January 1987

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The Current and Possible Future Role of the Canadian Import Tribunal in the North American Competitive Context

by Robert J. Bertrand*

My purpose with this paper is to compare and contrast the functioning and roles of the U.S. International Trade Commission (USITC) and the Canadian Import Tribunal in our two competitive North American economies. I intend to consider their roles, both in a possibly more open international trading environment—which may develop in the medium term if there is a return to a greater degree of order in the international monetary and financial systems, coupled with some positive, liberalizing arrangements to be negotiated in the Uruguay Round—and in a possibly more open trade regime organized by Canada and the United States on a bilateral basis. It has been widely speculated that the bilateral talks could significantly modify the anti-dumping and countervailing duty systems as they apply to trade between our two countries. I hasten to add that I am not involved in any way in these discussions looking to a special arrangement. I feel I can comment on that issue, as it touches on the future roles of our two tribunals, entirely as an outsider.

It is important to understand that the USITC and the Canadian Import Tribunal (I do not use the abbreviations because I understand that in the United States, CIT stands for your Court of International Trade) do not have identical assignments. Your ITC1 has a wide range of functions, some of which, in Canada, are not assigned to the Import Tribunal. As I understand it, the USITC, under various enactments has a mandate to carry out investigations and make reports, on the potential economic effects of potential concessions in international negotiations. The ITC also carries out investigations, at the request of Congress or the President, into production and trade trends in a wide range of industries, or dealing with important developments in trade. For example, in 1982 the ITC published the result of a broad economic inquiry into The Relationship of Exports in Selected U.S. Service Industries to U.S. Merchandise Exports.2

In Canada, our Tribunal does not carry out such general inquiries regarding potential international trade developments. The Government

* Chairman, Canadian Import Tribunal.
1 I have relied, as a useful summary, on the following the USITC study: JOHN M. DOBSON: TWO CENTURIES OF TARIFFS, THE BACKGROUND EMERGENCE OF THE U.S. INTERNATIONAL TRADE COMMISSION, (USITC Pub. No. 1976).
of Canada is considering a reorganization of the Boards and Tribunals which are charged with analyzing and adjudicating various trade matters. It may well be that a body similar to the ITC may emerge. But in the present I will limit my comments to the existing arrangements. Our Tribunal focuses on whether specified imports have caused or threatened injury to Canadian producers. There is, however, a fairly broad authority in section 48 of our Special Import Measures Act for the government to refer matters to the Tribunal for broad inquiry. Under their authority, we have conducted detailed enquiries into the footwear industry and into the steel industry. Canada has published less in the way of detailed sector-specific analysis of trade developments. This is an aspect of being a small country with fewer resources available to apply to such inquiries.

The Tariff Board of Canada, which has been functioning for many decades, was not unlike your Tariff Commission when it was first established in 1916. Our Tariff Board can hold hearings, make staff enquiries, and make reports (which the Minister of Finance must table in the House of Commons) as to the operation of the tariff structure in regard to particular products, sectors, or tariff items. The very extensive detailed revision of our Customs Tariff schedules (both nomenclature and rates) which has occasioned many re-negotiations with the United States and others under Article XXVIII of the GATT, have been, almost invariably, the result of proposals made by the Tariff Board and only after extensive public enquiry. In regard to such matters, Canada adopted or copied the U.S. habit of addressing such issues by the technique of open enquiry. Our Tariff Board also has a court-like function; it is to the Board that appeals may be made from the decisions of our Department of National Revenue (Customs and Excise) as to tariff classification, value for duty, margin of dumping for the anti-dumping provisions, and liability for the manufacturer’s sales tax. The Board built up an extensive body of jurisprudence over the years, in part because our tariff structure was complicated and provided for different rates of duty for the same product depending on whether or not it was held to be of a class (or kind) “made in Canada” or whether or not it was imported for a particular purpose. Appeals on issues of law can be made from tariff Board decisions to our Federal Court.

In 1984, when the Special Import Measures Act was promulgated, the Tribunal was given the general function of enquiry into the impact on domestic producers of unfairly traded imports or imports causing or threatening serious injury. Traditionally, Canada has considered that the whole issue of dealing with emergency situations, that is, with situations in which action could be justified under GATT Article XIX, the so-called safeguard or escape clause provision, should be as an in-house matter by officials advising ministers confidentially. Hence, no provision was made for public hearing and inquiry in regard to such matters. Prior to the Kennedy Round, Canada had no provision for public inquiry into the alleged injurious impact of dumped imports. There was a compli-
LATED SERIES OF STATUTORY AND REGULATORY TESTS IN REGARD TO THE APPLICATION OF OUR ANTI-DUMPING SYSTEM, WHICH WAS INTRODUCED IN 1904 AS AN ALTERNATIVE TO A GENERAL INCREASE IN TARIFFS AGAINST DUMPING BY FOREIGN CARTELS AND MONOPOLIES—MAINLY FROM GERMANY AND THE UNITED STATES. BUT THERE WAS NO REQUIREMENT THAT THERE BE AN ORGANIZED INQUIRY BY AN INDEPENDENT AGENCY. THIS ROLE, SO IMPORTANT FOR THE USITC, HAD NOT BEEN DEVELOPED IN CANADA, WHEN, IN 1967, WE SIGNED THE KENNEDY ROUND ANTI-DUMPING CODE.

THAT CODE INVOLVED AN OBLIGATION TO MAKE SYSTEMATIC ENQUIRY AND TO HOLD HEARINGS ABOUT POSSIBLE INJURY CAUSED BY DUMPING. ACCEPTING THIS OBLIGATION WAS A MAJOR CANADIAN CONCESSION IN THE KENNEDY ROUND, AND REPRESENTED A VERY SUBSTANTIAL OVERHAUL OF OUR LEGISLATION.³ THE CANADIAN GOVERNMENT CONCLUDED THAT THE MATTER WAS SO IMPORTANT THAT A NEW, SEPARATE AND INDEPENDENT AGENCY SHOULD BE ESTABLISHED TO CONDUCT INJURY ENQUIRIES. THE CREATION OF WHAT WAS AT FIRST CALLED THE ANTI-DUMPING TRIBUNAL, AND, NOW, WITH THE FURTHER REVISION OF OUR LEGISLATION BASED ON THE AGREEMENTS N EgOTIATED IN THE TOKYO ROUND, THE RE-CHRISTENED ADMINISTRATIVE TRIBUNAL CALLED THE CANADIAN IMPORT TRIBUNAL.

SOME OTHER DIFFERENCES IN OUR TWO STRUCTURES SHOULD BE NOTED. A MAJOR DIFFERENCE IS THE WAY IN WHICH THE VARIOUS ISSUES WHICH THE USITC DEALS WITH UNDER SECTION 337 OF THE U.S. TARIFF ACT ARE ADDRESSED. WE DO NOT HAVE, IN CANADA, A SEPARATE ADMINISTRATIVE BODY TO DEAL WITH ALLEGATIONS OF PATENT OR TRADE MARK INFRINGEMENT BY IMPORTATIONS. THESE ARE DEALT WITH BY OUR COURTS IN THE SAME MANNER AS ALLEGATIONS OF INFRINGEMENT BY DOMESTIC PRODUCERS. WE HAVE NOT SEEN ANY NEED TO PROVIDE ANY DIFFERENT OR LESS RIGOROUS APPROACH TO ADJUDICATING SUCH ISSUES. INDEED, IT REMAINS THE CANADIAN VIEW THAT ARTICLE III OF THE GATT, WHICH IMPOSES A FAR-RANGING OBLIGATION TO TREAT IMPORTS, EXCEPT FROM THE IMPOSITION OF THE AGREED CUSTOMS DUTY, NO LESS FAVOURABLY THAN DOMESTIC PRODUCTS, PRECLUDES US FROM TREATING SUCH ISSUES WHEN IMPORTS ARE INVOLVED IN ANY DIFFERENT FASHION THAN WE DO WHEN IT INVOLVES DOMESTIC PRODUCTS. (I AM AWARE THAT A GATT PANEL CONCLUDED OTHERWISE.⁴)

IT SEEMS TO ME THAT IF A SPECIAL BILATERAL ARRANGEMENT IS DEVELOPED BETWEEN OUR TWO COUNTRIES, THIS IMPORTANT DIFFERENCE IN APPROACH WILL HAVE TO BE EXAMINED.

ANOTHER DIFFERENCE, LOOKING AT THE TWO ADMINISTRATIVE COMPLEXES, IS THE MANNER OF DEALING WITH THE CLOTHING AND TEXTILE SECTORS. IN THE UNITED STATES, YOU ADDRESS THESE PROBLEMS IN-HOUSE, PRIMARILY BY THE USE OF AN INTER-AGENCY COMMITTEE. CANADA FOLLOWED THIS SAME TYPE OF PROCEDURE UNTIL IT DECIDED IN 1970 TO SET UP AN INDEPENDENT BOARD WHICH COULD

³ The legislation which enabled investigation in to the alleged injuries caused by dumping was the Anti-dumping Act of 1968, R.S.C. ch. A-15 (1970), which has been revised and incorporated into the Special Import Measures Act, R.S.C. ch. E-17 (1970).

⁴ The reference is to the so called Wallbank Case discussed in GATT, United States - Imports of Certain Automotive Spring Assemblies, (L/5333); in Basic Instruments and Legal Documents, at 107-28 (I GATT Supp. 30 1984) (report of the Panel adopted on May 26, 1983).
hold hearings and make reports. It is this Board—the Textile and Clothing Board—which makes the recommendations which, if accepted by the Ministers, lead to the negotiations with exporting countries as to the quotas they impose on exports to Canada. Alternatively, the Board may recommend that the Government make use of its rights under GATT Article XIX. For these two special sectors which have been given special access to safeguard procedures, it is the Textile and Clothing Board, not the Import Tribunal, which makes the recommendations. 5

I have devoted some initial space to this essentially taxonomic exercise because it is important to understand that the USITC and our Import Tribunal do not have identical functions. In going on to consider issues of substance, it is important to keep in mind this difference in structure and assignment. There is, moreover, the important difference that Canada has a Cabinet system of government, with responsibility placed on elected Ministers who enjoy the confidence of the House of Commons; thus, in the Canadian system there is less scope for initiative and inquiry in the legislature. Our tribunals are either autonomous bodies making legal, quasi-judicial decisions (such as a ruling by our Tariff Board on the amount of anti-dumping duty payable on a particular import, or a determination by the Import Tribunal that injury has been caused by dumped imports) or they make recommendations to Ministers, as does the USITC in an escape clause action. There is, however, no detailed set of rules prescribing the various choices which the executive arm of government may make (as in a U.S. escape clause case) nor is there any provision for scrutiny by the legislature. The Canadian system, in this area as in other areas, is more formalized and legalistic than is normally the case in European countries, but less than is normally the case in the United States.

As I have already observed, the various functions and assignments I have described may be reshuffled: the Government has indicated that it contemplates re-organizing the functions of the Tariff Board, the Textile and Clothing Board, and the Import Tribunal. Clearly, in such a re-organization it will be prudent to consider possibly uniting the function of inquiry into the impact on domestic producers of importations in some other body along with the more adjudicatory functions of rulings on tariff classification, value for duty, or sales tax, etc. These organizational issues are presently being worked out.

Having said that, I can return to the theme proposed for me by the organizers of this meeting: the potential functions and roles of the USITC and our Import Tribunal (as it exists or may be modified) in the emerging competitive North American environment. The central, key function of the two institutions is to assess the impact on domestic producers caused by imports. Has material injury been caused, or has there been a threat of material injury, to domestic producers by imports of

5 See Special Import Measures Act supra note 3, S. 103.
dumped or subsidized goods? Has serious injury been caused to domestic producers by goods imported under the conditions specified in GATT Article XIX - that is, in such increased quantities and under such conditions, and as a result of unforeseen developments and of the effects of the obligations incurred . . . under this Agreement. This key function is addressed in somewhat different terms, in a somewhat different fashion, by the two tribunals. In assessing the potential roles of our two tribunals we should identify and understand just the differences in interpretation of key terms which we both employ in our domestic legislation under the umbrella of the GATT.

There are two related concepts: injury and causation. In the U.S tradition, as developed by the ITC in a number of decisions and, as I understand it, supported by legislative history, injury is taken to refer to the existence of a state of less than maximum well-being; measured by prices, profits, and employment in the given industry. In the Canadian practice, as developed in the Import Tribunal's findings and supported by the words of our Statute and of the GATT and the relevant interpretative agreements, we take the injury that is relevant to be that worsening of conditions in the industry which is attributable to the dumping (or subsidization) at issue. We take injury in the sense of he did him an injury. It refers to the existence of conditions in the industry which are attributable to the dumping (or subsidization) at issue. Is there an injury directly related to the dumping (or subsidization)? The fact that there may be other adverse effects on the industry, other injuries which together make an industry very ill is not the issue. Let me quote from a recent USITC document to illustrate my proposition. In the additional views of Chairman Liebeler, in a recent determination it is stated that, "the Commission must determine whether the domestic industry producing the like product is materially injured . . . and whether any injury (emphasis added) . . . is by reason of the dumped or subsidized imports." We do not read our statute (or the GATT, or the Tokyo Round agreements) in that fashion. As we see it, our function under the law is to find whether the injury found to be due solely to the dumping (or subsidization) is, by itself, a material injury. It is apparent that our reading of our law is less protectionist than that of the ITC. It might well be that due to a variety of causes, a U.S. industry has suffered injury but the injury which is properly attributable to the impact of dumped or subsidized goods is less than material. In that situation the USITC would find injury, the Canadian Import Tribunal would not.

This discussion should make clear our differing concepts of cause or, to use the older U.S. wording, by reason of. In our view, the Kennedy

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6 Clearly, the most important legislative history is the Report of the Senate Finance Committee on the Trade Agreements Act of 1979 which implemented the Tokyo Round agreements.

7 The determination of the Commission is found in Investigation No. 701-TA-265, USITC PUB. No. 1911, at 23-24 (1986) (final determination).
Round discussion about principal cause was based on a misconception, and we did not take that concept into our law. We opted for the more rigorous interpretation which we thought was consistent with Article VI of the GATT and could not be inconsistent with the Code. We took—or take—the view that the GATT requires that the injury found to be the result of dumping (or subsidization), not including the injury due to other factors, must be found to be material if duties are to be imposed.

The word material raises another, but closely related, issue. What degree of adverse impact is suggested by that term? There is first, that degree of injury which is clearly trifling, which should not be considered by our two tribunals—this is a matter of settled law. Then, in my view, there is that degree of injury which is less than that degree required to be found to exist for the penalty duties to be imposed; that is injury which is less than material but more than trifling (de minimis). Somewhat further along this continuum there is that degree of injury which is serious, to use the language of Article XIX, and of our law, and the existence of which justifies (under the GATT) raising a bound rate of duty or imposing a quota. We should avoid the temptation to collapse serious into material, and both into the category of not immaterial. I say this despite the U.S. legislative history which is, by and large, a reflection of protectionist sentiments. 8

Our interpretation, and the plain meaning of the GATT provisions, is based on the judgment that dumping and subsidization are very general and extensive phenomena; many firms dump and many firms are subsidized. It follows that the anti-dumping and countervailing duty provisions should be used only when it is clear that the imports at issue are themselves the cause of severe harm. These provisions are measures of last resort; if we both viewed them in that way, it would be easier to work to a new multilateral or bilateral arrangement. In practical terms, a more rigorous approach means agreeing on a clear definition of causation and a clear concept of injury. One possible approach, a more radical one, is to sweep all anti-dumping, anti-subsidization, and escape clause concepts together with one standard of injury and one clarified concept of causation. I am aware that at least one distinguished member of the U.S. trade bar has already suggested that this is the only way out of the growing legalism and rampant protectionism of the anti-dumping and countervailing duty systems. 9 I predict that whatever approach is required, it is in this area that our bilateral negotiators will have the most difficulty, and there must inevitably be some rethinking, some re-casting of the roles of our two tribunals in regard to bilateral issues of this sort.

The intellectual and practical difficulties in the anti-dumping and

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8 See Senate Finance Committee Report, supra note 6.
9 See N. Hemmendinger, Shifting Sands: An Examination of the Philosophical Basis for U.S. Trade Laws, in INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE (Jackson, Cunningham & Fontheim eds. 1985).
anti-subsidization area are very serious and raise real problems which must be worked out. We must solve these problems to have a more effective multilateral regime, and a more open bilateral arrangement.

Take the issue of anti-subsidization measures and countervail in particular. The system sanctioned by GATT Article VI and the Tokyo Round Code is employed by the United States, with considerable vigour and frequency, more than by Canada. It is not at all clear from the record under the U.S. Trade Agreements Act that the acceptance by the United States of an injury test for countervail has in fact significantly limited the scope for countervailing duty application. Rather the reverse; having accepted an injury test, the Congress, the Administration, and the trade bar have assumed that any U.S. countervailing duty proceeding must be acceptable, and the system be deployed without question. But there are the difficulties created by the definitions of injury, material and causality to which I have already referred; there is the problem that subsidies are not defined in net terms—that is, we ignore costs imposed on producers by government programs which subsidies may merely offset. The countervailing duty provisions and the anti-dumping duty provisions have thus become overtly protectionist rather than being a legitimate remedy for injurious unfair practices.

It will be important, as we try to work out the roles of our two tribunals in the emerging competitive economies of North America, that we make some effort to see these matters from the point of view of the other country. In the United States, countervailing duty is an effective device, under domestic law, for getting at imports. It is true that a country which feels aggrieved by the results of that proceeding can take part in the domestic process and can make representations to the U.S. government, and can even proceed to invoke the GATT conciliation and dispute settlement procedure. But this is not likely to prevent real damage being done to the interests of a small country heavily dependent on exports by the improper or misconceived use of countervail. But take the reverse case: if a country such as Canada countervails against a large entity, such as the United States or the EEC, the economic impact on producers in that larger entity is likely to be minimal, as compared with the damage done to producers in the smaller economy by the protectionist actions of a larger entity. Moreover, the larger economy has a range of possible bargaining counters or techniques for applying pressure to the smaller economy which the smaller more open, more dependent economy does not have in relation to the larger. Most of us are aware of how aggressive and threatening the U.S. agricultural interests (and the U.S. Secretary of Agriculture) have been in relation to the Canadian use of the countervailing duty provisions; although it appears to me, speaking informally, that my colleagues in the Department of National Revenue, in calculating U.S. subsidies are at least as meticulous and conservative in their methods as are U.S. Commerce Department officials. We are also aware how belligerent and threatening the EEC authorities have been in
regard to Canadian use of countervail, including references to retaliation, which is, of course, not contemplated under the GATT rules in regard to a properly conducted countervail proceeding. In summary, what we see, is essentially an asymmetry in the use of countervail; it is an effective protective device for a large economy, but not for a smaller economy. This alone should be sufficient reason for treating countervail as a weapon of last resort and require, therefore, the use of rigorous criteria.

There is another form of asymmetry in countervail which must be understood and addressed in the forthcoming multilateral negotiation of the GATT Codes, and certainly in the bilateral discussions. That is the fact that there exists no remedy under domestic legal provisions for those damaging subsidies which make possible domestic production displacing otherwise competitive imports. There is no domestic law provision equivalent to countervail available to a Canadian firm which finds it can no longer export to the United States without dumping or accepting a subsidy because new U.S. production has been created by virtue of some U.S. subsidy, perhaps at the state level, perhaps through the demise of industrial revenue bonds. It may be that these domestic U.S. subsidy programs, including those through the tax system, which have favoured capital-intensive industries are now being cut back; if so, well and good because Canadian firms find it difficult to compete with U.S. state and Federal treasuries. But there are all the facilities, with many years of productive life ahead, which were built in the United States with the aid of subsidies. There is no effective remedy comparable to countervail for producers injured by such practices; true, under the Tokyo Round Code our government can go to Geneva and enter into a dispute. But clearly this is a feebler process as compared to a countervail proceeding.

This asymmetry, in the range of measures and remedies available as against damaging subsidies, is a good and a sufficient reason for using countervail sparingly and only in cases where intolerable damage is being done.

In a revised system, either within a bilateral arrangement or under multilateral auspices, there might well be roles for our two tribunals in assessing the impact on our domestic producers of an import-replacing subsidy in the other country. Clearly the investigative methods and the procedures developed under the existing rules could be adopted to such a purpose. I do, however, see one difficulty about such an approach. In our Canadian circumstance, U.S. subsidies, such as industrial revenue bonds, may have encouraged Canadian-controlled firms to establish U.S. producing affiliates rather than expand production in Canada. In such cases, we might find that there is no Canadian firm willing to come forth to make a claim that it has suffered injury. Of course, in such a situation it is the economy as a whole which has suffered an injury or, to use the GATT concepts in Article XVI, it is the interests of a contracting party which have suffered a serious prejudice.

Looking beyond these questions of imbalance, asymmetry and inad-
equacies in the basic structure of countervail, and as compared with the absence of effective remedies for a range of injurious subsidization practices other than those that are caught by countervail, there is the increasingly serious question of what constitutes a subsidy, and what sort of subsidy should be actionable. I am aware that some discussion has gone on between experts under the aegis of the GATT, but, as I understand it, the discussions have not done more than identify major issues.

In addressing this issue, as in addressing many of the issues in this paper, I am obviously going far beyond the narrow range of issues which fall under my direct scrutiny in the Canadian Import Tribunal, and I can speak only personally and without the benefit of having had to assist in making decisions. But it does seem to me that the U.S. administration (that is, the officials in the Department of Commerce) have done a thorough job in classifying a range of practices as countervailable or not (I have in mind particularly the various steel cases) but it may be that in so doing they were required, under the law, to exercise too much zeal. The key issue is one I have already referred to: subsidies are not defined in net terms.

Another major definitional issue with regard to subsidies to be discussed and, one may hope, agreed upon, is the issue of natural resources allocation programs. In many countries particular resources are not only regulated as to their exploitation by the state, they are also owned by the state. When Article VI of the GATT was drafted, was it seriously contemplated that the allocation of a natural resource by some method other than an arm's length auction would be deemed to be a countervailable subsidy? I think the answer is clearly no. Moreover, our negotiators in the Tokyo Round never had it suggested to them that natural resource allocation techniques, if they resulted in a less than auction price for the resource, could be countervailed. To make such a proposal would be (and, with regard to lumber, has been) to use the countervailing duty provisions, not against a subsidy, but against a comparative advantage. A sovereign government's allocation of its minerals, timber, water, airspace, fish, or use of territorial waters is an exercise of sovereignty. There is nothing in the GATT history, let alone the GATT text, which suggests that such a sovereign power must be limited to auction pricing if it is not to be countervailed. Indeed, this is the argument which one of your Assistant Secretaries of Commerce put to a Subcommittee of your [Senate] Finance Committee several years ago.10 The U.S. authorities

10 Forest Products Industry Issues: Joint Hearing Before the House Subcomm. on International Trade, the House Subcomm. on Taxation and Debt Management and the Senate Comm. on Finance, 97th Cong., 1st Sess. 21 (1981) (Testimony of Lawrence J. Brady, Assistant Secretary for Trade Administration in the Department of Commerce).

"A countervailable subsidy in this context exists where different purchasers in the exporting country are charged different, preferential prices. The fact that a country provides goods or services at a fee lower than the world market price or U.S. price, does not mean it has conferred a countervailable benefit. "Low prices or price ceilings placed on a natural resource, such as stumpage, do not neces-
apparently found it convenient to change their view when there was pressure to get at imports of Canadian lumber. In my view, and I have not, of course, been a participant in any of the relevant discussions, the precedent in U.S. law created by the lumber case cannot be accepted. That is not to say that resource allocation projects cannot be manipulated, or distorted, or used as a cover to provide a countervailable subsidy; that is the other side of the issue which we must surely resolve in multilateral discussion and, of course, in any bilateral arrangement.

To put the issue starkly, we cannot be expected to accept a system, taken to be sanctioned by the GATT, in which the U.S. changes the rules according to domestic political pressures.

Clearly, there is ahead for our two countries a long and difficult discussion of what is a subsidy, how the size of the subsidy is to be calculated, and what subsidies may be countervailed or otherwise give rise to a cause of action. But this will be the more manageable if we together work out a meaningful concept of injury, of causability, and of the degree of injury at issue, fully consistent with the GATT provisions. I do not see in this any suggestion that either Canada or the United States would not be able to act expeditiously against damaging subsidization of imports. It is, of course, in regard to the creation of more meaningful, more realistic and more economically justifiable standards of injury and causality that the USITC and the Canadian Import Tribunal have a major role to play in the competitive economies of North America.

The current style in which the anti-dumping provisions are deployed also raises issues. My remarks about injury, the degree of injury, and about causality obviously apply equally to the anti-dumping system as to countervail and indeed, as I hope I have made clear, to so-called escape-clause or safeguard actions under GATT Article XIX. But in regard to the anti-dumping system there is the increasingly serious issue of the widening gap, in concepts and standards employed, between the anti-dumping system and the relevant provisions of law regarding transactions in domestic commerce. (Perhaps I should note, parenthetically, that we do not have provisions in domestic law—which would surely not be irrelevant in federal states—to provide a remedy for a producer in-
jured by the effect of a subsidy paid to another producer in the same country. Given the importance of provincial and state subventions in our two countries, one could argue that this is an interesting omission. A U.S. tire producer can get a countervailing duty imposed in regard to Canadian provincial government subsidization of steel-belted radial tires, but another Canadian producer has no comparable remedy for the injury he suffers as a result of subsidized competition in the domestic market. It appears to be only the EEC which is trying to deal with this issue between member states. In any event, under the GATT we envisage punitive duties against one category of goods, imports, although there is no equivalent provision in regards to domestic commerce. It follows that countervail is uniquely a protective mechanism. But the anti-dumping system was supposed to be, at least in the United States, if I read the history correctly, the counterpart of legislation directed at injurious price discrimination or predatory pricing in domestic commerce. Such legislation exists in the United States and Canada, but over time it and the anti-dumping provisions have diverged substantially. Both in Canada and the United States, we see anti-dumping action taken against imports in situations where, to say the least, it is not clear that action would be taken in comparable situations in domestic commerce. Here there is clearly a very difficult issue for our bilateral negotiations. If we were to set aside anti-dumping measures, with regard to transactions as between Canada and the United States, as part of a broad bilateral arrangement, what could be done about price discrimination in such transaction? Would a U.S. producer have a right to proceed in a U.S. court or a Canadian court, under our competition law, for protection against a U.S. firm dumping in Canada? There are other questions which will have to be addressed. What about dumping by third countries using one country in the pre-trade arrangement as a pass-through? Clearly, this is a complex administrative issue rather than a conceptual one. A more interesting issue will be whether one would contemplate giving a producer in one country, say the United States, the right to invoke Canadian law against dumping in Canada by a third country. This would not be inconsistent with the GATT, which does contemplate such proceedings. I reiterate that I am not party to the bilateral discussions on these matters; I can only assume that they are being addressed.

Clearly, if such new arrangements are worked out, there may be new or redefined roles for our two tribunals as regards bilateral trade.

Before I go on to address, as a final topic, the issue of trade policy dispute settlement between our two countries and the possible role, if

any, of our two tribunals in regard to such issues, there are two matters I should mention.

The first is procedures. I have commented on matters of substance—innoculation, causation, the scope of countervailing, and so forth. But there is also the question of our procedures. I have long admired the high standard of the reports issued by the ITC, although not entirely agreeing with the conclusions reached by the Commissioners; that may be due to how the key concept of injury and causality are read in U.S. law and precedent, and in Senate Committee reports. I have the impression that, by and large, the USITC relies more on the investigative work of the staff than do we in the Import Tribunal, and that we attach more weight to what emerges in the submissions of the parties and in the public hearings. That is why we provide for cross-examination of witnesses in our hearings in anti-dumping cases (and in other types of hearings) and that is why our determinations cannot be fully assessed without examining the submission of the parties and the transcripts of the hearings. Our determinations are not, and are not intended to be, detailed comprehensive reports, but only statements of findings and the reasons therefore.

Another procedural difference is that we do not have a full system of preliminary determinations, at least by the Import Tribunal. Under our system, the agency responsible for investigating whether there is dumping or subsidization must be satisfied that there is sufficient evidence of injury. But the issue may be referred to the Tribunal by the investigating agency, importers, exporters, foreign governments, or, if an application is rejected by the investigating agency, by the producers concerned. The fact that we are not required to make preliminary determinations in all cases has kept our workload manageable and, with the safeguards I have referred to, has kept the procedural requirements for the parties within reasonable limits.

So much for differences in procedures. Let me note one interesting development which may suggest a wider role for the Import Tribunal, and may be a hint of what might be contemplated as a result of our multilateral arrangements or under a bilateral arrangement. When Canada was revising its legislation consequent to the Tokyo Round, a provision was enacted allowing the Government to direct the Tribunal "to inquire into and report . . . in relation to . . . the provision, by persons normally resident out of Canada, of services in Canada that may cause or threaten injury to, or that may retard, the provision of services in Canada by persons normally resident in Canada."13 This section has not yet been made use of; however, it is clear that, as both Canada and the United States are service economies, and as there is now considerable trade in services, there will be need for a mechanism of enquiry into allegations that imports are causing unacceptable damage to domestic producers. It

13 Special Import Measures Act, supra note 3, s. 48.
is likely that the role of our two tribunals will be expanded in the direction of services as rules about services trade are negotiated.

Finally, I turn to an issue which is no doubt receiving some attention in the bilateral trade policy discussions. That issue is, how to handle trade policy disputes which may arise between Canada and the United States, particularly those that are covered by some new agreement. It is not entirely clear that the USITC or the Canada Import Tribunal should or could necessarily have a role in the settlement of such disputes. In the main, our two tribunals deal with aspects of the system of providing remedies or relief for private parties in regard to the actions of other private parties. If either government decides that the action resulting from one of our findings is not consistent with the GATT, it is the GATT machinery which is employed, not our two tribunals. Similarly, if there is a dispute as between our two governments under some new bilateral arrangement, the issue could be put to some sort of institution comparable in function to the GATT machinery, or comparable to the Canada/U.S. International Joint Commission. It would not be difficult to devise some such arbitral or adjudicatory body. The key question will be not how to set up such a body, because there are many models, but whether or not our governments will accept to be bound by their decisions, or will take their findings merely as advice.

It would be a different, and more difficult, matter to devise a Canada/U.S. body to which private parties would have direct access. Such an arrangement makes sense in the EEC, where there is a body of supra-national law. Perhaps some sort of body could be constituted to which private parties would have access if they wish to state a case that the bilateral treaty is being abrogated; but this is difficult to envisage unless we accept the notion of private parties acting against the other national government. I do not myself see that such an arrangement is necessary; what will be needed is a bilateral mechanism for settling disputes between governments. In that context, our two tribunals may have no role except, of course, that their determinations may be subject to scrutiny in such a new institution.