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# The Canadian Antidumping Act: A Reaction to Professor Slayton

by Michael Trebilcock\* and John Quinn\*\*

## I. INTRODUCTION

ONE OF THE oldest ploys of human discourse is to call something one does not like a bad name—an emotionally-laden pejorative—in the hope that listeners will be persuaded to forego the hard work of careful analysis of the spokesman's claim and be carried along on the easy tide of an apparently axiomatic rhetoric.

For actors in a market economy, depending on the dictates of their interests, a semantic legend of this kind is a well-settled and freely utilized polemic technique. Terms such as "destructive" competition, "unfair" competition, price "discrimination," "predatory" pricing, and, in the present context "dumping," are all terms of wide currency invariably resorted to by those whose interests are in jeopardy from the market phenomena so characterized. We should not be too easily seduced. We submit that the vast majority of the cases sought to be described by affected interests in these terms are simply cases of vigorous, healthy competition.

While most of us tend to subscribe to the virtues of a market economy as an abstraction, this apparent consensus obscures the fact that in most applications of the precepts of the philosophy of free enterprise there are both winners and losers, and for the losers the social virtues (and sacrifices) entailed in competition will seem somewhat less compelling than they appear to the winners. Vigorously competitive markets create, in Joseph Schumpeter's famous phrase, "a perennial gale of creative destruction."<sup>1</sup> In other words, firms exit from such markets as well as enter. While the aggregate, or allocative, effect of this process may be to maximize the value of the social product (*i.e.*, resources will be induced to gravitate to their highest value uses), the distributive effects for different parties will be both positive and negative and will largely determine *political* preferences as to whether likely outcomes should be encouraged or avoided. Business interests are no exception to this view. As George Stigler once remarked, "[c]ompetition like other therapeutic forms of hardship, is by wide and age-long consent, highly beneficial to society when imposed upon other people."<sup>2</sup>

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<sup>1</sup> J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 87 (1975).

<sup>2</sup> Stigler & Cohen, *Can Regulatory Agencies Protect the Consumer?* 9 (American Enterprise Institute, 1971).

Typically, business firms are fervent believers in unfettered competition in markets for their inputs and rabid protectionists regarding regulation of markets for their outputs. While this reflects a perfectly rational appreciation of their economic self-interest, it does not mean that the rest of us should treat this interest as coterminous with the public interest, which presumably embraces a much wider set of social and economic interests. Among these other interests, we, perhaps somewhat arbitrarily, attach substantial weight to the interests of consumers of market outputs, although in so doing we are in distinguished company. As Adam Smith said two centuries ago, "[c]onsumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer."<sup>3</sup>

## II. WHY SHOULD WE BE "ANTI" DUMPING?

Taking as our normative reference point the consumer interest, what is wrong with dumping?

From the viewpoint of the consumer interest, antidumping legislation, as Professor Slayton suggests, seems largely irrational. We propose to sketch out why we believe this to be so, and then ask whether the existence of the legislation is simply evidence of obtuseness or perversity on the part of our political decision-makers, or whether other factors can be identified which make the legislation "rational," at least in a political, if not an economic perspective.

### A. *The Definition of Dumping*

The definition of the social evil (dumping) sought to be banished by the Canadian Antidumping Act<sup>4</sup> is a major puzzle if one is looking for any recognition of the primacy of the consumer interest. The Act defines dumping as selling in the export market (Canada) at a price *lower* than the price charged by the exporting firm in its home market (*e.g.*, Japan).<sup>5</sup> Simple-minded consumers might be forgiven for wondering, at first blush, why Canadians should consider this to be anti-social behavior at least with regard to Canada. Indeed, Canadian consumers might be inclined to argue the lower the better.

However, in order to determine how simple-minded, if at all, this reaction is, we need to understand how the phenomenon described by the Act in the definition of dumping can come about. The definition of dumping essentially conceives of a situation where a firm possesses some measure of market power in its home market which it lacks in the export market. This difference in market power permits it to charge different prices to customers in each of the two markets. This would not be possible to any degree in a world of free trade without tariff or non-tariff barriers. Buyers of products in the lower

<sup>3</sup> A. SMITH, *THE WEALTH OF NATIONS* 625 (1937).

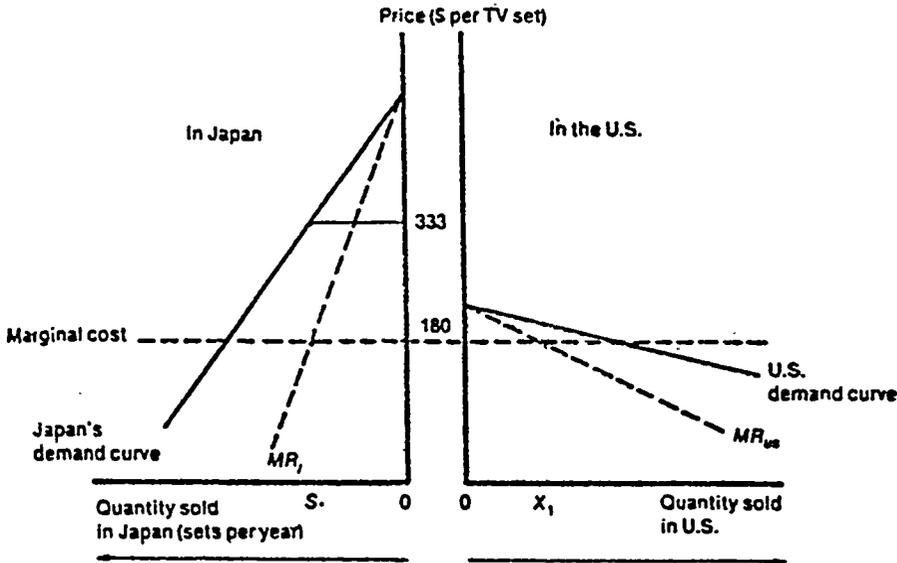
<sup>4</sup> R.S.C. 1970, c.A-15, *as amended* by R.S.C. 1970 (2nd Supp.) c.1 & c.10, S.C. 1970-71-72, c.43 & c.63.

<sup>5</sup> *Id.* § 8.

priced export market would, through arbitrage with buyers in the home market, transact away the price differences (subject only perhaps to a difference reflecting the cost of retransportation). Thus, for dumping as defined to arise, one must assume that the firm in question possesses greater market power in the home market than the export market, and that that market power is protected by favorable home country policies on tariff and non-tariff barriers, and to some extent by transportation costs.

A concrete and consumer-oriented example of such a situation is described by Kindleberger and Lindert:

CHART 1: DUMPING



The discriminating monopolist (SONY) maximizes profits by equating marginal revenue in each market with marginal cost.

[Chart 1] shows such a case of profitable price discrimination, under the diagram-simplifying assumption that the firm faces a constant marginal cost of production. The illustration is that of SONY's treatment of the U.S. and Japanese TV markets back in 1970. What makes the dumping profitable is that the firm faces a less elastic, (steeper) demand curve in its home market than in the more competitive foreign market. Sensing this, the firm will charge prices so as to maximize profits. In any one market, profits are maximized by equating marginal cost and marginal revenue. In the U.S. market the profit-maximizing price is \$180, which makes U.S. consumers buy  $X_1$  sets a year, at which marginal revenue just equals marginal cost. In the Japanese home market, where consumers have fewer substitutes for SONY sets, the profit-maximizing price is \$333, which causes consumers to buy  $S_1$  sets a year, again equating marginal costs and revenues. This price discrimination is more profitable for the firm than charging the same price in both markets, which would yield lower marginal revenues in Japan than in the United States. As long as transport costs and import duties make it uneconomical for

Japanese consumers to import Japanese-made TV sets all the way from the United States, the firm continues to make greater profits by charging a higher price in the Japanese market.<sup>6</sup>

This kind of example leads us to ask, why should American (or Canadian) consumers possibly object to buying television sets at almost half the price of their Japanese counterparts? Moreover, why should it be any direct concern of theirs that Japanese government policies have conferred on Sony a measure of monopoly power enabling Sony to exploit *Japanese* consumers? More to the point, why should the American (or Canadian) government have any interest in directing Sony to charge the same monopolistic price to American (or Canadian) consumers so that two groups of consumers get exploited rather than one? Although equality of exploitation has a certain egalitarian ring to it, it seems a little difficult to see any other virtue in replicating other people's miseries, particularly when in so doing we in no way ameliorate the lot of our fellow sufferers. From a consumer standpoint, is there nothing more to be said for antidumping legislation than this?

At the risk of considerable oversimplification, we believe that there are only three categories of situations in which antidumping legislation may be in the consumer interest: (1) predatory price-cutting; (2) intermittent dumping which causes severe market destabilization; and (3) subsidized imports.

#### B. *Predatory Pricing*

This may arise if the dumping takes the form of predatory behavior designed to eliminate either foreign or domestic rival firms from the market or to deter potential entry. The argument that dumping often constitutes export price-cutting for the purpose of monopolizing foreign markets is the most frequently stated justification for the existing regulatory scheme. It should be noted that price discrimination and predatory behavior have been much analyzed in the context of domestic antitrust policy. This antitrust literature suggests that as much care must be exercised in the use of terms like discrimination and predation in this context as with dumping in an international trade context. Many firms on the losing end of stiff competition will be inclined to regard it as discriminatory or predatory.

Posner suggests that a useful definition of predatory pricing, as a matter of economic analysis, is "pricing at a level calculated to exclude from the market an equally, or more, efficient competitor."<sup>7</sup> Posner argues convincingly that only two practices fit this definition. First, selling below short-run marginal cost; obviously to sell at a price below the actual costs incurred in making the sale is not consistent with efficiency and is only economically rational if intended to exclude an equally, or more, efficient competitor from the market. Such pricing would be predatory (as defined) and objectionable

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<sup>6</sup> C. KINDELBERGER & D. LINDERT, *INTERNATIONAL ECONOMICS* 166-67 (6th ed. 1978); see also Allen, *How Japan Competes: A Verdict on "Dumping"* (Institute for Economic Affairs, London, 1978).

<sup>7</sup> R. POSNER, *ANTITRUST LAW* 188 (1976).

on efficiency grounds. Second, selling below long-run marginal cost with the intent to exclude a competitor; Posner defines long-run marginal costs as those that must be recovered to stay in business for the more or less indefinite future. In some cases, selling below long-run marginal costs may be economically rational if a firm (*e.g.*, a railway company) intends to leave a market and does not need to recoup depreciation of its plant. However, the intent may in other cases be exclusionary, and in these cases such pricing practices would also be objectionable as a form of predatory pricing (as defined).

Despite the fact that predatory pricing is a possible strategy for attempting to monopolize a market involving either domestic or international producers, there are several reasons why we would expect such a strategy to be rarely utilized.

First, while predatory pricing inflicts costs on rival firms, it also inflicts costs on the predator. Predation entails the sacrifice of present revenue for future monopoly rents. The ability to engage in successful predation in the foreign market does not depend solely on the possession of power over price in the domestic market. Monopoly power in the home market may increase the predator's capacity to absorb losses, but the central concern of the profit maximizing predator is his ability to inflict losses upon his competitors which are substantially disproportionate to his own. While there is no *a priori* way of predicting whose costs will be greater, it is likely that few prospective predators will possess the power to harm rivals significantly while inflicting less severe losses upon themselves. Since, by definition, the predator sells below his long-run marginal cost, his short-run losses will often equal or exceed those suffered by his victims. This is because he must substantially expand his output, and sell below cost not only to the former customers of his victims, but also to those consumers attracted to the market by the new, lower price. Unless returns to scale are extremely favorable, it is unlikely that the predator could recoup a substantial proportion of these short-run losses through decreases in average production costs.

Moreover, in determining whether an investment in predatory behavior will be worthwhile, the prospective predator must contemplate not only the short-term losses but also the possibility of vanquished firms re-entering the market when it raises its prices to supra-competitive levels in order to recoup the costs incurred in its successful campaign for predation. Given these short-run and long-run costs faced by a predator, McGee has argued that acquisition of rival firms is almost always cheaper for the predator.<sup>8</sup> Subsequent analysts have modified this assertion and identified narrow classes of situations where predatory pricing may be a less costly strategy for the predator than outright monopolization through merger (which may not, of course, be legally possible).<sup>9</sup> Posner, for example, suggests that if a firm operates in a

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<sup>8</sup> McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. LAW & ECON. 137 (1958).

<sup>9</sup> See Yamey, *Predatory Price Cutting: Notes & Comments*, 15 J. LAW & ECON. 129 (1972); R. POSNER, *supra* note 7, at 188-90; *cf.* Williamson, *Predatory Pricing: A Strategic & Welfare Analysis*, 87 YALE L.J. 284 (1977).

number of markets and faces competitors, each of whom is limited to one of its markets, it may be economically rational to invest resources in eliminating one competitor in order to be able to establish a credible threat to repeat the exercise with other competitors in other markets.<sup>10</sup> This is a similar economic calculus to that faced by loan sharks and members of the Mafia in evolving an efficient enforcement strategy in moneylending transactions or protection rackets.

Second, the effectiveness of predatory pricing is based on the assumption that typical purchasers in the market will sustain a net loss over time as short-run gains from price-cutting are more than offset by price increases instituted by the predator after rivals have been eliminated. This would obviously be irrational behavior on the part of consumers, explicable only on the basis of ignorance, stupidity, or perhaps an attempt to free ride on other purchasers in the market who are prepared to foresake short-run price advantages in order to avoid long-term monopolistic prices. Most formulations of the free rider problem suggest that the individual purchaser's reluctance to cooperate in collectively profitable buying strategies (*i.e.*, allocating purchases between the predator and his domestic rivals) is most likely to be overcome if the number of purchasers whose actions must be coordinated is relatively small.<sup>11</sup> In other words, the individual purchaser is less likely to pursue the collectively profitable purchasing strategy when the total number of purchasers is of some appreciable size because he is more likely to assume that the viability of the strategy does not depend upon his participation. If enough purchasers take this position and decide to become free riders, the predator will be successful in inflicting heavy losses on his rivals. Because of this relationship between free riding and large numbers, one would expect that predatory dumping would be more frequently observed in markets with relatively large numbers of direct purchasers and low levels of buyer concentration. While there has been little empirical work on the incidence of dumping, available evidence indicates that most of the commodities subject to antidumping duties are semi-manufactures or industrial raw materials.<sup>12</sup> Purchasers in these product markets generally tend to be either small in absolute numbers or moderately concentrated; they also tend to be sophisticated repeat buyers who are more likely to apprehend the downside risks of shifting all their purchases to a dumper with predatory designs. Thus, the enforcement record suggests that most dumping has occurred in markets whose structural features deter free riding and, as a result, decrease the probability of successful predation.

Thus, economic analysis suggests very few circumstances in which predatory pricing will be an effective strategy for monopolizing a market. Moreover, and very importantly in the dumping context, to be able to dif-

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<sup>10</sup> R. POSNER, *supra* note 7, at 184, 186.

<sup>11</sup> See M. OLSEN, THE LOGIC OF COLLECTIVE ACTION 141 (1965); Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. 359 (1974).

<sup>12</sup> See, e.g., Lloyd, *Anti-Dumping Actions and the GATT System* 23-25 (Thames Essay No. 9, Trade Policy Research Center, London, 1977).

ferentiate price cutting as a healthy competitive tool from predatory pricing entails careful analysis of the alleged predator's costs. Price cutting only becomes predatory, in an economic sense, when prices are set below a firm's costs. Unfortunately, an analysis of a firm's costs, relative to prices, for a particular product line, even if one has settled on an appropriate concept of cost, involves formidable measurement problems.<sup>13</sup> In many cases, it would probably be impossible for administrators to acquire accurate and sufficient cost data. Firms are unlikely to be enthusiastic about revealing their costs, and incentives for selective disclosure or falsification are substantial. Moreover, multiproduct firms that market joint products or a wide range of commodities may be unable accurately to allocate production costs. In addition, an enforcement scheme aimed at predation would necessitate an examination of general contextual issues relating to structural characteristics which may predispose the export market to monopolization.<sup>14</sup>

It should be emphasized, however, that a serious effort to ascertain the dumper's cost of production would be unavoidable, at least under a consumer-oriented antidumping regime. This is because a dumper will find less-than-average total cost export pricing to be profit maximizing whenever the elasticity of demand in the foreign market exceeds the elasticity of his average total cost curve.<sup>15</sup> As a result, a dumper without predatory designs, and with some cost advantage, will often price in a manner which is likely to have an "anticompetitive effect" on the structure of the foreign market. The only relatively unambiguous evidence of predatory intent is a dumped price below the dumper's marginal cost.

The lie to whether the antidumping process in Canada is concerned with predatory pricing is given by the fact that neither an alleged dumper's cost functions nor general market structure questions are even considered relevant issues of inquiry under the Act. Section 8 of the Act provides that the Deputy Minister is to ascertain whether "dumping" has occurred by comparing the export price with the "normal value" of the goods. Section 9 defines "normal value" as the price prevailing in the dumper's home market or, if information on the home market price is unavailable or unreliable, on prices in third country markets. Only when current sales data are unavailable is the Deputy Minister authorized to determine "normal value" by reference to the dumper's costs of production. If obtaining proof of predation were the goal, the respondent's costs would be the focal point of the inquiry, not a second best proxy for the home market price.

The standards which govern the Tribunal's adjudicative function do not reflect any apparent concern for confining the scope of antidumping liability to predatory dumping. Section 3 of the Act authorizes the imposition of an antidumping duty when the Tribunal finds that dumping has caused or is likely to cause material injury to the production in Canada of like goods." It

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<sup>13</sup> R. POSNER, *supra* note 7, at 188.

<sup>14</sup> *Id.* chap. 4.

<sup>15</sup> See W. WARES, *THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY* 67-73 (1977).

should be apparent that an importing nation which regarded the consumer interest as paramount would only penalize instances of dumping which were likely to have anticompetitive effects on market structure or conduct. The Act directs the Tribunal to limit its inquiry to the effect of dumping on domestic production; it cannot consider existing or potential competition from other foreign suppliers. Moreover, in making its injury determination, the Tribunal does not consider evidence of the relevant cost efficiency of the dumper and the domestic complainants. The Tribunal's sole concern is whether the dumping has caused or is likely to cause a decline in the market shares of the domestic producers. One wonders whether elaborate quasi-judicial machinery and trial-type hearings are really required to resolve this issue. Why would domestic producers complain about dumping if it was unlikely to cause a loss in their market shares?

Finally, the Act prescribes that the duty imposed, in all cases, must be equal to the "margin of dumping"—the amount by which the "normal value" of the goods exceeds their export price.<sup>16</sup> In a consumer-oriented regime, duty would only be imposed in an amount sufficient to prevent the competitive injury. The effect of uniform "margin of dumping" duties is to penalize dumping *per se*, and impose an unnecessary burden on consumers. It seems fair to conclude that, whatever our antidumping process may be concerned with, it appears not to be directed at the control of predatory pricing.

### C. *Intermittent Dumping*

The most popular justification for policing non-predatory dumping which injures domestic producers is that consumers may also be harmed by temporary dumping which generates severe destabilization in the import market.<sup>17</sup> Viner and others have argued that transitory dumping may destabilize the import market by causing domestic producers to shift resources between industries both at the beginning and end of dumping episodes.<sup>18</sup> It is claimed that the stop-and-go operation of domestic plants and firms associated with bankruptcy or less drastic intra-firm adjustments to competition from temporarily cheap imports causes many inefficiencies. Productivity diminishes because of the deterioration of labor skills and failure to maintain and replace capital equipment during periods of disruption. Organizational continuity may be lost, and research and development projects may be slowed down or terminated. Moreover, it is argued that sharp competition from temporarily cheap imports may raise the cost of capital to domestic producers.<sup>19</sup>

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<sup>16</sup> Antidumping Act of 1968, R.S.C., c.10, § 8.

<sup>17</sup> The American Iron and Steel Institute report on steel dumping primarily relies on this justification for antidumping enforcement. See *The Economics of International Steel Trade: Policy Implications for the United States* (1977) (report prepared for the American Iron and Steel Institute by the consulting firm of Putnam, Hayes & Bartlett, Inc.).

<sup>18</sup> J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (chapter 8) (1923); Kohn, *The Anti-Dumping Act: Its Administration and Place in American Trade Policy*, 60 MICH. L. REV. 410 (1962).

<sup>19</sup> See W. WARES, *supra* note 15, at 77-78. For a discussion of the same general phenomenon in the context of cyclical competition among domestic oligopolists, see F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 200-01 (1970).

If temporary dumping drives price below the unit costs of efficient domestic producers, domestic prices must rise above full cost in subsequent periods in order to generate sufficient levels of average profit to attract a continuous supply of investment. This variability in earnings may cause some firms to fail under the burden of losses accumulated during dumping episodes, even though their long-run profit expectations are favorable. If there are imperfections or rigidities in capital markets, these firms will not necessarily be the least efficient producers, but those which are weakest financially, *i.e.*, the newer firms without strong banking connections. This unusual type of business risk may cause investors to demand a return which exceeds the rate of return earned in less volatile industries. If this is the case, an industry subjected to alternating periods of profitable operation and below-cost selling due to temporary dumping might be forced to pay more to attract a given amount of capital than more stable industries, *ceteris paribus*. This argument is partially supported by evidence that the average cost of capital to firms in competitive industries subject to cyclical demand fluctuation tends to be absolutely greater than the capital costs of firms subject to constant demand conditions.<sup>20</sup>

The direct costs of recurrent adjustment generated by temporary dumping will be borne by the domestic producers and their employees. In contrast, the net effect of intermittent dumping on consumer welfare depends on whether the dumped product's average price is either higher or lower than the average price level that would prevail in the absence of dumping. Thus, a net loss in consumer welfare will only ensue if the cost savings from dumped imports is more than offset by higher prices during normal market conditions. There is no theoretical basis for predicting *a priori* a net negative effect on consumer welfare from intermittent dumping. Even if the costs of recurrent adjustment increase the long-run average costs of domestic producers (*e.g.*, by generating absolute increases in the cost of capital), temporary dumping may nevertheless occur with sufficient frequency to depress average prices below the levels that would have prevailed in the absence of dumping. It would appear that the strongest consumer welfare argument that can be made for an enforcement scheme aimed at intermittent dumping is that consumers will be indifferent to the availability of temporarily cheap imports because long-run average prices will usually be roughly equivalent whether intermittent dumping is proscribed or not.

In light of these negligible potential benefits to consumers, it does not seem possible to justify the costs of any antidumping enforcement process aimed at intermittent dumping detrimental to consumer welfare. Temporary dumping which injures consumers by causing a substantial and transitory disruption of the domestic market will only occur under a highly unusual concatenation of demand and supply conditions. Temporary dumping could

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<sup>20</sup> See Sandmo, *On the Theory of the Competitive Firm under Price Uncertainty*, 61 *AMER. ECON. REV.* 65 (1971); Zucker, *On the Desirability of Price Instability: An Extension of the Discussion*, 22 *ECONOMETRICA* 437 (1965).

harm domestic consumers only if the following three conditions were satisfied: (1) the foreign exporters do not provide a permanent source of supply because they are not competitive with domestic producers under normal market conditions; (2) there are no alternative sources of supply competitive with domestic producers under normal market conditions; and (3) the temporarily cheap imports are of sufficient magnitude and duration to substantially destabilize domestic production. Within the modern international economic order, episodes of non-predatory intermittent dumping which satisfy all three of the above conditions are likely to be relatively rare.

The only plausible motive for temporary dumping by foreign exporters who could not profitably sell into the export market would be a desire to maintain capacity-utilization and a high home market price during a recession. Under these circumstances, a firm may dump at a loss to avoid weakening its ability to charge a supra-competitive price under normal home market conditions, to avoid the costs of temporary adjustment in plant utilization or to maintain employment.<sup>21</sup> But even if dumping to maintain capacity-utilization during home market recessions does occur with any frequency, it is nevertheless highly unlikely to materially disrupt domestic production in the export market. Dumping under such conditions involves selling below cost, and since by definition the dumped imports cannot be sold at remunerative prices in the export market during normal conditions, the dumping firms will be compelled to accept prices substantially below their long-run marginal costs in order to substantially cut into the market shares of domestic producers. Since the short-run losses incurred by the dumpers are likely to be high, it seems improbable that the dumped goods will be exported in sufficient volume and for a sufficient length of time to disrupt substantially domestic production. Moreover, even if temporary dumping does cause injury to domestic producers, it can be detrimental to consumer welfare only in cases when the dumped product is not normally supplied to the domestic market by foreign firms. The recent development of fully integrated international markets for most important commodities and the multinational organization of commercial activity suggest that most national markets will enjoy trade connections with several alternative foreign suppliers.<sup>22</sup> Finally, temporarily cheap imports can only displace more efficient domestic producers if domestic consumers shift a substantial amount of their patronage to foreign dumpers. Since domestic producers are the cheaper source of the product in the long-run, a shift in patronage of a magnitude sufficient to disrupt materially domestic production will occur only if domestic consumers are either extremely shortsighted or unable to control the free rider problem.<sup>23</sup> Since direct purchasers in import markets tend to be relatively few in absolute numbers and are also usually sophisticated repeat buyers, it seems that both

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<sup>21</sup> See W. WARES, *supra* note 15, at 82.

<sup>22</sup> See, e.g., M. HUDSON, *GLOBAL FRACTURE: THE NEW INTERNATIONAL ECONOMIC ORDER* (1977).

<sup>23</sup> See K. STEGEMANN, *THE RATIONALE OF ANTIDUMPING PROTECTION* (mimeo 1978).

widespread consumer shortsightedness or free riding would be highly improbable.

Since intermittent dumping which has a negative effect on consumer welfare will occur very infrequently, any effort to police temporary dumping would seem, on balance, undesirable from the consumer viewpoint. First, the direct costs of the enforcement process are likely to outweigh the benefits to consumers, even if the process functioned with perfect accuracy in identifying and eliminating dumping injurious to consumers. Moreover, the complexity of the theoretical and factual issues which would have to be resolved in such an enforcement process suggests that even the most conscientious and skilled regulators are likely to make a substantial number of incorrect decisions. These erroneous decisions will harm consumers when they result in the elimination and deterrence of temporary dumping which would result in lower long-run average prices than would prevail in the absence of dumped imports. In short, these process cost considerations militate against any consumer-oriented enforcement scheme aimed at intermittent dumping.

In any event, the existing statutory scheme is not specifically directed to the control of temporary dumping which creates a substantial risk of severe local market disruption. All dumping, whether temporary or continuous, attracts the scrutiny of the Ministry of National Revenue. The Tribunal's sole concern is loss of market share by domestic producers; it takes no interest in the general stability of the market for the dumped goods. While it is apparent that protecting the market shares of domestic firms will preclude any serious destabilization of the market, the overbreadth of the existing scheme prevents dumping that creates no real risk of domestic market disruption.

#### D. *Foreign Import Subsidies*

One reason why a foreign firm may be able to charge less in the export market than in the home market is the provision of various direct or indirect subsidies by the home government to encourage exports (*e.g.*, to increase local employment or improve the balance of payments).<sup>24</sup>

On the face of it, this seems to be a matter which should not distress Canadian consumers. If, for example, Japanese taxpayers want to subsidize Japanese firms to export products to Canada and sell them below cost, we should gratefully accept the benefits of the subsidy and note only our regret that they are not larger and timeless.

If the objection to this view is that this form of competition is unfair to Canadian producers, the response must be that if the gains to consumers resulting from a subsidized reduction in the price of imports exceed the losses to producers resulting from the price cuts, then we are collectively better off taking advantage of the subsidy. Typically, this will be the case, as not only are existing consumers better off by the amount of the price cuts (and producers correspondingly worse off), but new consumers are now able to enter

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<sup>24</sup> See generally Schwartz & Harper, *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831, 840-42 (1972).

the market and their increase in welfare is a net social gain. Similarly, if the concern is loss of jobs in domestic industries, then the response must be that, subject to costs of adjustment, resources, including manpower resources, will be re-allocated to their next most valuable uses. In other words jobs are not lost, but simply re-allocated. It should be emphasized that this proposition cuts two ways. In the Algoma steel case, referred to by Professor Slayton<sup>25</sup> (*Wide flange steel shapes*), the levying of antidumping duties against foreign firms importing steel into Canada is alleged, quite plausibly, by the British Columbia government to have caused a loss of jobs in British Columbia (and possibly Alberta) industries previously relying on these sources of supply,<sup>26</sup> although probably protecting jobs in Central Canada.

Only two circumstances can be envisaged in which subsidization of imports may be adverse to the consumer interest. First, to the extent that these subsidies are of a temporary nature (perhaps reflecting short-term responses by foreign governments to home market economic problems), it is possible that their impact on the market of the importing country may be destabilizing. Market disruption caused by temporary subsidization creates the same threats to consumer welfare that arise from intermittent dumping. Since there has been no empirical work on the duration or magnitude of export bounties and producer subsidies, it is difficult to assess their general implications for the stability of domestic production in export markets. At least one commentator has argued persuasively that there is no general *a priori* reason for the widely-held belief that export subsidies will be typically provided on a temporary basis.<sup>27</sup>

The other circumstance in which subsidized imports may imply a long-term consumer detriment is more speculative. One might conjecture that a local political response likely to be generated by domestic producer reactions to foreign subsidies of imports may be countervailing producer subsidies in the market directly affected and a more generalized escalation in subsidies to domestic firms operating in export markets able to exploit the showcase effect of foreign subsidy policies.

As subsidies beget subsidies, dead-weight social costs, presumably borne by everyone, increase as resources cease to be allocated to their most productive uses. Countervailing duty legislation might be justified as an attempt to pre-empt this spiral process.

Turning to the antidumping regulatory process in Canada in light of these two consumer concerns, we note again from a perusal of the annual reports of the Tribunal that the presence, absence or scale of an export subsidy as explaining price differentials has not been perceived as a relevant issue of inquiry. There are, however, signs that official attitudes toward export

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<sup>25</sup> Slayton, *The Canadian Legal Response to Steel Dumping*, 2 CAN.-U.S. L.J. 81, 85 n.15 (1979).

<sup>26</sup> BRITISH COLUMBIA GOVT WORKING PAPER, REGIONAL ECONOMIC ACCOMMODATION (Feb., 1978).

<sup>27</sup> See Barceló, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 LAW & POLY'L INT'L BUS. 779, 780-81 (1977).

subsidies may be undergoing rapid change. Although article XVI of the GATT provided for the imposition of duties to offset export subsidies, Canada did not formulate a countervail procedure until about eighteen months ago, when the Governor-in-Council promulgated Countervailing Duty Regulations.<sup>28</sup> Generally, these regulations provide for the levy of an offsetting duty, in the amount of the subsidy, whenever subsidized imports threaten or materially injure domestic producers. While the countervail procedure has not yet been utilized, a few of its salient features suggest that it is not aimed at the promotion of consumer interests. There is nothing in the regulations to suggest that the Ministry conceives of countervailing duty measures as a stopgap or short-term response to a temporary phenomenon. Moreover, the regulations predicate liability for duty on proof of harm or threatened injury to domestic producers; they do not limit authority to levy a duty to situations in which export subsidies create the threat of market disruption. While it is impossible to predict that the new countervail procedure will not be utilized to foreclose foreign subsidies from begetting local subsidies, the existing record of antidumping enforcement does not inspire confidence that this consumer-oriented approach will be adopted. There is no evidence that Canada's antidumping system has been consciously administered in a manner designed to defuse political support for more stringent forms of producer protection, such as quantitative restrictions and general tariff increases. Indeed, the enforcement record provides compelling evidence that the antidumping mechanism has been and is being used to *initiate* subsidies to local producers.

In any event, the preferred position of the consumer on the issue of foreign subsidies has to be to take the foreign bounty and run, that is to say, he would prefer not to foreclose foreign subsidies, while of course resisting all domestic subsidies. It is clearly a second-best solution for him to foreclose both, and as such he would not wish to assign such a role to our antidumping regulators, even if they were interested in assuming it.

As in the cases of predatory pricing and intermittent dumping, whatever else our antidumping process is concerned with, it does not appear primarily to be directed at neutralizing foreign import subsidies.

### III. CONCLUSION

We are now in a position to characterize the true nature of antidumping regulation in Canada and to assess the aptness of the regulatory process in the light of this characterization of its goals.

By a process of elimination, the principal goal of the regulatory scheme appears to be the protection of local producers from international competition, at the expense of Canadian consumers. Relatively highly concentrated producer interests, probably in many cases supported by highly organized labor interests, once again have been successful in overwhelming widely dispersed, unorganized, consumer interests. Apart from any losses in allocative efficiency engendered by the system, it is simply another way of coercively redistributing wealth from consumer to producer interests.

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<sup>28</sup> SOR 77-271 (Mar. 28, 1978).

If this form of redistribution is the goal of the system, then we are led to very different conclusions from Professor Slayton about the aptness of existing institutional arrangements.<sup>29</sup> The structural features of the existing enforcement system provide all the elements essential to the smooth functioning of a process of political brokerage: low visibility, flexible decisional standards and ministerial control. Legal commentators have focused their attention on the quasi-judicial functions performed by the Tribunal. Spokesmen for domestic producers have largely ignored the work of the Tribunal, in spite of the fact that more than forty percent of the Tribunal's determinations have been adverse to producer interests.<sup>30</sup> Domestic producers, the potential beneficiaries of the system, clearly understand that the crucial features of the enforcement process are controlled by the Ministry of National Revenue. It is the Deputy Minister who decides whether a formal investigation should be pursued when domestic producers complain of injurious dumping. The Ministry determines, in a closed administrative process, whether dumping has occurred; its staff also calculate the "margin of dumping," the amount of the dumper's potential duty liability. These determinations are carried out pursuant to regulations which confer a substantial amount of discretion; minor adjustments to "normal value" and export price, which are defined in several pages of complex regulations, are often determinative of whether goods have been dumped or not and are often crucial in ascertaining the amount of duty owed.<sup>31</sup> These determinations are not reviewable by the Tariff Board until after the Tribunal decides that material injury has occurred and definitive duties are imposed, a period of usually about four months.<sup>32</sup>

Of central importance to the administrative scheme are the statutory provisions which empower the Deputy Minister to require payment of provisional duties at the time a preliminary determination of dumping is made.<sup>33</sup> These provisions, and others which allow the retroactive assessment of dumping duties on goods entered prior to the date of preliminary determination, may be employed to create strong incentives for the dumper simply to increase the price of his goods and not pursue the inquiry to the Tribunal stage. The enforcement record suggests that the vast majority of dumping complaints are settled at the administrative level, prior to any formal action by the Tribunal.<sup>34</sup> This rate of voluntary settlement is not peculiar to the Canadian antidumping system. The European Community, which, unlike Canada, secures formal price undertakings from alleged dumpers, employed this method of administrative settlement in over ninety percent of its formal dumping investigations in the period 1970 to 1975.<sup>35</sup>

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<sup>29</sup> See generally Trebilcock, Waverman & Prichard, *Markets for Regulation*, in ONTARIO ECONOMIC COUNCIL, GOVERNMENT REGULATION (1978).

<sup>30</sup> See P. SLAYTON, THE ANTI-DUMPING TRIBUNAL 189 (Ottawa: Law Reform Commission, 1979).

<sup>31</sup> Antidumping Act Regulations, SOR 69/-18, as amended by SOR 72-191, §§ 2-7.

<sup>32</sup> See *In re Anti-dumping Act* and *In re Sabre International Ltd.* [1974] 2 F.C. 704.

<sup>33</sup> See Antidumping Act, *supra* note 4, § 14 (provisional duty), § 5(a) (retroactive application), §§ 10(3) & 34 (when entry perfected for purpose of calculating duty).

<sup>34</sup> See Lloyd, *supra* note 12, at 22.

<sup>35</sup> *Id.*

An appreciation of the tactical importance of the administrative phase of antidumping enforcement explains the successful effort by domestic producers to secure the implementation of an accelerated or "fast track" procedure for the investigation of steel dumping complaints. The key feature of the "fast track" procedure is that it allows customs officials to make a preliminary determination of dumping and impose provisional duties in regard to all steel products which enter Canada at an import price below a basic index price set by the Deputy Minister. While the "fast track" system has been rationalized as merely a procedural device for expediting investigations, its real purpose is to deter the importation of all steel products, whether dumped or not, at prices below the price guidelines fixed by the Ministry. The "fast track" procedure has been very successful in deterring imports; it has not been necessary for the Deputy Minister to open any formal investigations into the dumping of steel products since the implementation of the "fast-track" mechanism.

This brief analysis of the administrative aspects of the antidumping enforcement system demonstrates that the process is well suited to the pursuit of redistributive objectives. A low visibility, limited access, minimally accountable, apparently bureaucratic rather than political, form of process is politically ideal for the redistributive goals that the system is apparently designed to serve. When Professor Slayton proposes that the functions of the Deputy Minister be reassigned to a restructured public agency,<sup>36</sup> his proposal is politically irrational, *given the apparent goals of the system*. When he proposes that the Tribunal abandon some of its elaborate formalism and more arcane judicial trappings,<sup>37</sup> again his proposal is politically irrational. Creating an appearance that the process of decision-making is technically rigorous, scientifically rather than normatively based, and apolitical in nature, lends a necessary "air of verisimilitude to an otherwise bald and unconvincing narrative."

Without changing the substantive goals of the system, changes in the process itself may be largely pointless. This is not to deny that certain kinds of changes in the process may, over time, within the latitude permitted by the legislation lead to some redefinition of the substantive goals of the system. Some of these changes are instanced by Professor Slayton. Others might include a different configuration of constituencies represented on the Tribunal, and measures to facilitate a different configuration of interests appearing before the Tribunal. However, *somebody* has to decide why these changes in process are desirable, and in so doing it is impossible to avoid asking and answering the question, what goals are these changes intended to promote?

Why the goals of the system are the way they are leads us to ask much more profound questions about why the political process in Canada works the way it does, whether we (all) prefer it that way, and if we do not, how we should go about changing it. In that context, dumping becomes an interesting and intelligible question.

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<sup>36</sup> Slayton, *The Canadian Anti-dumping System*, 2 CAN. BUS. L.J. 438 (1978).

<sup>37</sup> *Id.*