the Tribunal has simply turned its back on causality, and appears to have assumed a posture of "where there's smoke, there's fire". This approach proceeds by inferring injury from dumping; a more sophisticated version assumes causality when there is a contemporaneous increase in dumped imports and decrease in domestic sales of Canadian producers. So, in the 1971 *Monochrome and colour television case*[67] the Tribunal said:

> Since the great bulk of these imports entered the Canadian market at prices which the Deputy Minister of National Revenue found preliminarily to be dumped, it is reasonable to conclude that the dumped imports had the effect, in an indeterminate but in our view significant degree, of displacing sales which would otherwise have been supplied by Canadian made sets.

More recently, the Tribunal perceived the inadequacy of this reasoning. In the *Colour television* case,[68] the Tribunal noted that "the main thrust of the industry case was that the Tribunal's own fact sheets or tables relating to production, market share enjoyed by imports, capacity and its rate of utilization, employment, and profitability by themselves established a case for material injury due to dumping and that nothing more was required". Commented the Tribunal:

> These tables . . . constitute factual information of a quantitative nature. They do not and cannot by themselves establish a relationship to

> dumping. Other factors must come into play to establish a causal relationship and it was for this reason that the Tribunal sought evidence of underselling of the domestic product by the dumped product.

One might, of course, question whether underselling is sufficient to establish causality. In the *Polyester filament yarn* case, [69] the Tribunal said:

> There is . . . no easy "cause and effect" finding possible here, since no clear and separate relationship can be established between dumping and material injury when so many adverse factors are involved in a commodity market. However, the contribution to the seriously depressed state of the domestic industry caused by dumping must be recognized. Certainly, had the exporting countries concerned not dumped in the large volumes indicated but had competed in the Canadian market at undumped prices, the situation of the domestic industry would not have been as serious by an indeterminate, but significant, degree, and that significant degree equates, in the view of a majority of the Tribunal, with material injury.

The reasoning is unconvincing. If the relationship between dumping and material injury cannot be established, how can it be decided that dumping has created even an indeterminate degree of injury?

One possible approach, perhaps espoused by some Tribunal members, is that the test of causality is a negative test. Is there a reason other than dumping to explain harm suffered by the Canadian industry? In other words, the burden of proof lies, not with the complainant, but with the exporters and importers. This approach has all the attractiveness of ease, but it is not in the spirit of either Article VI of the GATT or of the Code, and works an injustice on exporters and importers. It has been suggested, as a general response to the difficulty, that the Tribunal does not require "formal proof" of the causal relationship, but makes "a conscientious and careful effort to establish a judgment of reasonable confidence". It would, of course, be quite unreasonable to demand "proof" in the sense understood by a trial judge. But, what exactly is "a judgment of reasonable confidence"?

The Tribunal in its reasons has not paid as much attention as it might to the "other factors" referred to in Article 3 of the Code. The explanation in the reasons of injury of factors other than dumping does not always reflect the full exploration of alternative explanations which often taken place during Tribunal proceedings. One exception to the pattern of reticence was the *Colour television* case,[70] where the Tribunal referred to "other factors adversely affecting the performance of the industry", and mentioned the recession, market saturation,

competition between the domestic producers, and failure to keep abreast of product development. Concerning the recession, the Tribunal said that "consumer resistance to high-priced luxury goods of the kind under review played an important part in the reduced sales and the reduced profits of the domestic industry". The statement of reasons noted that "the market is contracting due to increasing saturation". It observed that "in a time of recession and diminishing markets, competition necessarily intensifies and underselling between the producers themselves is a recognizable market force". Finally, said the Tribunal, "Canadian producers were late starters in the solid state era and, while catching up on the lead time enjoyed by offshore producers, the market share of domestic producers suffered". Another exception was *Ladies' handbags*[71]: in that case, the Tribunal considered such "other factors" as the effect of Canada's wage levels and changing patterns of employment on labour-intensive industry, higher cost materials, and limited market size. Then it made this interesting remark: "it may well be that the basic internal problems of the industry actually rendered the surviving Canadian manufacturers more susceptible to injury which is attributable to dumping". How is the Tribunal to decide whether "other factors" are solely responsible for injury or whether they have only increased susceptibility to injury from dumping? Is it part of the international anti-dumping system that the exporter takes his "victim" as he finds him, no matter how thin the skull?[72]

It is often suggested that anti-dumping measures are taken to protect industries that, regardless of dumping, are unable to compete effectively. After a detailed empirical study of dumping in Australia, Lloyd concluded that in Australian anti-dumping cases a decline in the competitiveness of local production was at least as important a concern as dumping itself.[73] Indeed, some members of the GATT Committee on Anti-dumping Practices[74] have on occasion accused Canada of using her anti-dumping legislation to protect uncompetitive domestic industries.[75] It is clear that failure to establish a satisfactory concept of the causal link between dumping and injury facilitates the use of anti-dumping mechanisms to protect inefficient and uncompetitive domestic industry.

D. The "Likelihood" Finding

A common theme in the Tribunal's work, particularly in earlier years, is a finding of no past or present injury, but of a likelihood of future injury. The matter was explored in some detail in the 1976

Hydraulic turbines case.[76] There it was first decided that there was no past or present injury. Then the matter of "likelihood" was considered. The exporter argued that the Tribunal had no jurisdiction to consider the likelihood of future injury from *future* dumping; it could only inquire into the likelihood of future injury from dumped goods that have already entered the country at the time of the Deputy Minister's preliminary determination or for which contracts to purchase are in effect, and this might preclude finding likelihood in the absence of past or present injury. Referring to ss. 16(1) of the Act, the Tribunal described the movement of goods that is regarded as contemplated by the Act: "The movement does not stop just because the Deputy Minister, having examined certain entries, considers that on the volume studied and the margins of dump found he has sufficient information before him to proceed to a preliminary determination." The statement of reasons continues:

> Proceeding on the assumption, then, that unless inhibited by the imposition of anti-dumping duties, the U.S.S.R. will continue to dump hydraulic turbines other than the bulb type, the Tribunal finds that there is a likelihood of material injury being caused to Canadian producers by reason of such dumping.

There is some sense to the Tribunal's position. The "likelihood" category would have little significance if it was restricted to likelihood of injury from goods already dumped or contracted for. Is it reasonable to insist that there can be no "likelihood" finding in the absence of a finding of past or present injury? On the other hand, it is difficult to understand how a prediction of "likelihood" can be made based on study of the "period under review",[77] particularly when there has been found to be no injury during that period.

E. What is the "domestic industry"?

Subsection 16(4) of the *Anti-dumping Act* requires the Tribunal to take into account paragraph 4(a) of the Code. That paragraph states that "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products . . .". I mentioned earlier that the Code negotiators apparently thought that "major proportion" meant at least half the production of the goods in question.[78] But neither National Revenue,[79] the Tribunal, or the Federal Court share this perception. In the *Frozen, prepared, precooked dinners* case,[80] the Tribunal observed that "domestic

industry" equates with "production in Canada of like goods" and then commented:

> A producer, or group of producers, can represent less than 50% of the total and yet constitute "*a* major proportion" of the whole. The question is one of degree and therefore of fact upon which the Tribunal may pronounce. It would be otherwise had the Code used the expression "the major proportion".

The same point was made in the *Masking tape* case.[81] The Federal Court of Appeal has recently endorsed this approach. In *McCulloch v. Anti-dumping Tribunal*,[82] Chief Justice Jackett said:

> . . . when one examines the various senses that may be attributed to the word 'major', in my view, the sense in which it is used in Article 4(a) is "significant" and not the more precise mathematical sense of more than one-half that may be dictated by the context, in certain cases, as, for example, where one speaks of *the* major of two portions of a whole. Reading the *Anti-dumping Act* in its entirety, the meaning urged by applicants' counsel for the word "major" would, in my view, if it has any effect at all, tend to frustrate in part the obvious intent of the statute.[83]

It is now clear what, in Canada, constitutes the domestic industry for anti-dumping purposes.

F. What is a "separate industry"?

Paragraph 4(a)(ii) of the Code, applicable to Canada by virtue of subsection 16(4) of the Act, sets forth the concept of "separate industry". It permits a country to be divided into two or more competitive markets and the producers within each market to be regarded as a separate industry where, because of transport costs or special regional marketing conditions, there exists regional isolation. The Tribunal has found to be a separate industry the production of wallboard in Canada west of the Ontario-Manitoba border,[84] and of raw potato starch east of the Manitoba-Saskatchewan border.[85] Despite argument before it, it did not find there to be more than one market in Canada for caulking and sealing compounds,[86] or the Atlantic Region to be a regional market for twisted rope.[87] It considered, but did not decide (the case being dealt with on another basis), whether yeast production in Ontario and Quebec constituted a separate industry.[88]

Article 8(e) of the Code states that where injury has been found in a regional market, as permitted by Article 4(a)(ii), "anti-dumping

duties shall only be definitely collected on the products in question consigned for final consumption to that area . . . ". One consequence of the separation of this provision from Article 4 is that, since subsection 16(4) of the Canadian Act refers only to Article 4, apparently it is not possible in Canada to levy "regional" duties. Accordingly, Canada-wide duties may be put in place just to protect regional industries.[89] This anomaly calls for legislative change.[90]

An interesting question is whether the concepts of "major proportion" and "separate industry" can be combined. Would a complaint by some producers in a region of Canada (representing perhaps only a very small part of Canada-wide production) be entertained? If so, then injury to a very small part of a national industry might be used to justify Canada-wide anti-dumping duties. This possibility recalls a comment by Baier: "A standard focusing upon a smaller number of domestic manufacturers would magnify the competitive significance of any instance of price discrimination. This would inevitably produce more findings of injury and thus would be inconsistent with our [U.S.] trade policy encouraging competition from abroad."[91]

G. What are "like goods"?

Subsection 2(1) of the Act says that "like goods" are "*(a)* goods that are identical in all respects to the said goods, or *(b)* in the absence of any goods described in paragraph *(a)*, goods the characteristics of which closely resemble those of the said goods". The language of this section closely follows that of Article 2(b) of the Code. The test is not one of competition, with reference to cross-elasticity of demand and functional interchangeability, but the more mechanical and less significant test of characteristic comparison.

The Act makes clear that goods which "closely resemble" may only be considered in the absence of identical goods. In *Metal storage or parts cabinets*,[92] because there were identical goods, goods with characteristics that "closely resemble those of the dumped imports" were excluded from consideration, with their producers not being considered as part of the domestic industry. It seems certain that the production of identical goods in Canada precludes consideration by the Tribunal of injury to producers of competitive but not identical goods.

The position in the absence of identical goods is more complex. In two s.16.1 references (useful by way of analogy), *Footwear*[93] and *Preserved mushrooms*,[94] the Tribunal made this statement:

> As a general proposition it would probably be true to say that if imports of any given class of goods can be proven to cause injury to the production of any class of goods in Canada, that alone would be sufficient evidence that the two classes of goods are directly competitive if not alike. In the absence of such evidence, the most logical course would seem to be to compare the imported and domestically produced goods with reference to their physical characteristics, end use and the market which they serve.

The Tribunal's reasoning here is not outstanding. (Surely imports producing injury must be competitive). But the emphasis on competition seems sensible, in accord with commercial reality. In *Steam traps*,[95] the Tribunal said:

> . . . the question of whether goods are "like" is to be determined by market considerations. Do they compete directly with one another? Are the same consumers being sought? Do they have the same end use functionally? Do they fulfill the same need? Can they be substituted one for the other?

This passage was attacked by the applicant in *Sarco Canada Ltd. v. Anti-dumping Tribunal*.[96] In that case, there were no identical goods, and the issue was the characteristics relevant to a determination of goods that "closely resemble". The applicant contended that the Tribunal made this determination only on the basis of competition, substitutability, or functional similarity, and in this way lost or exceeded its jurisdiction under paragraph 2(1)*(b)* of the Act. Said Mr. Justice Heald for the Court:

> . . . in defining "like goods" the respondent was required to consider *all* of the characteristics or qualities of the goods, and not restrict itself to a consideration of something less than the totality of those characteristics. Accordingly, if the record disclosed that the Tribunal had restricted itself to "market considerations" in defining "like goods", I would agree with counsel for the applicant that the Tribunal had erred in law. However, my perusal of the record does not impel me to such a conclusion.[97]

It is now clear that substitutability, functional similarity or competitiveness by themselves do not meet the "closely resemble" requirement; *a fortiori*, the requirements for "identical" goods.

It should be remembered that the Deputy Minister formulates the class of goods referred to in a preliminary determination, and that this formulation is not subject to review.[98] The difficulty of finding identical

goods, or goods of close resemblance, will obviously vary according to the width and generality of the class established by the Deputy Minister. So, for example, a very narrow and detailed formulation might effectively prevent the Tribunal from finding Canadian producers that have suffered injury.

Both the Code and the Act clearly require the mechanical characteristic comparison test for like goods, and that test, at very best, whether sensible or not, can only attribute very limited significance to cross-elasticity of demand and functional interchangeability. The Tribunal, necessarily, is trapped by the unambiguous language of the statute.

H. The Problem of Components

In the *Zipper* case,[99] the issue was "whether, when the preliminary determination includes components or parts of a product, each component or part is to be considered as an article of commerce and a case made to establish injury to the production in Canada of that component or part". The Tribunal held that in this case components were not to be treated separately, since for the most part dumped components were being assembled into finished zippers. The importers appealed to the Federal Court, and contended that:

> . . . the Tribunal is obligated to make an inquiry into parts produced by the exporter, and to ascertain the effect of dumping of parts produced by it *on the production in Canada of parts*. It [the applicant] objected to the fact that, in effect, the Tribunal considered only the result of dumping of parts *on the production in Canada of finished zippers*.

Mr. Justice Urie for the Court rejected this contention, and concluded that "in effect, the Tribunal found that the applicant was an importer of certain dumped finished or partly finished zippers which were, in its view, 'like goods' to certain zippers produced in Canada and thus within the class formulated by the Deputy Minister in his preliminary determination".[100] The Tribunal took a similar line in *Bicycles;*[101] in that case it rejected the argument that a separate inquiry into material injury is required in respect of components identified in the preliminary determination where those components are clearly not primarily separate articles of commerce. The Tribunal said:

> It may be stated, as a general rule, that where it is found that dumping of an article has caused, is causing and is likely to cause material injury, then, in all likelihood, where there is production in Canada of the major

components of that article, continued dumping of these components will also cause material injury. This rule must find its application where, in the opinion of the Tribunal, the purpose and effectiveness of anti-dumping measures levied against the complete article would otherwise be frustrated, as the Tribunal believes to be the case here, where the feasibility of simple assembly has been demonstrated.

Good sense recommends this approach, although it is not without difficulty. What if dumped components are both separate articles of commerce, and may also easily be assembled into the relevant finished product? Must there be component production in Canada before dumped components can be treated as "like goods"?

I. Conclusion

It is difficult to assess the formal record of the Tribunal's work: quite simply, there are no obvious criteria for judgement. But perhaps nonetheless something can be said. Do the statements of reasons reflect the Act and, where applicable, the Code? Is the approach consistent? Are problems properly appreciated? Do the statements of reasons offer adequate explanation for the Tribunal's decision?

So far as material injury indicators are concerned, little criticism can be levelled at the Tribunal. By and large, the indicators that have been adopted are those well-accepted ones described by the Code. The Tribunal's indicators have been made formal by the Rules of Procedure, and they are consistently applied. But a serious problem arises when the material injury that has been indicated must be related to the dumping of like goods. This link is a very difficult one to establish, but the Tribunal has not adequately explored the causal relationship; until it does so, its statements of reasons are vulnerable to description as "mere allegations or hypothetical possibilities", (Article 3(a) of the Code).

As for other matters mentioned in this chapter, where the Tribunal has some significant measure of discretion it has exercised it reasonably well. The Tribunal's definition of "domestic industry" is realistic in the Canadian context, and has been endorsed by the Federal Court of Appeal. It does not have the jurisdiction to deal with difficulties associated with the concept of "separate industry" or "like goods". And what it has said about components reflects good sense.

V

Tribunal Organization

A. The Tasks

Figure 1 illustrates the Tribunal's organization. The Tribunal consists of a Chairman, Vice-Chairman, and three members. The Chairman is the chief executive officer (subsection 23(1) of the Act). Reporting to the Chairman is the Secretary who has a delegated general day-to-day responsibility for the Tribunal's functioning. The Assistant Secretary, responsible to the Secretary, is in charge of secretarial, administrative and records matters. The Director of Research, responsible for the Tribunal's research effort, reports to the Secretary, and has two project managers in turn reporting to him. Each project manager has a staff of three research officers and one statistical clerk. (Figure 1 indicates the government occupation classification of the various Tribunal positions.)

The Tribunal began, in 1969, with a staff of eleven:[102] there were three members, a Secretary, two researchers, three secretaries and two clerks. A substantial increase occurred in 1973: two members were added, together with three researchers, an editor, and four secretaries. In 1977, an Assistant Secretary, four researchers, an editor, a secretary and a clerk were appointed. The remaining staff members — to bring the complement to thirty-two — were added in the first part of 1978.

As chief executive officer, the Chairman obviously has the most opportunity to influence — and in some measure even control — both the substantive work and the administration of the Tribunal. But, as with any institution, the formal organization chart does not always tell the whole story. Particular knowledge or skill, or unusual strength of personality, or any one of many factors may contribute to or detract from an individual's power and influence. To give one example, if a

difficulty arises that is characterized as a "legal" problem, members who are lawyers will likely come to the fore.

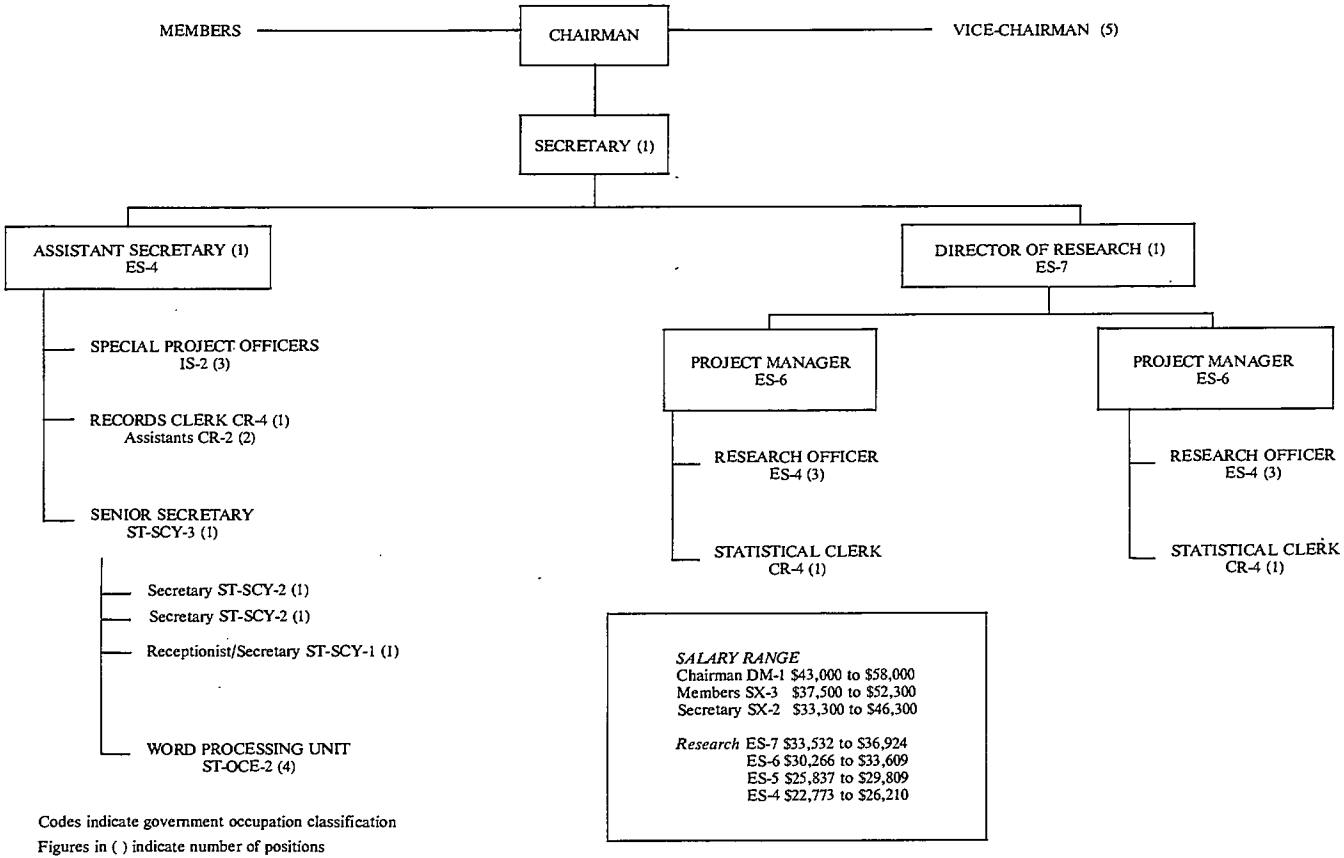
Similarly, Tribunal staff may acquire substantial influence. Undoubtedly there have been senior staff members who have contributed significantly to Tribunal decision-making; their influence was based on knowledge resulting from mastery of the relevant data and files, attendance at hearings, and long Tribunal service. The tendency of senior administrators of tribunals or similar organizations to acquire substantial influence on policy and decision-making may be of some concern. Administrators are not entrusted by Parliament with policy matters or decision-making power. And what power they have is concealed; those who are entitled to have their views known and considered cannot directly influence bureaucrats operating behind the scenes.

B. Background of Personnel

The most common component in the background of Tribunal members is government service. The typical Tribunal member has occupied a senior position — perhaps at the Director General or Assistant Deputy Minister level — in Industry, Trade and Commerce, or National Revenue or the Department of Regional Economic Expansion. That position was normally reached after long government service. There has never been much private sector experience in the Tribunal. Nor has the Tribunal ever numbered among its members someone with a graduate economics degree who has at some point pursued a career as a working economist. No doubt the Tribunal of the future would benefit if some members had significant private sector experience and serious economics expertise.

The Tribunal's senior administrative and research staff have backgrounds paralleling those of Tribunal members. The dominant theme is one of employment in the public sector. In particular, the Tribunal research staff normally come to the Tribunal from the Department of National Revenue.

Figure 1 — Anti-dumping Tribunal



Codes indicate government occupation classification
Figures in ( ) indicate number of positions

C. Finances

Figure 2 illustrates the annual expenditure of the Tribunal. The cost has increased approximately commensurate with the increase in workload. The major part of expenditure — about seventy percent — is on salaries.

Figure 2 — Main Estimates for Anti-dumping Tribunal

Source: Anti-dumping Tribunal

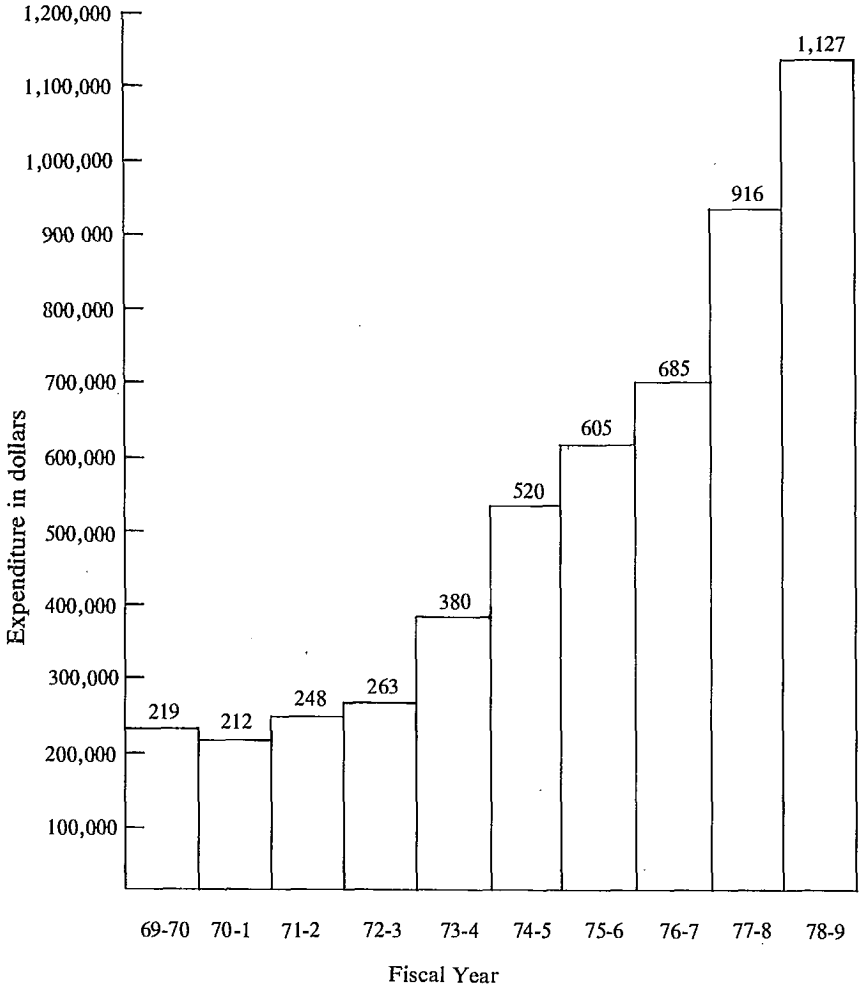


Table One: Senior Tribunal Personnel, 1969-1977

Chairman	
W. W. Buchanan	(1969-1972)
J. P. C. Gauthier	(1972-1976)
G. D'Avignon	(1976-1978)*
Vice-Chairman	
J. P. C. Gauthier	(1970-1972)
M. E. Ritchie	(1972-)
Members	
J. P. C. Gauthier	(1969-1970; appointed Vice-Chairman in 1970 and Chairman in 1972)
B. G. Barrow	(1969-1970)
A. P. Mills	(1970-1975)**
W. J. Lavigne	(1973-)
A. L. Bissonnette	(1973-)
H. Perrigo	(1976-)
Secretary	
C. D. Arthur	(1969-1970)
G. Thomson	(1970-1971)
D. M. Allan	(1971-1973)
M. Brazeau	(Acting, 1973)
A. P. Trudeau	(1973-)
Director of Research	
K. Besharah	(1973-)***
M. Brazeau	(Acting, 1976-1977)

*D'Avignon was replaced by David H. W. Kirkwood on January 15, 1978.
**Mills was re-appointed on January 1, 1978 as a Temporary Substitute Member for six months.
***Besharah joined the Tribunal as Economist in 1970.

VI

Process and Procedures

A. The Preliminary Determination[103]

A claim of injurious dumping is first investigated by the Deputy Minister of National Revenue, Customs and Excise (more precisely, by the staff of Special Assessment Programs[104]). Under most circumstances, the Anti-dumping Tribunal only becomes involved if the Deputy Minister finds both dumping and some evidence of material injury or retardation, in which case provisional duty equal to the margin of dumping is levied by National Revenue and the Tribunal is given the injury question. If an investigation is not initiated because there is no indication of injury or retardation, or is terminated for the same reason, either the Deputy Minister or the complainant may refer the matter of injury or retardation to the Tribunal under section 13 of the Act.

Department of National Revenue anti-dumping procedures begin either at the Department's instigation or, much more commonly, because of a complaint received from a Canadian producer. Typically, the very first event is a telephone call or letter, of inquiry or informal complaint, from a producer or his representative (or on occasion his Member of Parliament). If the matter is to be pursued, then either the Deputy Minister must begin an investigation — which he may do if the Canadian producer regards it as inconvenient or impolitic to proceed himself — or the Canadian industry must make a formal complaint. For these purposes, National Revenue will consider as "the industry" companies responsible for as little as thirty percent of industry production;[105] "the industry", of course, may be only one producer.

A formal complaint from the industry must identify the precise nature of the product in question, list the Canadian producers, give an estimate of the Canadian market, offer *prima facie* evidence of

dumping (including giving the countries of origin of the goods alleged to be dumped), and give *prima facie* evidence of material injury or material retardation. Following such a complaint, Special Assessment Programs will seek evidence of the alleged dumping and injury in order to decide whether to launch a full investigation; according to administrative guidelines announced on March 30, 1977, these initial inquiries will normally take no longer than thirty days.[106] In the one-month initial period, Special Assessment Programs will, among other things, send outa "manufacturer's questionnaire" and may also visit the plants of Canadian producers. The questionnaire asks for a full description of both the goods alleged to be dumped and the manufacturer's own goods; a list od exporters and importers; any available evidence of dumping, such as unit selling price in the country of export and unit landed Canada price, and data relating to export subsidies and rebates; and evidence of injury, including financial statements and full details of production, inventory, sales, imports, exports, marketing, capacity and utilization, and employment. In effect, the questionnaire requires complete details of matters alleged in the formal complaint.

If, after the thirty-day period of initial inquiries, the Deputy Minister can find no evidence of dumping, he will terminate proceedings. If he finds evidence of dumping, but no evidence of injury, he will either terminate the proceedings or refer the injury question to the Tribunal; if the proceedings are terminated, the complainant may refer the injury question to the Tribunal within thirty days of his receipt of the Deputy Minister's Notice to Terminate.[107] If, following a reference, the Tribunal considers that there is no evidence of injury, proceedings will be terminated; if the Tribunal finds evidence, a formal investigation must then be initiated by the Deputy Minister.

If, after initial inquiries, the Deputy Minister considers that there is evidence both of dumping and injury he will initiate a formal investigation, which under the 1977 guidelines[108] must normally be completed within six months. Notice of the investigation is sent to the importer, exporter, government of the country of export and the complainant, and is published in the *Canada Gazette*. Importers are sent a questionnaire to determine the facts of the export transaction. Exporters are sent a "Request for Information", seeking details of the exporter's domestic sales, prices, costs, customers and marketing network. The "Request for Information" may be preceded by a preliminary questionnaire inquiring into the nature of the exporter's business; the response to this questionnaire allows Special Assessment Programs to construct an appropriate subsequent "Request". Some overseas

"verification" of information supplied by exporters is carried out according to procedures that National Revenue will not disclose. If the Deputy Minister cannot gather sufficient information to determine normal or export price, or if the goods have been exported to Canada from a state-controlled economy, he may use section 11 or subsection 9(7) of the Act to prescribe another method of determination — for example, based on the value for another exporter of the same goods. Revenue Canada's practice is to issue a ministerial prescription in every case as a "stand-by" measure to cover new models or new exporters not part of the original investigation.

In the course of his investigation, the Deputy Minister examines the most recent figures on entries into Canada of the goods being investigated — typically, figures for a six month period falling in the twelve months preceding initiation. To establish normal value, foreign domestic sales are examined for an appropriate period, generally on the basis of at least a sixty day period preceding sales to Canada. These two periods together constitute what is called the "period under review" for the purposes of a preliminary determination.

If, following the investigation, the Deputy Minister concludes that there is insufficient evidence of dumping, or that the dumping is negligible, the proceedings are terminated. If the Deputy Minister concludes that there has been dumping but there is no evidence of injury, the proceedings will either be terminated, or the Deputy Minister or complainant may refer the question of injury to the Tribunal under section 13; if the Tribunal is of the opinion that there is no evidence of injury, the Deputy Minister will terminate the proceedings; if the Tribunal finds evidence, the Deputy Minister will make a preliminary determination. When the Deputy Minister has found both dumping that is not negligible and some evidence of material injury, then, of course, there is a preliminary determination and the Tribunal must definitely settle the question of injury. Following a preliminary determination, the Deputy Minister assesses provisional duties against the dumped goods. Importers either pay provisional duty equal to the margin of dumping or post security in an equal amount. Dumped goods subject to the preliminary determination of dumping, which are imported into Canada between the date of the preliminary determination of dumping and the date of the Tribunal's order or finding, are entered provisionally.

Throughout the investigation by Special Assessment Programs, there will likely be attempts by both complainant and the object of the complaint to make representations on the issues of dumping and injury.

These attempts will generally be by counsel, and will largely be informal, perhaps by telephone. It is reported that National Revenue is unsympathetic to such representations, particularly those made by exporters and importers.

Are the investigations that lead to the preliminary determination conducted in a satisfactory way? Canadian industry, looking at the process from a protectionist point-of-view, might feel prejudiced; after all, domestic producers generally have the burden of initiating the process and supplying much of the necessary information, and must normally wait about seven months before a preliminary determination (if there is to be one) is made.[109] Is it reasonable to ask this much from Canadian producers? Do they all have the resources and information necessary to initiate the anti-dumping process? Is there a sound policy reason for requiring the industry, in the beginning, to be the main actor? And does the investigation of dumping take too long?

The present preliminary determination system is best justified from a free trade perspective. If anti-dumping measures are regarded as exceptional, to be used only in unusual circumstances, then it makes sense to demand much from those who seek to rely on such measures. The protection offered by anti-dumping duties must not be automatic, or even put in place too easily.

Recent measures introduced to combat steel dumping support this analysis. On February 20, 1978, the Minister of National Revenue announced a system of "Fast Track" anti-dumping investigation of imported steel mill products. A Steel Task Force within Special Assessment Programs establishes Canadian "bench-mark" prices. Export prices below these bench-mark prices attract the particular attention of the Task Force, which will itself initiate a formal investigation if there is in addition *prima facie* evidence of injury. The period for formal investigation will be three months, rather than the usual six, and it is anticipated that ministerial prescriptions under section 11 will frequently be used. The Fast Track system is a product of the world steel recession, and of fear that similar systems introduced earlier by the European Economic Community and the United States might cause the diversion of large quantities of dumped steel into Canada. Fast Track indicates that when a special need for protection is perceived, the normal procedures leading to a preliminary determination may be scrapped in favour of quicker procedures requiring less involvement by the Canadian industry.[110]

Even the present procedures for reaching a preliminary determination suggest something of a protectionist bias. The major thrust of National Revenue's investigation is directed towards dumping, rather than injury. Little attention appears to be paid even to the existence of *prima facie* injury. The justification given for this lop-sided approach is the Anti-dumping Tribunal's responsibility for the injury question. Even so, exporters and importers may become embroiled in cumbersome and costly investigations when, as yet, there is little if any evidence that their activities are harming Canadian industry.

B. Before the Preliminary Sitting

The formal procedures of the Tribunal are found in the Rules of Procedure,[111] drawn up in 1974 as a last step in a post-*Magnasonic* reorganization of the Tribunal's activities. Following receipt of a preliminary determination by the Deputy Minister, the Tribunal publishes a Notice of Commencement of Inquiry in the *Canada Gazette*, giving details of the subject matter of the inquiry and procedures for filing briefs and written submissions (Rule 7). Copies of the Notice are sent to a variety of people, including importers and exporters, the government of the country of export, relevant trade associations, and the complainant (Rule 8). The Deputy Minister files with the Tribunal the complaint, if any, and all relevant information provided by the complainant; in the absence of a complainant, the evidence relied on to find dumping and injury; a description of the dumped goods; information on Canadian production and on importation; and information on dumping and margin of dumping (Rule 9). The Secretary establishes a timetable for the inquiry. Subsection 16(3) of the Act, following Article 10 of the Code, requires the Tribunal to complete its work within 90 days. The Tribunal adheres to a strict timetable, which places the hearing at about the 45 day mark. Any party who proposes to appear at the hearing must file a Notice of Appearance at least twenty days prior to the date fixed for the hearing (Rule 14); there appears to be no restriction on who may appear. Finally, the Tribunal Chairman assigns three Tribunal members to the panel for the case.

A day or two after a preliminary determination, the researcher assigned to the case by the Director of Research visits the Ministry of National Revenue to discuss the basis of the complaint, the product, and any other relevant matters. There may be a number of subsequent telephone calls by Tribunal staff to Special Assessment Programs to discuss points of difficulty. The assigned staff member then prepares

and dispatches a questionnaire for the Canadian industry (the mailing list is supplied by National Revenue), and one for the importers. The Canadian industry questionnaire focuses on the criteria for injury: it seeks full production and sales figures for several years, details of accounts lost or prices reduced because of dumped imports, inventory statistics, and figures concerning employment, capacity and utilization. The importers' questionnaire concentrates on import activity. The questionnaire system was developed as part of the 1974 reorganization.

While waiting for questionnaire returns, the staff member assembles from all available sources (particularly Statistics Canada) statistical information on imports, production, employment figures, and other relevant matters. He visits the complainants, other large producers and significant importers, to discuss their products and figures. The information in returned questionnaires is examined.[112] Any briefs or written submissions concerning injury or retardation that have been filed will be scrutinized.[113] Then, all available information is assembled into the Preliminary Staff Report.

In the meantime, any person who wishes information regarding Tribunal procedure may communicate with the Secretary (Rule 31). Members of the panel assigned to the case by the Chairman will likely visit the plants of Canadian producers to acquaint themselves with the product; care is taken, in the course of such visits, not to discuss the merits of the case. The occasional practice of meeting privately with the parties prior to the hearing to discuss the merits was abandoned after the *Magnasonic* decision.

C. Members' Meeting and the Preliminary Sitting

About ten days before the final hearing, there is a meeting of the panel assigned to the case, with the assigned researcher and the Secretary or Assistant Secretary present. The preliminary staff report is submitted by the researcher to the panel shortly before the meeting; the meeting considers this report and has a general discussion of the apparent facts and issues. About a week before the final hearing, and two or three days after the members' meeting, a "preliminary sitting" is held. Preliminary sittings were introduced in 1973 as part of the post-*Magnasonic* reorganization. The Tribunal may direct parties to appear at this sitting (Rule 15); in practice, those who plan to appear at the hearing almost always come to the preliminary sitting. Both at the

preliminary sitting and at the hearing, representations may be made in person or by counsel (Rule 32). Generally counsel appears. The purpose of the sitting is to consider the procedure to be followed at the hearing; to exchange briefs, documents and exhibits proposed to be submitted at the hearing; to consider any confidentiality problems; and generally to arrange for "the expeditious presentation of evidence and the disposition of the inquiry" (Rule 15).

The problem of confidentiality of business information has much exercised the Tribunal and has been given new life by the *Sarco* decision.[114] Section 29(3) requires the Tribunal to respect confidentiality in certain instances. On the other hand, the *Magnasonic* decision held the Tribunal to be in violation of the rules of "natural justice". The *Rules of Procedure* attempt to steer a course between apparently conflicting requirements. Rule 12 provides that persons submitting briefs, written submissions or exhibits may indicate that they are confidential; if the Tribunal does not agree, the person who submitted the brief, submission or exhibit, provided it was done voluntarily, may withdraw it. Prior to, or at the commencement of a hearing, the Tribunal provides each person who has filed a Notice of Appearance with all information filed except that considered to be confidential. Procedures to respect confidentiality at the hearing itself are mentioned below.

D. The Hearing

The Tribunal almost invariably sits in Ottawa, although Rule 13 permits it to sit elsewhere in Canada at the direction of the Chairman. Both the hearing and preliminary hearing are recorded, and in due course edited transcripts are placed in the Tribunal's records.

Hearings normally begin on a Monday, and typically last most of the week (although some have lasted as long as two weeks), with some evening and perhaps a Saturday sitting (evening and Saturday sittings are provided for by Rule 17). They begin with the Secretary reading into the record the events leading up to the hearing, including the letter from the Director General of Special Assessment Programs informing the Tribunal of the preliminary determination, and an account of the preliminary sitting. The Secretary then files as exhibits briefs, aggregate data compiled by the research staff, and any other relevant information.

Most of the first day, and sometimes longer, is taken by all the witnesses (who are sworn in), reading prepared statements into the record. The Tribunal instituted this practice — replacing lengthy question and answer sessions — after *Magnasonic*, in an attempt to inject order into, and shorten, the proceedings, and it is provided for by Rule 19. Following this procedure, examination-in-chief and cross-examination proceed, often for several days, followed by final argument. The Tribunal has the power of subpoena, and any person who has filed a Notice of Appearance may have the Secretary subpoena any person (Rule 20). Subpoenas are from time to time issued at the request of interested parties. On its own account, the Tribunal often invites the testimony of persons not adversarially involved, and requests interested parties to provide original documents in support of information provided in questionnaires or presented in testimony; since such requests have never been refused, the Tribunal has never had occasion to issue subpoenas on its own behalf.

The Tribunal builds the case for injury afresh. It takes no cognizance of information on injury assembled by National Revenue. It is in some measure inefficient to ignore the Deputy Minister's materials on injury, for it means duplication of research. But, as the Tribunal is quick to point out, the Deputy Minister's information is obtained purely by administrative means and is not critically tested by parties adverse in interest; to base quasi-judicial findings on such information would invite appeals. And, in any event, the Tribunal's research effort on the injury question is more intensive and covers a longer period of time than that of National Revenue. These points would, of course, lose their force if one administrative organization only was charged with investigating dumping and injury, and substantial efficiencies could then be realized free from the fears that currently persist.

By contrast, information provided by the Deputy Minister on the margin of dumping is received into the record, made available in confidence to counsel, and considered by the Tribunal in reaching its decision. No doubt the Tribunal is right to allow this information to inform its investigation of injury. After all, for example, it is unlikely that a finding of material injury would be credible if the margin of dumping, although not negligible, was very small. But information on dumping acquired by the Deputy Minister presumably possesses the same characteristics as information on injury, and therefore presents similar danger to the Tribunal. This difficulty was most recently discussed in the *Hermetic compressors* case.[115] There, some of the exporters/importers argued:

> . . . that it was within the Tribunal's competence to look into the methods and procedures used by the Deputy Minister of National Revenue, Customs and Excise in arriving at his preliminary determination of dumping. It was suggested that the margin of dump established by this official, and which forms part of the record, could not but influence the Tribunal in reaching a conclusion as to material injury and was, therefore, a matter of prime concern. In the submission of counsel, the preliminary determination of dumping was arrived at arbitrarily and without regard by the Deputy Minister to the principles of investigation enunciated in the International Anti-Dumping Code (Article VI of the GATT).[116]

The Tribunal refused to "look behind" the preliminary determination, arguing that nothing in the Act gives it the jurisdiction, as the Tribunal put it, "to sit in appeal on the issue of dumping", and that the Act establishes a "basic dichotomy of functions . . . ".

Another nettle grasped by the Tribunal hearings is the problem of confidentiality. Business adversaries face each other across the floor. To support their positions, these combatants must describe themselves and their business in great detail. Such intelligence is of commercial value, and must be kept out of the hands of competitors. Procedures to do so must be in place, all the while ensuring adherence to the strictures of *Magnasonic*. Confidential briefs, documents and exhibits are made available by theTribunal only to counsel who are appearing for parties represented at the hearings, and those counsel are required to give an undertaking not to reveal confidential information to their clients. Confidential material made available must be returned by counsel at the conclusion of the hearings. Expert advisers to counsel — accountants, for example — may be given access to confidential information at the Tribunal's discretion and with the consent of other parties. In-house counsel and those on the boards of directors of their clients are not given access to such material. When confidential information will be given in evidence, the Tribunal goes behind closed doors, excluding everyone except the various counsel (and any expert advisers who have given the undertaking and are permitted to remain) (Rule 24). Until 1978, confidential information supplied by an interested party who was not represented at the hearing was not disclosed to the counsel of parties who were represented. This "reciprocity" requirement appears to have been made possible by Rule 23, which states that "the Tribunal may disregard as evidence any brief, written submission or exhibit received prior to or during the course of an inquiry unless the person or his representative who filed the brief, submission or exhibit is present at the hearing to testify to the matters set out in the brief, exhibit or submission". Application of this rule

prevented full access by counsel to confidential information, although in those circumstances the rule does seem to require the Tribunal to itself ignore such information.

In *Steam traps*[117] the Tribunal did not make available to counsel for the Canadian complainant certain confidential exhibits; these exhibits comprised attachments to a letter from the Deputy Minister to the Tribunal Secretary, some replies to the manufacturer's questionnaire by companies not represented at the hearing, other information supplied by companies not present, and a summary of information received from Canadian importers together with supporting material. Although this material was not given to the complainant, the panel Chairman stated that the Tribunal would use it in making its decision. The Chairman also denied the complainant an adjournment, sought by the complainant so that it could have sufficient time independently to acquire some of the information contained in the withheld material. As it later turned out, some of the information denied the complainant was incorrect. On appeal to the Federal Court of Appeal, the Tribunal's decision, because of the Tribunal's treatment of the confidential material, was set aside. Mr. Justice Heald, for the Court, quoted extensively from *Magnasonic*. Said Heald J.:

> . . . I have concluded that the Tribunal did not conduct the inquiry required by the statute since it acted on information not disclosed to the parties with the result that the applicant was given no opportunity to respond to that information. Likewise, I am of the opinion that in the circumstances of this case, the Tribunal's refusal to grant to the applicant the adjournment asked for was an improper exercise of the Tribunal's discretion.[118]

There can be little doubt, in light of *Magnasonic*, that the Tribunal behaved improperly in *Steam traps*. It presumably acted on the basis of its "reciprocity" rule: confidential information supplied by an interested party who is not represented at the hearing is not disclosed to the counsel of parties who are represented. But Rule 23 of the Tribunal's own Rules of Procedure permits the Tribunal to disregard such information, and that is clearly the course of action required by *Magnasonic*. By ignoring its own Rules, the Tribunal fell into serious error and jeopardized its entire approach to the handling of confidential material. The Tribunal has now adopted the practice, as *Steam traps* requires, of making available in confidence to counsel all confidential information received, and not merely that provided by parties represented at the hearings.

The opinion is sometimes expressed that ninety days is not nearly enough time for consideration of injury. That time limit is imposed by

the Act, which in turn implements Article 10(d) of the Code.[119] In any event, there is little evidence that the ninety day provision has created any substantial difficulty;[120] members and staff of the Tribunal seem content with the limitation.

E. The Tribunal's Finding

Following the hearing, the researcher assiged to the case prepares the Final Staff Report, which incorporates any additional information produced during the hearing, and may present a more refined analysis than that found in the preliminary staff report. Within a few days of the hearing another members' meeting is held — attended by the Secretary or Assistant Secretary, the editor assigned to the case, and the researcher — when the case is discussed and an attempt, generally sucessful, is made to reach a consensus on the finding and reasons. One member of the panel agrees to write a draft statement of reasons; part or all of this draft may be assigned to the researcher for preparation. Once the draft has been prepared and circulated, a further members' meeting is held, where some changes to the draft may be made. It is then turned over to the assigned editor for any necessary stylistic and grammatical changes. These events must take place with scrupulous regard for the 90-day time limit imposed on the Tribunal's deliberations.

The Tribunal's finding and reasons are sent by mail to those persons who were sent a copy of the Notice of Commencement of Inquiry and to any other interested parties, and are published in the *Canada Gazette* (Rule 25). Statements of reasons are not published, but are available on request.

I earlier noted that, generally speaking, the Tribunal's statements of reasons are quite brief. I mentioned also that these statements typically omit reference to matters that the Tribunal often considers during proceedings — for example, factors other than dumping that may be responsible for material injury. No doubt the Tribunal considers extensive reasons inappropriate; it is, after all, not a court, building jurisprudence in some formal sense. Furthermore, as I indicate in various places in this study, there is a great deal to be said for handling anti-dumping matters in an expeditious administrative fashion. But, once a quasi-judicial approach is adopted, with all its drawbacks, it seems right that its advantages be utilized as well. It would be helpful if Tribunal statements of reasons fully reflected Tribunal proceedings

and deliberations, and in particular fully disposed of such questions as explanations of material injury other than dumping. In the absence of such statements, how will any interested person — including members of the legal profession — learn about Canadian anti-dumping measures and the operations of the Tribunal? Very few people are able to attend sessions of the Tribunal, and very few can study tens of thousands of pages of transcripts. By making comprehensive statements of reasons widely available, the Tribunal could extend knowledge about its operations beyond itself, affected businessmen, and a small group of highly specialized lawyers. Professor Stanley Metzger, who was Chairman of the United States Tariff Commission from 1967 to 1969, has drawn particular attention to the Tribunal's habit of giving unanimous reasons (dissents appear quite seldom). Metzger comments:

> . . . it is most often through the "facts" newly adduced in the dissenting opinion that the weaknesses in the majority opinion are disclosed. Without an examination of the record (a good portion of which may be confidential and unavailable), and without a disclosure of at least a summary of the information developed in the investigation, the observer is at a serious disadvantage in reaching judgments concerning the merits of the determinations. It would be useful if in the future the Anti-dumping Tribunal made public such information as the United States International Trade Commission just commenced doing when it issued in November 1975 the "information obtained" in its investigation in Vinyl Clad Fence Fabric from Canada (USITC Publ. 745). Some 45 pages of material were published, including information concerning the extent of sales at LTFV [less than fair value], the United States producers, marketing and channels of distribution, United States consumption, United States shipments and exports, United States imports, "practices and profits", profit-and-loss experience of United States producers and statistical tables and charts.[121]

The Tribunal should consider publishing, as a minimum, "information obtained" for each case, thereby following the lead of the United States International Trade Commission.

F. Other Proceedings

1. References under section 13

I have already described how section 13 of the Act provides for reference under certain circumstances of the injury question to the Tribunal prior to a preliminary determination. Subsection 13(8) requires the Tribunal to "render its advice on the question as soon as possible, without holding any hearings thereon, on the basis of such

information and advice as is then available to it". Rules 3-6 of the Rules of Procedure deal with the mechanics of a reference. At the end of 1977, there had been only four section 13 references.

2. Inquiries under subsection 16(1)

Subsection 16(1) simply reads:

> The Tribunal shall inquire into and report to the Governor in Council on any other matter or thing in relation to the importation of goods into Canada that may cause or threaten injury to the production of any goods in Canada that the Governor in Council refers to the Tribunal for inquiry and report.

Rule 26 of the Rules of Procedure stipulates that upon receipt of such a reference the Tribunal shall issue a Notice of Commencement of Inquiry in the normal way. Rule 27 states that the Tribunal is not bound by its other Rules of Procedure during a section 16.1 inquiry. Although not obliged to do so, the Tribunal, during such an inquiry, does follow approximately its normal procedure. Briefs and submissions are invited from interested parties. Research is undertaken, paying particular attention to information from Statistics Canada and questionnaire returns. Members and staff of the Tribunal visit plants, importers and retailers. A public hearing is held, and individual meetings with interested parties take place. The *Magnasonic* requirements are not relevant to section 16.1 inquiries.

By the end of 1977, the Tribunal had only undertaken three section 16.1 inquiries.[122] The Tribunal's economic inquiry function is of relatively little consequence compared to its anti-dumping activities. By contrast, the Tariff Board since 1969 has undertaken thirteen economic inquiries under section 4 of the *Tariff Board Act*,[123] not including those inquiries underway at the beginning of 1969. In addition to the Tribunal and the Board, similar investigations are conducted by the Textile and Clothing Board, which functions as part of the Department of Industry, Trade and Commerce. There is no evident explanation for this fragmentation of economic inquiry activity, or for greater use of the Tariff Board rather than the Anti-dumping Tribunal for this purpose.

3. Reviews under section 31

Section 31 provides that the "Tribunal may, at any time after the date of any order or finding made by it, review, rescind, change, alter or vary the said order or finding or may re-hear any matter before deciding it". Rule 28 allows any person affected by an order or finding to apply for its review, giving the grounds on which he relies. By Rule

29, if sufficient grounds are presented to warrant a review, or if the Tribunal decides to review a matter on its own initiative, a review commences and a Notice of Review is published in the *Canada Gazette*. If subsequently the Tribunal proposes to rescind, change, alter or vary an order or finding, Rule 30 requires it to notify interested parties to the original inquiry and permit them to make oral or written representations to the Tribunal. Otherwise, the Tribunal is not bound by its Rules of Procedures during section 31 reviews (Rule 29(2)), although its practice is to hold a pre-hearing conference and a formal hearing in the usual way.

To the end of 1977, the Tribunal had held eleven section 31 reviews. In nine of those cases, the original finding was changed or rescinded.

G. The Final Determination[124]

Should the Tribunal find no material injury or retardation, the Deputy Minister terminates proceedings and refunds any provisional duty that has been collected. Should the Tribunal find that there is material injury or material retardation, the Deputy Minister will reinvestigate the question of normal or export price in order to establish a definitive margin of dumping. The period of review for the final determination differs from that for the preliminary determination; the Deputy Minister will now look at a period subsequent to the preliminary determination (*i.e.*, the provisional period). The Deputy Minister then makes a final determination of dumping, assesses anti-dumping duties on the basis of the final determination, and refunds any overpayment of provisional duty.[125] The amount of anti-dumping duty applicable by virtue of the final determination to goods entered provisionally may not exceed the provisional duty paid. The values that are determined at the time of final determination are used to appraise goods which are entered subsequent to the Tribunal's positive injury finding. The final determination may be appealed to the Tariff Board.

H. After the Final Determination

Once a final determination has been made, goods of the kind described in the Tribunal's finding will attract anti-dumping duties based on the Deputy Minister's determination of normal value. Section 18 of

the Act provides for a redetermination of description or reappraisal of normal value by a Dominion customs appraiser; an appeal from a Dominion customs appraiser's decision to the Deputy Minister; and redetermination or reappraisal on the initiative of the Deputy Minister. Determinations of the Deputy Minister may be appealed to the Tariff Board, and questions of law are appealable from the Tariff Board to the Federal Court (sections 19-20). Apparently the practice of Special Assessment Programs is, at its own initiative, to reinvestigate normal values and export prices about once a year in order that these values reflect changes in expenses, costs and market conditions.

It should be noted that anti-dumping duties are unlikely to generate much revenue. The rational response of an exporter whose goods are the subject of an anti-dumping duty is to raise his price to a non-dumped level and keep for himself whatever additional sales revenues can be generated at that price.

I. Process and Procedures: an Assessment

The Canadian anti-dumping system labours under two disabilities. First, there is an irrational dichotomy of functions: National Revenue is responsible for investigating dumping, and the Tribunal for consideration of injury. Second, largely because of the intervention of the Federal Court, one function (that of National Revenue) is treated as an administrative matter, while the other (that of the Tribunal) is regarded as quasi-judicial. These disabilities are responsible for several defects in process and procedures.

I have mentioned already the consequences that follow the division of functions. The most obvious is inefficiency. In some areas (particularly research) there is duplication of effort, and in others (such as the determination of dumping) one hand is not permitted to benefit from the efforts of the other. The Tribunal research staff, with very tight deadlines to observe, has to devise strategy and formulate questionnaires immediately the preliminary determination is received. The staff may well have little if any knowledge of the product in question, which is often very complex. To deal with this difficulty, the research staff plans in the future to begin study of the product whenever an investigation by the Deputy Minister is under way, so that they will be fully prepared should a preliminary determination be made. Presently, then, the Tribunal must, in a short space of time, learn about a product already very familiar to Special Assessment Programs; and if

plans for the future are implemented, there will be two contemporaneous but separate studies of the product.

Again, as I have noted, in general the Tribunal's ninety-day time limit is manageable. That, however, is the case only if the flow of preliminary determinations from National Revenue is reasonably paced, and that does not always happen. The Tribunal's Secretary keeps track of what cases are "coming over" from Revenue Canada, and attempts have been made to coordinate with Special Assessment Programs the spacing of preliminary determinations at fortnightly intervals.

A more serious consequence of the dichotomy is that fragmentation of effort may impede full grasp of the overall dumping problem. This impediment carries through even to the appeal stage; appeals from determinations of the Deputy Minister go to the Tariff Board, while findings of injury are reviewed by the Tribunal under section 31. Difficulties here have been exacerbated by the posture of the Tribunal, which as we have seen takes the view that the matter of dumping, in contrast to injury, is not at all its concern. Finally, the divided jurisdiction does not permit what the Code comtemplates in Article 5(b), a simultaneous investigation of dumping and injury, although the forms are adhered to by talking of a "preliminary" determination and pretending that dumping is still being considered while the Tribunal investigates injury.

We have seen that the Federal Court, notably in the *Creative Shoes* and *Sabre* decisions, found the anti-dumping activity of Revenue Canada not subject to review. The Tribunal, in *Hermetic compressors*, made clear that it would not examine the procedures of Special Assessment Programs. Some critics of Revenue Canada consider that immunity from review has permitted abuse of anti-dumping procedures. Special Assessment Programs has been accused of excessive secrecy; of resorting too easily to section 11 of the Act (ministerial prescriptions), simply because that is easier to do than to apply sections 9 and 10; of not respecting an alleged "fifty percent guideline" in deciding who constitutes the domestic industry; of calculating the margin of dumping on the basis of the difference between the dumped price and that charged by the Canadian industry, because it is often too difficult to ascertain the foreign domestic price; of calculating "normal value" in an unreasonable or careless way, thereby producing absurd margins of dumping in preliminary determinations, that are adjusted in final determinations; of being hopelessly biased in favour of the Canadian producers; and so on.

Some of these criticisms likely have no substance. We have seen that there is no fifty percent guideline. In any event, Revenue Canada explains that many Canadian industries are dominated by subsidiaries of foreign companies; if, for whatever reason, such subsidiaries do not wish to be complainants, it may be impossible to meet a fifty percent requirement. On the question of bias, a review of Special Assessment Programs' procedures does not suggest that they are structured to favour Canadian industry, with the possible exception of the Fast Track system for steel investigations. As for the matter of discrepancies between margins of dumping found in preliminary and final determinations, that may be because the period under review for a final determination is not the same as that for a preliminary determination. In addition, following a preliminary determination, exporters may adjust export price to correspond to normal value, or previously uncooperative exporters may choose to cooperate and supply information permitting a new and more accurate determination of normal value.

But some of the criticisms of Revenue Canada may be valid. An objective and complete assessment could only be made following very careful study of the work of Special Assessment Programs, a study that Revenue Canada is not prepared to allow. It must be of some concern that criticisms of the kind I mention are frequently voiced.

From time to time those with an interest in the Tribunal's work have suggested that Tribunal proceedings are formal to the point of being cumbersome. This criticism has become more common following the post-*Magnasonic* procedural changes. The Tribunal is criticized for allowing proceedings to be much too long and accordingly much too expensive (legal fees are substantial, and key executives appearing as witnesses have to spend a long time away from their business); for permitting lawyers to harass witnesses, trick the Tribunal into providing grounds for appeal to the Federal Court, and engage in "commercial fishing expeditions"; for being so sensitive to the requirements of natural justice that the Canadian complainant is oppressed by length of proceedings and irrelevant cross-examination, so that *he* is denied justice of a kind; for being obsessed with problems associated with confidentiality; for not adopting an inquisitorial approach, but allowing lawyers to build the entire record; and so on.

In a number of respects Tribunal practices are relatively informal. For instance, participants have an opportunity at the preliminary sitting to help determine points at issue; procedures have been devised to allow Tribunal members to visit factories unaccompanied by the

opposing parties and their lawyers; at hearings arguments may be reopened if later evidence suggests that to do so may be a good idea; and so on. Furthermore, some of the particular criticisms of Tribunal formality may be exaggerated or inaccurate. So, for example, the statistics do not support the claim that since *Magnasonic* the average length of sittings has increased. The criticisms do, however, emphasize a basic dilemma that confronts the Tribunal. The constraints applied to its activities by the courts are the constraints appropriate to a quasi-judicial body. Yet the Tribunal is simply investigating whether or not there is a causal relationship between dumping and any injury to Canadian producers. Are trappings similar to those of a court really necessary?[126] Is the game worth the candle?[127]

VII

The Tribunal in Context

Many interests, organized and not, are affected by, or attempt to influence, the work of the Anti-dumping Tribunal. A mention of these interests will better place the Tribunal in the appropriate context.

A. Canadian Industry

The purpose of the Canadian anti-dumping system is quite simply to protect Canadian industry. If Canadian producers are experiencing injury as a result of international price discrimination, a "corrective tax" is levied on the offending commodities. It is sometimes forgotten that anti-dumping duties often merely benefit one part of industry to the detriment of another. That effect presumably occurs whenever the dumped good subject to duty is some industry's input,[128] or when a domestic industry is providing input to the foreign dumping exporter[129] anti-dumping duties will, of course, always adversely affect the Canadian importers. Hindley has remarked that "the prevention of dumping merely increases the profits of one group at the cost of a reduction in another's . . . ".[130]

B. Foreign Industry

It is pointless to ask foreign industry to endorse an overseas anti-dumping system. But, given the system, exporters might agree that the administration of anti-dumping measures is fair. Administration is important, for however equitable the structure of a system, those running it will be able to find many opportunities to harass and discourage participants. I noted earlier criticism of Canadian process and

procedures, directed particularly at the activities of Special Assessment Programs. In general, these criticisms are of the kind one would expect; some, I have suggested, are clearly without merit.

Many commentators have observed that exporters may dump only to be competitive. Kenneth Dam, for example, points out that a dumping foreign industry may only be meeting competition by local firms in the importing country or by third-country exporters.[131] That one exporter is dumping and another is not, seems irrelevant to Canadian concerns, since that depends on overseas market conditions and trade restrictions of foreign countries. Yet these irrelevant considerations come into play to penalize one exporter and not another. Canadian industry may suffer far more from non-dumped than from dumped imports.

C. Consumers

Anti-dumping systems respond to low prices rather than high prices. It is hard therefore to see how anti-dumping duties can benefit consumers, whether industry or private citizens. At most, such duties may discourage disconcerting price variability and uncertainty.

It has been argued in the past that consumers do have an interest in eliminating so-called "predatory" dumping, designed to eliminate domestic production and create a monopoly for the foreign producer permitting the raising of prices. Many commentators now feel, however, that the predation argument is weak.[132] For one thing, predation of this sort only makes sense for the foreign producer if he has a world monopoly. For another, the argument from predation "assumes that firms once having been driven out of that industry will not be able to, or simply will not, reenter, and that the rate of entry into the industry is not responsive to higher prices".[133] These are highly unusual conditions.

Non-predatory sustained dumping arguably may give a net loss to the economy, with one component being a loss of real income by employed labour.[134] However, losses of this kind can probably be avoided by taxation and other provisions; Lloyd suggests that "economists have long recognized that the gain to the consumers/users from sustained dumping is more than enough to make it possible for them to compensate the producers for losses of income suffered through

dumping".[135] This argument leads Lloyd to state categorically that "dumping . . . benefits the importing country".[136]

Anti-dumping duties sacrifice consumers in the interests of producers. Sometimes, there may be good reasons for requiring such a sacrifice. But anti-dumping duties are probably an inefficient way of proceeding. Hindley offers this analysis:

> The aim of an anti-dumping duty is to transfer income from the rest of the community to the domestic producers of the dumped good, and it must be an inefficient means of doing so. The reason for this is that the gross loss to consumers is approximately equal to the average of the "before" and "after" level of output times the change in price. Since consumption must exceed output for an imported good, consumers must lose more than producers gain; and where imports are sufficiently great to justify invoking the rationale for anti-dumping duty, they must lose substantially.[137]

For this reason, Hindley prefers temporary increases in conventional duty or subsidies to domestic production.

Positions of this kind cannot, of course, be advanced before the Anti-dumping Tribunal, given the narrow nature of its jurisdiction; any argument against the overall system would have to be directed to the politicians, who would then have to press the case in the international forum.[138] One might, however, expect consumer associations to take a close interest in the Tribunal's activities, and from time to time make whatever representations appeared appropriate. They might wish, for example, to bring attention to "other factors" explaining injury, so as to demonstrate that the Canadian industry — charging higher prices — should not be protected. It is surprising to discover that the various consumer associations show almost no interest in the Tribunal's work. The record discloses only one case when there was official representation — the Consumers Association of Canada appeared in the *Tetanus immune globulin* case[139] (one might think this a strange case to choose — why not colour television sets?). And, on the whole, the Tribunal attracts little press attention; the media only appear interested when chairmen resign in unfortunate circumstances.

D. Unions

Dumping may cause unemployment; accordingly, one would expect unions to be concerned with dumping matters, and to appear before the Tribunal when appropriate. But the record shows very few

union appearances. Some observers have noted that, on occasion, when union representatives do appear, they tend to castigate Canadian management, thereby inadvertently lending support to the arguments of importers that injury to domestic producers is a consequence, not of dumping, but of poor management.

E. The General Agreement on Tariffs and Trade

Article 17 of the Code provides for the establishment of a Committee on Anti-dumping Practices, composed of representatives of Code signatories, "for the purpose of affording parties to this Agreement the opportunity of consulting on matters relating to the administration of anti-dumping systems in any participating country or customs territory as it might affect the operation of the Anti-dumping Code or the furtherance of its objectives". The Committee came into existence on November 14, 1968, and normally meets about twice a year.

Canadian anti-dumping activity has not always been regarded favourably by the Committee on Anti-dumping Practices. The Committee's Second Report records that "some members of the Committee expressed concern with the methods of calculation of margins of dumping in Canada in respect of products made to measure".[140] The Third Report notes that "with regard to certain decisions of the Canadian Anti-dumping Tribunal, members of the Committee expressed the wish that these decisions be reviewed in accordance with Article 9 of the Code . . ." .[141] The Fifth Report contains the following observation:

> The Committee welcomes the decision of Canada to eliminate anti-dumping duties in one case that had been the subject of considerable controversy in the Committee. Nevertheless, some members of the Committee voiced serious concern that the Canadian authorities had in this case been applying its anti-dumping legislation for the purpose of protecting what they considered to be uncompetitive domestic industries.[142]

The Sixth Report records one member's complaint against Canada that in one particular case "exporters of his country had been discriminated against, contrary to Article 3 of the Code, when normal values for the product had been determined . . . ".[143] According to the Seventh Report, Canada was criticized by one member of the Committee for not calculating normal value in accordance with Article 2(d) and (f) of the Code;[144] by another member, for not determining injury in one case according to Article 3(a) and (e);[145] and by yet another member, for

contravening Articles 6(b) and 10(c) in two further cases.[146] The discussion of Canada in the Seventh Report closes on this cryptic note: "As regards the practices of Canada, the delegations concerned agreed, at the suggestion of the Chairman, to have further consultations bilaterally during the current meeting".[147]

The recorded views expressed in the GATT Committee must be treated with caution. They are not the views of impartial observers, but rather of states with a position to protect or enhance at the negotiating table. Nonetheless, with the exception of the United States, Canada's anti-dumping activity is the most frequently criticized, and that must be of some concern. Most of the criticism is of that part of the system within the jurisdiction of National Revenue, and, in particular, of the methods used to calculate the margin of dumping. These international criticisms echo many of those made domestically.

F. National Revenue, Customs and Excise

I have already dealt in detail with the relationship between National Revenue and the Tribunal. It is, for the most part, a formal relationship, governed by statute, regulations and rules, although as I have described, this formal relationship is supplemented in various informal ways. Informal contact appears to have decreased recently. Until the end of 1975, for example, Tribunal members and staff and Revenue Canada officials would meet every six months or so to discuss "policy matters" of common interest. It is not clear why these meetings were dropped, although it may have been from a desire to emphasize the Tribunal's independence.

G. Department of Finance

The Chairman of the Tribunal meets from time to time with the Assistant Deputy Minister of Finance in charge of International Trade and Finance, and with the Director General in charge of International Economic Relations. The Tribunal Secretary meets with the staffs of the Assistant Deputy Minister and Director General. Discussions are apparently about various policy matters, including the workings of the Tribunal and the consequences of various Tribunal decisions.

H. Industry, Trade and Commerce

Industry, Trade and Commerce statistics are often used by the Tribunal's research staff. The Department is sometimes used as a go-between by both complainants and importers. IT&C may encourage a Canadian producer in difficulties to lodge a dumping complaint with Revenue Canada.

I. The Tariff Board: the Textile and Clothing Board

We have seen that section 19 of the *Anti-dumping Act* provides for appeals to the Tariff Board from decisions of the Deputy Minister of National Revenue for Customs and Excise made under subsection 17(1) or 18(4) of the Act. The Board also hears appeals from rulings of the Customs Division on classification and value for duty, under subsection 47(1) of the *Customs Act*;[148] considers appeals by way of reference from the Deputy Minister, in which the Deputy Minister may seek the Board's opinion on any question of valuation or tariff classification, under section 49 of the *Customs Act*; and, under section 59 of the *Excise Tax Act*,[149] by way of application for a declaration as to rates of tax payable.

Apart from the appeal function, the Tariff Board has the responsibility of making recommendations to the Minister of Finance on tariff nomenclature and rates of duty, and making economic inquiries as directed by the Governor-in-Council, under section 4 of the *Tariff Board Act*. I noted earlier[150] the significance of the Board's economic inquiry function; it is substantially greater than that of the Anti-dumping Tribunal's comparable work under section 16.1 of the *Anti-dumping Act*. The Textile and Clothing Board also has an economic inquiry function; its responsibility is the clothing and textile industry.

From time to time a reallocation of agency functions associated with trade has been proposed. The most common suggestion is that all appeal functions be concentrated in one agency, and all economic inquiry functions in another. Such a change would require restructuring the regulatory machinery, and probably the creation of new agencies to replace those that now exist.

J. Conclusion

The Anti-dumping Tribunal, and the system of which it is part, exists to protect domestic industry from foreign industry, without regard for Canadian consumers. Those consumers often are other Canadian industries, and so Peter is robbed to pay Paul. The argument that consumers benefit from anti-dumping duties that ward off predation is controversial, if not discredited; at best, predation can only occur under very unusual conditions.

The Tribunal sees little of consumer groups and unions, but somewhat more, on an informal basis, of bureaucrats, be they from National Revenue, Finance, or Industry, Trade and Commerce. The GATT Committee on Anti-dumping Practices harbours many critics of Canadian procedures, particularly those of National Revenue. The jurisdictions of the Tribunal and the Tariff Board are illogical in relation to each other, and overlap to some extent.

VIII

Conclusion

This study has described a number of problems in the Canadian anti-dumping system. Some are problems of process and procedure: others, for example, the causal relationship between dumping and injury, are of a conceptual nature. These specific difficulties, important and troublesome as they may be, are, however, eclipsed by three overriding considerations.

A. Cogency of the System

The anti-dumping system is arguably irrational and inefficient. It is arguably irrational because the protection afforded Canadian industry depends, not just on injury experienced by the industry or on prices in Canada, but on prices in a foreign market; and because the protection given one Canadian industry will often be at the expense of another. It is arguably inefficient because there may well be alternative less costly ways of providing the protection thought necessary; producer subsidies are most often mentioned, with another possibility being temporary increases in conventional duty.

These considerations are outside the scope of this study, and, of course, are no business of the Anti-dumping Tribunal. But necessarily they affect one's perception of the entire anti-dumping system, and increase the difficulty of judging how well components serve the system's purpose.

B. The Division of Functions

I have discussed in considerable detail the division of anti-dumping functions between the Department of National Revenue and the Anti-dumping Tribunal.[151] There is little to recommend this division. It is inefficient, and may easily create confusion in the anti-dumping process. The fragmentation of effort makes full grasp of the dumping problem more difficult, in particular by giving study of dumping to one group and consideration of injury to another, with little contact between the two.[152] Nor does the division appear to respect the Anti-dumping Code requirement of simultaneous investigation of dumping and injury.

C. Judicialization of the Tribunal

An important theme of this study has been the impact of the Federal Court of Appeal's *Magnasonic* decision on the Tribunal. That impact has been highlighted by decisions of the Federal Court holding the procedures of National Revenue not subject to review. This development is not wholly to be deplored. Early abuses — for example, private meetings before the formal hearing with one party to the proceedings — have been eliminated, and the 1974 Rules of Procedure, prompted by *Magnasonic*, brought a measure of order and efficiency to some of the Tribunal's process. But, as a general question of institutional design, it is not clear that quasi-judicial hearings are appropriate for the kind of narrow economic inquiry undertaken by the Tribunal. Alternative models merit investigation.

D. Recommendations

Four possible lines of development should now be canvassed by those responsible for Canada's anti-dumping system.

First, should anti-dumping functions be united? It may be best to remove the task of investigating dumping from the Department of National Revenue and to give it to the Anti-dumping Tribunal, renamed the Anti-dumping Office (transferring the appropriate staff from Revenue to the Office). There is something to be said for having anti-dumping in the hands of a semi-independent agency, rather than firmly in the grip of government bureaucracy.

Second, alternatives to the present quasi-judicial Tribunal process should be explored. So, for example, the purposes of the Tribunal (or Office) might better be met if inquiries were conducted by the Tribunal staff in an administrative fashion, with the public hearing being simply an opportunity for interested parties to comment on the panel's tentative position. Any change of this kind should be implemented by statute, to remove the spectre of the Federal Court now hovering over the Tribunal.

Third, and related to the second, the Tribunal (or Office) might benefit from weapons in its armoury other than anti-dumping duties. Producer subsidies or temporary increases in conventional duty would fall outside its jurisdiction. But perhaps it should have the authority to negotiate voluntary price undertakings.[153] The major advantages of these undertakings are speed and low-cost. Lloyd identifies one possible drawback: "a price undertaking has an effect which is different from that when an equal anti-dumping duty is collected, for it raises the landed cost before duty. This effect is less desirable than that of a duty since it transfers to the *foreign* seller the benefit of the dumping . . .[54] But, when an anti-dumping duty (including a provisional duty) is imposed, a likely consequence is that the exporter will raise his price to eliminate the margin of dumping, creating the same effect as a price undertaking. It is not necessary that the process of negotiating price undertakings be entirely behind closed doors or dependent upon arbitrary evaluations of normal value and export price; the process of negotiation may be structured so that it is equitable and genuine.

Finally, those responsible for Canada's international trade negotiations, with the GATT and elsewhere, might consider whether the anti-dumping systems required by the GATT and the Code are compatible with international trade goals, or those of Canada. A reappraisal of this particular trade mechanism is in order. Is anti-dumping really necessary?

Endnotes

1. *Unemployment Insurance Benefits: A Study of Administrative Procedure in the Unemployment Insurance Commission*, (Law Reform Commission Administrative Law Series, 1977), pp. 3-4.

2. G. Bruce Doern, Ian A. Hunter, Donald Swartz, V. Segram Wilson, "The structure and behaviour of Canadian regulatory boards and commissions: multi-disciplinary perspectives", (1975) 18 *Canadian Public Administration* 189. The original version of this paper was prepared for the Law Reform Commission.

3. Paul R. Verkuil, "The Emerging Concept of Administrative Procedure", (1978) 78 *Columbia Law Review* 258, at 260.

4. For simple definitions of many of the terms used in this study, see Glossary, p. vii.

5. So-called "reverse dumping" is the sale in a foreign market at prices higher than those charged in the domestic market. For example, the identical tractors made in the United Kingdom are more expensive in Canada than in the U.K. This led the Royal Commission on Farm Machinery to make the following recommendation:

> In those instances where the prices for tractors charged to the Canadian subsidiary are significantly higher than the prices to an equivalent selling organization in other countries, the government might wish to consider the establishment of a *reverse dumping duty*. The traditional dumping duty is designed to protect manufacturers from competitors who sell in the export market at prices below those prevailing in their home market. A reverse dumping duty would be designed to protect consumers from the practice pursued by multi-national corporations of selling at higher prices in one market than they do in another, the objective presumably being to maximize their worldwide profits. The proposal is to levy a duty equal to 100 per cent of the amount by which the price to the Canadian selling organization exceeds the price charged to an equivalent selling organization in the country where the tractor or other product was manufactured. The duty collected could then be used to subsidize the purchaser and thus provide him with the same price treatment as that accorded consumers in other markets. To cover instances where the tractor or other machine was manufactured in more than one location, the Canadian selling subsidiary organization of the multi-national farm machinery company would also need to be given the right to import from the lowest

cost source of supply. Because such a proposal is far-reaching and could be applied to a wide range of products beyond farm machinery, its implications would need to be studied carefully before it was implemented. It is put forward here for the government's consideration.

Royal Commission on Farm Machinery, *Special Report on Prices of Tractors and Combines in Canada and other Countries*, (Ottawa: Queen's Printer, 1969) pp. 97-8.

6. I consider briefly the merits of anti-dumping measures, from various perspectives, in Chapter VII. The classic economic analysis is by Jacob Viner, *Dumping: A Problem in International Trade* (Chicago: University of Chicago Press, 1923). More recent analysis can be found in, among other places, Kenneth W. Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970) (Chapter 10); Brian Hindley, *Britain's Position on Non-tariff Protection* (London: Trade Policy Research Centre, 1972) (especially pp. 13-15); Stanley D. Metzger, *Lowering Non-tariff Barriers: U.S. Law, Practice and Negotiating Objectives* (Washington: Brookings Institute, 1973) (Chapter 4); Stanley D. Metzger, *Compliance with International Obligations: Some Recent United States and Canada Injury Determinations Under the International Antidumping Code* (Ottawa: The Norman Paterson School of International Affairs, Occasional Paper 31, 1976); Peter Lloyd, *Anti-dumping Actions and the GATT System* (London: Trade Policy Research Centre, 1977); William A. Wares, *The Theory of Dumping and American Commercial Policy* (Toronto: Lexington Books, 1977); G. C. Allen, *How Japan Competes: A Verdict on "Dumping"* (London: Institute of Economic Affairs, 1978); H.W. de Jong, "The Significance of Dumping in International Trade" (1968) 2 *Journal of World Trade Law* 162; and R. A. Cocks and Harry G. Johnson, "A Note on Dumping and Social Welfare" (1972) 5 *Canadian Journal of Economics* 137.

7. R.S.C. 1970, chap. A-15.

8. The Code's formal title is *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*. It is conceivable that some changes to the Code will be negotiated in the course of the Tokyo Round (still underway at the time of writing).

9. Provisional and anti-dumping duties may be described as corrective taxes on the international transfer of commodities.

10. For a discussion of the complexities of bilateral versus multilateral negotiations, see Kenneth W. Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970), at pp. 61 *et seq.*

11. Article VI is found in Appendix A to this study. It is discussed in the following chapter.

12. See Dam, *supra* n. 10, chapter 19.

13. This part of my discussion relies heavily on the excellent study by Rodney de C. Grey, *The Development of the Canadian Anti-dumping System* (Montreal: Private Planning Association, 1973).

14. R.S.C. 1952, c. 60.

15. R.S.C. 1952, c. 58.

16. Subsection 6(1) of the Customs Tariff.

17. For a detailed account of British criticisms of the pre-Code Canadian anti-dumping system, see Edward M. Cape, *Canada's Role in Britain's Trade* (Montreal: Private Planning Association, 1965) pp. 19-31.

18. That is, sale by an importer at a price below that corresponding to the price invoiced by the exporter with whom the importer is associated, and below the price in the exporting country. See General Agreement on Tariffs and Trade, *Anti-Dumping and Countervailing Duties, Report of a Group of Experts*, (Geneva, 1961), p. 12.

19. The exporter invoices a subsidiary of its Canadian customer at a dumped price, but before the goods are entered at Customs they are transferred to the parent Canadian company who becomes the exporter for customs purposes and prepares customs documents showing a non-dumped price.

20. Grey gives this example:

> . . . A corporation in the United States might purchase goods from a subsidiary in a third country at a price below fair market value. The goods will be shipped direct from that subsidiary to another subsidiary in Canada, but invoiced by the company in the United States to the importer at an invoice price that did not constitute dumping. Grey explains that if the Canadian importer actually remitted the invoiced price, the extra profits of the United States' subsidiary might find their way back to Canada by a transfer of capital or some other means.

Supra n. 13, p. 25.

21. Section 6 of the Customs Tariff required a "selling price" before anti-dumping duties could be imposed. Writes Grey:

> Therefore, if an exporter wanted to dump to the extent, say of 10 percent without being subject to dumping duties, he could arrange to sell one hundred units at fair market value and transfer an extra ten units at "no charge". Another example . . . was in the case of consignment shipping, or of a transaction across the border between a corporation abroad and a branch of the same corporation that had not been separately incorporated in Canada; in this situation there would be no sale at all.

Idem.

22. For example, the exporter could bank subsidies received overseas, in the name of the importer, who could then use this account to pay overseas expenses.

23. P. 28.

24. The text of the Code is in Appendix B, and is discussed in the following chapter.

25. R.S.C. 1970, Chap. A-15. It is discussed in the following chapter.

26. My discussion of the Code is indebted to Rodney de C. Grey's excellent and full account — see *The Development of the Canadian Anti-dumping System* (Montreal: Private Planning Association, 1973) Chapter 4.

27. *Ibid.*, p. 47.

28. R.S.C. 1970, Chap. A-15, amended by Chaps. 1, 10 (2nd Suppl.) 1970-71-72, cc. 43, 63. A useful practitioner's manual describing the Act, regulations made under the Act, etc., is Richard S. Gottlieb, *The Canadian Anti-dumping Act: Law and Practice* (Toronto: Canadian Importers Association, 1976).

29. For a discussion of the requirements for a successful application under s. 28(1)(*c*) of the *Federal Court Act* (erroneous finding of fact), see the decision of the Federal Court of Appeal in *Rohm and Haas Canada Ltd. v. Anti-dumping Tribunal*, No. A-568-77, judgment rendered on June 30, 1978 (unreported at time of writing).

30. Section 172(3) of the *Customs Act*, R.S.C. 1970 chap. C-41, reads:

> In no case shall an invoice be shown or a copy thereof given to any person other than the importer, or an officer, except upon the order or subpoena of a court of justice.

The invoices in question are invoices of imported goods, filed at the port of entry by a customs collector.

31. This problem often arises. See, for example, *Commissions of Inquiry: A New Act* (Ottawa: Law Reform Commission Working Paper 17), p. 45 (commenting on s. 5 of the *Inquiries Act*, R.S.C. 1970, chap. I-13).

32. R.S.C. 1970, chap. 10 (2nd Supp.).

33. SOR/69-18; SOR/69-123; SOR/71-126; SOR/72-191. The basic regulations, discussed here, are SOR/69-18, as amended by SOR/72-191. There is as well an order prescribing form of oath (SOR/72-369) and an order prescribing form of written request (SOR/72-370).

34. 19A was added by SOR/71-126.

35. At the time of writing, the possibility of a separate Countervailing Code is under discussion as part of the GATT Tokyo Round.

36. SOR/77-271.

37. R.S.C. 1970, Chap. C-41.

38. SOR/74-581.

39. *Minister of National Revenue and The Queen v. Creative Shoes Ltd., Dunmor Shoe Co. and Creations Marie-Claude Inc.* (1972) F.C. 993.

40. In *re "Anti-dumping Act" and in re Sabre International Ltd.* (1974) 2 F.C. 704.

41. *Creative Shoes Limited, Dunmor Shoe Company Limited and Creations Marie-Claude Inc. v. Deputy Minister of National Revenue for Customs*

and Excise, Minister of National Revenue, The Queen and the Anti-dumping Tribunal (1972) F.C. 115.

42. The shoe importers did not give up. In due course, they appealed to the Tariff Board from the Ministerial prescriptions concerning "value for duty" and "normal value". The Board declared that it did not have jurisdiction to review such prescriptions. The Federal Court of Appeal declared that it had no jurisdiction to set aside these Tariff Board rulings. Chief Justice Jackett said that "the Board's declaration that it did not have jurisdiction to review the validity of the 'prescriptions' had no legal effect so long as that declaration was made prior to, and therefore apart from, the decisions disposing of the applicants' appeals. It follows that the declaration is not a 'decision' that this Court has jurisdiction to set aside under section 28(1) of the Federal Court Act". *In re Anti-dumping Act and in re Dunmor Shoe Co. Ltd.* (1974) F.C. 22, at 29.

43. A somewhat different approach was taken by the Trial Division in *Mitsui v. Minister of National Revenue*, September 9, 1977 (unreported at the time of writing). After holding that the Deputy Minister acted in a purely administrative capacity in arriving at a preliminary determination, the judge remarked that "all conditions precedent to the preliminary determination" are subject to attack before the Tribunal and, later, before the Tariff Board. It is unlikely that this view is correct. The position of the Tribunal with respect to a preliminary determination is discussed, *infra*.

    A decision which helped further interpret the power of National Revenue is *Mitsui v. Anti-dumping Tribunal* (1972) F.C. 944. In that case, Chief Justice Jackett took the position that "Section 13(1) is not referring to specific goods but to a class of goods and leaves the formulation of the class to the Deputy Minister" (at p. 950). On this point, see also *Re Cutter Laboratories International and Anti-dumping Tribunal* (1976) 64 D.L.R. (3d) 5.

44. *Re Magnasonic Canada Ltd. and Anti-dumping Tribunal* (1972) F.C. 1239.

45. P. 1244.

46. P. 1249.

47. R.S.C. 1970, Chap. I-23. Subsection 21(2) deals with what constitutes a quorum.

48. P. 1245.

49. P. 1246.

50. Pp. 1246-8. The Tribunal's own view of these matters is found in its statement of reasons in Glacé cherries from France, September 16, 1970.

51. No. A-16-77, judgment rendered June 9, 1978 (unreported at the time of writing).

52. Steam traps, pipeline strainers, automatic drain traps for compressed air service, thermostatic air vents and air eliminators including parts, screens and repair kits pertaining thereto, produced by or on behalf of

Sarco Co. Inc., Allentown, Pennsylvania, United States of America (ADT-10-76), December 31, 1976.

53. *Supra* n. 51, p. 8.

54. *Ibid.*, p. 21. For a further discussion of the *Sarco* decision, see *infra*, pp. 30, 48.

55. See also the remarks of Cattanach J. in *Re Anti-dumping Trubunal and re Transparent Sheet Glass* (1972) F.C. 1078.

56. Appendix C summarizes Tribunal proceedings.

57. Two s. 16.1 references have referred in their terms of reference to "serious" rather than "material" injury. The Tribunal observed:

> In the judgment of the Tribunal, the main criteria against which claims of material injury from imports are usually judged are also relevant to determinations as to whether or not imports cause or threaten serious injury. Any difference between the two concepts would appear to be one of degree, it generally being necessary to show that imports cause or threaten injury which is more than just "material" before a finding of "serious" injury can be made.
>
> Dictionary definitions of "material" and "serious" tend to confirm the above distinction between the two terms. In *Webster's Third New International Dictionary* one of the definitions given for "material" is "being of real importance or great consequences: substantial". The *Shorter Oxford English Dictionary* (third Edition, Revised) defines it, in part, as "of much consequence; important . . .". The word "serious" on the other hand, according to Webster's, may be defined as "important, significant, emphatic; . . . not easily answered or solved: weighty, difficult; . . . such as to call forth strong measures for combatting or rectifying; . . . such as to cause considerable distress, anxiety, or inconvenience: attended with danger (a serious injury)". The Oxford definition for "serious" includes the sense of "weighty, important, grave; (of quantity or degree) considerable; . . . attended with danger; giving cause for anxiety".
>
> See Footwear of all kinds, other than footwear the main components of which are canvas, April, 1973: The effects of preserved mushroom imports on Canadian production of like goods, November 27, 1973.

58. See the statement by E. J. Benson, Minister of Finance, in *White Paper on Anti-dumping* (Ottawa: Queen's Printer, 1968).

59. R. St. J. Macdonald, "The Relationship between International Law and Domestic Law in Canada", in R. St. J. Macdonald, Gerald L. Morris, and Douglas M. Johnston (eds.), *Canadian Perspectives of International Law and Organization* (Toronto: University of Toronto Press, 1974) 88 at p. 114.

60. See Monochrome and colour television receiving sets originating in Japan and Taiwan, not including television receiving sets having an overall diagonal measurement of less than eight inches, September 27, 1971 (market, profit, capacity, employment); Double knit fabrics wholly or in part of man-made fibres originating in the United Kingdom, the Chan-

nel Islands and the Isle of Man (ADT-1-73) April 2, 1973 (price erosion, volume, capacity, expansion, profit); Stainless flat rolled steels originating in or exported from Sweden and alloy tool steel bars, not including high speed, AISI P-20 mould steel and die blocks, originating in or exported from Sweden and Austria (ADT-5-73), September 18, 1973 (market, capacity, price, employment, profit); Tetanus immune globulin (human) originating in the United States of America (ADT-3-74), December 2, 1974 (capacity, price erosion, market, profit, inventories); Photo albums with self-adhesive leaves and component parts thereof originating in Japan and the Republic of Korea (ADT-4-74), January 24, 1975 (profit, price, market, distribution, capacity, employment, expansion); Steam traps, pipeline strainers, automatic drain traps for compressed air service, thermostatic air vents and air eliminators including parts, screens and repair kits pertaining thereto, produced by or on behalf of Sarco Co. Inc., Allentown, Pennsylvania, United States of America (ADT-10-76), December 31, 1976 (market, profit, capacity, inventory, price, expansion, research and development).

61. SOR/74-591.

62. In the United States, the Tariff Commission (now the International Trade Commission) from time to time looked at the motivation for dumping in considering injury. On occasion, predatory intent was the explicit basis of an injury finding, or the absence of such intent was referred to in finding no injury. See Lowell E. Baier, "Substantive Interpretations Under the Anti-dumping Act and the Foreign Trade Policy of the United States" (1965) 17 *Stanford Law Review* 409, at pp. 417-9. The Canadian Anti-dumping Tribunal does not explicitly consider the motive of the exporter/importer.

63. Tetanus immune globulin (human) originating in the United States of America (ADT-3-74), December 2, 1974.

64. Hair accessories, and component parts and packaging materials exported to Canada by H. Goodman and Sons Incorporated, Kearney, New Jersey, United States of America (ADT-2-74), June 20, 1974.

65. Colour television receiving sets originating in or exported from the United States of America, Japan, Taiwan and Singapore, having an overall diagonal measurement across the picture tube of sixteen inches and over (ADT-4-75), October 29, 1975.

66. Sultana raisins, in retail-size packages of less than 5 pounds originating in Australia (ADT-1-75), April 18, 1977.

67. Monochrome and colour television receiving sets originating in Japan and Taiwan, not including television receiving sets having an overall diagonal measurement of less than eight inches, September 27, 1971.

68. Colour television receiving sets originating in or exported from the United States of America, Japan, Taiwan and Singapore, having an overall diagonal measurement across the picture tube of sixteen inches and over (ADT-4-75), October 29, 1975.

69. Textured or bulked polyester filament yarn, originating in Austria, the Federal Republic of Germany, France, Hong Kong, Italy, Japan,

Switzerland, Taiwan and the United States of America (ADT-13-76), March 2, 1977.

70. *Supra*, no. 60.

71. Ladies', genuine and simulated leather handbags originating in or exported from the Republic of Korea, Hong Kong and Taiwan (ADT-10-77), October 21, 1977.

72. Some support for the "thin skull" approach is given by Article 3(a) of the Code which requires, not that dumping be the only cause of injury, but only that it be "demonstrably the principal cause".

73. Peter Lloyd, *Anti-dumping Actions and the GATT* System (London: Trade Policy Research Centre, 1977) pp. 27-41, and especially p. 40.

74. For an account of this Committee, see chapter VII.

75. For example, see the Committee's Fifth Report: document L/3943, in General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents, Twentieth Supplement* (Geneva, 1974), at p. 46.

76. Hydraulic turbines for electric power generation, not including bulb type turbines, originating in the Union of Soviet Socialist Republics (ADT-4-76) July 27, 1976.

77. A period prior to the preliminary determination, identified by Revenue Canada as the period for study of entries into Canada, and for determination of normal value.

78. See p. 9.

79. For a discussion of National Revenue's position, see Chapter VI.

80. Frozen, prepared precooked dinners containing meat, poultry and/or other ingredients, produced by the Banquet Foods Corporation, St. Louis, Missouri, United States of America (ADT-5-74), February 21, 1975.

81. Crepe paper masking tape and filament reinforced strapping tape originating in the United States of America (ADT-1-75), April 8, 1975.

82. (1978) 1 F.C. 222.

83. P. 225. The applicants contended that the word "major" required that the "domestic industry" represent more than one-half of the Canadian production.

84. Standard gypsum wallboard and fire rated gypsum wallboard originating in the United States of America, August 6, 1971.

85. Raw (unmodified) potato starch originating in the Netherlands (ADT-6-72), January 18, 1973.

86. Caulking and sealing compounds of the oil base, butyl base, acrylic base and emulsion polymer base types originating in the United States of America in retail-size containers or in bulk for packaging into retail-size containers not including caulking and sealing compounds of the polysulfide base type (ADT-3-73), August 14, 1973.

87. Polypropylene and Polyethylene twisted rope, from one-eighth of an inch (3.2 millimeters) to one-half inch (12.7 millimeters) in diameter, inclusive, exported from or originating in Japan and the Republic of Korea (ADT-5-75), November 24, 1975.

88. Yeast, live or active, with a moisture content of more than 15 percent, produced by Anheuser-Busch, Inc., St. Louis, Missouri, United States of America (ADT-6-75), January 29, 1976.

89. On February 16, 1978, anti-dumping duties on wide flange steel shapes (see ADT-12-77) were, by Order-in-Council, suspended for nine months retroactive to September 29, 1977, for shapes destined for use in British Columbia, Alberta, the Yukon Territory and Newfoundland (P.C. 1978-472, SI/78-29 dated March 8, 1978, made under s. 17 of the *Financial Administration Act* R.S.C. 1970, chap. F-10). This suspension was to protect a regional steel fabricating industry which relies on low-cost imports. The incident illustrates the difficulty, in an anti-dumping context, that faces a large country with dispersed industry. The *Globe and Mail* for January 7, 1978 (page B3), reported the Premier of British Columbia as saying that "while the Tribunal decision protects the central Canadian steel industry, it 'threatens 1,100 to 1,200 jobs in British Columbia' ".

90. In the United States, more use appears to be made of the regional industry concept: see Baier, *supra* n. 62, at pp. 426-7.

91. *Ibid.*, p. 456.

92. Metal storage or parts cabinets with plastic drawers, originating in Denmark (ADT-8-77), September 7, 1977.

93. Footwear of all kinds other than footwear the main components of which are canvas, April, 1973.

94. The effects of preserved mushroom imports on Canadian production of like goods, November 27, 1973.

95. Steam traps, pipeline strainers, automatic drain traps for compressed air service, thermostatic air vents and air eliminators including parts, screens and repair kits pertaining thereto, produced by or on behalf of Sarco Co. Inc., Allentown, Pennsylvania, United States of America (ADT-10-76), December 31, 1976.

96. No. A-16-77, judgment rendered June 9, 1978 (unreported at time of writing).

97. *Ibid.*, p. 6.

98. See *Mitsui v. Anti-dumping Tribunal* (1972) F.C. 944.

99. Slide fasteners, or zippers, and parts thereof, manufactured by Yoshida Kogyo K.K. Tokyo, Japan (ADT-1-74), June 7, 1974.

100. *In re "Anti-dumping Act" and in re Y.K.K. Zipper Co. of Canada* (1975) F.C. 68, at p. 74, 75.

101. Bicycles, assembled or unassembled, and bicycle frames, forks, steel handlebars and wheels (not including tires and tubes), originating in or

exported from the Republic of Korea and Taiwan (ADT-11-77), November 8, 1977.

102. The figures on growth of the Tribunal staff were supplied by the Secretary.

103. The flow-chart at the end of this study (Appendix D) graphically illustrates the overall anti-dumping mechanism.

104. Special Assessment Programs was known as the Anti-dumping Directorate until the countervail program became part of its responsibilities in 1977.

105. For a discussion of what constitutes "the industry", see *supra*, pp. 27-28. The decision of the Federal Court of Appeal in *McCulloch v. Anti-dumping Tribunal* (1978) 1 F.C. 22 should have laid this particular controversy to rest.

106. On March 30, 1977, when Finance Minister Donald Macdonald and National Revenue Minister Monique Begin announced that "a decision on whether or not to initiate a formal investigation under the *Anti-dumping Act* would normally be taken within 30 days from receipt of an adequately documented complaint from Canadian manufacturers, and that investigations would then normally be completed within six months".

107. There have been only four s. 13 references in the Tribunal's history.

108. See n. 106.

109. Before the 1977 administrative guidelines, the wait was often much longer than seven months.

110. Fast Track may be the system of the future. At the time of writing, the European Economic Community is reported considering such a system for chemical imports.

111. SOR/74-581. The full title is "Rules respecting the procedure for making representations to the Anti-dumping Tribunal and inquiries under Section 16 of the *Anti-dumping Act*". Rule 33 provides that "Where any matter arises during the course of any inquiry or hearing not otherwise provided for by the Act or by the Rules it shall be dealt with in such manner as the Tribunal directs". Rule 34 states that "non compliance with any of these Rules shall not render any proceedings void unless the Tribunal shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Tribunal shall think fit".

112. Information provided by respondents is customarily accepted at face value, unless there is inconsistency with other information from the same or different sources, or other similer reason for scepticism. Where there is doubt, additional information, including original documents, is requested, and if this does not resolve the issue the problem is brought to the attention of the panel which will ask appropriate questions during the hearing.

113. Rule 11 describes the information that briefs and submissions should contain: see *supra*, p. 23.

114. *Sarco Canada Ltd. v. Anti-dumping Tribunal*, No. A-16-77, judgment rendered June 9,1978 (unreported at time of writing). For a discussion of that part of the *Sarco* decision dealing with confidentiality, see p. 48.

115. Hermetic compressors with power ratings of 1/12 to 1/3 horsepower, with or without relays and overload protectors, originating in or exported from Italy and Singapore (ADT-1-78), April 21, 1978.

116. The Code and Article VI are not, of course, one and the same.

117. Steam traps, pipeline strainers, automatic drain traps for compressed air service, thermostatic air vents and air eliminators including parts, screens and repair kits pertaining thereto, produced by or on behalf of Sarco Inc., Allentown, Pennsylvania, United States of America (ADT-10-76), December 31, 1976.

118. *Sarco Canada Ltd. v. Anti-dumping Tribunal* A-16-77, judgment rendered on June 9, 1978 (unreported at time of writing) p. 20.

119. Article 10(d) limits *the imposition of provisional measures* to a ninety day period. In a sense, it is the peculiar structure of the Canadian anti-dumping system which requires the Tribunal to work within this deadline. It should be noted that 10(d) provides that the period may be extended to six months "on decision of the authorities concerned upon request by the exporter and the importer . . . " But the Canadian Act does not adopt this extension provision.

120. The ninety day requirement did create difficulties in the *Steam traps* case, *supra*, n. 117. It was in part because of this time restraint that the Tribunal felt unable to grant the adjournment requested by the complainant. Failure to grant the adjournment was one reason the Federal Court of Appeal set aside the Tribunal's decision: see *Sarco Canada Ltd. v. Anti-dumping Tribunal, supra,* n. 114, and the discussion above.

121. Stanley D. Metzger, *Compliance with International Obligations: Some Recent United States and Canada Injury Determinations Under the International Anti-dumping Code* (Ottawa: Norman Paterson School of International Affairs, Occasional Paper 31, 1976) p. 29.

122. Footwear of all kinds, other than footwear the main components of which are canvas (April, 1973); The effects of preserved mushroom imports on Canadian production of like goods (November 27, 1973); Footwear of all kinds, except rubber or canvas footwear (September, 1977).

123. R.S.C. 1970, chap. T-1. For a further discussion of the functions of the Tariff Board, see the following chapter.

124. See Richard S. Gottlieb, *The Canadian Anti-dumping Act: Law and Practice* (Toronto: Canadian Importers Association, 1976), pp. 70-76.

125. If the Tribunal found that dumping is only likely to cause material injury, the provisional duty is wholly refunded and no final determination of dumping is required. Note that in the case of "massive importation" anti-dumping duties may be levied for a ninety day period preceding the preliminary determination — s. 5.

126. Professor Ian Hunter's study of the Immigration Appeal Board made the following observation:

> Would justice not be better served if the Board saw itself as an informal lay tribunal — an immigration admissibility review board, if you will — and followed a relaxed common-sense approach taking as the central issue the desirability of the appellant as a future citizen of Canada? Why should the proceedings not be an inquiry in which the Board takes a much more active role in the questioning? We submit that the Board's reluctance to do this can be traced to its self-conception as an appellate court of record. Without question this has had a profound influence on both its procedures and the substantive content of its decisions. The Board has often seemed to be "grasping at the form rather than the substance".

The Immigration Appeal Board (Ottawa: Law Reform Commission of Canada, 1976), p. 61. The Board is, of course, quite different from the Tribunal in many respects. So far as the Tribunal is concerned, judicialization is not so much a question of "self-conception", but rather a matter of response to judicial decisions.

127. In her well-known book *Legalism*, Judith Shklar makes this observation:

> . . . businessmen do not want regulatory governmental agencies to become too courtlike, but prefer to maintain direct access to them in order to bargain with officials. The official program of the A.B.A. [American Bar Association], on the other hand, calls for judicialization. In this the lawyers, true to their ideology and habits, express their traditional distaste for the politics of negotiation, expediency, and arbitrariness.

Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964) p. 17.

128. A compelling recent example is the effect of steel anti-dumping duties on the British Columbia steel fabrication industry. See n. 89, *supra*.

129. For example, the United States coal industry, exporting to Japanese steel manufacturers, does not view favourably high levels of protection for the American steel industry.

130. Brian Hindley, *Britain's Position on Non-tariff Protection* (London: Trade Policy Research Centre, 1972) p. 13.

131. Kenneth W. Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970), p. 168. For a comprehensive discussion of the causes of dumping, see William A. Wares, *The Theory of Dumping and American Commercial Policy* (Toronto: Lexington Books, 1977) pp. 7-12.

132. The classic study of predation is John S. McGee, "Predatory Price Cutting: The Standard Oil (N.J.) Case" 1 *Journal of Law and Economics* 137, an analysis of *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). McGee concluded that "anyone who has relied upon price discrimination to explain Standard's dominance would do well to

start looking for something else. The place to start is merger", (p. 168). More recent discussions include Phillip Agreeda and Donald F. Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act", (1975) 88 *Harvard Law Review* 697, and Agreeda and Turner, "Williamson on Predatory Pricing" (1978) 87 *Yale Law Journal* 1337.

133. Dam, *op. cit.*, p. 169.

134. See Peter Lloyd, *Anti-dumping Actions and the GATT System*, (London Trade Policy Research Centre, 1977), p. 13.

135. *Ibid.*, p. 12.

136. *Idem.*

137. Brian Hindley, *Britain's Position on Non-tariff Protection*, (London: Trade Policy Research Centre, 1972) p. 14.

138. The anti-dumping system in some jurisdictions contains a "national interest" provision providing for no anti-dumping duty even although dumping and injury have been shown. Such a provision, which does not exist in Canada, could be used to prevent serious "injury" to consumers, although the jurisdictions with the provision appear to have used it, not for this purpose, but rather when military equipment is in issue, or problems of international relations have arisen.

139. Tetanus immune globulin (human) originating in the United States of America (ADT-3-74), December 2, 1974.

140. Second Report of the Committee on Anti-Dumping Practices, adopted on April 21,1971 (document L/3521), General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents*, Eighteenth Supplement (Geneva, 1972) p. 43.

141. Third Report of the Committee on Anti-Dumping Practices, adopted on November 9, 1971 (document L/3612), *op. cit.*, Nineteenth Supplement (Geneva, 1973), p. 47. Article 9 deals with the duration of anti-dumping duties.

142. Fifth Report of the Committee on Anti-Dumping Practices, adopted on November 7,1973 (document L/3943, *op. cit.*, Twentieth Supplement (Geneva, 1974), p. 46.

143. Sixth Report of the Committee on Anti-Dumping Practices, adopted on October 21, 1974 (document L/4092), *op. cit.*, Twenty-first Supplement (Geneva, 1975), p. 31. Article 3 deals with the determination of injury.

144. Article 2(d) deals with determination of the margin of dumping when "there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison . . . " Article 2(f) requires comparison of prices at the same level of trade, with allowance for factors affecting price comparability.

145. Article 3(a) requires that dumping be the principal cause of material injury, and that there be "positive findings". Article 3(e) requires that a determination of a threat of material injury shall be based on "facts".

146. Article 6(b) requires the authorities to make available to the parties all non-confidential information used in an anti-dumping investigation. Article 10(c) requires the authorities to inform interested parties of the reasons for their decisions concerning provisional measures.

147. Seventh Report of the Committee on Anti-Dumping Practices, adopted on November 21, 1975 (document L/4241), *op. cit.*, Twenty-second Supplement (Geneva, 1976), p. 21 at p. 23.

148. R.S.C. 1970, chap. T-1.

149. R.S.C. 1970, chap. E-13.

150. *Supra*, p. 51.

151. See Chapter VI in particular.

152. From a broader perspective, the fragmentation problem is even more serious. Certain aspects of Canada's trade policy are dealt with by three separate organizations — the Anti-dumping Tribunal, the Tariff Board, and the Textile and Clothing Board. The division of jurisdictions seems irrational, and may well hinder implementation of trade goals.

153. Article 7 of the Code defines price undertakings as "voluntary undertakings by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices". Voluntary price undertakings are widely used. The European Economic Community, for example, relies heavily on such undertakings negotiated in private between Commission officials and exporters.

154. Peter Lloyd, *Anti-dumping Actions and the GATT System*, (London: Trade Policy Research Centre, 1977), p. 21.

APPENDIX A

Article VI of the General Agreement on Tariffs and Trade

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 been 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.

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 subject 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 subparagraph (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 or 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 subparagraph (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 subparagraph (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 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.

APPENDIX B

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Anti-dumping Code)

The parties to this Agreement,

Considering that Ministers on 21 May 1963 agreed that a significant liberalization of world trade was desirable and that the comprehensive trade negotiations, the 1964 Trade Negotiations, should deal not only with tariffs but also with non-tariff barriers;

Recognizing that anti-dumping practices should not constitute an unjustifiable impediment to international trade and that anti-dumping duties may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry;

Considering that it is desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases; and

Desiring to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Hereby agree as follows:

PART I - ANTI-DUMPING CODE

Article 1

The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement. The following provisions govern the application of this Article, in so far as action is taken under anti-dumping legislation or regulations.

A. Determination of Dumping

Article 2

(a) For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

(b) Throughout this Code the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

(c) In the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely trans-shipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

(d) When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

(e) In cases where there is no export price or where it appears in the authorities[1] concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

(f) In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI: 1(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in Article 2(e) allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.

(g) This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex 1 of the General Agreement.

B. Determination of Material Injury, Threat of Material Injury and Material Retardation

Article 3

Determination of Injury[2]

(a) A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. In reaching their

[1] When in this Code the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate, senior level.

[2] When in this Code the term "injury" is used, it shall, unless otherwise specified, be interpreted as covering cause of material injury to a domestic industry, threat of material injury to a domestic industry and material retardation of the establishment of such an industry.

decision the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry. The determination shall in all cases be based on positive findings and not on mere allegations or hypothetical possibilities. In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered.

(b) The evaluation of injury — that is the evaluation of the effects of the dumped imports on the industry in question — shall be based on examination of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

(c) In order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined, for example: the volume and prices of undumped imports of the product in question, competition between the domestic products themselves, contraction in demand due to substitution of other products or to changes in consumer tastes.

(d) The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effect of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, for which the necessary information can be provided.

(e) A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

The change in circumstances which would cause material injury must be clearly foreseen and imminent.[1]

(f) With respect to cases where material injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.

Article 4

Definition of Industry

(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that:

(i) when producers are importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market, or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

(b) Where two or more countries have reached such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the industry referred to in Article 4(a).

(c) The provisions of Article 3(d) shall be applicable to this Article.

[1]One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.

C. Investigation and Administration Procedures

Article 5

Initiation and Subsequent Investigation

(a) Investigations shall normally be initiated upon a request on behalf of the industry[1] affected, supported by evidence both of dumping and of injury resulting therefrom for this industry. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have evidence both on dumping and on injury resulting therefrom.

(b) Upon initiation of an investigation and thereafter, the evidence of both dumping and injury should be considered simultaneously. In any event the evidence of both dumping and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, starting on a date not later than the earliest date on which provisional measures may be applied, except in the cases provided for in Article 10(d) in which the authorities accept the request of the exporter and the importer.

(c) An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible.

(d) An anti-dumping proceeding shall not hinder the procedures of customs clearance.

Article 6

Evidence

(a) The foreign suppliers and all other interested parties shall be given ample opportunity to present in writing all evidence that they consider useful in respect to the anti-dumping investigation in question. They shall also have the right, on justification, to present evidence orally.

[1]As defined in Article 4.

(b) The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the exporting countries, to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph (c) below, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

(c) All information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an anti-dumping investigation shall be treated as strictly confidential by the authorities concerned who shall not reveal it, without specific permission of the party submitting such information.

(d) However, if the authorities concerned find that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

(e) In order to verify information provided or to obtain further details the authorities may carry out investigations in other countries as required, provided they obtain the agreement of the firms concerned and provided they notify the representatives of the government of the country in question and unless the latter object to the investigation.

(f) Once the competent authorities are satisfied that there is sufficient evidence to justify initiating an anti-dumping investigation pursuant to Article 5 representatives of the exporting country and the exporters and importers known to be concerned shall be notified and a public notice may be published.

(g) Throughout the anti-dumping investigation all parties shall have a full opportunity for the defence of their interests. To this end, the authorities concerned shall, on request, provide opportunities for all directly interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the

parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

(h) The authorities concerned shall notify representatives of the exporting country and the directly interested parties of their decisions regarding imposition or non-imposition of anti-dumping duties, indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public the decisions.

(i) The provisions of this Article shall not preclude the authorities from reaching preliminary determinations, affirmative or negative, or from applying provisional measures expeditiously. In cases in which any interested party withholds the necessary information, a final finding, affirmative or negative, may be made on the basis of the facts available.

Article 7

Price Undertakings

(a) Anti-dumping proceedings may be terminated without imposition of anti-dumping duties or provisional measures upon receipt of a voluntary undertaking by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices if the authorities concerned consider this practicable, e.g. if the number of exporters or potential exporters of the product in question is not too great and/or if the trading practices are suitable.

(b) If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the product in question, and the authorities concerned accept the undertaking, the investigation of injury shall nevertheless be completed if the exporters so desire or the authorities concerned so decide. If a determination of no injury is made, the undertaking given by the exporters shall automatically lapse unless the exporters state that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case. However, the authorities are of course free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

D. Anti-dumping Duties and Provisional Measures

Article 8

Imposition and Collection of Anti-dumping Duties

(a) The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories parties to this agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

(b) When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

(c) The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(d) Within a basic price system the following rules shall apply provided that their application is consistent with the other provisions of this Code:

> If several suppliers from one or more countries are involved, anti-dumping duties may be imposed on imports of the product in question found to have been dumped and to be causing injury from the country or countries concerned, the duty being equivalent to the amount by which the export price is less than the basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing. It is understood that for products which are sold below this already established basic price a new anti-dumping investigation shall be carried out

in each particular case, when so demanded by the interested parties and the demand is supported by relevant evidence. In cases where no dumping is found, anti-dumping duties collected shall be reimbursed as quickly as possible. Furthermore, if it can be found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(e) When the industry has been interpreted as referring to the producers in a certain area, *i.e.* a market as defined in Article 4(a)(ii), anti-dumping duties shall only be definitively collected on the products in question consigned for final consumption to that area, except in cases where the exporter shall, prior to the imposition of anti-dumping duties, be given an opportunity to cease dumping in the area concerned. In such cases, if an adequate assurance to this effect is promptly given, anti-dumping duties shall not be imposed, provided, however, that if the assurance is not given or is not fulfilled, the duties may be imposed without limitation to an area.

Article 9

Duration of Anti-dumping Duties

(a) An anti-dumping duty shall remain in force only as long as it is necessary in order to counteract dumping which is causing injury.

(b) The authorities concerned shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if interested suppliers or importers of the product so request and submit information substantiating the need for review.

Article 10

Provisional Measures

(a) Provisional measures may be taken only when a preliminary decision has been taken that there is dumping and when there is sufficient evidence of injury.

(b) Provisional measures may take the form of a provisional duty or, preferably, a security — by deposit or bond — equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure provided that the normal duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

(c) The authorities concerned shall inform representatives of the exporting country and the directly interested parties of their decisions regarding imposition of provisional measures indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public such decisions.

(d) The imposition of provisional measures shall be limited to as short a period as possible. More specifically, provisional measures shall not be imposed for a period longer than three months or, on decision of the authorities concerned upon request by the exporter and the importer, six months.

(e) The relevant provisions of Article 8 shall be followed in the application of provisional measures.

Article 11

Retroactivity

Anti-dumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under Articles 8(a) and 10(a), respectively, enters into force, except that in cases:

(i) Where a determination of material injury (but not of a threat of material injury, or of a material retardation of the establishment of an industry) is made or where the provisional measures consist of provisional duties and the dumped imports carried out during the period of their application would, in the absence of these provisional measures, have caused material injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the anti-dumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

(ii) Where appraisement is suspended for the product in question for reasons which arose before the initiation of the dumping case and which are unrelated to the question of dumping, retroactive assessment of anti-dumping duties may extend

back to a period not more than 120 days before the submission of the complaint.

(iii) Where for the dumped product in question the authorities determine:

(a) either that there is a history of dumping which caused material injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury, and

(b) that the material injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to assess an anti-dumping duty retroactively on those imports,

the duty may be assessed on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

E. Anti-dumping Action on Behalf of a Third Country

Article 12

(a) An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

(b) Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

(c) The authorities of the importing country in considering such an application shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

(d) The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the

CONTRACTING PARTIES seeking their approval for such action shall rest with the importing country.

PART II - FINAL PROVISIONS

Article 13

This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to the General Agreement and by the European Economic Community. The Agreement shall enter into force on 1 July 1968 for each party which has accepted it by that date. For each party accepting the Agreement after that date, it shall enter into force upon acceptance.

Article 14

Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-dumping Code.

Article 15

Each party to this Agreement shall inform the CONTRACTING PARTIES to the General Agreement of any changes in its anti-dumping laws and regulations and in the administration of such laws and regulations.

Article 16

Each party to this Agreement shall report to the CONTRACTING PARTIES annually on the administration of its anti-dumping laws and regulations, giving summaries of the cases in which anti-dumping duties have been assessed definitively.

Article 17

The parties to this Agreement shall request the CONTRACTING PARTIES to establish a Committee on Anti-dumping Practices composed of representatives of the parties to this Agreement. The Committee shall normally meet once each year for the purpose of consulting on matters relating to the administration of anti-dumping systems in any participating country or customs territory as it might affect the operation of the Anti-dumping Code or the furtherance of its objectives.

Such consultations shall be without prejudice to Articles XXII and XXIII of the General Agreement.

This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES who shall promptly furnish a certified copy thereof and a notification of each acceptance thereof to each contracting party to the General Agreement.

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Geneva this 30th day of June one thousand nine hundred and sixty-seven, in a single copy, in the English and French languages, both texts being authentic.

APPENDIX C

Work of the Anti-dumping Tribunal — 1969-77

The following table summarizes the work of the Tribunal for the period 1969-1977. All activity of the Tribunal — under sections 13, 16, 16.1, and 31 — is noted, except those occasions when the Tribunal did not undertake a s. 31 review although requested to do so. The Tribunal's "finding" is sometimes abbreviated when there is a complex finding concerning several products. The chronological numbering of "findings" is my own, and does not correspond to the Tribunal's own system, which began in 1973 and is based on the yearly chronology of findings under s. 16; I give the Tribunal's reference number, where there is one, after each title.

DATE OF FINDING	TITLE*	FINDING
1969		
(1) March 10	Isooctanol from the United States	No material injury
(2) August 8	Power Transformers from Britain and Japan	No finding**
(3) August 15	Leather Boots and Shoes for work and sports wear from Romania and Poland	No material injury
1970		
(4) March 13	Transparent sheet glass from Czechoslovakia, East Germany, Poland, the Union of Soviet Socialist Republics and Romania	Likely to cause material injury
(5) Sept. 16	Glacé cherries from France	Material injury
(6) Nov. 6	Transformers and reactors rated over 500 KVA or KVAR from the United Kingdom, France, Japan, Sweden, Switzerland and the Federal Republic of Germany, and reactors rated over 500 KVAR from Belgium	Likely to cause material injury
(7) Dec. 23	Liquid chlorine originating in Bellingham, Washington, United States of America	No material injury
(8) Dec. 24	Ethylene Glycol based anti-freeze in bulk from the United Kingdom	No material injury
1971		
(9) Feb. 11	Electric can openers originating in Japan with or without supplementary features for sharpening knives and opening bottles	Material injury
(10) Mar. 3	Certain needles and syringes originating in the United States of America and Japan	Material injury with respect to syringes
(11) Aug. 6	Standard gypsum wallboard and fire rated gypsum wallboard originating in the United States of America	No material injury
(12) Aug. 25	Women's footwear originating in Italy and Spain	Likely to cause material injury

*All inquiries are under s. 16 of the *Act* unless otherwise noted.
**The Tribunal recommended that the Deputy Minister undertake a wider investigation of dumping.

(13)	Sept. 27	Monochrome and colour television receiving sets originating in Japan and Taiwan, not including television receiving sets having an overall diagonal measurement of less than eight inches	Material injury
(14)	Nov. 26	Industrial press-on solid rubber tires exported to Canada by Bearcat Tire Company, Chicago, Illinois, U.S.A.	Likely to cause material injury
(15)	Dec. 22	Wedding gowns exported to Canada by Bridallure Inc. and Alfred Angelo Inc., Philadelphia, Pennsylvania	No material injury
1972			
(16)	Jan. 10	Apple juice concentrate originating in Austria, Bulgaria, Greece, Hungary and Switzerland	Material injury
(17)	Apr. 7	Alternating current high voltage circuit breakers rated 115,000 volts (115 KV) and above, including components, whether or not imported separately, for use in the assembly, construction, or erection of such circuit breakers, all the foregoing originating in or exported from France, Switzerland, or Japan	Material injury with respect to breakers and components rated 115 KV to 230 KV exported from France and Japan; otherwise no injury
(18)	Apr. 19	Methanol (Methyl Alcohol) exported to Canada by Tenneco Chemicals, Inc., Intermediates Division of New Jersey, United States of America	No Material injury (complaint withdrawn)
(19)	June 23	*Section 31*: Petition of Cegelec Industrie Inc. and Delle-Alsthom, S.A., to alter or vary the finding of April 7, 1972, concerning alternating current high voltage circuit breakers rated 115,000 (115 KV) and above, including components, whether or not imported separately, for use in the assembly, construction, or erection of such circuit breakers, all the foregoing originating in or exported from France, Switzerland, or Japan	Finding altered to exclude such goods for metal-clad gas insulated substations
(20)	July 28	Vinyl coated fiber glass insect screening originating in the United States	Material injury
(21)	Aug. 11	Steel EI transformer laminations in sizes up to and including 2-1/2 inches which is the width of the centre leg of the E exported to Canada by Tempel Steel Company of Chicago, Illinois, U.S.A.	No material injury
(22)	Aug. 15	Bicycle tires and tubes originating in Austria, Japan, The Netherlands, Sweden, and Taiwan	No material injury with respect to tires; retardation with respect to tubes

DATE OF FINDING	TITLE	FINDING
1972 (Cont'd)		
(23) Dec. 4	*Section 31*: Review of the August 15, 1972 finding concerning bicycle tubes originating in Austria, Japan, The Netherlands, Sweden and Taiwan (ADT-4-72)	Finding rescinded
1973		
(24) Jan. 18	Raw (unmodified) potato starch originating in the Netherlands (ADT-6-72)	No material injury
(25) Apr. 2	Double knit fabrics, wholly or in part man-made fibres, originating in the United Kingdom, the Channel Islands and the Isle of Man (ADT-1-73)	Material injury; likelihood of material injury with respect to 100% acrylic double knit fabrics
(26) Apr.	*Section 16.1*. Footwear of all kinds, other than footwear the main components of which are canvas	No serious injury
(27) May 11	*Section 31*. Petition for review, change, alteration and/or variation of an order or finding dated 6 November, 1970 concerning transformers rated above 500 KVA (0.5 MVA) and reactors rated above 500 KVAR (0.5 MVAR) originating in the United Kingdom, France, Japan, Sweden, Switzerland and the Federal Republic of Germany, and reactors rated above 500 KVAR (0.5 MVAR) originating in Belgium (ADT-2A-70)	Petition dismissed
(28) July 17	Disposable glass culture tubes originating in the United States of America (ADT-2-73)	Material injury
(29) Aug. 14	Caulking and sealing compounds of the oil base, butyl base, acrylic base and emulsion polymer base types originating in the United States of America in retail-size containers or in bulk for packaging into retail-size containers not including caulking and sealing compounds of the polysulfide base type (ADT-3-73)	Material injury
(30) Aug. 14	Panel adhesive (alternatively known as construction adhesive, dry wall adhesive or wall board adhesive) originating in the United States of America (ADT-4-73)	No material injury

(31)	Sept. 18	Stainless flat rolled steels originating in or exported from Sweden and alloy tool steel bars, not including high speed, AISI P-20 mould steel and die blocks, originating in or exported from Sweden and Austria (ADT-5-73)	No material injury
(32)	Sept. 21	*Section 31*. Order of the Anti-dumping Tribunal to rescind its finding of August 25, 1971 concerning women's footwear originating in Italy and Spain (ADT-2B-71)	Finding rescinded
(33)	Nov. 13	*Section 13(8)*. Crepe paper masking tape and filament reinforced strapping tape by several United States firms(ADT-13-1-73)	Material injury
(34)	Nov. 27	*Section 16.1*. The effects of preserved mushroom imports on Canadian production of like goods	Serious injury threatened
1974			
(35)	June 7	Slide fasteners, or zippers, and parts thereof, manufactured by Yoshida Kogyo K.K., Tokyo, Japan (ADT-1-74)	Material injury
(36)	June 20	Hair accessories, and component parts and packaging materials exported to Canada by H. Goodman and Sons Incorporated, Kearney, New Jersey, United States of America (ADT-2-74)	No material injury
(37)	Dec. 2	Tetanus immune globulin (human) originating in the United States of America (ADT-3-74)	Material injury
(38)	Dec. 31	*Section 31*. Glacé cherries from France (ADT-1A-70)	Finding rescinded
1975			
(39)	Jan. 24	Photo albums with self-adhesive leaves and component parts thereof originating in Japan and the Republic of Korea (ADT-4-74)	Material injury
(40)	Feb. 21	Frozen, prepared, precooked dinners containing meat, poultry and/or other ingredients produced by the Banquet Foods Corporation, St. Louis, Missouri, United States of America (ADT-5-74)	Material injury
(41)	Apr. 8	Crepe paper masking tape and filament reinforced strapping tape originating in the United States of America (ADT-1-75)	No material injury

DATE OF FINDING	TITLE	FINDING
1975 (Cont'd)		
(42) Apr. 30	*Section 31*. Apple juice concentrate originating in Austria, Bulgaria, Greece, Hungary and Switzerland (ADT-6C-71)	Finding rescinded
(43) Aug. 25	Moulded plastic statuettes with inscriptions, known as "sillisculpts", originating in the United States of America (ADT-2-75)	No material injury
(44) Sept. 12	Artificial brick, for use as decorative wall covering, produced by the VMC Corporation, Woodinville, Washington, United States of America (ADT-3-75)	Material injury
(45) Oct. 29	Colour television receiving sets originating in or exported from the United States of America, Japan, Taiwan and Singapore, having an overall diagonal measurement across the picture tube of sixteen inches and over (ADT-4-75)	No material injury, except likely to cause material injury with respect to Japan, Taiwan and Singapore
(46) Nov. 24	Polypropylene and polyethylene twisted rope, from one-eighth of an inch (3.2 millimeters) to one half inch (12.7 millimeters) in diameter, inclusive, exported from or originating in Japan and the Republic of Korea (ADT-5-75)	No material injury
1976		
(47) Jan. 29	Yeast, live or active, with a moisture content of more than 15 per cent, produced by Anheuser-Busch, Inc., St. Louis, Missouri, United States of America (ADT-6-75)	No material injury
(48) Mar. 2	Natural rubber (latex) balloons, in sizes up to approximately thirty (30) inches in diameter when inflated, of assorted shapes and colours, printed or unprinted, produced by Latex Occidental S.A., of Guadalajara, Jalisco, Mexico (ADT-7-75)	Material injury
(49) Mar. 30	Single row tapered roller bearings and parts thereof originating in Japan in sizes up to and including 6.625 inches outside diameter (ADT-8-75)	Material injury

(50)	Apr. 15	Mirror tile, nominally measuring 12 inches by 12 inches, with or without double-faced adhesive tape, originating in the United States of America (ADT-1-76)	No material injury
(51)	Apr. 21	*Section 13(8)*. Rotating cap type journal double tapered roller bearings, Class "E", size 6" × 11", Class "F", size 6-1/2" × 12", with or without end cap assembly (end cap, cap bolts, locking plate, lubricant fitting) having outer ring (outer face or cup) outer diameters in the range of 8-1/2" to 10-1/4" and having inner rings (cones, roller assemblies, inner races) bore diameters in the range of 5-1/2" to 6-1/4", by companies from Japan	No evidence of material injury
(52)	May 18	Fabrics woven from oriented slit-film tapes of polyethylene resin, uncoated or either coated or laminated on one or both sides with polyethylene film, originating in Japan (ADT-2-76)	Material injury
(53)	June 21	Stainless steel compartment type steam cookers, jacketed kettles and steam generators for use therewith in modular or combination form, in either complete or knocked down condition, produced by Market Forge Co., Everett, Massachusetts, United States of America (ADT-3-76)	Likelihood of material injury
(54)	July 27	Hydraulic turbines for electric power generation, not including bulb type turbines, originating in the Union of Soviet Socialist Republics (ADT-4-76)	Likelihood of material injury
(55)	Aug. 10	Gasoline powered chain saws, having an engine displacement of 2.5 cubic inches or less, manufactured by McCulloch Corporation, Los Angeles, California and Beaird-Ponlaw, a division of Emerson Electric Company, Shreveport, Louisiana, United States of America (ADT-5-76)	Material injury
(56)	Aug. 18	*Section 13(8)*. Sultana raisins, in retail-size packages of less than five pounds, originating in Australia (ADT-13-2-76)	Evidence of likelihood of material injury
(57)	Aug. 24	9-Lives brand luxury cat food marketed in can sizes of 3-7/16" × 1-13/16" with a net weight of 6 to 6.5 ounces, and 3-7/16" x 3-2/16" with a net weight of 12 to 13 ounces, originating in or exported from the United States of America (ADT-6-76)	No material injury

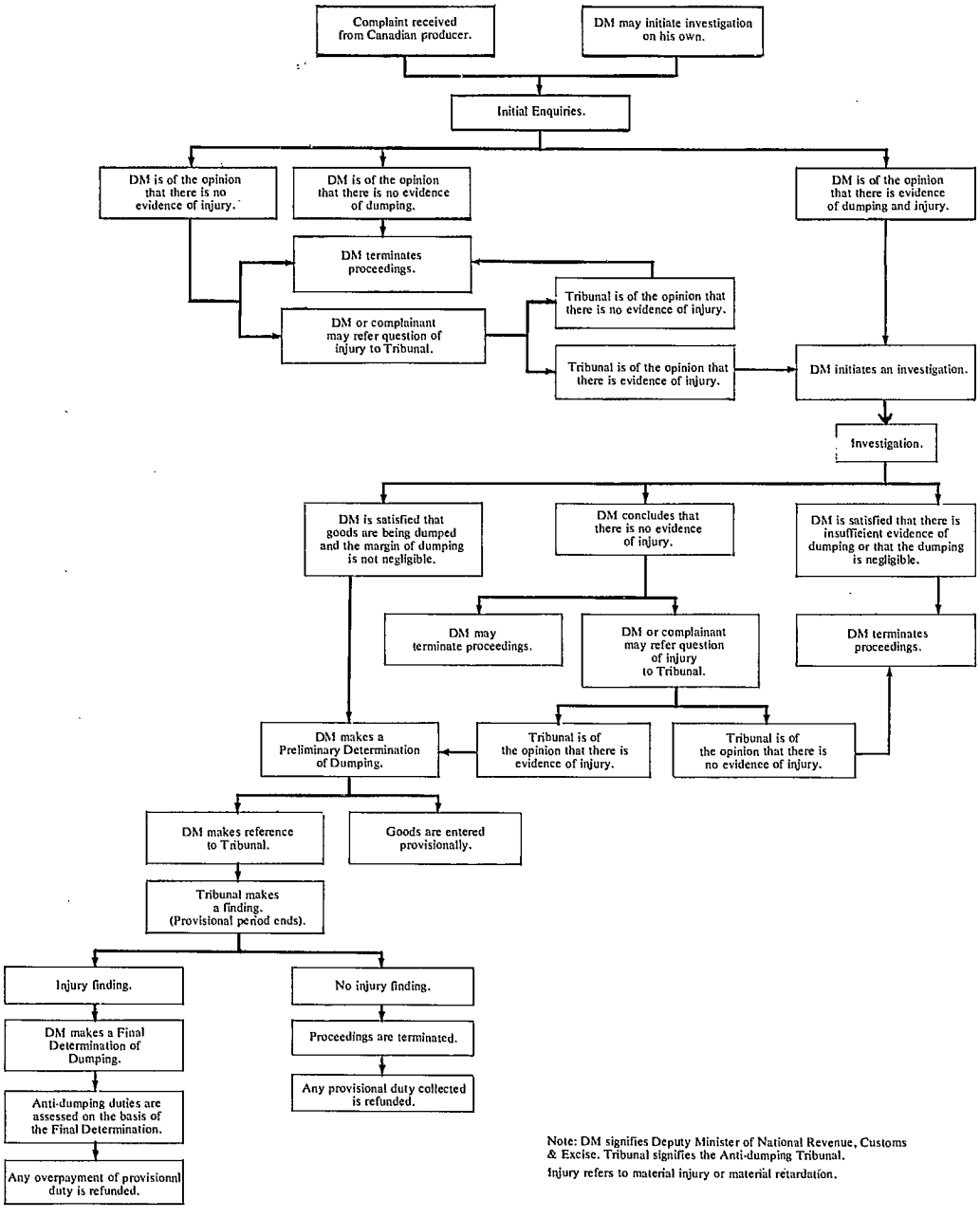
DATE OF FINDING	TITLE	FINDING
1976 (Cont'd)		
(58) Sept. 14	Gymnasium equipment, namely "Reuther" boards with or without spacers, pads, or carpetings; balance beams with or without coverings; horizontal, parallel and uneven parallel bars with or without conversion kits; pommel horses with or without pommels; wood pommels; horse and beam body recoverings; vaulting bucks; ring stands and ring frames; rings with or without attachments; trampolines; floor plates and transporters; whether imported in an assembled or unassembled condition, produced by Nissen Corporation, Cedar Rapids, Iowa, U.S.A. (ADT-7-76)	Material injury (with some specific exceptions)
(59) Nov. 26	Wooden clothespins originating in or exported from Romania and Hong Kong (ADT-8-76)	No material injury
(60) Dec. 7	*Section 31*. Certain caulking and sealing compounds originating in the United States of America (ADT-3A-73)	Finding rescinded
(61) Dec. 10	Painted aluminum rollformed sheets and related parts for use in the manufacture of stepdown awnings, originating in the United States of America (ADT-9-76)	No material injury
(62) Dec. 22	*Section 31*. Certain single-use syringes originating in the United States of America and Japan	Finding rescinded
(63) Dec. 31	Steam traps, pipeline strainers, automatic drain traps for compressed air service, thermostatic air vents and air eliminators including parts, screens and repair kits pertaining thereto, produced by or on behalf of Sarco Co. Inc., Allentown, Pennsylvania, United States of America (ADT-10-76)	No material injury
1977		
(64) Jan. 14	Bacteriological culture media in prepared form in tubes and plates originating in or exported from the United States of America (ADT-11-76)	No material injury

(65)	Feb. 4	Battery post and terminal cleaning brushes originating in or exported from Japan and Hong Kong (ADT-12-76)	Material injury
(66)	Mar. 2	Textured or bulked polyester filament yarn, originating in Austria, the Federal Republic of Germany, France, Hong Kong, Italy, Japan, Switzerland, Taiwan and the United States of America (ADT-13-76)	Material injury, 101 to 200 deniers; likelihood of material injury, 100 deniers and less; no material injury,
(67)	Apr. 1	*Section 31*. Transformers rated above 500 KVA (0.5 MVA) and reactors rated 500 KVA (0.5 MVAR) originating in the United Kingdom, France, Japan, Sweden, Switzerland and the Federal Republic of Germany, and reactors rated above 500 KVAR (0.5 MVAR) originating in Belgium (ADT-2B-70)	No change
(68)	Apr. 18	Sultana raisins, in retail-size packages of less than 5 pounds, originating in Australia (ADT-1-77)	No material injury
(69)	May 3	Calcium propionate, sodium propionate and sodium benzoate, originating in the United States of America (ADT-2-77)	Likelihood of material injury in the case of propionates
(70)	May 24	Surgical gloves, specifically: floor or ward gloves, excluding examination gloves, and disposable latex surgeon's groves, packaged or in bulk, originating in the United States of America and the United Kingdom (ADT-3-77)	Likelihood of material injury
(71)	May 31	*Section 31*. Transparent sheet glass originating in Czechoslovakia, East Germany, Poland, the Union of Soviet Socialist Republics and Romania (ADT-4B-69)	Finding rescinded
(72)	June 9	Disposable electrodes, for use with cardiac monitoring and diagnostic systems, originating in or exported from the United States of America (ADT-4-71)	Material injury
(73)	June 22	Natural colour acrylic fibre: tow, staple and sliver, 10 denier per filament and finer, made of material containing not less than 85% by weight acrylonitrile; not including bicomponent consisting of two polymers of different composition within each fibre; originating in or exported from the United States of America and Japan (ADT-5-77)	Material injury only in connection with staple above 1-1/2 denier to 10 denier produced by Monsanto Company in the United States of America

DATE OF FINDING	TITLE	FINDING
1977 (Cont'd)		
(74) July 6	12-hydroxystearic acid originating in Brazil (ADT-6-77)	Material injury
(75) Aug. 10	Acrylic sheet (other than patterned, embossed, prismatic or laminated extruded sheet), including finished products cut to shape such as chairmats, consisting of predominantly polymethy methacrylate polymers, in thicknesses of .030" to .500" (1/32" to 1/2"), both inclusive, and of a sheet width not exceeding 80", originating in the United States of America, Taiwan, Japan and the Federal Republic of Germany (ADT-7-77)	No material injury
(76) Aug. 26	*Section 31.* Slide fasteners, or zippers, and parts thereof, manufactured by Yoshida Kogyo K.K., Tokyo, Japan, (ADT-1B-74)	Finding rescinded
(77) Aug. 26	*Section 13(8).*Forced Warm Air Furnaces, as used in mobile homes and similar structures, in either complete or knocked down condition, produced by or on behalf of Inthertherm Inc., St. Louis, Missouri, U.S.A.	No evidence of material injury
(78) Sept. 7	Metal storage or parts cabinets with plastic drawers, originating in Denmark (ADT-8-77)	No material injury
(79) Sept.	*Section 16.1.* Footwear of all kinds, except rubber or canvas footwear	Serious injury
(80) Oct. 17	Industrial press-on solid rubber tires originating in or exported from Ireland (ADT-9-77)	Likelihood of material injury
(81) Oct. 21	Ladies' genuine and simulated leather handbags originating in or exported from the Republic of Korea, Hong Kong and Taiwan (ADT-10-77)	Material injury
(82) Nov. 8	Bicycles, assembled or unassembled, and bicycle frames, forks, steel handlebars and wheels (not including tires and tubes), originating in or exported from the Republic of Korea and Taiwan (ADT-11-77)	Material injury from bicycles; likelihood of material injury from frames, etc.
(83) Dec. 29	Wide flange steel shapes, etc., originating in the United Kingdom, France, Japan, the Republic of South Africa, Belgium and Luxemburg (ADT-12-77)	Material injury, with exceptions for some ranges of sizes, and for Belgium
(84) Dec. 30	Hot rolled carbon steel bar size angles, having each leg less than 3 inches in length, originating in or exported from Japan (ADT-13-77)	Material injury

Appendix D

ANTI-DUMPING PROCEDURES



Note: DM signifies Deputy Minister of National Revenue, Customs & Excise. Tribunal signifies the Anti-dumping Tribunal.

Injury refers to material injury or material retardation.