

Senti, Richard

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the vanishing readiness of many member countries to accept compromises, i.e. a vanishing willingness to come to a general consensus in complex negotiations.

The expectation that the multilateral system of GATT will not be able to solve the problems it now faces in due course is no doubt one of the factors contributing to the current prominence of regionally orientated policy approaches including such differing concepts as:

- the recommendation that the countries of the Asia-Pacific region should take the initiative in a return to liberal world trade,⁴⁸
- the plea for greater inter-regional policy coordination as a means of overcoming foreign trade conflicts *ex ante*,⁴⁹

□ efforts to give institutional reinforcement to existing areas of interdependence, as have been intensively discussed for some time with regard to the Pacific Basin.⁵⁰

Of course anyone who has studied the matter will be aware that regional policy coordination is treading a hard and rocky road, at the end of which there have so far all too seldom been any convincing results. This is hardly a problem which applies only to developing countries: witness the EC's most recent summit failures. On the other hand, a realistic point of view requires that the imperfect results of regional policy coordination should not be measured against a theory-derived *ideal* of multilateral liberalism, but against the *reality* of increasing bilateralism.

GATT

Dumping and Anti-Dumping Measures

by Richard Senti, Zurich*

In recent times, the number of dumping actions has shown a striking correlation with the respective level of economic activity.¹ The following observations convey an overall picture of the dumping actions currently pending and the anti-dumping measures implemented, and look into the current problems faced by the international anti-dumping system.

For years, dumping actions have been at the centre of discussions in the trade negotiations between the US, Canada, Japan and the member countries of the EC. At the end of 1977, there were twenty dumping actions in progress in the USA. Tension eased in 1978 following the introduction of the trigger price system to regulate steel imports.²

On confirmation of the modified cost criterion in the US Trade Act of 1979, the US steel firms once again took action against the EC steel producers. In 1980, the trigger price system briefly became temporarily inoperative but was applied again the same year with added force. Nevertheless, more dumping actions followed, particularly in the years 1981 and 1982.³

At the beginning of 1983, the GATT Committee on Anti-Dumping Questions published a summary of the anti-dumping proceedings instituted during recent years

in the USA, EC, Finland, Canada, Austria and Sweden, the provisional and definitive counter-measures and the price agreements reached (cf. Table 1).

The majority of actions are directed at the industrialised nations and only a few against the developing countries. Neither withdrawn actions nor those which resulted in a negative decision are included in these figures.

Table 2 shows between which trade partners dumping negotiations took place during the years 1981/

¹ Cf. S. P. Magee: Protectionism in the United States, University of Texas at Austin 1982 (mimeo), quoted from B. S. Frey: The public choice view of international political economy, in: International Organization 38 (1984) 1, p. 211.

² Trigger prices are fixed by the US Administration every quarter. If importers undercut these minimum prices, this automatically triggers a dumping investigation.

³ At the beginning of 1982 in the USA, there were in total 93 actions being brought by American steel firms for allegedly dumped or subsidised steel imports. Cf. US Mission Geneva, Daily Bulletin No. 33 of 19. 2. 1982, p. 1.

* Center for Economic Research, Swiss Federal Institute of Technology Zurich.

Table 1
Number of Anti-Dumping Actions and Counter-Measures during the Years 1972/73 to 1981/82

Years	Institution of proceedings	Provisional counter-measures	Definitive counter-measures	Price agreements
1972/73	50	30	14	16
1975/76	75(14) ^a	38(7)	11(4)	9(0)
1976/77	113(27)	38(10)	24(4)	12(1)
1977/78	155(23)	85(17)	50(16)	30(4)
1978/79	115(20)	51(10)	37(9)	31(3)
1980/81	71(7)	39(2)	24(-)	11(1)
1981/82	156(19)	41(8)	60(6)	18(1)

^a Shown in brackets are the actions and measures against the developing countries.

Sources: GATT, BISD 20th S (1974), p. 47 (for the years 1972/73) and GATT ADP/W/42/Add. 1/Suppl. 1 of 10. 1. 83, mimeo (for the years after 1975).

Table 2
Survey of the Trade Partners Involved in Anti-dumping Proceedings during 1981/82

Countries taking measures	Institution of proceedings	Provisional counter-measures	Definitive counter-measures	Price agreements
USA	51 D(7), GB(5), Lux(5), I(4), Jp(4), NL(4), C(3), TW(2), among others	11 Jp(3), F(2), TW(2), among others	47 Jp(16), C(7), F(4), D(3), Fin(2), I(2), among others	1 TW(1)
EC	39 CS(8), USA(7), Ru(6), H(5), Pl(4), among others	7 Ru(3), USA(1), among others	5 USA(4), C(1)	17 CS(5), Pl(3), Ru(3), H(3), among others
Canada	64 F(8), D(8), I(8), Jp(5), USA(5), GB(3), CH(1), among Ko(3), Sing(3), among others	23 Jp(4), USA(4), GB(2), Sing(2), others	8 USA(2) among others	—

Key C: Canada, CH: Switzerland, CS: Czechoslovakia, D: W. Germany, F: France, Fin: Finland, GB: Great Britain, H: Hungary, I: Italy, Jp: Japan, Ko: S. Korea, Lux: Luxembourg, NL: Netherlands, Pl: Poland, Ru: Rumania, Sing: Singapore, TW: Taiwan, USA.
Source: GATT, ADP/W/42/Add.1/Suppl. 1 of 10. 1. 1983, p. 3.

82, i.e. which countries instituted proceedings and which were sitting in the dock (as far as was reported to GATT).

US Anti-Dumping Legislation as a Basis

In 1945, immediately after the end of the war, the US State Department published the first proposals for a new world trade order. According to these proposals, the members of an international trade organisation still to be created should, among other things, undertake "to

subscribe to a general definition of the circumstances under which anti-dumping and countervailing duties may properly be applied to products imported from other members".⁴

Only a year later, the Americans submitted the Charter for the Creation of an International Trade Organisation containing concrete suggestions on the anti-dumping settlement⁵ which were later adopted by the Havana Charter⁶ and GATT without undergoing significant alterations. Both the basic concept and many individual provisions are in line with the American anti-dumping legislation of that time.

The first US anti-dumping provisions are to be found in the Revenue Act of 1916.⁷ According to this law, the Americans imposed something akin to a fine⁸ if (1) imports were offered in the USA at a lower price than in the country of origin and (2) as a result American industry was exposed to serious danger (intent to destroy or injure). The two criteria "underpricing" and "infliction of damage" were later adopted by the actual anti-dumping laws of 1921 and 1930⁹ and still apply today following the supplements and refinements made in 1974 and 1979.

According to American Law of 1921 and 1930, dumping has occurred if

□ the goods are offered more cheaply in the USA than on the home market (price criterion). — Or, where there are no sales on the home market, if

□ the goods are offered more cheaply in the USA than in a third country (modified price criterion). — In case no sales are offered outside the country of destination, if

□ the goods are exported below the costs of manufacture in the producing country (cost criterion). Costs of manufacture are calculated on the basis of exact data on materials and production costs as well as the overheads and profit margins computed.¹⁰

The legal amendments of 1974 and 1979 brought with them an extension of the cost criterion to cover cases in

⁴ US Department of State: Proposals for Expansion of World Trade and Employment, November 1945, Publication 2411, C: III, Sec.A:3.

⁵ US Department of State: Suggested Charter for an International Trade Organization of the United Nations, September 1946, Publication 2598, Art. 11.

⁶ US Department of State: Havana Charter for an International Trade Organization, 24. 3. 1948, Publication 3206, Art. 34

⁷ US Revenue Act of 1916, §801, 39 Stat. 798 (1916).

⁸ The law talks of a "fine". In essence, this is already an anti-dumping duty as was later incorporated into the anti-dumping law of 1921.

⁹ US, Anti-dumping Act of 1921; Tariff Act of 1930

¹⁰ More specific details are given above.

which the domestic sales prices (in the country of origin) no longer cover the costs of production.¹¹

Origin of GATT Provisions and Anti-Dumping Convention

In discussions surrounding the reshaping of the world trading system,¹² several delegates demanded going beyond the US regulation of price dumping of that time and incorporating service, exchange-rate and social dumping. *Service dumping* revolves around freight costs, i.e. the cheapening of exports by way of dumped transport services. *Exchange-rate dumping* is the cheapening of exports in the form of parity guarantees and foreign exchange allowances.¹³ *Social dumping* is constituted in cases where products from prison camps or prisons find their way onto the world market at prices with which private entrepreneurs cannot compete. The negotiating delegations finally agreed on the *price dumping* in line with the US proposal.

There were initial differences of opinion regarding the extent of the damage necessary for counter-measures to be taken. Must serious, material or indeterminate injury occur before counter-measures can be taken? Does the difference between domestic price and export price have to reach certain dimensions (e.g. at least 5 % of the domestic price) before counter-measures can be justified? Can serious injury caused be responded to with something like a punitive measure? Must the approval of the ITO or of the contracting parties to GATT be obtained before counter-measures are taken? The formulation finally agreed upon states that counter-measures may only be taken if the contracting party establishes "that the effect of the dumping . . . 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".¹⁴

In 1955, Article VI of GATT was supplemented (the first and only amendment to the GATT wording on dumping) to the effect that in cases where delay might cause "damage that would be difficult to repair", immediate measures are permitted without the need to seek the prior consent of the contracting parties to GATT.¹⁵

The dumping question experienced a revival during the Kennedy Round between 1964 and 1967. The

Americans had tried to include also non-tariff barriers in the trade talks. Subsequently, they realised much to their annoyance that the negotiating parties were spotlighting the very barriers to trade which applied in the USA, above all the US anti-dumping law. After brief hesitation, the Americans attempted to turn the anti-dumping controversy in their favour with the help of a detailed regulation. Thus emerged the Anti-Dumping Code of 1967 which, although it ties the Americans' hands in many a procedural question, otherwise hits particularly hard at Canada and Great Britain.

Canada's anti-dumping legislation up to that time did not conform to GATT in that the taking of anti-dumping measures was not bound to the precondition of economic damage. Also in Great Britain – according to the American view – anti-dumping measures at that time were being misused for the protection of the domestic economy. From the US perspective, the advantages associated with the Anti-Dumping Code outweighed the resultant disadvantages which it was felt had to be accepted.

The "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Code)" is dated 30th June, 1967.¹⁶ During the Tokyo Round, the 1967 Anti-Dumping Code underwent a two-fold amendment: firstly, there was the question of demarcation vis-à-vis the Code on Subsidies and Countervailing Duties which was in the process of formation;¹⁷ secondly, changes were made to the existing agreement in terms of ascertainment of damage (Art. 3: 1-4), the privileged position of the developing countries (Art. 13) and consultations, arbitration and settlement of disputes (Art. 15).¹⁸ The currently valid agreement on anti-dumping was reached on 12th April 1979 in Geneva.¹⁹ Wherever the anti-dumping agreement is mentioned in the following, reference is being made to the currently valid version of 1979.

Definition of Dumping

In imitation of the American legal system of the 20s and 30s, GATT speaks of dumping when products of the

¹⁴ GATT, Art. VI:6(a).

¹⁵ GATT, Art. VI:6(c).

¹⁶ "Agreement on Implementation of Article VI of the GATT", in: GATT, BISD 15th S (1968), p. 24 ff.

¹⁷ "Agreement on Interpretation and Application of Articles VI, XVI and XXIII", in: GATT, BISD 26th S (1980), p. 56.

¹⁸ Cf. GATT: The Tokyo Round of Multilateral Trade Negotiations, Geneva 1979, p. 181; GATT: The Tokyo Round of Multilateral Trade Negotiations II – Supplementary Report, Geneva 1980, p. 10.

¹⁹ "Agreement on Implementation of Article VI", in: GATT, BISD 26th S (1980), p. 171.

¹¹ US, Public Law 96-39 of 26. 7. 1979 (Trade Agreements Act of 1979), Section 773(b).

¹² The observations on the creation of the GATT Dumping Provisions are based on, among others, John H. Jackson: World Trade and the Law of GATT, Indianapolis, Kansas City, New York 1969, p. 404 ff.

¹³ Contributions from private organisations in the interests of a joint export risk guarantee. Aid from the national bank falls under subsidies.

same kind "of one country are introduced into the commerce of another country at less than the normal value of the products".²⁰

Hence, dumping means that the "normal" domestic value of an article exceeds its export value. How does GATT define the "normal" domestic value? When is a product "of the same kind" when compared with another? How should we interpret export value?

The "normal" value of an article is undercut according to Art. VI:1 of GATT "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".

Differences in terms and conditions of sale, varying taxation and other differentials influencing the price are to be given "due" consideration. On the other hand, however, if export prices are lower because of the reimbursement of domestic duties and taxes (e.g. by way of the reimbursement of VAT), this does not, according to GATT, constitute dumping which would justify counter-measures. The "normal" domestic value is taken to be exclusive of duties and taxes.²¹

The GATT definition of dumping applies to all countries which are signatories to GATT – apart from one important exception. The US anti-dumping law contains divergent and partly narrower provisions than GATT in two specific areas:

□ Should the export product come to be sold in the country of origin, GATT says that dumping is to be determined according to the price criterion irrespective of the extent of the costs of manufacture. According to American law, however, the costs of manufacture can also be taken into consideration as well as the domestic price. The cost criterion shall apply in cases where there is good reason to suppose that the domestic price remains lower than the costs of manufacture for substantial quantities of merchandise over a relatively long period of time.²²

In this way, the Americans succeed in shielding the market from merchandise which has been falsely priced as a result of any production cost contributions, or in taxing them with anti-dumping duties. They refute the GATT contravention of which they are accused with the argument that GATT talks in terms of "normal" domestic prices. Normal prices, however, cannot be lower than costs of manufacture over longer periods. This is why, in the case of price undercutting over longer periods, the cost criterion should be applied.²³

□ In applying the cost criterion, the export prices are, according to GATT, to be compared with the cost of production "plus a reasonable addition for selling cost and profit".²⁴ The addition for profit "shall not exceed the profit normally realised on sales of products of the same general category in the domestic market of the country of origin".²⁵ By way of contrast, the US anti-dumping law defines the costs taken as a basis for comparison as follows: (1) material and production costs, (2) overheads of not less than 10 % of the material and production costs, (3) profit margin of not less than 8 % of the costs mentioned in points (1) and (2), and (4) packing and loading expenses as defined under the f.o.b. price.

When are goods described as being of the same kind? The American proposal of 1946 for the creation of a world trade organisation spoke of the "like" and "similar" products.²⁶ During the subsequent negotiations it was decided to limit the definition to "like" products, products which are identical, homogeneous.²⁷ In practice, however, this terminology proved to be impracticable. Slight divergences of quality or differing forms or colourings do not rule out competition nor hence the possibility of dumping. To make allowance for this fact, the Anti-dumping Code holds that such goods are also included which "although not alike in all respects, have characteristics closely resembling those of the product under consideration".²⁸

This leaves us with the conceptual definition of the "export price". Art. VI of GATT refrains from offering a more precise definition of this concept. In 1959, this gap

²⁰ GATT, Art. VI:1.

²¹ GATT, Art. VI:4.

²² "Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation... have been made at prices which represent less than the cost of producing the merchandise in question..." US, Public Law 96-39 of 26. 7. 1979 (Trade Agreements Act of 1979), Sec. 773(b)).

²³ Cf. on this point of controversy Kiyoshi Kawahito: Steel and the U.S. Antidumping Statutes, in: Journal of World Trade Law 16 (1982) 2, p. 153 ff.

²⁴ GATT, Art. VI:1(b)ii.

²⁵ GATT, Anti-dumping Code, Art. 2:4.

²⁶ US Department of State: Suggested Charter for an International Trade Organization of the United Nations, September 1946, Publication 2598, Art. 11:1.

²⁷ US Department of State: Havana Charter for an International Trade Organization, 24. 3. 1948, Publication 3206, Art. 34:1(a).

²⁸ GATT, Anti-dumping Code, Art. 2:2.

was filled by the report on anti-dumping and countervailing duties and in 1967 by the Anti-dumping Code. According to the report, the export price is that price at which an article leaves the country, not that price at which it enters a country, i.e. ideally speaking, the ex-factory price on sales for export. The f.o.b. price at the port of departure provides an equally adequate basis for comparison.²⁹ The 1967 Anti-dumping Code further provides that all price comparisons (comparison of domestic price with export price) are to be carried out at the same level of trade, "normally at the ex-factory level, . . . and at as nearly as possible the same time".³⁰ In addition, due allowance is to be made for differences in terms and conditions of sale, taxation and other factors affecting the comparability of the prices, depending upon the circumstances of the individual case.

Anti-Dumping as a Protective Measure

An anti-dumping duty may be levied when two conditions are fulfilled:

- ☐ dumping is known to exist and
- ☐ injury or threat of injury to an industry is ascertained as a result of dumping.

What is understood by the term dumping was treated in the previous section. How does GATT or the Anti-dumping Code define "injury", "threat" and "industry"?

According to the Anti-dumping Code, the ascertainment of *injury* to an industry within the meaning of GATT requires investigation of (1) the extent of dumping imports, (2) their effects on the prices of like goods on the domestic market and (3) the consequences of the imports for the domestic producers of these goods.³¹

The extent of dumping imports is evident from the answer to the question as to whether there has been any significant increase in imports either in absolute terms or in relation to the production or consumption in the country of import. This was how, for example, the US International Trade Commission determined that, from 1980 to 1981, US steel plate imports from West Germany rose by 240 %, from Rumania by 580 % and from the remaining countries included in the investigation by 29 %. According to the ITC, the steel imports in 1981 constituted around 19 % of domestic consumption as compared with 15.2 % in 1979 and 1980.³²

With regard to prices, the investigating authorities examine ". . . whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance".³³ This is exemplified by the EC Commission's investigation into the importation of refrigerators from Eastern Bloc countries. The Commission determined dumping margins of between 7.4 % and 74.2 % of the prices at the Community border (without customs duty) depending upon the model and size of the refrigerator.³⁴

According to the Anti-dumping Code, Art. 3:3, "The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments". The list is by no means exhaustive. Here, too, an example taken from the "steel war" between the USA and Europe in the early 1980s shows how the line of argumentation runs: the ITC ascertained that during 1981 (i.e. at the time of the radical increase in steel imports) the capacity utilization of the US steel mills dropped from 81.5 % in June of that year to 58.6 % in December the same year. During the same period, 70,000 steelworkers lost their jobs and a further 20,000 workers were on short-time working.³⁵

The Code further prescribes that the *threat* to a branch of economic activity must be supported by facts and may not merely be founded on allegations, suppositions or remote possibilities. The application of anti-dumping measures to avert a threat "shall be studied and decided with special care".³⁶

In none of the aspects of ascertainment of injury is the Anti-dumping Code conclusive, nor does it contain quantified details of the extent, price and effects of the imports. The aim of the agreement is rather to unify the process of producing evidence and to urge that a fair assessment of the damage inflicted be made.

²⁹ GATT, BISD 8th S (1960), p. 146.

³⁰ GATT, Anti-dumping Code, Art. 2:6

³¹ GATT, Anti-dumping Code, Art. 3:1.

³² US Mission Geneva, Daily Bulletin No. 33 of 19. 2. 1982, p. 1 f.

³³ GATT, Anti-dumping Code, Art. 3:2.

³⁴ Neue Zürcher Zeitung of 13. 7. 1982, No. 159, p. 11.

³⁵ US Mission Geneva, Daily Bulletin, No. 33, of 19. 2. 1982, p. 2.

³⁶ GATT, Anti-dumping Code, Art. 3:6 and 7.

By domestic *industry*, the Anti-dumping Code refers 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 those products...".³⁷ If exporters and importers are commercially related (e.g. as subsidiary and parent company), the agreement allows an exception to be made in the case of such companies and restricts itself to the remaining producers. Furthermore, "in exceptional circumstances", the marketing area of a contractual party can be divided into different sections. This exceptional situation is of topical interest to areas of integration with market sectors as yet not fully integrated. If, on the other hand, a high degree of integration is achieved with a unified overall market, the agreement does not allow anti-dumping duties to be levied by area.³⁸

Procedural Requirements

Competence to levy anti-dumping duties lies with the authorities of the importing country. In the majority of countries which are contractual parties, the competent authority is the Department of Foreign Trade, in the USA the International Trade Commission (ITC) and in the European Economic Community the Commission. The executive bodies of GATT only take action in the case of consultations, arbitration, settlement of disputes, and in levying anti-dumping duties in favour of third countries.³⁹ Hence, generally speaking, administrative proceedings are taken as is the case in connection with the compensatory levies for subsidies.⁴⁰

The administrative proceedings can be divided into: application for or initiation of proceedings, continuation of the proceedings and imposition and collection of anti-dumping duties.

Initiation of Proceedings: The anti-dumping investigation is initiated either by way of a written application from the industry affected or by the authorities themselves.⁴¹ The application must be accompanied by sufficient evidence of the existence of (a) dumping, (b) injury and (c) a causal connection between dumping and injury. The investigating authority decides whether to continue with proceedings on the basis of the evidence submitted. In the case of refusal to grant the application, no anti-dumping duties may be levied. Should the proceedings be continued, the investigating authority can already ordain provisional counter-measures with a view to thus preventing the

incidence of damage during the actual proceedings.⁴² Provisional measures may consist in the levying of a duty or a security in the form of deposit or bond.

Continuation of the Proceedings: Should the investigating authority decide to continue the proceedings, it must notify all contracting parties having an interest therein. The parties have the unqualified right to defend their interests during the proceedings in the form of written applications or in oral hearings.

Premature Termination of the Proceedings: Should an exporter undertake voluntarily and in a satisfactory manner to alter his prices or to refrain from exporting to the territory concerned, the investigation or the proceedings may be interrupted at any time. Price increases must be kept within the existing margin of dumping. In this connection, the Code explicitly states that this "voluntariness" must not be compelled.⁴³

Imposition and Collection of Anti-Dumping Duties: Given the prerequisites (dumping, injury and causal connection between dumping and injury), the authority may finally and conclusively impose anti-dumping duties. The anti-dumping duty – as has already been mentioned – must not exceed the margin of dumping. If a lower duty is sufficient to eliminate the injury or disturbance, it is desirable according to the agreement to levy such a lower anti-dumping duty.⁴⁴ The authorities are obliged to mention the countries and suppliers affected by the anti-dumping duties by name.

Anti-dumping Action on behalf of a Third Country: Application for anti-dumping measures in favour of a third country should be made by the authority of the country concerned. The decision as to the initiation of examination proceedings rests with the importing country. If the importing country is prepared to take action in favour of a third country, it must seek the consent of the contracting parties.⁴⁵

Conflicting Interests

The GATT anti-dumping regulation can be viewed differently depending upon the nature of the interests involved.⁴⁶ Let us for the present establish that GATT

³⁷ GATT, Anti-dumping Code, Art. 4:1.

³⁸ GATT, Anti-dumping Code, Art. 4:3.

³⁹ Apart from one exception in 1954 (action taken by Italy against Sweden (GATT, BISD 3rd S (1955), p. 81 ff.)) GATT has seen no disputes in this connection up to the present time.

⁴⁰ R. S e n t i : Subventionen in der geltenden Welthandelsordnung, in: Außenwirtschaft 38 (1983) I, p. 21 ff.

⁴¹ GATT, Anti-dumping Code, Art. 5:1.

⁴² GATT, Anti-dumping Code, Art. 10:1.

⁴³ GATT, Anti-dumping Code, Art. 7.

⁴⁴ GATT, Anti-dumping Code, Art. 8:1.

⁴⁵ GATT, Anti-dumping Code, Art. 12.

⁴⁶ Cf. Kenneth W. D a m : The GATT, Law and International Economic Organization, Chicago, London 1970, p. 167 ff.; Kiyoshi K a w a h i t o , op. cit., p. 157 ff.

overtly safeguards the interests of industry, i.e. the industry competed against by the import trade. The producers thus have the opportunity of applying for protective measures as soon as they are in one way or another seriously threatened by cheap imports. The fact that, on the other hand, consumers and processors profit from cheap consumer goods and inexpensive intermediate products is left out of account by GATT. "The fact that governments act against dumping only when the low price is charged in their own territory reveals that governments are concerned with the welfare of their own enterprises rather than with the protection of their citizens from discriminatorily high prices charged by monopoly sellers".⁴⁷

In terms of the economy as a whole, it is not the country receiving the cheap imports which is the loser but rather the country of export which sells its products at less than the costs of manufacture. Seen from this perspective, it ought not to be the concern of the importers to take protective measures. It ought rather to be in the interests of the exporting countries that their products are not sold at "give-away" prices.

The system of price comparison applied by GATT also causes problems in that, as a result, monopolistic pricing behaviour and inefficiency are protected: if domestic prices are on a low level due to free trade and perfect competition, they can scarcely be underbid from abroad. If, on the other hand, the domestic prices are on a high level because of monopolistic features on the supply side or inefficient methods of production, import prices relatively quickly lead to injury to domestic suppliers. In other words, the more monopolistic and inefficient the organisation and structure of the domestic market, the easier it becomes to produce evidence of the causal connection between dumping and injury. The same is true of the foreign market, the country of origin of the imported goods. If in the market of the exporting country the price level is low thanks to strong competition or highly efficient production methods, producing evidence of dumping is much more difficult than if prices are high on account of monopoly and inefficiency. This results in an asymmetrical treatment of countries by GATT in that current anti-dumping policy favours domestic monopolistic pricing behaviour and inefficiency yet, with the countermeasures it allows, penalizes foreign countries for their own monopolistic pricing behaviour and inefficiency.

It is often the case that anti-dumping measures are justified with the argument that foreign prices can only be kept so low, i.e. below their cost level, thanks to the excessive domestic prices. Ultimately, price undercutting is damaging to both the exporter and the

importer. This argument contradicts the theory of profit maximization.

Nor is it a particularly convincing argument that dumping is always short-term with the aim of forcing competitors out of the market by way of rock-bottom prices in order to then recoup oneself retroactively on the "vacated" markets with excessive prices. Given a free market, what reason could there be to prevent domestic supplies from emerging again if prices are excessive.

In this connection, opponents of the anti-dumping system also draw attention to the fact that individual firms and industries may be forced in times of recession, as, for example, in 1973/74, and in phases of fresh capital investment, to sell for short periods below their total production costs if they do not wish to run the risk of having to close up for good. In order to avoid being accused of dumping, suppliers would have to raise their foreign prices in times of recession above their domestic prices and adopt an anti-cyclical attitude to economic trends when doing business on foreign markets. Yet neither the Keynesians nor the monetarists advocate any such pricing behaviour. They all point out – albeit with varying arguments – that by keeping prices up the recession can be made worse or economic recovery delayed. Domestic firms tend to lower their prices when demand is sluggish: why should foreign suppliers not enjoy the same right?⁴⁸

Depending upon perspective and the nature of the interests involved, these are all sound objections. Nevertheless, in all of this GATT's general overall thrust should not be overlooked: GATT came into being at a time when American industry was making the transition from the economy of war to the economy of peace-time and Europe was in the process of rebuilding its industry which had been shattered by the war. Here, the preservation of industry was not an end in itself but it was more than anything a question of mastering the problem of employment. In other words, GATT empowers its contracting partner states to take protective measures to preserve and safeguard jobs irrespective of whether they profess to adhering to free trade. In the final analysis, GATT – and hence also the anti-dumping regulation of GATT – are nothing more than the mutual concession to tackle and overcome the conflicts of interests, to safeguard and preserve national interests in a spirit of mutual fairness.

⁴⁷ Kenneth W. Dam, op. cit., p. 168.

⁴⁸ Cf. Kiyoshi Kawahito, op. cit., p. 157. Following in the vein of this argumentation, Kiyoshi Kawahito says with reference to the US/EEC steel war: "It is irrational for the United States to expect foreign producers to adopt a pricing policy which is neither approved by economic theories nor practiced by American business firms."