UNITED STATES TRADE LAW:
An Overview and Some Topical Issues

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In this paper I will discuss some aspects of the principal U. S. laws that may be used to restrict imports into the United States. I will be looking at these laws more from the viewpoint of a practising lawyer than that of an academic. Although I have just completed a year at ICU teaching various aspects of international law — including a course on the GATT — this was simply a year's diversion from my normal occupation as a member of a law firm in Washington, D. C., where I specialize in international trade cases. One of the great pleasures of a practice of this kind is the enormous diversity of clients. I have represented Colombian growers of cut flowers, Swiss cheese and watch producers, Mexican and Swedish steelmakers, and a Finnish manufacturer of ice hockey sticks, to name a few.

I will first discuss some of the important aspects of the four major laws used to restrict imports — the Antidumping Act, the Countervailing Duties statute, the Unfair Trade Practices Statute, and the Escape Clause. Then I will focus on a couple of topical and extremely important issues — the *Zenith* case on countervailing duties recently decided by the U. S. Supreme Court, and the cost-of-production and trigger-price systems as used under the Antidumping Act in connection with steel imports. Both of these, of course, are matters of great interest to Japan.

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First, though, some brief general observations. Many of the difficulties in the trade field result from the rigid separation between the Executive and the Legislature in the American political system. On most trade issues the Executive Branch, mindful of the international obligations of the United States, tends to lean toward the liberal trade side. But it cannot ignore the often strong protectionist sympathies in Congress — often the result of constituent pressures on individual senators and congressmen — and the tension between the two branches of government is often colossal.

This tension is well illustrated by the Trade Act of 1975, the most important piece of U. S. legislation in the trade field for more than a decade. Primarily, of course, the Act was designed to give the United States Government authority to participate in the multilateral trade negotiations now proceeding toward what I hope will be a successful conclusion in Geneva. But the Administration took the opportunity to make some changes that it felt were needed in the basic trade legislation. And, more importantly, Congress itself used the Act as a vehicle for some very significant changes in the existing law. Some of these were substantive, for example the cost-of-production amendment to the Antidumping Act, discussed later in this paper. But others were procedural, and it is these, more than anything else, that have led to the spate of trade cases in the last three years.

The general aim of these procedural amendments was to reduce the degree of discretion given to the Executive Branch in the administration of the trade laws. In part, at least, this represented a reaction to what many viewed as abuses of executive discretion by the Nixon Administration (the Act was passed only a few months after President Nixon's resignation). Thus, for example:

(1) For the first time, Congress imposed strict time limits on investigations under the trade laws. Although the Treasury Department had conducted antidumping investigations under self-imposed time limits, there was no limit of any kind on countervailing investigations. This enabled Treasury to quietly set aside cases that it did not want to decide. Some cases had languished for as much

as six years without any action.

(2) The 1975 Act limited the Executive's freedom of action in some cases, particularly the escape clause, by providing for congressional override of its decisions. This has, in my judgement, had a profound impact on the Presidential decisions in such important escape clause cases as specialty steel and footwear.

(3) For the first time, the domestic manufacturer who had filed a countervailing duty complaint was given the right to appeal to the courts from a negative decision by the Treasury Department. Previously, the only right to judicial review (admittedly a rather limited one) was that of the importer after an affirmative decision. Without this amendment, it is unlikely that the *Zenith* case would have reached the courts.

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Let me turn now to a brief review of the four principal statutes used to restrict imports (there are others, of course, but generally these are less significant).[1] Appendix A, a chart outlining some of the main features of these laws, may be helpful in indicating some of the similarities of and differences between the statutes.

I The Antidumping Act

At least until 1975, this was the most widely used of the statutes by U. S. manufacturers seeking relief from imports. Dumping is the exportation of goods at prices lower than those charged in another market (usually the manufacturer's domestic market), and it is treated by most countries as an unfair practice in international trade. The rationale behind the condemnation of dumping is that manufacturers may use "excess profits" generated from a monopolistic or oligopolistic home (or other) market to unfairly subsidize exports. Under U. S. law two conditions must be met before antidumping duties may be imposed:

(a) there must be sales at Less Than Fair Value ("LTFV") as defined by the Act, *i. e.*, dumping in the economic sense; and

(b) the LTFV sales must cause injury or likelihood of injury to a domestic industry.

The investigation is divided, in a rather cumbersome fashion, into two parts -- the LTFV determination being made by Treasury, following an investigation by the Customs Service (an arm of Treasury); the injury determination being made by the International Trade Commission (formerly called the Tariff Commission). The two investigations take place in sequence, not simultaneously, so that the injury phase does not begin unless and until an LTFV determination is made by Treasury.[2]

The statute requires that in determining whether or not there are sales at LTFV, the export price to the United States be compared in the first instance to the price on the home market in the country of manufacture. Only if home market sales are non-existent or so small as to be an inadequate basis for comparison (or, since the 1975 amendment, below cost of production), does Treasury look to sales to other countries, known as third-country sales.

There is a very strong preference for using home market sales. Until a few years ago, the Treasury regulations specified that third-country sales would be used where home market sales constituted less than twenty-five percent of total non-U. S. sales (*i.e.*, home market plus third-country sales). But these were changed a few years ago, there is now no set percentage figure, and Treasury has used home market sales where they constitute as little as six percent of non-U.S. sales.[3] The new approach seems entirely inconsistent with the economic rationale underlying the Antidumping Act, which is of course designed to prevent a foreign manufacturer from subsidizing his exports to the United States with "excess" profits made on a home or third-country market where there may be little or no price competition. In a recent dumping case I was involved in, home market sales were only 70,000 units per year, compared with 400,000 to the United States, almost the same quantity to Canada, and substantial sales to other third countries. It is hard to see how the home market sales could have been used to subsidize the exports to the United States to any significant degree. Yet Treasury insisted on using home market price rather than the Canadian sales, which were far more closely comparable to the U. S. sales not only in quantity but also in method of sale.

Only if there are no home market or third-country sales (or they are below cost of production) does Treasury resort to what is termed "Constructed Value", which is essentially cost of production plus overhead and profit. I will discuss this in more detail later in the context of the steel problem.

The most important aspect of the LTFV phase is the adjustment made to the U. S. and foreign prices designed to place them on a comparable basis. Essentially, each is stripped down to an f.o.b.—factory price, so that items such as transportation and duties are deducted. Also, adjustments may be made for such items as differences in quantities sold and differences in circumstances of sale, *e.g.*, credit terms, guarantees, and servicing costs. But the Treasury rules in this area are very strict. During the 1960s it was felt by many people that importers were often unjustifiably escaping findings of dumping because Treasury was too liberal in allowing adjustments of this nature. The Nixon Administration, as part of an effort to reduce pressure for protectionist legislation (such as the Burke-Hartke bill), promised to step up enforcement of the Antidumping Act, and this included substantial changes to the rules on adjustments. In some areas at least, these changes represented an overreaction to the problem, and have produced results that are highly unfair to the importer.

For example, foreign manufacturers often offer substantially lower prices on their exports to the United States than on their home markets simply because they are selling in much larger quantities, and can therefore offer quantity discounts. But very stringent conditions must be met before Treasury will take account of such discounts. The rules relating to adjustments for differences in circumstances of sale are even more restrictive. The regulation is almost incomprehensible, and it would take too long to try to explain it in this paper. The only bright spot is that there seems to be a recognition on the part of the new policy-level officials at Treasury that this particular regulation can operate unfairly, and I understand that it is currently under review.

An antidumping case is often won or lost over the price adjustments, and there is considerable discretion on the part of the investigating

officials. The investigation itself is carried out by the Customs Service, with limited supervision by policy-level officials in Treasury. In my experience, the competence and conscientiousness of the Customs Service case handlers has generally improved over the last few years, though there is still a good deal of variation.

There are two other aspects of the LTFV phase that are of some importance. First, confidentiality. Normally information submitted to the Customs Service during an antidumping investigation is made available to the complainant and to the public. Supposing, as happens in nearly all cases, the foreign manufacturer regards some of the information he is requested to supply — prices, discounts and the like — as highly confidential. Under the rules, he may submit the information with a request that it be treated in confidence, *i.e.*, not disclosed to the complainant or placed on the public record. The Customs Service decides whether or not the information should be so handled. If it decides against confidential treatment, the person submitting it is given the choice of withdrawing it, in which case it is not used, or submitting it on the public record.

So far so good. But, and to my mind this is a very big "but", if Customs does decide to accord confidential treatment, the information must be accompanied by a "summary or approximated presentation" of the information which is "sufficiently full and descriptive".[4] This summary is placed on the public record. In the case of figures, Customs normally requires that a range be given within twenty percent of the actual figure. Thus, a price discount of five percent must be described on the public record as a discount in the range of 4-6 percent, or 4.9-6.9 percent. This may appear to offer little disguise. Also, although it is a criminal offense for a U. S. Government official to release information that has been submitted to the Government in confidence, I have known cases where a Customs official has inadvertently let slip some piece of information that was supposed to be given confidential treatment.

The foreign manufacturer who feels that part of the information relevant to the case is so confidential that he cannot even risk submitting it to Customs in confidence faces something of a dilemma. For, although Customs has no means of forcing disclosure of the information, it takes

the position (perhaps understandably) that in the absence of information from the foreign manufacturer as to his prices, discounts, etc., it will use "the best information available". This is usually the material submitted by the complainant, which is of course unlikely to be favorable to the foreign manufacturer. I understand that this was a serious problem in the recent cases involving Japanese steel.

A second issue of importance relates to exchange rate fluctuations. In these days of floating and sometimes rapidly changing exchange rates, what obligation does the foreign manufacturer have to adjust his prices to the United States in accordance with the ups and downs of the dollar? A Treasury regulation[5] provides that foreign manufacturers (and U. S. importers) are expected to act within a reasonable period of time to take account of price differences resulting from "sustained changes in prevailing exchange rates." On the other hand, they need not adjust for temporary exchange rate fluctuations. So Treasury would not be sympathetic to a Japanese manufacturer who explained that his price to the United States had been established on the basis of an exchange rate of ¥350 to the dollar. On the other hand, a rate of ¥200 might be acceptable, at least for the time being.

A few brief points about the International Trade Commission's investigation of injury. First, note the very short time – only three months – in which the Commission must complete its inquiry. This puts great pressure on both the Commission and the participants. Although not required to do so by the statute, the Commission invariably holds a relatively formal public hearing at which testimony may be presented by interested parties. In order to give itself enough time to digest the results of the hearing, the Commission holds the hearing roughly six weeks after the case has been referred to it. Speaking from practical experience, six weeks is an uncomfortably short time within which to marshal the facts, and to locate and prepare the necessary fact witnesses and economic experts.

What about the legal test applied by the Commission? The Commission has decided that any degree of injury more than *de minimis* will suffice. This is clearly less than the "material injury" test required by

Article VI of the General Agreement on Tariffs and Trade, although it might take a zen scholar rather than a lawyer to precisely quantify the difference. But the injury must result not from the imports as such, but from the fact that they were sold at Less Than Fair Value. Thus, in one case the LTFV margins were determined to be 15 percent. But the imports were underselling the domestic product by as much as 45 percent, and the Commission concluded that as a result of their basic cost advantage they would have had just as much impact even if they had not been sold at Less Than Fair Value, and so made a negative determination.[6]

Also, the injury or threatened injury must be to an *industry* in the United States. An antidumping investigation is usually begun by a single manufacturer filing a complaint. But it will not be enough for him to show that he alone has been hurt by the LTFV sales. Indeed, the Commission will be quite sceptical of a claim of injury made by a single member of the affected industry, and will ask why other representatives of the industry have not appeared to support the allegations.

The Commission's handling of the antidumping and other statutes leaves a good deal to be desired. The Commission is currently held in rather low esteem in Washington. There has been serious dissension among various of the Commissioners and between them and the staff. A couple of years ago the Vice Chairman (subsequently Chairman) publicly accused the staff of incompetence, and went so far as to name names. A senior staff member of the Commission was said to have seriously considered suing the Vice Chairman for libel. This is obviously a lamentable state of affairs for an agency charged with such heavy responsibility in the international trade field.

The quality of the Commission decisions is seriously inadequate. One problem is that, unlike the courts and most other government agencies which conduct quasi-judicial investigations, the Commission does not appear to regard itself as bound by its previous decisions, so that it is hard to develop any body of principles on which cases are decided. Also, the published opinions are, in my judgement, highly deficient. They are usually extremely short, and often no more than mere statements of con-

clusions, without any reasoned analysis of how the Commission reached its conclusion.

I can best illustrate this point by referring, not to an antidumping case, but to the specialty steel case decided under the escape clause two years ago. Before granting relief, the Commission had to make two findings: first, that increased imports had caused or were threatening to cause "serious" injury to the domestic industry; second, that increased imports were at least as important a cause of injury as any other cause. One of the key issues in the case was whether the sufferings of the U. S. industry were due more to the effects of the economic recession than to increased imports, in which case, of course, the finding would be negative. The economic evidence appeared to me — admittedly a biased participant — to point overwhelmingly to the recession rather than increased imports as the major cause of the problems. The domestic's industry's economic expert appeared at one point to concede as much. Yet on this critical issue, to which much of the evidence was directed, all that the Commission could find to say was that "on the basis of all the evidence," it had concluded that increased imports were not less important a cause of injury than any other cause. As a lawyer who has represented many foreign clients before the Commission, I am frankly embarassed by this kind of performance on the part of a U. S. Government agency.

A final point on antidumping. As the chart indicates, unlike the other three statutes, there is no administrative discretion to withhold application of the Act. Once the two findings — LTFV sales and injury — have been made, all future imports must be assessed for antidumping duties. But this is done on a current basis, *i. e.*, the Treasury Department periodically updates its information on home market or third-country prices, or Constructed Value, whichever is applicable. So by increasing its prices on exports to the United States, an exporter can generally avoid the assessment of antidumping duties on his future shipments. And Treasury is usually willing to revoke a dumping finding after two years of "clean living", *i.e.*, no or negligible LTFV sales.

In some cases, however, there have been very substantial delays in

assessing the duties – in 1978 the Treasury Department finally assessed antidumping duties on television sets imported from Japan in 1970 and 1971. This kind of delay creates uncertainty for all parties, and seems quite unjustified.

II The Countervailing Duties Law

This statute is designed to counteract the effect of subsidies provided by foreign governments on exports to the United States, and the remedy is an additional duty equal to the amount of the subsidy. Since the imposition of strict time limits on countervailing duty investigations by the 1975 Trade Act, this has become a popular avenue for U. S. manufacturers seeking import restrictions. The reason is simple. Under the statute, there is no need to prove injury to a domestic industry.[7] Upon the mere establishment that a subsidy is paid, the duty must be imposed. This is of course inconsistent with Article VI of the GATT, which requires proof of injury in countervailing duty as well as antidumping cases. But the U. S. Countervailing Duties Law long pre-dates the GATT, so is protected by the "grandfather" provision in the Protocol of Provisional Application of the GATT, which exempted existing laws. An important issue in the current Geneva talks is whether the United States will commit itself to adding an injury test, which it has indicated that it will do only if other countries are willing to substantially tighten up the GATT provisions on subsidies.

Note that the statute is written in very broad terms. All that is required is a finding that a "bounty or grant" is paid on the "manufacture, production or export" of goods exported to the United States. Strictly speaking, the bounty or grant does not even have to be paid by a government, and it has been pointed out that the law would theoretically apply to the situation where a man gives his son financial assistance in setting up a manufacturing operation. But in practice, the statute has only been applied in cases of government assistance.

The Treasury Department, which administers the statute, has applied it to a wide range of government programs beyond the simple export subsidy, such as export loans at preferential interest rates, export guaran-

tees, multiple currency schemes, and the like. A fairly recent issue of some controversy has been whether grants and preferential tax treatment given to manufacturers as an inducement to set up facilities in depressed areas is covered by the statute. The Treasury Department's attitude is that they are, at least if a high proportion of the total production from the facility is exported to the United States.[8] The most topical question, of extreme importance, is whether the rebate of indirect taxes — such as the Japanese Commodity Tax — on exports is subject to countervailing duties. I will discuss this matter later.

The 1975 Trade Act made one quite significant amendment to the statute, though one that is only temporary in its effect. Formerly, there was no administrative discretion to withhold application of the law. Once Treasury was satisfied that a bounty or grant was being paid, it was required to levy the duty. However, Congress recognized that the current failure of the United States to apply an injury test might seriously impede the Geneva negotiations, particularly in light of the expected flood of new cases as a result of the introduction of mandatory time limits. It therefore gave Treasury power, for a four-year period (the expected duration of the negotiations), to waive the application of countervailing duties after an affirmative determination. Certain conditions must be met before Treasury can exercise this discretion, the most important being that the country concerned must take steps to remove or substantially reduce the harmful effects of the subsidy — which usually involves at minimum a commitment to remove the subsidy within a fairly short period of time. This discretionary power expires on January 2 next year, and there is serious doubt as to what will happen then. While the Administration could seek an extension of its power from Congress, it may be deterred from doing so by the fear that the legislation could be used as a vehicle for protectionist riders.

III Section 337

This is sometimes known as the law against unfair trade practices, and, as the chart shows, the statutory language is extremely broad. Traditionally, however, the statute was used almost exclusively in cases of patent

violations — upon a showing that an imported item violated a U. S. patent, the imports would be completely blocked by an exclusion order. A few early cases, however, involved other issues, such as passing off, and some members of the Commission would like to use the statute as a means of placing the Commission in the forefront of the fight against all kinds of unfair trade practices involving imports, even though this is strongly opposed by other U. S. Government agencies on the ground that it would create an overlap with their own jurisdiction. The recent Section 337 investigation of color television sets from Japan involved allegations of unfair pricing (dumping), and anticompetitive practices contrary to the U. S. antitrust laws. The Treasury Department and the Justice Department requested in strong terms that the Commission refuse to consider these allegations since they should more properly be handled by those agencies. The ITC firmly refused to drop the issues, and continued with the case. Since the case was later settled by consent decree, there was no means of testing the correctness of the Commission's position in the courts, but no doubt the opportunity will arise again.

If the use of Section 337 to combat alleged anticompetitive practices of foreign manufacturers becomes commonplace, a powerful weapon will have been added to the protectionist's armory, since a Section 337 investigation must be completed within twelve months (or eighteen in more complicated cases), a far shorter time than the average antitrust case in the courts. Also, the courts often have difficulty in establishing jurisdiction over foreign manufacturers, making it impossible to impose remedial orders against them. Under Section 337 there is no such difficulty, since the exclusion order remedy is exercised against the imports themselves. The foreign manufacturer who refuses to appear before the ITC to defend himself does so at peril of having his exports to the United States barred altogether.

With regard to the ITC's efforts to expand its sphere of interest through extended use of Section 337, I was encouraged by President Carter's recent disapproval of the Commission's cease-and-desist order issued in the stainless steel pipe and tube case.[9] The disapproval was based in part on the ground that the antidumping issues in the case were

the subject of a current investigation by the Treasury Department under the Antidumping Act, and that unnecessary duplication of investigations of imports would be regarded by other countries as an unjustified burden on international trade. It may be that the President will routinely disapprove Section 337 decisions which trespass onto the jurisdiction of other agencies, at least where those agencies have the issues involved under active consideration. In this connection, it should be noted that, unlike the case of the escape clause, Congress does not have power to override the President's disapproval of an ITC decision.

The 1975 Trade Act made several changes of significance to Section 337. First, the Commission's function under the statute as previously written was merely to recommend action to the President, who had the final say. Now, the Commission itself has power to issue an order, subject to disapproval by the President on the basis of certain public interest factors. Although this may appear to be little more than a change in form, I think that in practice Presidential overrides of Commission decisions will be much less frequent than refusals to implement Commission recommendations under the pre-1975 version of the statute.

Second, the Commission was given power to issue a cease-and-desist order as a substitute for the ultimate sanction of the exclusion order, which was previously its only recourse. There was a belief that in more than one case the Commission had issued a negative determination despite the existence of a violation of Section 337, simply because it felt that the extreme remedy was not justified. A cease-and-desist order is essentially a final warning to the foreign manufacturer or importer — if you don't stop the practice in question, we will impose an exclusion order.

Third, prior to 1975 the Commission's practice in patent cases — the vast majority of Section 337 cases — was to conclusively assume the validity of the U. S. patent in question. Thus, an importer could defend on the ground that the import was not covered by the U. S. patent, but not on the ground that the patent itself was invalid. Congress amended the statute in a way to make clear that patent invalidity may now be raised as a defense. In at least one recent case, the Commission has

upheld that defense.[10]

IV The Escape Clause

The most important distinction between the escape clause and the other laws discussed in this paper is that under it there is no need to show the existence of any kind of unfair trade practice, such as dumping or subsidies, before relief can be granted. All that is necessary is a showing that imports have increased, usually a simple matter of statistics, and a demonstration of injury to the domestic industry to which the increase in imports contributed at least as much as any other cause.

The 1975 Trade Act amended the escape clause statute in an extremely significant fashion. Previously, under the statute, the complainant had to show not only that a domestic industry had been injured by an increase in imports, but also that the increase in imports had resulted from concessions granted in trade agreements. This latter requirement, while consistent with Article XIX of the GATT, proved a difficult hurdle for domestic industries, and prior to 1975 there were few decisions granting escape clause relief. The 1975 Trade Act removed the link with trade concessions, and now all that a complainant need do is show that increased imports have caused or threatened serious injury to the relevant domestic industry, and that they were at least as important a cause of that injury as any other factor.[11] The new statute appears to be squarely inconsistent with the GATT, but I am not aware that it has been subject to formal challenge there.

If the ITC makes an affirmative determination, it recommends specific relief in one of the four forms set forth in the Act, *viz*, increase in duty, tariff-rate quota, straight quota, or negotiation of orderly marketing agreements. The President is not required to follow the Commission's recommendation, but may instead impose some other form of import relief or none at all. But if he does not take the precise action recommended by the ITC, Congress can override his decision, in which case the ITC's recommendation automatically goes into effect.

In a number of the escape clause cases involving large industries which could muster strong congressional support — and I am thinking particu-

larly of specialty steel and footwear — the Executive did not follow the Commission recommendation, but instead imposed what it felt was the minimum amount of relief that would be sufficient to overcome the pressure for a Congressional override. In the specialty steel case, for example, a number of Executive Branch officials believed that the ITC decision that relief should be granted was wrong as a matter of law. But if the President had refused to provide any relief at all, there was a serious risk of a Congressional override, in which case the very restrictive quotas recommended by the Commission would have gone into effect. Rather than chance this result, the President negotiated an orderly marketing agreement with Japan, and tried unsuccessfully to do the same with the Common Market and Sweden before imposing quotas on imports from those countries that were less restrictive than those recommended by the Commission.

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So much for my broad overview. Let me turn now to a couple of topical issues which directly concern Japan. First, the *Zenith* case, which in terms of its potential impact on world trade must have been the most important U. S. court decision for years. As we have seen, the Countervailing Duties Law speaks broadly of any "bounty or grant" being paid on the "manufacture, production or export" of goods. However, the Treasury Department has consistently taken the position that it is not obliged to levy countervailing duties in the situation where an indirect tax levied on domestic sales, such as a consumption tax or a sales tax, has not been paid on exports (or, if already paid by the manufacturer, has been rebated). This is in line with the GATT.(12)

In 1970 Zenith Manufacturing Corp., a U. S. manufacturer of television sets, filed a complaint with the Treasury Department claiming that the rebate of the Japanese Consumption Tax on exports of television sets should be subject to countervailing duties. Treasury, in line with its customary practice, dismissed the complaint, after it had languished there for some six years. Using its new right under the 1975 Trade Act, Zenith appealed to the U. S. Customs Court, which found in Zenith's favor, *i. e.*, that Treasury was wrong and that the rebate was covered by

the statute. Treasury appealed to the Court of Customs and Patent Appeals, which, by a three-two majority, reversed. Zenith appealed to the U. S. Supreme Court, which unanimously upheld the CCPA's decision in June 1978.[13]

The case was of vital importance, because a decision in Zenith's favor would not simply have meant an automatic 10 percent additional duty on television sets imported from Japan (unless the Japanese Government had ceased to grant the rebate), but would also have resulted in the potential application of countervailing duties to a vast number of U. S. imports. Many other Japanese products are subject to a similar commodity tax which is rebated on export, and the European Common Market relies heavily on a value-added tax which is likewise rebated on exports. An adverse ruling in *Zenith* would have covered all of these, and it was estimated that a total of as much as 70 percent of U. S. imports might have been affected. And, of course, bear in mind that there is no injury test in the U. S. law. All that a domestic manufacturer would have had to do would have been to demonstrate to Treasury that an indirect tax was being rebated on exports.

I might add that the whole issue of border taxes is not as clear as it might seem. The GATT rules, which distinguish between indirect taxes — which may be rebated — and direct taxes — which may not — were drafted at a time when many economists believed that indirect taxes were entirely passed on to, and so borne by, the consumer. Direct taxes, on the other hand, were viewed as being absorbed by the manufacturer without being passed on. If this is correct, then the GATT rule is appropriate, and indeed essential to correct what would otherwise be a distortion in the taxation of international trade. But many economists today believe that the direct/indirect distinction is not so clear-cut, and in particular that a large proportion of the so-called direct taxes are in fact passed on to the consumer. In this event, the GATT distinction is not logical, and discriminates against the United States, which raises a much higher proportion of its total tax revenue through direct taxes than other industrialized countries.

Whatever the merits of this viewpoint, it would have been most un-

fortunate to have had it imposed unilaterally by the United States as a result of a court decision. If a change is needed in the GATT rules on border taxes, it should be achieved through multilateral negotiation.

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Let me now make a few comments on two aspects of the administration of the Antidumping Act with respect to imports of steel. First, the so-called "trigger-price" system introduced in 1978. The system came about as a response by the Carter Administration to very strong pressure in Congress for some form of assistance to the steel industry in the United States. As one of the largest industries in the United States, steel can muster powerful political support, and, given the very sharp rise in imports in 1977 and the substantial lay-off of workers, it was clear that the Administration had to take some action to restrict imports. The alternative would have been to face the likelihood of legislated quotas. So the Carter Administration focussed attention on increased use of the Antidumping Act, and in particular introduced the trigger-price system, which was designed principally as a response to complaints that the normal antidumping investigation took too long to launch and conduct.

The trigger-price system involves no change in the existing law. The Treasury Department has always had the authority to initiate its own antidumping investigations. In practice, however, since its resources are limited, it has never done so, but has instead waited for domestic manufacturers to file complaints. The rules require the complaint to contain a good deal of rather detailed information, some of which, especially that relating to foreign market prices and (where relevant) cost of production, can be quite difficult to obtain. So it can take a number of months between the time that a U. S. manufacturer suspects that dumping is taking place and the point at which he is ready to file a complaint, and from that point it will take roughly a year before a decision is reached. The trigger-price system short-circuits this process, by eliminating the time needed to prepare and file a complaint, and by providing for speeded-up investigations, to be conducted in less than half the normal time.

The "trigger-prices" are supposedly established on the basis of the production costs of the lowest-cost manufacturers, who happen to be

Japanese. Any imports that are priced below the trigger prices are automatically subjected to an antidumping investigation. Given the strong political pressure for some form of import relief, this may well be what economists would term the "least worst" alternative. However, the system places a very high degree of discretion in the hands of government officials, since the determination of "cost of production" is necessarily a rather artificial process, requiring a number of quite subjective assumptions to be made as to cost allocations, etc. (*see* page 42 , below). The system could be used in a subtle manner to restrict imports to a given desired level; in effect, a "back-door" quota. It is interesting to note in this connection that a fairly similar reference-price system introduced by Sweden was the subject of a GATT inquiry twenty-three years ago. The GATT panel concluded that although in principle the system did not violate the Agreement, its practical application might well do so.[14] Sweden abandoned the system soon afterwards.

Much more troublesome to me than the trigger-price system is the cost-of-production amendment that was included in the 1975 Trade Act. It is interesting to see how this amendment came into existence, as an example of the workings of the legislative process in the United States. In 1972, a U. S. producer of sulphur filed a complaint alleging that sulphur from Canada was being dumped in the United States. It did not allege dumping in the conventional sense, conceding that sulphur prices on the Canadian market appeared to be no higher than the export prices to the United States. Instead, it argued that the sulphur, which was produced as a by-product of natural gas, was being sold in the United States at below its cost of production, and that this constituted dumping under the Antidumping Act as it then stood. After receiving legal submissions from interested parties, including the Canadian producers, Treasury concluded that the complainant's interpretation of the statute was wrong. So the domestic sulphur industry went to Congress and managed to persuade it to change the law. This effort was immeasurably helped by the fact that the Chairman of the Senate Finance Committee, which handles all matters relating to trade, was Senator Long from Louisiana, the home of a large part of the U. S. sulphur industry.

The amendment was ingeniously worded. Instead of simply providing that exports to the United States at prices below cost of production would be subject to antidumping duties, it directs that where *home market* or *third country* sales are below cost of production, they must be disregarded in making the basic price comparison. In this situation then, Treasury is obliged to compare the U. S. price with Constructed Value, which is essentially cost of production *plus* an allowance for profit which must be at least 8 percent. In other words, a manufacturer who is selling on his home market at as little as 1 percent below his "cost of production" (as determined by Treasury) will be found to be dumping unless he is making a profit of at least 8 percent on his sales to the United States. Given current market conditions, few if any steel manufacturers can be making that kind of profit today, so that in terms of steel, at least, the cost-of-production amendment imposes a virtually impossible standard.

The vice of the amendment can be illustrated with a simple hypothetical example. Suppose that a foreign manufacturer has a unit cost of production of 100. He sells on the home market at 99, and exports to the United States at 104. He is not dumping in the conventional sense, since his U. S. price is higher than his home market price. Nor is he selling to the United States market at below his production cost. Yet, he will be held to be "dumping" because the U. S. price is lower than the Constructed Value which would be 108. In effect, the U. S. Government is saying to the foreign manufacturer that unless he makes a profit on his home market, his exports will be taxed by the United States to the extent that his profits there fall below 8 percent. This is a remarkable result, and one that, in my view, has little to do with "dumping" as that term is generally understood.

The Japanese Government, and others, have alleged that the U. S. law violates the GATT. Certainly Article VI requires that home market sales, if they exist, be used as the basis for comparison rather than Constructed Value. It does not in terms state that such sales must be at prices above production costs. But the United States points out that the GATT provision refers only to home market sales "in the ordinary course of

trade", and argues that below-cost sales are not in the ordinary course of trade.[15] This may be a valid viewpoint, at least in terms of U. S. business practice. But given the social tradition in Japan of refusing to lay off workers even in times of recession, a Japanese manufacturer might well regard below-cost sales, even for an extended period of time, as nothing out of the ordinary.

A very strong objection to the cost-of-production provision is the sheer practical difficulty of determining production costs. I have had some experience of this, since I represented one of the Canadian sulphur producers in the lengthy Treasury Department investigation of the cost of production of Canadian sulphur that took place following the 1975 amendment (an investigation that, ironically in view of the origin of the amendment, ended in a determination that there had been no sales below cost of production). The complainants in that case inadvertently illustrated the difficulties by submitting a cost study prepared by a well-known consulting firm which, using three different methods of calculation — each a valid hypothetical approach — produced three different figures for the "cost of production" of sulphur ranging from $15 per ton to $45 per ton.

I will conclude with some prophetic words written 55 years ago by Jacob Viner, an economist who was one of the leading scholars of dumping, and who in 1923 published what is still considered to be the classic work on dumping:

> "In the case of an industry producing from the same plant and equipment a variety of kinds and grades of products, the exact determination of costs of production is impossible .... The development of comprehensive tariff legislation dependent upon the accurate determination of cost of production, whether foreign or domestic, for its administration is a dream incapable of even partial realisation."[16]

The Japanese steel industry may feel that "nightmare" would be a more appropriate term.

Notes

(1) Another of these laws is 19 U.S.C. §1862, which requires the President to "adjust" the level of imports of any product where it is determined that such imports are being imported "in such quantities or under such circumstances" as to impair the national security. Although it has been little used in recent years, an investigation under the statute was recently instituted into imports of industrial fasteners.

(2) This procedure is inconsistent with the International Antidumping Code, to which the United States is a signatory, and which requires simultaneous investigation of dumping and of injury. In an effort to bring U.S. law more in line with the Code, the 1975 Trade Act empowered the Treasury Department, where there seems to be little *prima facie* evidence of injury, to send the matter over to the International Trade Commission at the outset of an investigation for a determination whether there is "no reasonable likelihood of injury" even if dumping margins are found. Such a determination results in a closing of the investigation. However, the ITC is given only 30 days within which to carry out its task, a time limit which makes anyting more than the most superficial of inquiries impossible. The Commission has reached a "no reasonable likelihood of injury" conclusion in only a few of its "mini-investigations" carried out under this authority.

(3) Interestingly, the change took place at a time when Treasury was conducting an antidumping investigation covering large power transformers from Switzerland. Home market sales were considerably below the 25 percent mark, and had Treasury used third-country sales, as it would have been obliged to do under the old regulation, it would almost certainly have found no sales at Less Than Fair Value. In the event, however, home market sales were used, and these resulted in very substantial LTFV margins.

(4) 19 Code of Federal Regulations ("C.F.R.") Section 153.22(a). In the alternative, the foreign manufacturers may supply a full statement of reasons as to why the information is not susceptible to summary or approximation.

(5) 19 C.F.R. §153.52.

(6) *Germanium Point Contact Diodes From Japan,* 38 Fed. Reg. 27339 (1973).

(7) Except in cases involving non-dutiable products. The statute originally applied only to dutiable products, and it was not until 1975 that it was extended to non-dutiable products. This extension was not, of course, protected by the "grandfather" provision in the Protocol of Provisional Application of the GATT (discussed

in the text below), and so included an injury test as required by Article VI of the General Agreement.

(8) *See, e.g., X-Radial Steel Belted Tires From Canada,* T.D. 73-10, 38 Fed. Reg. 1018 (Jan. 8, 1973). The case is now being contested in the U.S. Customs Court.

(9) 43 Fed. Reg. 17439 (April 24, 1978).

(10) In the Certain Solder Removal Wicks, 42 Fed. Reg. 35231 (July 8, 1977), *aff'd,* 65 C.C.P.A. 120 (August 1978).

(11) One of the Congressional Committee Reports on the Act suggests that the Commission should normally measure the increase in imports from 1968, the conclusion of the most recent round of multilateral tariff negotiations. But the Commission is not bound by this. In the case of specialty steel the Commission used 1964 as the base year from which to measure the increase in imports.

(12) *See* Article VI, paragraph 4, of the General Agreement.

(13) 437 U.S. 443, 98 S.Ct. 2441.

(14) GATT Basic Instruments and Selected Documents, 3rd Supp. (1955), at p. 81.

(15) Article 2(d) of the International Antidumping Code, of which both Japan and the United States are signatories, provides that third-country sales or constructed value may be used where "because of the particular market situation, [home market] sales do not permit a proper comparison." The U.S. Government contends, naturally, that sales below cost of production fall within this exception.

(16) Viner, *Dumping: A Problem in International Trade* (1923), at pp. 292-93.

Note
The Trade Agreements Act of 1979, which is designed to implement the Tokyo Round multilateral trade agreements, was signed into law on July 26, 1979. This law makes a number of significant changes to the antidumping and countervailing duties laws. In particular, (a) it requires a finding of "material injury" before countervailing duties may be imposed on impacts for countries that are signatories to the Agreement on Subsidies and Countervailing Measures (one of the Tokyo Round Agreements); (b) it requires a finding of "material injury" in antidumping cases instead of simple "injury"; (c) it substantially reduces the time limits for investigations. Most of the amendments go into effect on January 1, 1980.

APPENDIX A

STATUTE	FINDING	AGENCY	REMEDY	DISCRETIONARY POWER
Antidumping Act 19 USC §§160-173	(1) Sales at Less Than Fair Value	Treasury	Antidumping Duties	None
	(2) Injury or likelihood of injury to an industry in the U.S.	I.T.C.		
Countervailing Duties Law 19 USC §1303	"Bounty or grant" paid or bestowed on "manufacture or production or export" of goods imported to the U.S.	Treasury	Countervailing Duties	Treasury may, if certain conditions are met, waive duties until Jan. 2, 1979, subject to Congressional override (one house)
Unfair Trade Practices 19 USC §1337	"Unfair methods of competition or unfair acts in importation", causing or threatening "substantial" injury to an "efficiently and economically operated" industry in the U.S.	I.T.C.	(1) Exclusion order (2) Cease-and-desist order	President may disapprove affirmative decision of I.T.C.
Escape Clause 19 USC §§2251-53	Increase in imports causing or threatening "serious" injury to the industry making "like or directly competitive" products	I.T.C.	(1) Duty increase (2) Tariff-rate quota (3) Quota (4) Negotiation of OMAs	President may refuse to follow I.T.C. recommendation for relief following affirmative recommendation, subject to Congressional override (both houses)