Dumping and Anti-Dumping in International Trade Origins, Legal Nature, and Evolution Developments in Brazil and in the United States

Luiz Claudio Duarte

University of Georgia School of Law
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LUIZ CLAUDIO DUARTE
Bel., Universidade Federal do Rio de Janeiro, 1983

A Thesis Submitted to the Graduate Faculty
of The University of Georgia in Partial Fulfillment
of the
Requirements for the Degree

MASTER OF LAWS

ATHENS, GEORGIA
1997
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by

LUIZ CLAUDIO DUARTE

Approved:

[Signature]
Major Professor
Date: May 19, 1997

[Signature]
Chairman, Reading Committee
Date: May 21, 1997

Approved

[Signature]
Graduate Dean

Date: 5/28/97
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Introduction

Globalization has become a "mantra" in the world today. Technological innovations in communication and in transportation of people, money and goods, have extended markets beyond national boundaries. After more than seven years of negotiations, the Uruguay Round of the General Agreement on Tariffs and Trade - GATT (1986/1994), culminated in the creation of the World Trade Organization - WTO, the legal and institutional foundation of the multilateral trading system established on January 1, 1995.

The Uruguay Round, the seventh forum of negotiation since the GATT was instituted in 1947, inter alia, reduces ordinary import barriers, sets up new mechanisms for dispute resolution as well as guidelines for trading services and intellectual property. The world has become small.

At the same time, against a background of open-border countries and global markets, unfair trade practices, known as dumping also flourished. Indeed, dumping is defined as the practice of using discriminatory price where the imports goods are sold at prices below the selling price in the country of export and, consequently, causing injury to competing industry in the importing country. In response to such a situation, mechanisms of defense have been developed as tools to protect and prevent the nations from unfair trade practices.

The GATT, since its original version of 1947, recognizes in Article VI anti-dumping tariffs as a legitimate defense designed to protect domestic industries against foreign predatory pricing strategies.
This thesis focuses in the anti-dumping systems that arose in international trade since the beginning of the twenty-century until the creation of the World Trade Organization, with particular attention to developments in Brazil and in the United States.

Chapter 1 presents a historical analysis of dumping, discussing the origins, classification, juridical nature and evolution in the international economy. Chapter 1 also lays out distinctions between ordinary import duties erected in protectionist economic policies, and defensive duties stemming from unfair trade practices.

Chapter 2 surveys the evolution of dumping and anti-dumping measures under the General Agreement on Tariffs and Trade - GATT. It analyses anti-dumping measures and their applicability under Article VI of the General Agreement on Tariffs and Trade - Anti-Dumping and Countervailing Duties, as well as the evolution of the Agreement on Implementation of Article VI of the General Agreement, the so-called Antidumping Code, since its first version in the Kennedy Round (the Fifteenth Supplement - May 1966-Nov.1967), the second in the Tokyo Round (Twenty-Sixth Supplement - Nov 1978-Nov.1979), and concluding in its current text established in the Uruguay Round in 1994. Furthermore, this Chapter analyses some of the recent decisions taken in the Uruguay Round that are related to the issue dumping, and the subsequent creation of the World Trade Organization (WTO).

Chapter 3 presents an overview of the application of antidumping legislation in Brazil, pointing to some of the legal problems that arose in that country especially for enforcing retroactive duties under Article 10 of the Antidumping Code. It also surveys the evolution of the domestic anti-dumping legislation.

Chapter 4 shows how the United States has dealt with the issue of dumping in this century, covering the conflicts between domestic trade regulations and international regulations set forth by the GATT. Chapter 4 also speculates on future changes that can be expected in the United States international trade policies, considering that the WTO agreements have now been approved by the U.S. Congress.
Finally, this paper presents a personal view of the anti-dumping system officially established by the World Trade Organization, and makes some suggestions for their successful enforcement in the international trade.
Chapter 1

A - The Definition of Dumping

Dumping has been practiced long before the beginning of the twenty-century. As observed by Jacob Viner, "(T)he practice of dumping has long been known, although not by this name, to writers on commercial matters. Adam Smith, for example, not only discusses unfavorably the practice on the part of government of stimulating exports at prices lower than those current in the domestic market by the grant of official bounties, but gives an instance from personal observation of the grant of bounties on exports by a private combination of producers in order to reduce the supply available for the domestic market." At that time, Smith was trying to implement his principle of "absolute advantage", fighting against the mercantilist concept prevalent since the sixteenth-century, by which the wealth of a nation was measured by the quantity of gold and silver (bullion) that a country had in its treasure. Smith showed that the wealth of a nation should be also measured by the consumption alternatives available to the national citizens.

However, the term dumping first appears in economic literature at the beginning of the twenty-century, although "it [dumping] had but a vague and uncertain meaning, and it is still often used indiscriminately for such diverse price-practice as severe competition, customs, undervaluation, bargain, sacrifice, or slaughter sales, local price-cutting, and selling in one national market at a lower price than in another." For instance, the English economist T.E.G. Gregory points out four different definitions of dumping: "1) Sale at prices below foreign market prices; 2) Sale at prices with which competitors cannot cope; 3) Sale at prices abroad which are lower than current home prices; and 4) Sale at prices unremunerative to the sellers."
The prevalent concept of dumping in modern international trade, however, is that originated from price-discrimination in the basis defined in case 3 above, i.e., dumping being characterized by a situation where the sales are made abroad at lower price than those current domestic prices. Indeed, this is the definition for dumping that is established in Article VI of the General Agreement on Tariffs and Trade, as will be discussed in greater detail in Chapter 2 below.

As a matter of fact, price-discrimination is the key element in dumping. According to classic economic theory, price-discrimination occurs when “a firm sells an identical product in two different markets for different prices.” Whenever pricing discrimination can be detected in trades between national markets, i.e., when the products are charged at prices lower than the price in the export market, then a dumping practice should be characterized.

There are scholars who argue that the phenomenon of dumping is more likely to occur in developing countries, where weaker domestic competition allows the dominant oligarchies to impose high prices for their products, making the country, therefore, more vulnerable to foreign competition.

However, until recently, the industries of developing countries have traditionally been protected by high tariffs of ordinary import duties, the so-called prohibitive tariffs, which makes the possibility of the entry of a dumped product less probable.

On the other hand, developed countries with lower trade barriers can be easy targets for the oligarchic economies predominant in developing countries. Indeed, in developing countries lower prices can be reached, for instance, by the so-called “social dumping”, which means reducing the costs of production by the payment of very low wages to workers. Also, many economies in developing countries normally are highly subsidized, notably through the concession of significant privileges to special interest groups.

Therefore, domestic prices can be kept at a level that represents a compromise between the low cost of production and the high value of the import duty imposed on the
same product. The effects of these practices on the domestic environment are surely perverse and only favor the oligarchies: the industry loses efficiency, the domestic market loses elasticity, the local consumers are forced to pay high prices for products, and the government also loses substantial revenues that could come from reasonable import duties. In addition, it is important to mention that in developing countries it is common to find companies where the government is either the owner or has a substantial share in the ownership. This at the least casts suspicion on the official local policies for the protection of these same companies.

On the other hand, a developing country can achieve international competitive prices in exporting its surplus by simply expurgating the local tariff barrier. Furthermore, it is very unlikely that such a practice would be characterized as dumping abroad, on the grounds that the entry of a product from a developing country into a highly competitive developed country, seldom will result in damage to the local industry.

Therefore, the necessary causal link between dumping and injury, which satisfies the characterization of dumping for the implementation of an anti-dumping tariff, will probably not exist.

For various reasons, the implementation of such a mechanism by a developed country is unlikely, due to the combination of high wages vis a vis low tariffs barriers prevalent in competitive markets.

It is reasonable to assume, however, that the accentuated and widespread reduction of tariffs that have occurred in the Uruguay Round of the GATT will make developing countries significantly more vulnerable to dumping practices, if taken into consideration the damage that massive imports from developed countries can bring to the local industries.

Notwithstanding the classic definition of dumping, some interesting forms of dumping or quasi-dumping can be detected in the international trade environment, as for instance:
Spurious Dumping

Spurious dumping should not be confused with genuine dumping. It is characterized by a situation where the low price is brought about by an external and/or artificial factor, caused by a legitimate market condition or by a fact independent of the seller’s intention. For example, when price-discrimination is a mere consequence of the size of the combined foreign orders and/or from the conditions of pre-payment (cash) that favor the seller when the goods are sold to the foreign instead of the domestic market. These conditions represent logistic advantages perfectly justified by legitimate commercial interests and, therefore, they do not represent an unfair trade practice that could characterize dumping. Then, the expression “price-discrimination” should give way to another one: “Sales at different prices”.

Exchange Dumping

This exists when the currency of a country presents “a substantial divergence between its internal and its external purchasing power.” In this case, the simple conversion from one currency to another makes a distortion which might point to the presence of dumping. However, an intentional divergence between currencies can be artificially created for the purpose of disguising dumping, and such a practice certainly can be defined as unfair.

Freight Dumping

When favorable transportation costs, commonly offered in order to incentivate exports, influence the price of a commodity “they somewhat resemble dumping.” This practice can be defined as one favored by subsidies and, hence, may be resolved by countervailing measures instead of anti-dumping ones.

Concealed Dumping

Concealed dumping is generally classified in the category of genuine dumping. It occurs when there is “the charge of the same prices to purchases in different markets although the conditions and terms of sale differ substantially as between the different
markets. The main characteristic of this sort of practice is the intentional act of camouflaging aspects of the sale to hide the dumping. A common form of concealed dumping occurs, for instance, in the concession of much longer credit terms to certain foreign buyers than to domestic ones without extra-charges.

In addition to these forms of dumping or quasi-dumping above mentioned, there are other modern kinds of dumping, as follows:

Social Dumping

Social dumping has been the object of several complaints by developed countries. It occurs when an abundant supply of labor results in very low wages and, therefore, reducing production costs to the extent of creating a competitive advantage over prices of developed countries. In the same category one can include the practice of utilizing labor prison for the manufacture of goods, an issue that has made China the object of several international objections.

Hidden Dumping by Associated Houses

Hidden dumping occurs “(I)n cases where there is no import price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party...”.

Indirect Dumping

Occurs “in the case where goods are not imported directly from the country of origin but are consigned to the country of importation from an intermediate territory...”.

B - The Classification of Dumping

Jacob Viner summarizes the classification for dumping in a splendid charter that is found in his book “Dumping - A Problem in International Trade.” Indeed, there he divides the classification according to motive and to continuity of the dumping, encompassing three categories of continuity: sporadic, short-run or intermittent, and long-run or continuous.
Then, we perceive that when dumping is sporadic it is either motivated by an intention to dispose of a casual overstock, or it is an unintentional phenomenon.

If the dumping is classified as being a short-run or intermittent one, the motivation for that can be either a) "to maintain connections in a market in which prices are on remaining considerations unacceptable", or b) "to develop trade connections and buyers' goodwill in a new market", or c) "to eliminate competition in the market dumped on", or d) "to forestall the development of competition in the market dumped on", or e) "to retaliate against dumping in the reverse direction."

Finally, if dumping is classified as long-run or continuous, the cause for that shall be a) "to maintain full production from existing plants facilities without cutting domestic prices", b) "to obtain the economies of larger-scale production without cutting domestic prices", or c) "on purely mercantilistic grounds".

Although recognizing the unquestionable merits of the classification above described, the fact of the matter is that the world trade market is something much more dynamic and unpredictable. Consequently, it is perfectly possible, for instance, the occurrence of a sporadic dumping motivated by purely mercantilistic grounds. Likewise, an unintentional dumping can occur for an intermittent period. There may even be a sporadic dumping originated by a kind of retaliation from another sporadic one. Indeed, "(T)he economic rationale behind this (Viner) classification is not clearly stated" and "(The) usual classification of dumping according to continuity/duration is therefore open to a number of serious objections."

Furthermore, due to the existing mechanisms which protect economies from dumping practices, it is very unlikely that a long-run or continuous dumping can occur without being repealed long before reaching such a category. However, these are economic theories that actually escape from the purposes here pursued.
C - Dumping v. Ordinary Import Duties - Distinctions

The objective of this section is to make a clear distinction between the juridical nature of the anti-dumping duties and the ordinary import duties, an issue that had a crucial importance in Brazil in the early 1990's, as will be seen in Chapter 3 below.

Background

Ordinary import duties were probably first applied in the sixteenth-century. At that time, the predominant theory of mercantilism upheld the concept that the wealth of a country was directly proportional to the quantity of gold and silver (bullion) that that country had in its treasure. Mercantilism marks the beginning of the first ideas about balance of trade, the so called "Balance of Trade Doctrine"17, which is probably the father of the current concept of balance of payment. Consequently, the nations made huge efforts to incentive the export of goods at any price, while at the same time that barriers were created to block imports. These barriers simply prohibited imports altogether or discourage them by the application of very high tariffs. These tariff barriers are the forerunners of the ordinary import duty such as we know today.

Since then, the concept of import duties has evolved through out the centuries, incorporating theories of eminent economists, as for instance, Adam Smith, David Ricardo, and others. Nowadays, the majority of countries in the world recognizes that import duties are part of the autonomous body of laws that integrates their national tax law18.

Contemporary thinking about the application of import duties recommends the achievement of a delicate balance. The duty should be high enough to protect local industry but, at the same time, low enough to allow the entry of foreign products into the local market in order to stimulate competition, which is extremely healthy for the economy in general. Also, an import duty applied at a reasonable level that would allow the entry of foreign goods, represents a substantial and consistent source of revenue for the government. Moreover, it is now generally accepted that "(P)rotection is not condemned as being wholly wrong and frustrating to international exchange of goods, even by those
who believe in the ultimate benefit of free trade. Leaving aside sectional pressures for protection for its own sake without consideration of the interests of the consumers, it is admitted for instance that the one way to reduce the gap between the rich nations and the poor nations is to encourage the poor nations to learn to use mechanical power in industry to supply their needs and even to manufacture for export.19

On the other hand, the motivation for the appearing of anti-dumping tariffs are completely distinct from those that originated the ordinary import duty. The first concerns about dumping practices took place after the Industrial Revolution, which started in England in the final of the eighteen-century, and “it is therefore not surprising that the first extensive charges of dumping were directed against her (British) manufactures.20” For instance “(S)oon after the Treaty of Ghent between England and the United States had made possible a resumption of the trade relations which had been interrupted by the War of 1812, Americans accused English manufacturers of deliberately dumping their products in the United States in order to crush the new industries which had developed there during the war”21. Concerns about British unfair trade practices caused the United States to enact the Tariff Act of 1816, which “was the first distinctly protectionist tariff of the United States, and it has been claimed that the threat to American industries from English dumping, and especially Brougham’s (Henry Brougham was a member of the British House of Commons) frank utterance with respect thereto, was an important influence contributing to the enactment of this, as well as of subsequent, protectionist legislation.22”

However, it was in the early years of the twenty-century that “the growth of trusts and combinations in industry has brought with it the systematic and more or less continuous practice of export dumping on the part of many of the important manufacturing industries of the great industrial nations, and especially on the part of such industries as were organized into producers’ trust or combination.23” At that time, Germany was repeatedly accused of exporting dumping through its kartells which were supported by German industry, especially by the iron and steel sector, and there is a “general agreement
that before 1914 export dumping was more systematically practiced in Germany than any other country.\textsuperscript{24}

It was against this background that the first specific anti-dumping legislation was enacted by Canada in 1904. In so doing, the Canadian government “found an ingenious escape in the enactment of the anti-dumping law, which gave the manufacturers the specific type of protection which they claimed they needed without ... an increase in the rates of duty of the ordinary duty.”\textsuperscript{25}

\section*{Distinctions}

As already mentioned before, ordinary import duties are an autonomous body of laws that form part of the tax law of a country, and therefore they are created under the principle of legality “to supply funds to the public authority, which decides unilaterally, within the limits of its competence (\textit{ratione personae}, \textit{ratione materiae}, \textit{ratione loci}) as to the amount and manner of distribution of the burden which it will impose (\textit{in ponere}) on the taxpayers.”\textsuperscript{26}

Anti-dumping tariffs, on the other hand, are beyond the legal definition of taxes, on the grounds that, unlikely ordinary import duties, they are not an integral part of the autonomous body of laws of a country. Indeed, while ordinary import duties are motivated by protection of the domestic economy and supply of funds through revenues, the anti-dumping tariffs are essentially punitive. Anti-dumping are, in fact, penalties which are imposed through extraordinary custom duties, whenever the practice of dumping can be identified. For instance, in the Brussels Sugar Convention signed in 1902 by Great Britain, Germany, France, Austria-Hungary, Italy, Belgium, Holland, Spain and Sweden, the adoption of countervailing measures against, the import of bounty-fed sugar were contemplated in a “penal clause”\textsuperscript{27}.

While it is true that anti-dumping tariffs have a protectionist effect their role is primarily punitive. Indeed, the GATT allows that anti-dumping measures to remain in force for a period of 5 years, as will be analyzed in Chapter 2. It means that, once a
dumping practice is detected, the penalty will be continuously applied for the subsequent imports of the same product from the same exporter, independent of the new price that the product can have after the penalty’s imposition. Also, the extraordinary duty can be applied continuously even though the dumping detected was classified as a sporadic one. Consequently, the character of protection disappear from the anti-dumping tariff, giving way to punitive action needed to inhibit unfair trade practices.

A frontal attack against the argument that the anti-dumping is applied as a punishment is made on the grounds that the passive agent for the payment of the penalty is the importer, and not the party who in fact practiced the dumping, i.e. the exporter. We do not agree with this argument. First, although it is true that the importer pays the penalty, the exporter will be indirectly punished by the loss of the market where the extra-duty is in force, due to the high price that his product will reach after the addition of the tariff. Second, there is always the possibility that the exporter and the importer being the same company, in the event of a hidden dumping by associated houses, which is very common. Third, it should consider an event of an anti-dumping being applied in the period between the sale and the purchase of the goods. In this case the importer surely will cancel the operation and its costs will probably be supported by the exporter.

Furthermore, a situation where the importer has to pay for the tariff it is not totally unjust. Indeed, as an active member of the market, the importer knows that the product he is buying has a price considerably lower than the usual prices. Then, he is undergoing a calculated risk based on the relation of cost/benefit. In order to better explain this point-of-view, it could be compared with a situation where an investor makes an application in investment funds. As much as the investor wants a quick and substantial return for his investment, that much higher will be the risks he will have of losing everything; on the other hand, if the investor wants only a fair remuneration for his money, the risk will be practically non-existent.
Other strong elements in distinguishing ordinary duties (import tariffs) from extraordinary custom duties (anti-dumping tariff) is due to the fact that if the anti-dumping tariff were considered as a tax it would constitute double-taxation (*bis in idem*), an evil recognized by all tax systems in the world. Additionally, in such a situation the import duty would be applied in a discriminatory manner, where the tax would be one rate for some and a different one for others in regard to the same product, which is another big evil in the environment of tax laws.

Also, ordinary import duties have been considered a matter of sovereignty of nations. In spite of the fact that nowadays the duties are object of international concessions through regional treaties, as NAFTA, MERCOSUL, European Community, APEC and others, or international treaty, as the GATT, national sovereignty in fixing import duties remains untouchable, on the grounds that these duties are part of the tax law of that country. Conversely, the anti-dumping tariff must only be applied under the rules foreseen in article VI of the GATT. Therefore, the decision of a country leading to the imposition of anti-dumping tariffs can be always reviewed either by the courts of the same country under Article 13 of the Antidumping Code, or by the WTO Dispute Settlement system under Articles XXII and XXIII of the GATT. In regard to the issue of sovereignty for the purposes of anti-dumping, one can assume that the sovereignty is performed in a negative way, i.e., when a government decides not to apply the penalty even though dumping has been practiced and identified, on the grounds that such a decision can not be questioned.

Another piece of evidence, this time a factual one, can be used to emphasize the distinction here pursued. At the present, the United States is conducting an investigation regarding Mexican exports of fresh or chilled tomatoes. As we know, the United States and Mexico are member-states of the North-American Free Trade Act - NAFTA, a regional treaty where, *inter alia*, preferential ordinary import duty were established. However, in spite of this common partnership related to import duties, the United States is pursuing the imposition of anti-dumping against Mexico, instead of seeking resort in the NAFTA
Treaty. Here, once more, the character of punishment is prevalent over the principle of protection that consecrates the ordinary import duty.

Indeed, in his book *Dumping - A Problem In International Trade*, Jacob Viner several times refers to the anti-dumping as a penalty. For instance, in the chapter that makes a comparative analysis of anti-dumping laws, he wrote that "...the imposition of penalties on imports in case they are sold for export at f.o.b. prices or their equivalent which are lower than the current fair market values for domestic sales in the country of export", and yet "(T)he British law restricts the scope of the dumping penalty by making it applicable only in case foreign goods are sold in Great Britain, c.i.f., at prices lower than the fair market value in the country of export." Interestingly enough the word "penalty" is defined in the "American Heritage Dictionary" as "a punishment for a crime or offense"

In conclusion, one can assume that the anti-dumping tariff is an extraordinary customs duty, by which a penalty is applied in order to punish an unfair trade practice.

Finally, it is opportune to distinguish dumping from export subsidies. While dumping is considered to be an unfair activity of a private enterprise, subsidies are granted by governments to foster an exporting policy. The remedy for dumping is the establishment of anti-dumping tariffs. The remedy for subsidies is the imposition of countervailing measures. Nevertheless, it is true that the first measures against dumping in the past century occurred in order to eliminate subsidies granted by governments. Two considerations, therefore, have to be made: First, the fact that before the twenty-century, the definition for dumping was very broad, as we pointed at the beginning of this Chapter, and the concepts of dumping and subsidies were commonly interwined. Second, it is also a fact that until the last century it was common for governments to have direct participation and ownership in the enterprises, which makes a policy for concession of bounties at the least suspect.
Canada was the first country to introduce anti-dumping legislation. It was introduced in 1904 by a Liberal government "in order to neutralize the aggressive campaign of Canadian manufacturers for higher import duties on the plea that they were necessary to protect Canadian Industry from dumping." The measure was explained by the Minister of Finance, W.S. Fielding, who said that "it was unscientific to meet special and temporary cases of dumping by a general and permanent raising of the tariff wall and that the proper method was the one which he now proposed, namely, to impose special duties upon dumped goods." The Canadian law, as amended in 1907, in classifying dumping established those "...articles exported to Canada of a class or kind made or produced in Canada, if the export or actual selling price to an importer in Canada is less than the fair market value of the same article when sold for home consumption in the usual and ordinary course in the country whence exported to Canada at the time of its exportation to Canada..." and the anti-dumping tariff was limited to the maximum to 15 per cent ad valorem. Mr. Fielding explained the limitation "as conforming to the estimate that the difference between the export price and the fair market value in exporting country of goods dumped in Canada amounted on the average of 15 per cent." The concept of fair market value is certainly the forerunner of the GATT's concept for normal value. For the Canadian law, an unfair market value would be characterized whenever the difference between the foreign domestic and the foreign export price exceeded 5 per cent.

Another characteristic of the Canadian law is that "...the anti-dumping provisions contained no injury test", which is the necessary link between the dumping practice and the damage that such a dumping causes in the local industry for the implementation of an anti-dumping tariff, as foreseen in the GATT. The introduction of the injury test in Canada occurred only in 1967, after the implementation of the 1967 GATT Antidumping Code.
New Zealand

Following Canada, New Zealand implemented an anti-dumping law in 1905, the Agricultural Implement Manufacture, Importation, and Sale Act, “in response to complaints from domestic and British manufacturers of agricultural implements that an American harvester trust was attempting to monopolize the New Zealand market by systematic price-cutting to New Zealand purchasers...” It established a method by which a bonus in the maximum limit of 33 percent was granted whenever it was necessary to enable the local manufacturers to compete with the importers.

A new anti-dumping law was introduced in New Zealand in 1921, by which three classes of imports were subject to anti-dumping tariff: “a) goods imported into New Zealand of a class or kind produced in New Zealand, if the f.o.b. selling price to the importer is less than the current domestic value in the country of export; b) goods imported into New Zealand at a price which in the opinion of the Minister of Customs is less than the cost of production, including a reasonable profit, in the country of origin or the country of exportation at the time of exportation; c) goods imported into New Zealand of a class or kind produced in New Zealand, or goods imported into New Zealand from a non-British country of a class or kind produced in some other part of the British Empire, if the Minister of Customs is satisfied that any special concession, whether by way of railway or shipping freight, subsidy, special bounty, rebate, or otherwise, is given to such goods and that there results from such concession injury to a New Zealand or British industry.”

Australia

Australia enacted its anti-dumping legislation in 1906, the Australian Industries Preservation Act, “which was aimed chiefly at the suppression of monopolies, but which also contained provisions dealing with dumping.” It was characterized by a broad definition for unfair competition that “not only covers dumping proper and selling below costs of production, but it also applies to ordinary keen competition if it embarrasses Australian industry.”
In 1921, Australia enacted a supplementary legislation, the Tariff Board Act, that "apparently does not repeal the earlier anti-dumping provisions in the 1906 law.\textsuperscript{42}"

France

France tried to implement an anti-dumping law in 1908, which had similarities with and differences from the Canadian Law: "It resembled the Canadian law in the fundamental particular that the additional duty was to be applied only to imports sold at prices lower than those current in the exporting country. It differed, however, from the Canadian law in that it was to apply only to instances of dumping resulting from the grant of export bounties, that the amount of the bounty instead of the amount of difference between the domestic price in the exporting country and the export price was to be the measure of the additional duty, and that the application of the additional duty was not mandatory upon the customs officials but was subject in each case to the discretion of the president and the Cabinet.\textsuperscript{43}\)

However, on the grounds that the implementation of the law as proposed would implicate in a total revision of the French custom system, the government withdrew the proposal without submitting it to a vote\textsuperscript{44}. Hence, 
"(I)n the revised tariff law as finally enacted in 1910, there was inserted instead a bounty-countervailing duty of the ordinary kind \textsuperscript{45}, i.e., to be calculated in the amount of the difference between the domestic price in the exporting country and the export price."

Great Britain

The British anti-dumping law, the Safeguarding of Industries Act, was implemented in 1921, and it reflected special concerns with Germany activities during World War I and the post-armistice period\textsuperscript{46}. The Act, established that if "foreign manufactured goods of any class or description other than articles of food or drink are being sold or offered for sale in the United Kingdom at prices below the cost of production thereof as defined in the Act, and that by reason thereof employment in any industry in the United Kingdom is being or likely to be serious affected, the Board (of Trade) may refer the matter for inquiry to a committee constituted for the purposes of this part of the Act.\textsuperscript{47}\)
The penalty in the British law was applied through "...a special duty equal to one-third of their value, defined as the price in bond at the point of importation which an importer would give for the goods." Curiously, although the law characterizes dumping on the grounds of a product sold below cost of production, "the Act has nothing to do with cost of production and it is directed against imports sold in the United Kingdom at prices below the foreign market price by more than 5 per cent, regardless of whether these prices are below the cost of production." 49"

However, the British Act also foresaw a complicated and bureaucratic system before allowing the application of the anti-dumping duty. The following steps had to be first accomplished: 50 a) a complaint to the Board Trade; b) an investigation by the Board; c) a reference to a committee; d) a report by the committee; e) the drafting of an order by the board; f) its submission to the House of Commons; g) the passage of a resolution by the House; h) the issue of the order by the Board; and, finally, i) the administration of the order by the commissioners of customs and excise. Therefore, it is not a surprise that "(O)f 123 applications for the imposition of duties up to July 31, 1922, only four passed through the Board and reached the House of Commons." 51"

Indeed, it can be said that "(A)s it stands today the anti-dumping section of the Safeguarding of Industries Act is of little significance." 52"

The comments on the evolution of anti-dumping legislative measures in Brazil and in the United States will be reserved for separate analysis in Chapters 3 and 4, respectively.
Notes (Chapter 1)


3 - Viner, Jacob, *Dumping - A Problem in International Trade*, at 1 and 374 (1966). “Dumping as a term in the literature of commercial was first used during the English tariff controversy of 1903-1904, although reference had often been made previously to the use of one country as the dumping ground for another. In its original meaning and as now used by careful writers in English and in other many languages in which the term has become fairly well established it signifies sale for export at prices lower than those charged to domestic buyers.”

4 - Id., at 3 (quoting T.E.G. Gregory, *Tariffs: A Study in Method*, at 3 (1921).


6 - Id., at 26. “It (dumping) is likely to occur whenever a firm is the only, or one of the only, sellers in its home market and in addition is protected from foreign competition at home by natural or artificial barriers to trade. In such a case it will face a less elastic demand for its product in its home market than abroad and will respond to that discrepancy by charging a higher markup at home than abroad.”

7 - Viner, Jacob, *Dumping - A Problem in International Trade*, at 9 - 11. “The most important single factor giving rise to spurious dumping is probably the difference in the size of the unit orders which are obtained in different markets. The foreign buyer often gives as a general rule larger orders than the domestic buyer. This may be because the former makes few buying trips and concentrates his purchases into a few weeks of the year, whereas the domestic buyer finds it more convenient to make his purchases in small quantities as he needs new supplies.” “Similarly, if exports sales are commonly on cash or short-credit terms, whereas long credits must be given to domestic purchasers; if foreign buyers are safer credit risks than the small-scale domestic buyers; if export grades are of poorer quality or not as well finished or of smaller construction than the domestic grades of similar commodities; if export prices are f.o.b. the factory or a nearby port, whereas domestic prices are prices delivered; if packing is separately charged in the export sale but is included in the domestic prices; under any of these circumstances the sale for export at prices lower than the domestic prices would not of itself necessarily indicate that genuine dumping was taking place.”

8 - Id., at 8.

9 - Id., at 15.

10 - Id., at 16.

11 - Id., at 17.
12 - Id., at 17, (quoting the Report of United States Industrial Commission, at 726 (1901) “An instance is reported of an American beer-bottling concern which sold for export at the same nominal prices as those quoted to domestic buyers, but concealed its practice of dumping by making its concessions on export sales take the form of omitting any charge for extra boxing and packing and of making its domestic prices f.o.b. factory whereas its exports prices were f.o.b. New York.”


14 - Id.

15 - Viner, Jacob, Dumping - A Problem in International Trade, at 23 (1966).


17 - Viner Jacob, Studies in the Theory of International Trade, at 6 (1965). “The most persuasive feature of the English mercantilist literature was the doctrine that it was vitally important for England that it should have an excess of exports over imports, usually because that was for a country with no gold or silver mines the only way to increase its stocks of the precious metals. The doctrine is of early origin, and some of the mercantilists, in the earlier period when it was still customary to scatter miscellaneous tags of classical wisdom through one’s discourse, succeeded in finding in Latin quotations which seemed to expound it.”

18 - Houtte, Jean Van, Principles of Interpretation in Internal and International Tax Law, at 36 (1968). “We have recognized the autonomous character of tax law. We have emphasized that it embodies a particular aspect of the powers of the body politic over the individuals which composed it. We believe that it is precisely because of the source of the tax obligation, namely the unilateral will of the public authority, expressed in constitutional forms, that one must accept, in the interpretation of tax laws, all the consequences of the spirit of legality.”

19 - Bower, Sir Frank - Tax Problems and the Development of International Trade and Commerce, at 18 (1966) “If the local market were left open to free access by foreign competition, the local industry would never get off the ground. The danger lies in giving protection after a point where the industry should be able to compete without it, and in extending protection to industries which never have a reasonable hope of efficiency by reason of adverse local conditions or unsuitability of the persons engaged in it. If by virtue of initial and temporary protection of its infant industries a poor country can increase its income and therefore spending power, it will be able to purchase more of the goods of the richer nation.”

20 - Viner, Jacob, Dumping - A Problem in International Trade, at 36 (1966). “It is by no means certain, however, either that the actual practice provided a substantial basis for the charges of dumping, or that fear of or resentment against British dumping, actual or prospective, was the real motive leading to the making of the charges.”

21 - Id.

22 - Id. at 43 (quoting R.W. Thompson, The History of the Protective Tariffs Laws, at 126-128).
“The Minister of Finance, W.S. Fielding, in introducing the measure claimed that it was unscientific to meet special and temporary cases of dumping by a general and permanent raising of the tariff wall and that the proper method was the one which he now proposed, namely, to impose special duties upon dumped products.”

Houtte, Jean Van, op. cit., at 20.

Viner, Jacob, Dumping - A Problem in International Trade, at 304 (1966).


Viner, Jacob, op. cit., at 275.

Jackson, John H. and Vermulst, Edwin A., op. cit., at 3. “Dumping, at least as that term is now used, should be distinguished from export subsidies. The latter involve some benefit or subvention, usually derived by from government sources, which accrue to the seller or producer of goods, provided that the goods are exported. The current rules regarding dumping and subsidies, either international or national, generally sharply distinguish the two practices, although older descriptions, including those of Adam Smith and Jacob Viner sometimes tend to lump the practices together...This book is about dumping. The subject of subsidies and countervailing duties as a response to subsidies is left to other works.”

Viner, Jacob, op. cit., at 192 (quoting Edward Porrit, Sixty Years of Protection in Canada, at 406, 1908).

Id., at 193 (quoting Canada: House of Commons Debates, col. 4365, June 7, 1904).


Id., at 196 (quoting Canada: House of Commons Debates, col. 4367, June 7, 1904).

Id., at 198.


Id.

Viner, Jacob, op. cit., at 204.

Id., at 231, 232 (quoting the Custom Amendment Act, Section II, Dec.22, 1921).

Id., at 206. “The dumping section of the law was extremely unusual in a number of respects, including its terminology and its provisions for the administration of the penalties which it provided. The dumping section is long and complicated, and there does not appear to have been a single instance of its application...”

Id., at 207.

Id., at 227.
43 - Id., at 214.

44 - Id, at 215.


46 - Id., at 216. “The wartime of the menace of German dumping, the fear that Germany during the war and the post-armistice period was storing up her energies for a campaign of predatory competition with the industries of the Allied countries, above all the marked increase of protectionist sentiment since 1914. All of these factors contributed to the development of what was apparently a strong and widespread feeling in Great Britain that there should be enacted in some form or other protective legislation which would safeguard British industries against injury by foreign dumping or abnormally keen competition.”

47 - Id., at 219.

48 - Id., at 222. “The strange and illogical use of the term ‘cost of production’ in the Act can be explained only as arising out of the desire of the government to attain at least a verbal redemption of its pre-election pledge to introduce legislation penalizing imports sold at prices below cost of production and its reluctance to commit itself to measures which would actually necessitate for their execution the determination of that elusive quantity, cost of production.”

49 - Id.

50 - Id., at 225.


52 - Id.
Chapter 2

A - The GATT/WTO

Origins and Evolution

For the last forty years, the General Agreement on Tariffs and Trade (GATT) has been the main instrument for the regulation of international trade. The GATT is the result of a common effort among several countries to rebuild international world trade, which had been disorganized and devastated during World War II.

The idea of creating an International Trade Organization (ITO) capable of bringing harmony into the market, was the cornerstone of the meeting held between 1946 and 1948, which is known as the “Havana Charter”. However, the decisions emanating from the Havana Charter never took effect, mainly because the United States failed to adopt the ITO charter as conceived at the Havana meeting.

As a matter of fact, the roots of the GATT are due to a parallel action taken in order to create a provisory agreement regulating the reduction of tariff barriers in international trade that could be quickly enforced while the main instruments for the creation of the ITO were being negotiated in the Havana Charter. The general idea was that such an agreement could bring “suggestions for rules to govern trade barriers, restrictive business practices, intergovernmental commodity arrangements, and the international aspects of domestic employment policies, and also proposed a structure for the organization.”

After several meetings among representatives of governments of nineteen countries, including the United States and the United Kingdom, the GATT began to be applied in January 1, 1948, through a Protocol of Provisional Application. However, as the Havana Charter never took effect, the GATT Agreement, that was supposed to be only a protocol for provisory application, became the main instrument in the public law of
international trade for over 40 years. Therefore, “the agreement, which started as a temporary arrangement, has become a completely autonomous and self-sufficient entity.”

In the GATT’s preamble, the Contracting-States defined its objectives, stating that by the GATT they were:

“Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”

Since the GATT’s creation, seven rounds of multilateral negotiations on tariffs and trade barriers were held, as follows:

1 - Annecy, 1948-49, involving 33 countries.
2 - Torquay, England, 1950-51, involving 34 countries.
3 - Geneva, 1955-56, involving 22 countries and $2.5 billion of trade.
4 - The Dillon Round, Geneva, 1961-62, involving 45 countries and $4.9 billion of trade.
6 - The Tokyo Round of Multilateral Trade Negotiations (MTN), involving 99 countries and $155 billion of trade.
7 - The Uruguay Round of MTN, 1986-94, involving 125 countries and $3.7 trillion of Trade.”

The first five rounds dealt basically with reciprocal reductions in tariff rates. However, it was in the Kennedy Round that the first version of the Agreement on
Implementation of Article VI of the General Agreement, the so-called Antidumping Code, was created. The sixth round, also known as Multilateral Trade Negotiations (MTN), took place in Tokyo in the late 1970 and, in addition to tariff reduction, produced some codes establishing standards and procedures for the applicability of the General Agreement. The last round, the Uruguay Round (1986-1994), brought to the GATT new issues, such as trade in services, intellectual property and foreign investment, hitherto outside of the GATT’s sphere of application.

However, the principal achievement of the Uruguay Round was the creation, 40 years after the unsuccessful attempt through the Havana Charter, of the World Trade Organization - WTO, the legal and institutional foundation of the multilateral trade system.

The WTO Framework

The creation of the WTO is established in the “Uruguay Round Agreement Establishing the World Trade Organization”7. In its Article II, the Agreement states that “the Agreements and associated legal instruments included in Annexes 1,2 and 3...,” (the so-called Multilateral Trade Agreements), “...are integral part of this Agreement, binding on all members”8. Therefore, among the Multilateral Trade Agreements, which are binding on all GATT/WTO members, we find, *inter alia*, the “Agreement on Implementation of Article VI of the General Agreement” (the Antidumping Code), which will be carefully analyzed in this Chapter.

Thus, the so-called Plurilateral Agreements (Agreement on Trade in Civil Aircraft and Agreement on Government Procurement) only bind “...those Members that have accepted them,...”9.

Consequently, the GATT/WTO structure is composed of the following documents:
I - General Agreement on Tariffs and Trade 1947 (the GATT Agreement);
II - Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations;
III - Uruguay Round Agreement Establishing the World Trade Organization;
IV - Uruguay Round Multilateral Agreements on Trade and Goods;
V - Uruguay Round General Agreement on Trade in Services;
VI - Uruguay Round Agreement on Trade Related Aspects of Intellectual Property Rights;
VII - Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes;
VIII - Uruguay Round Plurilateral Trade Agreements.

The multilateral agreements, eleven in number, are an integral part of the Uruguay Round Multilateral Agreements on Trade in Goods.

In conclusion, the former GATT Agreement (General Agreement on Tariffs and Trade 1947) became only one, but without doubt the most important, of the agreements that compound the general structure of the GATT.

B - Article VI of the GATT

The provisions for the determination of dumping and for the application of anti-dumping tariff and countervailing duties were originally established together in Article VI of the General Agreement on Tariffs and Trade, 1947. As we have already mentioned, anti-dumping duties and countervailing measures are two different concepts and, coherent with the purpose of this thesis, the analysis will focus only on the issue anti-dumping.

At first sight, Paragraph 1 of Article VI leads to the conclusion that, for the GATT purposes, the practice of dumping is not considered illegal or unfair "per se". Indeed, Paragraph 1 establishes that "(T)he contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." Therefore, the wrong to be condemned is not the dumping itself, but the material injury that it causes or threatens to cause to a domestic industry. Paragraph 1 also clarifies the definition for "normal value", which is considered
"...the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country,...". In the absence of such a domestic price, the normal value will be determined by "the highest comparable price for the like product for export to any third country…", or "the cost of production of the product in the country of origin plus a reasonable addition for selling costs and profit.”

Paragraph 2 establishes parameters for the imposition of anti-dumping tariffs, which cannot be "greater in amount than the margin of dumping in respect of such product." Hence, the "margin of dumping" must be determined by the difference between the export price and the normal value, as considered in Paragraph 1. Therefore, it becomes clear that there is no room for the imposition of barriers other than tariffs, which means that, consistent with the GATT’s spirit\textsuperscript{12}, the imposition of quantitative restrictions (quotas) are prohibited and cannot be applied to remedy dumping. The other Paragraphs in Article VI, either deal with countervailing measures, or with less important regulations that are not relevant for the purpose of this analysis.

As a matter of fact, given the generic language adopted, the provisions of Article VI, "which were designed to accommodate the U.S. domestic antidumping law, frequently lack precision and specificity,\textsuperscript{13} and the “antidumping duties had received little attention from the Contracting Parties\textsuperscript{14}."

C - The Antidumping Code - Evolution

The Kennedy Round

It was in the Kennedy Round\textsuperscript{15} that “the dumping question came to life\textsuperscript{16}, through the creation of the “Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade\textsuperscript{17}, hereinafter referred to as the Antidumping Code. At that time, there was general dissatisfaction among the signatories of the GATT with “certain practices of other countries.\textsuperscript{18}”
As a matter of fact, the lack of details in Article VI allowed the members to form different interpretations that could favor them in applying the penalties. The Canadian antidumping law, for instance, was inconsistent on the grounds that "it did not require a finding of injury as a prerequisite to the imposition of antidumping duties." In the United Kingdom, "anti-dumping duties could be imposed without notice and without opportunity for the parties to be heard."

Furthermore, "(A)lthough the U.S. antidumping statute required findings both that import sales were being made at below fair value and that injury to domestic industry was resulting therefrom, the established procedures called for withholding appraisement of the goods in question following a tentative Treasury Department finding of below fair value sales without any finding as to injury."  

Actually, Article VI of the GATT "was signed conditionally, i.e., subject to existing legislation and practice", the so-called Grandfather clause. Therefore, a specific agreement that could eliminate the broad language existent in Article VI and at the same time bring detailed and elucidative provisions for the application of the anti-dumping tariffs was extremely necessary.

Additionally, in spite of the fact that the anti-dumping and countervailing duties were included in the same Article VI of the GATT, the Antidumping Code was specific for the regulation of anti-dumping, i.e., "...no countervailing duty code came out of the Kennedy Round to take its place beside the Antidumping Code."

The Antidumping Code brings in its original version 17 articles, and it seeks basically the elimination of ambiguities related to Article VI of the GATT, establishing detailed procedures for the application of anti-dumping duties.

Article 2 of the Code states the principles for the finding of dumping. It clarifies, inter alia, the meaning of like product, which "...shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the
absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.\textsuperscript{25}

Article 3 establishes the rules for the determination of injury to the domestic industry. Article 4 brings the definition of industry. In Articles 5 and 6 we find the necessary procedures for the investigation and gathering of evidence. Articles 8 and 9 deal with how to impose and collect anti-dumping duties. Articles 10 and 11 deal with the application of provisional measures and retroactivity of the effects of anti-dumping duties, which we consider as the two most powerful weapons in the Code to inhibit the practice of dumping\textsuperscript{26}. Procedures related with the application of anti-dumping on behalf of a third country are found in Article 12. Article 17 established a “Committee on Anti-Dumping Practices”, to be composed by representatives of the contracting parties.

Interestingly, in the Kennedy Round Antidumping Code there was no provision for judicial review of the decisions taken by the members establishing anti-dumping penalties.

The Kennedy Round Antidumping Code became operative on July 1, 1968. Unfortunately, its practical effect was impaired since the U.S. Congress “failed to implement it into U.S. law.\textsuperscript{27}

The Tokyo Round

The Tokyo Round of trade negotiations “received its name from the largely coincidental event that its origins occurred at the GATT meeting of Ministers held in Tokyo in September 1973.\textsuperscript{28}

The main amendment introduced in the Antidumping Code in the Tokyo Round is a new Article 13\textsuperscript{29}, where special treatment to less developed countries (LDCs) is granted. The LDCs “had a particular amendment...which provided that because of the unique situation of LDCs, the value for determining whether goods from an LDC are being dumped should determined by a comparison of the export price from the export country with the price of a like product when exported to a third country.\textsuperscript{30} After exhaustive negotiation, the participants finally agreed to give special treatment to less developing
countries, and it “included a recognition that for LDCs the base for calculating dumping margins would be the price of comparable exports to third countries or the cost of production, rather than simply the price that the product is exported to the country alleging dumping.\(^{31}\)

Another significant innovation in the Tokyo Round Antidumping Code “was its requirements that antidumping investigation be reported to, and a semi-annual report on antidumping cases be transmitted to, the GATT Secretariat.\(^{32}\)

This Antidumping Code took effect in January 1, 1980, and, “unlike its predecessor, The Tokyo Round Antidumping Code was implemented into U.S. law - Congress did so through Section 2 (a) of the Trade Agreements Act of 1979.\(^{33}\)

D - The Uruguay Round and the Current Code

In The Uruguay Round the Antidumping Code was substantially revised. Among the main improvements the “...Agreement provides for great clarity and more detailed rules in relation to the method of determining that a product is dumped, the criteria to be taken into account in a determination that dumped imports cause injury to a domestic industry, the procedures to be followed in initiating and conducting anti-dumping investigations, and the implementation and duration of anti-dumping measures.\(^{34}\)

The Uruguay Round Antidumping Code establishes a methodology for determining dumping, such as the “...criteria for allocating costs when the export price is compared with a constructed normal value and rules to ensure that a fair competition is made between the export price and the normal value of a product so as not to arbitrarily create or inflate margins of dumping.\(^{35}\)

Further, the Agreement “strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the domestic industry”, and “confirms the existent interpretation of the term domestic industry.\(^{36}\)
Other relevant improvements, are:

a) Procedures to establish how anti-dumping cases are to be initiated and how such investigations have to be conducted, ensuring that “...all interested parties are given an opportunity to present evidence...” Therefore, the Agreement “calls for prompt and detailed notification of all preliminary or final anti-dumping action to a Committee on Anti Dumping Practices”, the “parties (shall have) the opportunity of consulting on any matter relating to the operation of the agreement or the furtherance of its objectives, and to request the establishment of panels to examine disputes.”

b) A new proviso on application of provisional measures establishes that “anti-dumping measures shall expire five years after the date of imposition, unless a determination is made that, in the event of termination of the measures, dumping and injury would be likely to continue or recur.”

c) The Code presents a new Article 13, establishing domestic judicial review “of administrative actions relating to final determinations and reviews of determination...” of anti-dumping measures, which reinforce the concept that a decision taken by the authorities of a country determining the application of anti-dumping measures cannot be considered as a sovereign decision or an Act of State.

d) The Antidumping Code also introduces a new Article 17, Consultation and Dispute Settlement, by which decisions taken under the Code are also subject to the procedures in the DSU - Dispute Settlement Understandings foreseen in The Uruguay Round Understanding on Rules and Procedures Governing The Settlement of Disputes. This Article 17 will be analyzed separately.

Thus, in its current version, the Antidumping Code presents eighteen articles and two annexes.

Annex I provides "Procedures for On-The-Spot Investigations Pursuant to Paragraph 7 of Article 6", which deals with procedures for the notification of the exporting countries that an anti-dumping investigation has been initiated and for the
gathering of evidence in the territory of other GATT members, including standard provisions for the visit of firms abroad by governmental or non-governmental experts of the importing country.

Annex 2, “Best Information Available...”, is also related to the issue “gathering of evidence”, and it makes clear that “...if the information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.”

As mentioned before, we understand that the provisions in Articles 7 “Provisional Measures” and 10 “Retroactivity” are fundamental weapons for the inhibition of dumping, which is, without doubt, the main purpose of Article VI of the General Agreement and the Antidumping Code, since the principal objective of the GATT is to prevent dumping, rather than to punish it. Therefore, we will now proceed to a detailed analysis of these two articles.

**Article 7 - Provisional Measures**

In Article 7 Paragraph 1, the Code presents the circumstances where provisional measures can be applied. Then, three possibilities justify and allow its application: “(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments; (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.”

It seems important to mention that the findings of the practice of dumping and the injury to the domestic industry must be determined preliminarily to the application of provisional measures, and these are the reasons by which the Code allows its application only 60 days after the date of the beginning of the investigation. Therefore, the Code
assumes that a preliminary investigation cannot be conclusive in a period shorter than 60 days.

Paragraph 2 establishes that a provisional measure "may take the form of a provisional duty or, preferably, a security -by cash or bond- equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. 45" It also allow the withholding of appraisement, providing that it "is subject to the same conditions as other provisional measures. 46"

Paragraph 4 limits the application of provisional measures to a period of four months, which can be extended to six months "...upon request by exporters representing a significant percentage of the trade involved...47". Interestingly enough, it is hard to imagine a situation where the exporter himself asks for the extension of the period of application of provisory penalties and it is very probable that it has never occurred. Also, if the authorities decide that the application of a "duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively. 48"

Article 10 - Retroactivity

Article 10 is surely the most powerful instrument to prevent dumping during the period after an investigation of dumping has started. It creates exceptions by which the applicability of penalties can retroact for the period that antecedes the decision for the imposition of definitive or provisional anti-dumping measures.

Paragraph 2 states that "Were a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made...", then "antidumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied. 49"

Therefore, the retroactivity does not ever apply, in cases of retardation of the establishment of an industry, though it can be applied when "... a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the
provisional measures, have led to a determination of injury,...50. Consequently, it is possible that the effects of anti-dumping duties can be applied retroactively to imports that occurred in the period of two months after the beginning of the investigation.

It is evident that such a retroactivity will not apply over the period when provisional measures are in force, whenever the definitive duty is decided to be in the same amount of that duty applied through provisional measures. However, if there is a difference between definitive and provisory duties an adjustment has to be made, either by restitution to the importer of the value paid in excess (whenever the definitive duty is fixed in a lower value than the value fixed for the provisional measure), or by the levy of the remainder in debt (in case that the definitive duty is higher than the provisory duty).

Notwithstanding Paragraph 2, Paragraph 6 foresees the extension of the period of retroactivity in special cases for the products which entered 90 days prior to the date of application of provisional measures, provided that:

"i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports...is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.51"

Therefore, considering the fact that a provisional measure can be applied 60 days after the start of the investigation, and that the retroactive effect can cover the period of 90 days prior to the application of provisional measures, one can assume that it would be technically possible that an anti-dumping duty be applied for a period up to 30 days before the beginning of the investigation. However, Paragraph 8 limits the period for imposition of retroactive effects when it states that "(N)o duties shall be levied retroactively pursuant to Paragraph 6 on products entered for consumption prior to the date of initiation of the
investigation.\textsuperscript{52} Then, in its maximum extension, retroactivity can cover the whole period while the investigation is taking place.

Actually, the fact of the matter is that the language adopted in (i) above is extremely subjective, on the grounds that one can always argue that the importer, at least, “should have been” aware that the products were being dumped into the country. Further, as we already mentioned in Chapter 1, it is very improbable that the importer, as an active member in the market, was not aware that the goods were being introduced into the country under dumped prices. Indeed, given the facilities of communication and the dynamic exchange of data that are available nowadays, such a hypothesis can hardly be considered.

Also, it has to be considered that an investigative process of dumping practices is invariably very expensive, since evidence must be gathered abroad, and it is very difficult to imagine the initiation of a process if the requirements foreseen in (ii) are not met. Hence, one can assume that, whenever a country decides to apply definitive anti-dumping measures, retroactivity effects are always likely to be applied.

Another article of the Uruguay Round Anti-dumping Code, the 17th, deserves special attention, and we will proceed, also, to a separate analysis of the mechanisms for dispute settlement under the Anti-dumping Code.

\textbf{Article 17 - Consultation and Dispute Settlement}

Traditionally,\textsuperscript{53} the principal objective of the GATT in matters of dispute settlement procedures “is not to decide who is right and who is wrong, or to determine a State’s responsibility in the matter, but to proceed in such a way that even important violations are only temporary and are terminated as quickly as possible.”\textsuperscript{54} Therefore, “(T)he development of an understanding between the parties - of a mutually acceptable solution - is the main objective of the dispute settlement procedure.”\textsuperscript{55}

Paragraph 1 of Article 17 of the Uruguay Round Anti-dumping Code states that “the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.”\textsuperscript{56} It means that whenever a contracting-party decides for
the imposition of anti-dumping duties, definitive or provisional, such a decision can be addressed for review by the WTO, by utilization of the rules established in the “Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes”\textsuperscript{57}, hereinafter referred to as the DSU Agreement.

The role played by the DSU Agreement, on the other hand, is to regulate the mechanisms and procedures for the application of Articles XXII (Consultation) and XXIII (Nullification or Impairment) of the General Agreement on Tariffs and Trade. Therefore, in sending dumping matters to be settled under the DSU Agreement, Article 17, Paragraph 1 of the Uruguay Round Antidumping Code clarifies the link between Article VI (Anti-Dumping and Countervailing Duties) and Articles XXII and XXIII of the General Agreement. In other words, “...the Uruguay Round Antidumping Agreement operates \textit{in tandem} with the DSU.”\textsuperscript{58}

Unlike the situation existent before the Uruguay Round\textsuperscript{59}, through the procedures established in the DSU Agreement, the adoption of a panel report by the Dispute Settlement Body (DSB) cannot be blocked by the losing party, and it “is significant because adoption is the key prerequisite for the establishment of legal obligations incumbent in a losing party.”\textsuperscript{60}

Article 17, Paragraph 2 points out that each GATT Member “shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.”\textsuperscript{61} It means that whenever a Member A makes a representation to clarify the imposition of anti-dumping penalties by a Member B, Member B must show at least good-will in seeking a “...mutually satisfactory resolution...”\textsuperscript{62}

Nevertheless, if the parties failed to “...achieve a mutually agreed solution,...”\textsuperscript{63}, and a definitive anti-dumping duty was applied, then the aggrieved Member can send the matter to be decided by the DSB. The same mechanism is applicable when the imposition of provisional measures was taken, but it is necessary that such an imposition produces a
"significant impact, and the Member that requested provisional consultations considers that
the measure was taken contrary to the provisions of Paragraph 1 of Article 7..."65"
Paragraph 1 of Article 7 states the prerequisites for the application of provisional matters.

Paragraph 5 provides that the WTO panel will be based on the "facts made available
in conformity with appropriate domestic procedures to the authorities of the importing
Member."65" This provision seems to make applicable for the procedures of gathering the
evidence to be analyzed by the WTO panel the Annex II of the Antidumping Code, "Best
Information Available".

Interestingly, the DSU Agreement establishes in its Article 16.4 that ... the
(WTO) report shall be adopted at a DSB meeting unless a party to the dispute formally
notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the
report."66"

However, Article 17 Paragraph 6 of the Antidumping Code recognizes a situation
where the acceptance of a panel report will not necessarily be mandatory. Indeed,
Paragraph 6 states that "...(W)here the panel finds that a relevant provision of the
Agreement admits more than one permissible interpretation, the panel shall find the
authorities' measure to be in conformity with the Agreement if it rests upon one of those
permissible interpretations."67" Thus, whenever more than one interpretation is possible,
the decision taken by a Member to impose anti-dumping measures cannot be questioned,
even if the panel reaches a different conclusion.

It is important to mention that such an exception for the acceptance of a WTO
report, which is applicable "...only to antidumping disputes..."65", opens a wide door for
discussion, given the subjectivism that the issue "interpretation" can bring. In fact, the
interpretation of something (a law or a fact) is the main foundation on which the legal
system is built. Indeed, it is unimaginable in the legal world, for instance, that a decision
taken by a court or tribunal could be questioned (in any other way than by a legal appeal)
on the grounds that one understands that more than one interpretation can be found. In
creating such an exception for the application of a panel report, the WTO deliberately weakened its dispute settlement system. As a matter of fact, it creates a fertile field for argumentation by clever lawyers, who always can find different interpretation in anything whatsoever. As an inevitable result, such a provision incetivates protectionist practices in the adoption of anti-dumping measures, at the same time that it retards the implementation of uniform and arbitrated solutions that can be brought by the WTO.

Nevertheless, Articles 21 (Surveillance of Implementation of Recommendation and Rulings) and 22 (Compensation and the Suspension of Concessions) of the DSU Agreement, establish the procedures and remedies for the enforcement of the WTO panel reports. If a Member fails to adopt a WTO decision, then the aggrieved Member can unilaterally retaliate through suspension of concessions or other trade benefits, observed the over-retaliation limitations set forth in Paragraphs 6 and 7 of Article 22 of the DSU Agreement. Further, in Paragraph 8 is determined that “(T)he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.”
Notes Chapter 2)

1 - Muhammad, V.A. Seyid, The Legal Framework of World Trade, at 17 (1958). "The prospect of a successful termination of the war brought with it the necessity of facing up to the problems of peace. There was a universal feeling that political security could not be divorced from financial and commercial stability; consequently it was felt that both these aspects of the post-war settlement should be tackled in a co-ordinated and simultaneous fashion."

2 - Guide to GATT Law and Practice, Analytical Index, 6th edition, Geneva, at 3 (1994). "When it met for the first time in London in February 1946, the United Nations Economic and Social Council (ECOSOC) adopted a Resolution calling a United Nations Conference on Trade and Employment for the purpose of promoting the expansion of trade and production, exchange and consumption of goods. The Resolution established a Preparatory Committee of representatives of the governments of nineteen countries, to elaborate an annotated draft agenda, including draft convention for consideration by the Conference, taking into consideration suggestions which might be submitted to it by ECOSOC or any member of the United Nations."


4 - Muhammad, V.A. Seyid, op.cit., at 309.

5 - General Agreement on Tariffs and Trade, Secretariat General, Geneva (1947).


8 - Id., at 82.

9 - Id.

11 - Dam, W. Kenneth, *The GATT - Law and International Economic Organization*, at 167 (1970). “Although antidumping duties and countervailing duties are treated together in Article VI and in the domestic legislation of some contracting parties, the two types of duties are, as a matter of principle, designed to deal with different problems. Antidumping duties are intended to restrain unfair pricing practices by private exporters. Countervailing duties are intended to offset governmental unfair practices that have their effect on the prices charged by private exporters.”

12 - Article XI, Paragraph 1 of the GATT establishes that “(N)o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

13 - Dam, W. Kenneth, *op.cit.*, at 172.

14 - Id., at 173.

15 - St. Charles, A. Charles and Weaver A. Robert, *The GATT Uruguay Round - A Negotiating History*, at 391 (1993). “The Kennedy Round, so called because it was made possible by the signing into U.S. law of the Trade Expansion Act of 1962 by President Kennedy, expanded both the number of countries and the breadth of issues covered by the GATT.

16 - Dam, W. Kenneth, *op. cit.*, at 174.


19 - Dam, W. Kenneth, *op. cit.*, at 174.

20 - Id., at 177. “By accepting the Antidumping Code, the Canadian Government bound itself to apply an injury criterion, and Article 6 of the Code imposed upon the United Kingdom the obligations of notifying the exporters and importers concerned of the initiation of an investigation and of permitting all parties a full opportunity to defend themselves, including the right to submit whatever evidence those parties considered useful and the right to examine, with certain exceptions, all evidence against them.”

21 - Id. at 176. “The Antidumping Code compels a change in the U.S. practice by providing that provisional measures, including withholding of appraisement, can be taken only when a preliminary decision has been taken that there is dumping and when there is sufficient evidence of injury.”

22 - Bierwagen, Rainier M., *op.cit.*, at 22.

23 - Dam, W. Kenneth, *op. cit.*, at 178. “Contervailing duties have never received the same degree of attention in the GATT as have antidumping duties. The panel of experts commissioned to study antidumping and countervailing duties spent most of its time on the dumping question.”

25 - Id., at 25.

26 - A factual example of the efficiency of these two weapons are described in Chapter 3, in the analysis of the "PVC Case".

27 - Bhala, Raj, op. cit., at 617-618 (Quoting Jackson, John H., The World Trade System, at 226, 1989). "In the United States (ironically, since the U.S. was a major proponent of the Antidumping Code, this Code caused a major constitutional problem. The Code, as an international treaty, had been signed by authority of the president, but there was no participation of the U.S. Congress, either through the constitutional Senate advice-and-consent procedure, or by statute adopted by the Congress as a whole. The president's officials argued that the Code could be accepted within the existing constitutional ans statutory powers of the president, but the Congress disagreed with him (sic). The Congress enacted legislation that prohibited the executive and then Tariff Comission (later the International Trade Comission) from following the rules of the GATT AD Code in certain circumstances. Although the U.S. consistently argued that the internal measures it took were an (sic) adequate compliance with the Code, many other nations did not agreed."


29 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 26th Supp., at 184 (1980). "Article 13 - Developing Countries - It is recognized that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code. Possibilities of constructive remedies provided by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries."

30 - Glick, Lesley Alan, op.cit., at 49.

31 - Id.

32 - Bahla, Raj, op. cit., at 618.

33 - Id., at 685, "Title I of the Trade Agreements Act of 1979 repealed the 1921 Act and added a new Title VII to the 1930 Act that implemented the provisions of the Tokyo Round Antidumping Code."


35 - Id.

36 - Id. "Subject ot a few exceptions, domestic industry refers to to the domestic producers as a whole of the like product ot to those of them whose collective output of the products constitutes a major proportion of the total domestic production of these products."

37 - Id.

38 - Id.
39 - Id. “A new provision requires the immediate termination of an anti-dumping investigation in cases where the authorities determine that the margin of dumping is *de minimis* (which is defined as less than 2 percent expressed as a percentage of the export price of the product) or that the volume is negligible (generally when the volume of dumped imports from an individual country accounts for less than 3 per cent of the imports of the product in question into the importing country).”

40 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, in Bhala, Raj, *International Trade Law - Documents Supplement*, at 195 (1996). “Article 13 - Judicial Review - Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determination within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.”


45 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade Article 7, Paragraph 2, in Id., at 208.

46 - Id.

47 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 7, Paragraph 4, in Id., at 208, 209.

48 - Id.

49 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 10, Paragraph 1, in Id., at 212.

50 - Id.

51 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 10, Paragraph 6, in Id., at 213.

52 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 10, Paragraph 8, in Id.

object being to end a situation in which one government is violating the obligations owed to another. GATT dispute settlement has not operated to punish a government for past behavior, nor has it sought to compensate private parties.”


55 - Id., at 71. “It is made clear in the procedures for application of Article XXIII that a prerequisite for an effective operation of the General Agreement is the quick settlement of any situation that could compromise the balance of advantage between the contracting parties concerned.”


59 - Id., at 620, 621. “Until the Uruguay Round, reports of the GATT panel could be blocked by the losing party. That is, the losing party could prevent the adoption of the report by the contracting parties because GATT decision-making, including dispute resolution, operated in a consensus basis. The U.S., which viewed itself principally as a complainant instead of respondent, successfully negotiated a ‘reverse consensus’ provision that effectively eliminates the ability of the losing party to block adoption. Under 16.4 of the DSU, a WTO report must be adopted unless the DSB decides by consensus not to adopt the report. Thus, the only way for the U.S. (or any other Member) to block of the adverse antidumping report is to persuade every other WTO Member to block adoption - an unlikely event. If after adoption the U.S (or any other Member) fails to comply, it can compensate the complaining Member. If a compensation agreement is not reached, then the complaining Member can retaliate, which entails the suspensions of concessions owed to the U.S. (Retaliation is subject to the “over-retaliation limitations in Articles 22.6 and 22.7 of the DSU.) The WTO, of course, lacks authority to issue injunctions or enforce panels reports.”

60 - Id., at 620.


62 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 7, Paragraph 3, in Id.

63 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 7, Paragraph 4, in Id.

64 - Id.

65 - See supra Note 44.


Chapter 3

A - Dumping in Brazil

Historical Background

The incorporation of anti-dumping laws in Brazilian legislation occurred very recently. In spite of the fact that Brazil was an original member of the GATT 1947, it was only in 1987 that the Brazilian Congress promulgated the first specific anti-dumping legislation, i.e., 40 years after the creation of the GATT, and 20 years after the enactment of the first Antidumping Code in the Kennedy Round.

Indeed, the first anti-dumping law in Brazil was introduced by virtually translating into Brazilian law the Antidumping Code adopted in the Tokyo Round (1979), through the Decreto 93.941, of January 16, 1987. However, before we comment on the Brazilian law, and in order to better understand the evolution of protectionist policies in Brazil, it is necessary to conduct a brief survey in the country’s history, since the last century.

Until 1822, the year in which Brazil became independent from Portugal, and also during the decades that followed its independence, Portugal kept a total monopoly of all Brazilian foreign commerce, which was centralized on the exports of coffee. At that time, Brazil was basically an importing country and unlike what occurred in the United States, after its independence Brazil did not have the political and economic power to fight against unfair practices of trade by developed countries. The reasons for that can be explained by the Portuguese effort to prevent the establishment of industries in Brazil and, therefore, to keep its ex-colony economically dependent on Portugal even after 1822.

Consequently, the evolution of the protectionist policies in the country started in the 1880s and ran parallel to an effort for the substitution of imports, which can be divided into distinct periods.
First Period (1885-1918)

The first attempt of industrialization in Brazil occurred between 1885-1890, through an orchestrated effort to develop the textile industry of cotton. Indeed, in 1890 Brazilian industry was able to supply 60 per cent of the domestic demand for cotton.

A survey made in 1917, showed that 80 per cent of the industry in the State of São Paulo, the most developed state in Brazil, was composed of former textile industries and, in 1900, the Brazilian industry was already strongly protected by prohibitive import duties.

Additionally the policy for the substitution of imports was highly influenced by a depreciation of the Brazilian currency that occurred in the same period, which increased substantially the prices of import goods. Therefore, at the same time that consumption was automatically directed to national products, investments were directed into national production.

Second Period (1918-1945)

Even considering the fact that the lower cost of labor favored the process of industrialization in Brazil, its industrial production at the beginning of this century could be considered as limited and unsophisticated, on the grounds that it was mainly based on the exploitation of agricultural products.

However, despite the effort to implement the growth of the economy through its exports, a model adopted by all developed countries, Brazilian exports were limited to primary products, such as coffee and cotton, and the expansion of the domestic market was dependent on the success of the exports.

On the other hand, as the Brazilian import duties were not established under “ad valorem” criteria, a gradual inflation of the local currency brought a continuous devaluation of the tariff barriers, and without protection national products began to lose market to imported goods.
This period of difficulties prevailed until 1930, when the "Great Depression" occurred. The most important impact of the Great Depression in Brazil was the immediate decrease of Brazilian exports and, consequently, it again forced the government to establish protectionist measures, such as the implementation of high import duties and the rigid control of the exchange of currencies. These measures started a new period for the substitution of imports in the country, and one can assume that the real process of industrialization in Brazil started in 1930, ironically invigorated by the depression experienced in the United States.

Third Period (1945-1980)

In the period post-World War II, the international trade scenario was extremely favorable for the implementation of substitution of import policies in Brazil. On the one hand, the export of primary products was favored by high prices and large foreign demand, which could produce the accumulation of reserves in the Brazilian treasury. On the other hand, the difficulties of imports led the country to pursue technological development. However, the opportunity was lost due to a wrongful exchange rate policy, in which the rates were kept fixed despite the continuous inflation of the national currency. Consequently, the reserves were continuously lessened, which significantly obstructed the diversification of the industrial process.

Nevertheless, it was in 1957 that a fundamental law for the improvement of the national industry was promulgated. Law 3.244 gave discretionary power to the CPA-Comissão de Política Aduaneira (Customs Policy Commission) to fix, change or suspend import duties, whenever it was necessary to protect domestic industry.

As a result, Law 3.244, inter alia, increased the entry of foreign investments in Brazil, as a direct response to a new acknowledgement that the industry was then being protected rationally.
It is important to point out that Law 3.244 mentioned for the first time in the history of the Brazilian legislation the word “dumping”. Indeed, in Paragraph 2 of Article 3, the law established that in case of dumping practices, the import duty would be elevated to a limit that could neutralize the dumping.

However, it is possible to observe that, unlike the anti-dumping legislation dominant at that time in the world\(^\text{14}\), the neutralization of dumping in Brazil was made through a mechanism to increase the ordinary import duties, rather than by the imposition of a penalty that should be established in a specific anti-dumping legislation.

Such a criteria seems to have created a culture that would lead to future misunderstanding, as we will see below during the analysis of the recent problems experienced in Brazil for the application of retroactive effects of anti-dumping duties, as foreseen in the GATT Antidumping Code.

Therefore, by the system adopted in Law 3.244 the system of protection was good enough not only to prevent dumping, but also to protect the national industry from the import of specific goods whenever necessary, independent of the occurrence of unfair practices of trade\(^\text{15}\).

In 1964 armed forces took the power in Brazil, establishing a military dictatorship that lasted for more than 20 years. The first phase of this period was marked by a strong nationalism, in which the government launched a monumental effort to develop industry through the import of technology from abroad. It was in this period, for instance, that Brazil initiated a strong program for the substitution of imports\(^\text{16}\), through the development of energy-generating projects (hydroelectric, nuclear energy), transports (Trans-Amazon Highway, Iron Railroad), and through heavy investments in industry in general (petrochemical, paper and cellulose, metallurgy\(^\text{17}\)).

This was the so-called “Brazilian Miracle”. Nationalistic slogans were spread all over the country, such as “The Oil is Ours”, which was utilized to justify the governmental monopoly in the exploitation and distribution of oil, or “Brazil, Love it or Leave it”, which
made so many important intellectuals and scientists flee from the country. However, as a consequence of such a policy, the foreign debt increased significantly and, until now, has been one of the most complex problems for the development of the country.

At that time, Brazil was not much concerned with dumping, given the prohibitive tariff barriers by which the new “miraculous” industries were being entirely protected from competitive industries abroad.

The second period started with the first “oil crisis” in 1973, which encountered in Brazil a country completely unprepared to face international competition. This period was characterized by the so-called implementation of a “relative democracy” in Brazil, which started under the presidency of General Geisel in 1974 as a response to international pressures for the return of human rights guarantees in Brazil. At that time, the rate of growth in Brazil was roughly 7 per cent a year, and the problems in the balance of payments were increasing very fast, due to the high level of the foreign debt.

However, although the whole developed world was suffering the effects of the oil crisis and the countries were, therefore, providing adjustments in their economies, Brazil opted for a policy of accommodation, and continued its growth through mechanisms for the substitution of imports and a search for foreign financing. Hence, in the middle of a world crisis scenario, Brazil started a strong industrial program for the substitution of imports.

The same accommodation was observed in the second oil crisis in 1980, a year in which Brazil had a rate of growth of 8.2 per cent. The result of such a policy was necessarily disastrous, and in 1981 Brazil submerged into a period of deep recession. Consequently, efforts were directed to an emergence export policy large enough to generate resources directed to the payment of the foreign debt.

Economists in Brazil have called de 1980s “the lost decade”, and this period was characterized by a total stagnation of the economy, high rates of inflation, increase of
poverty, and by a complete incapacity to keep up to date the payment of the external debt. Brazil was paying the price for its "miracle".

Obviously, no dumping concerns were present during the substitution of imports program in Brazil, which was guaranteed by the protectionist policy of imposing import duties on a level high enough to keep international competition far from its borders.

The Current Situation

With the return to the democratic system in 1985, the main concern of the national industry was to prepare itself to face international competition. On the one hand, it was extremely necessary to achieve of high levels of quality in order to grant the access of national products into the international market, which was at that time more and more competitive mainly due to the aggressive presence of the Asiatic Tigers.

On the other hand, the opening of Brazilian borders through the lowering of the ordinary import duties was unavoidable. Furthermore, it is important to mention that in the late 80s Brazil was participating in the GATT Uruguay Round, where reciprocal compromises for the reduction of import duties were taking place among the GATT members.

Domestic industry, then, started a monumental effort to modernize itself, applying international know-how to the management and organization of national companies. These modern technical concepts, such as "down sizing", "just in time", "re-engineering", "quality control", and others, were imported mainly from the United States and Japan. Globalization had already become the corner-stone of world commerce. However, it was only in 1990, under the presidency of Collor de Mello23, that a program for the reduction of import duties took effect.

In 1994 Brazil elected President Fernando Henrique Cardoso, a liberal-democrat who has not only continued but has also improved the effort to make of Brazil a free-trade country.
Another element that favored the strengthening of Brazilian international commerce was the advent of the MERCOSUL (Treaty of Asuncion), the customs union agreement establishing a free-trade area among Brazil, Argentina, Uruguay and Paraguay.

B - The Brazilian Anti-Dumping Law

Decreto 93.941

On January 16, 1987 the Brazilian Congress promulgated the Decreto 93.941 (Acordo Antidumping), which adopted into the Brazilian Law the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade, the Antidumping Code, as conceived in the Tokyo Round.24

As a matter of historical curiosity, we point out that the first imposition of anti-dumping penalties in Brazil occurred in 1989, when the imports of bicycle chains’ transmission from China, USSR, India and Czechoslovakia were penalized with anti-dumping duties.

However, it was only after 1990 that anti-dumping Brazilian law became a powerful weapon to protect national industry from unfair practices of trade. The reason for that, of course, was the implementation of the program for the reduction of ordinary duties, as mentioned above, which made the national industry suddenly vulnerable in the face of international competition.

In its article 2, the Decreto 93.941 gave discretionary power to the Comissão de Política Aduaneira (CPA) for the regulation of the administrative procedures necessary for the implementation of both the Antidumping and Subsidies Codes in Brazil. The CPA, therefore, enacted Resolução 1.227/87.

The Resolução 1.227

Resolução 1.227 is a regulatory instrument with 54 articles, covering all the necessary steps for the imposition of anti-dumping and, also, countervailing duties. Indeed, the procedures for the petitionary, consultative and investigative processes,
application of provisional measures, and others, are fully covered in its text, and it could be
considered a perfect document if a monumental mistake had been avoided: in its two first
articles, the Resolution classifies antidumping and countervailing duties as additional to the
ordinary import duty. As a matter of fact, such a definition constitutes, at the least, a total
extrapolation of the discretionary power given by Decreto 93.941, on the grounds that the
CPA was not supposed to have competence for the definition of the legal nature of anti-
dumping and countervailing duties. Article 1, *ipsi liueris*, states that the anti-dumping and
countervailing duties constitute an additional import duty. Article 2 reinforces the
definition.

Before commenting on the chaotic effects produced by such an erroneous
classification for anti-dumping penalties, it would be helpful to understand the reasons that
led the CPA to do that. Apparently, the mistake can be explained by the precedent existent
in Law 3.244, which was, as we mentioned before, the first Brazilian legislation to deal
with dumping. Indeed, by Law 3.244 the remedy for the neutralization of dumping
practices was the mere adjustment (increase) of the ordinary import duty, since there was
no specific legislation with previsions for the applicability of anti-dumping penalties, as
practiced all over the world.

In Chapter 1 of this thesis, we emphasized the legal distinctions between ordinary
import duties and anti-dumping duties, showing that these two institutes are completely
different and, thus, must not be confused. Unfortunately, at a moment when Brazil was
inaugurating its first specific anti-dumping legislation, a wrongful definition such as the
one made by the CPA created obstacles for the full application of the Antidumping Code in
Brazil.

The Problem of the Application of Retroactive Effects

As mentioned before in this paper, we consider the possibility of the application of
retroactive effects as one of the most powerful weapons of the Antidumping Code. In a
world where information travels at vertiginous velocity, it is very difficult to conceive
dumping being practiced for a long period of time. As we have already mentioned in Chapter 1, dumping is more likely to occur nowadays in sporadic shots or even in short term transactions (intermittent), since the nations, at least the GATT members, would be ready enough to repeal dumping well before it could reach the category of long term dumping. By the provisions of the Antidumping Code it is possible that anti-dumping duties can be levied retroactively for the period covering 90 days prior to the application of provisional measures, its application being limited to the date of initiation of the investigation.

However, in order to do that, i.e., to apply retroactive anti-dumping penalties, two pre-requisites have to be met: a) the importer should be aware that dumping was being practiced; and b) the injury to the local industry was caused by massive dumping of imports over a relatively short period of time. Pre-requisite "a)" seems to be easy to meet, given its subjective character. Also, the practice of dumping foreseen in "b)" is more likely to occur for the reasons given in the paragraph above, i.e., the dumping of huge volumes of goods practiced for a short period of time.

On the other hand, if the applicability of retroactive effects did not exist, one can assume that dumping could be practiced for almost the whole period in which an antidumping investigation was taking place, with the exception of the period eventually protected by the application of provisional measures. Such a situation would create a perfect environment for the discharge of eventual dumped surplus, even after the beginning of an investigation process, granting to the exporter/importer the comfortable situation of avoiding undesirable extra-duties. In order for this to happen, it would be enough for the exporter/importer to have access to the investigation process, by which he would be aware of when the imposition of definitive duties would probably be established.

This introduction was made in order to explain the situation that was created in Brazil, when the CPA classified anti-dumping duties as being additional to the ordinary import duty. In Brazil, there is strong jurisprudence establishing that import duties can
never be applied retroactively. Ordinary import duties in Brazil are regulated by the Decreto 61.574/67, and it established that the fact that generates the levy of an import duty is its entry in the country. It is on these grounds that the jurisprudence prevalent in Brazil rejects the possibility of having ordinary import duties applied retroactively.

Consequently, in spite of the fact that in article 11 of Decreto 93.941 (the Brazilian Antidumping Code) there were previsions for the applicability of retroactive effects, as foreseen in the Tokyo Round Antidumping Code, the erroneous definition for anti-dumping duties given by the Resolução CPA-1.227 made its application impossible. Interestingly enough, in article 47 of Resolution 1.227 there was a provision establishing that anti-dumping duties would apply only to imports occurring after the definitive imposition of anti-dumping penalties, with the exception foreseen in article 11 of Decreto 93.941.

Consequently, in all the cases where the imposition of definitive anti-dumping duties was decided, the effects applied only over imports occurring after the publication of the authorities' decision in the Diário Oficial.

As a matter of fact, it would be extremely easy to solve the question through a declaratory action that could be provoked to declare the legal nature of anti-dumping duties. However, matters involving dumping in Brazil have been characterized by a delicate diplomacy among government on the one side, and industries and importers on the other side. The main reason for that is based on the principle that the imposition of anti-dumping duties is a matter of government discretionary power, i.e., the government can always decide for the non-application of penalties, even when the dumping practice is proved. Therefore, no one would take the position of challenging a governmental decision, since it would create a conflict that could cause future problems. Actually, Brazil still has to learn how to live in a democratic system.
The Current Law

After the Uruguay Round, the General Agreement on Tariffs and Trade 1994, including understandings and the so-called Marrakech Protocol, was introduced in Brazilian Law by Decreto 1.305 in December 12, 1994.

On March 30, 1995, Congress passed Law 9.019, which deals with the application of anti-dumping and countervailing duties, as conceived in the Uruguay Round. What is curious about Law 9.019 is that, in its unique paragraph, article 1 states that antidumping and countervailing duties have neither a tributary nature nor a relation with the levy of ordinary import duties\(^{32}\). Indeed, for those who are not familiar with the problems created by the CPA’s definition of anti-dumping duties through Resolution 1.227, such a concern about the legal nature of anti-dumping duties in article 1 of the new law sounds really awkward.

As a matter of fact, the explanation about the anti-dumping legal nature in the body of the law it seems to be totally unnecessary. Indeed, the distinction between anti-dumping penalties and ordinary import duties is elementary, as mentioned before. It would have been enough, we think, to eliminate the erroneous definition in articles 2 and 3 of the CPA’s Resolution, and no one would have doubt about the legal nature of anti-dumping duties.

Actually, in spite of the fact that the *Comissão de Política Aduaneira* does not exist anymore, article 12 of Law 9.019 reaffirms the provisions related to the anti-dumping administrative process procedures defined in Resolution CPA 1227, whenever, of course, it does not conflict with Law 9.019.

Therefore, there is no problem anymore for the application of retroactive effects of anti-dumping penalties in Brazil, though until now no case has been registered case in which the application of retroactive effects took place.

The complementary current Brazilian legislation dealing with dumping, countervailing, and safeguards is as follows:
Regulamentos (Regulatory Laws)

- Subsidies Agreement - Decreto 1.751, (December 19, 1995).

These agreements are an incorporation into Brazilian law of the co-related agreements generated in the GATT Uruguay Round.

Law 9.019 - Highlights

Article 5 gives to the Secretaria de Comércio Exterior - SECEX (Foreign Commerce Secretariat) of the Ministério de Indústria e Comércio (Ministry of Industry and Commerce) the competence for the conduct of the administrative process and the determining of the existence of dumping, margin of dumping, injury (or the threat of injury) to the domestic industry, and the causal link between dumping and injury.

Article 7 establishes that the Ministério da Fazenda (Ministry of Finance) shall be competent to levy anti-dumping duties.

Article 6 states that the imposition of anti-dumping and countervailing duties, provisional or definitive, must be established through an inter-ministerial “Portaria” (Act). This means that any federal act deciding for the imposition of anti-dumping and countervailing duties has to be signed both by the Minister of Finance and the Minister of Industry and Commerce.

Article 8 foresees the possibility of the application of retroactive effects of anti-dumping and countervailing duties. Article 11 establishes that the Ministers of Finance and Industry and Commerce can enact procedures complementary to the law.

Decreto 1.602 (Acordo Antidumping)

As mentioned before, Decreto 1.602/95 (Acordo Antidumping) is a quasi-translation, whenever possible, of the Uruguay Round Antidumping Code, introducing in the Brazilian law the adjustments decided in the Uruguay Round.
However, Decreto 1.602 does not repeat the provisions of the Uruguay Round Antidumping Code for revision of decisions imposing anti-dumping duties. Indeed, the provisions for "Judicial Review" (article 13 of the GATT Antidumping Code) and for "Consultation and Dispute Settlement" (article 17) are not present in the Brazilian Acordo Antidumping. This can be explained on the grounds that Decreto 1.602 just makes public "the rules of the game", i.e., the conditions and procedures necessary for the admission and conduct of an anti-dumping administrative process.

Nevertheless, an eventual prevision of judicial review in the Acordo Antidumping would be redundant, since such a possibility constitutes a principle protected by the Brazilian Constitution\(^5\). Furthermore, the absence of article 17 of the Antidumping Code in the Acordo Antidumping can be explained by the fact that only a Member-State of the GATT/WTO can address a matter to the Dispute Settlement Body of the WTO\(^6\), which means that it does not constitute a private right.

C - Brazilian Agencies in Charge of International Commerce\(^5\)

Ministry of Industry and Commerce

- *Secretaria de Comércio Exterior* (SECEX) - Created by Decreto 1.757 in December 22, 1995, the SECEX is the organ responsible for the formulation and proposal of foreign commercial policies. It also suggests parameters for the imposition of ordinary import duties. As mentioned before, the SECEX has competence for the conduct of the administrative process and for determining: i) the existence of dumping; ii) the margin of dumping; iii) the injury (or the threat of injury) to the domestic industry; and iv) the causal link between dumping and injury.

- *Departamento de Defesa Comercial* (Commercial Defense Department) - The DDC is an organ subordinated to the SECEX, and it is actually the responsible agency for the conduct of the administrative process for the imposition of anti-dumping duties, by force of the Circular - SECEX n\(^o\) 73, of September 12, 1995. The same Circular establishes the initial
procedures for beginning an anti-dumping investigative process. Therefore, a petition for the initiation of an anti-dumping process must be directed to the Departamento de Defesa Comercial.\textsuperscript{37}

- \textit{Comitê Consultivo de Defesa Comercial} (Commercial Defense Consultative Committee) - The CCDC is a consultative group presided by the Secretary of the SECEX. The group is composed of representatives of the Ministério da Fazenda (Ministry of Finance), Ministério das Relações Exteriores (Ministry of Foreign Relations), Ministério da Agricultura, Abastecimento e Reforma Agrária (Ministry of Agriculture, Supply and Agrarian Reform), Ministério do Planejamento e Orçamento (Ministry of Planning and Budget), and by members of the executive secretary of the Câmara de Comércio Exterior (Chamber of Foreign Commerce). The CCDC is the organ able to make recommendations related to all the steps of the administrative process, such as recommendations for the beginning or terminus of an investigative process, applicability of provisional or definitive anti-dumping duties measures, retroactivity, etc.\textsuperscript{38}

- \textit{Departamento de Operações de Comércio Exterior} (Foreign Commerce Operations Department) The DOCE is the agency in charge of the collection, analysis, and dissemination of statistical information related to foreign commerce. It is also the DOCE which authorizes imports and exports. This organ is subordinated to the SECEX.

- \textit{Departamento de Negociações Internacionais} (International Negotiations Department) Subordinated to the SECEX, the DNI is responsible for the technical preparation of international negotiations in the ambit of WTO, MERCOSUL, and ALADI. Therefore, it is the DNI which analyzes requests for the increase or decrease of ordinary import duties.

- \textit{Departamento de Política Comercial Exterior} (Foreign Commerce Policy Department) The DPCE is the agency in charge of i) accompanying the execution of governmental policies and programs related with foreign commerce, and ii) suggesting governmental actions in matters involving foreign commerce. The DPCE is also subordinated to the SECEX.
- **Câmara de Comércio Exterior** (Foreign Commerce Chamber)  This agency was created by Decreto 1.386 on February 6, 1995, and it is an inter-ministry group responsible for the coordination of activities related to foreign commerce. The group is presided over by the **Ministro Chefe da Casa Civil da Presidência da República** (Chief Civilian Minister of the Presidency).

**Ministry of Finance**

- **Secretaria da Receita Federal** (Federal Revenue Secretariat)  The SRF is the agency responsible for the control and administration of federal taxes. It includes the levy of ordinary import duties, and anti-dumping and countervailing duties. It also controls imports and exports of goods in the country.

- **Banco Central do Brasil** (Brazilian Central Bank)  The BACEN controls the entry, exit, and convertibility of foreign currencies in Brazil.
Notes (Chapter 3)


2 - Id., at 64.

3 - Real de Azúa, Daniel E., O Neoprotecionismo e o Comércio Exterior, at 53-59 (1986).

4 - Id., at 53. “A industria textil tinha-se iniciado no País em 1850, atingindo, em 1885-1890, o nível acima referido, para continuar avançando a ponto de abastecer praticamente a totalidade do mercado local no período da Primeira Guerra Mundial”.

“The textile industry which started in 1850, reached 60 per cent of the domestic demand between 1885-1890 and, during the World War I period, it was able to supply the totality of the local market”.

5 - Id., at 53,54. “No ano de 1900, a indústria brasileira começou a ser fortemente protegida através de tarifas alfandegárias, que, no caso de certas roupas de algodão, atinjiram o montante de 314%, sem dúvida uma das mais altas do mundo”.

“In 1900, Brazilian industry started being strongly protected by import duties. Cotton clothes, for instance, were charged with an import duty of 314 per cent, which was without doubt one of the highest duties in the world.”

6 - Id., at 53.

7 - Guedes, Josefina Maria M.M., and Pinheiro, Silvia M., op.cit., at 64.

8 - Real de Azúa, Daniel E., op. cit., at 55.

9 - Id. “As medidas tomadas trouxeram resultado imediato: as importações caíram pela metade e se estagnaram durante cinco anos. Para os setores de aço e cimento, cujas atividades tinham começado alguns anos antes, o novo sistema de proteção tornou-se vital à sua sobrevivência.”

“The measures taken by the government brought an immediate result: The imports dropped by 50 per cent, remaining at low levels for 5 years. For the iron and cement sectors, which had begun activities a few years before, the new system of protection became essential for their survival.”

10 - Guedes, Josefina Maria M.M., and Pinheiro, Silvia M., op.cit., at 64. “A partir de 1930 o país deu início ao seu processo de industrialização. A produção industrial cresceu, através de uma utilização intensiva dos equipamentos já instalados e da importação de outros, geralmente provenientes de indústrias americanas atingidas pela crise.”
“It was in 1930 that the country initiated its process of industrialization. The national industrial production increased through the intense utilization of equipments already installed, and through the purchase of new equipment imported mainly from American companies that had been affected by the crisis.”

11 - Real de Azúa, Daniel E., op. cit., at 56.

12 - Id. “A política errada continuou ainda durante a guerra da Coreia, quando o preço do café aumentou além do previsto, facilitando ainda mais a política de importações desnecessárias. O Brasil, assim como outros países latino-americanos, malograram suas duas grandes oportunidades históricas. Situações tão favoráveis como as que se apresentaram nos dois períodos de pós-guerra dificilmente voltarão a se repetir.”

“The wrongful policy remained in force until the Korean War, when the price of coffee increased significantly, and unnecessary imports were made. Brazil, as well as other Latin-American countries, lost two great historical opportunities. It is very unlikely that such favorable situations will occur again.”

13 - Guedes, Josefina Maria M.M., and Pinheiro, Silvia M., op. cit., at 66. “O período entre 1956 e 1961 caracterizou-se por dois fatores mais destacados: o aumento da participação governamental directa e indireta nos investimentos, e a entrada de capital estrangeiro privado e oficial no País. Nesse período, teve lugar a instalação de algumas indústrias dinâmicas, como a automobilística, de construção naval, de material elétrico pesado e outras indústrias mecânicas e de bens de capital.”

“The period between 1956 and 1961 was characterized by two main factors: the increase of direct and indirect governmental participation in investments, and the entry of private and state foreing capital. It was in this period that the installation of dynamic industries took place, such as automobile, shipyard, heavy electric material, and other mechanical industries.”


16 - Campos, Roberto, A Lanterna na Popa, at 1172 (1994).

17 - Unfortunately, the great majority os these pharaonic projects have failed. The nuclear program is still incomplete due to complex technical problems, the Trans-Amazon highway and the Iron-Railroad were abandoned for lack of financial support. However, the petrochemical, cellulose and metallurgy industries have been a significant success.

18 - Real de Azúa, Daniel E., op. cit., at 57. “...aconteceu o fenômeno típico a todo processo de substituição de importações criado ao amparo exclusivo da proteção tarifária, ou seja, satisfeitas as necessidades do mercado interno, entrou-se num período de estagnação, em face das dificuldades de competir no mercado externo. Por outro lado, o problema do balanço de pagamentos começou a agravar-se, já que essas indústrias substitutivas, impossibilitadas de competir no mercado exterior, foram em grande parte instaladas com ajuda do capital estrangeiro, que, obviamente, teve de ser reembolsado através da remessa de royalties.”

“...what happened was the typical phenomenon that occurs whenever the process of the substitution of imports is based exclusively on the protection of tariff barriers, i.e., after supplying the total demand of the domestic market, domestic industries experienced a
period of stagnancy, since industry was unprepared to compete in the international market. On the other hand, the balance of payments problem worsened, since such industries were installed with the support of foreign capital, which had to be reimbursed through the consignment of royalties.”

19 - Campos, Roberto, op. cit., at 955. “O próprio president Geisel utilizaria a expressão “democracia relativa” para se referir “a situação brasileira.”

“President Geisel himself used to utilize the expression “relative democracy” in referring to the Brazilian situation.”

20 - Campos, Roberto, op. cit., at 1171. “Dos quatro possíveis processos de ajuste `a crise de balanço de pagamentos - substituição de importações, financiamento externo, ampliação de exportações e redução de ritmo de crescimento -, o Brasil optou pelos dois primeiros.”

“Among the four possible measures for solving the balance of payment problem - substitution of imports, foreign financing, enlargement of the exports, and reduction of the rhythm of the growth -, Brazil chose the first two.

21 - Campos, Roberto, op. cit., at 1172.

22 - Id.

23 - President Fernando Collor de Mello was impeached by Congress on September 29, 1992, for corruption. However, in his government the concept of a liberal and open economy was applied. In addition to the program for the reduction of trade barriers, another remarkable decision was the implementation of a strong privatization program (Law 8.031/90).

24 - During the same year, Congress also promulgated Decreto 93.962, which brought into Brazilian law the Agreement on Implementation of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code).


26 - Resolução CPA - 1227/89 - “Artigo 1 - Os direitos antidumping e compensatório definitivos, de que tratam os Acordos Antidumping e de Subsidios e Direitos Compensatórios, constituem imposto de importação adicional.”

“Article 1 - The definitive antidumping and countervailing rights, referred to in the Antidumping and Subsidies Codes, constitute an additional import tax.”

27 - Id., “Artigo 2 - A Comissão de Política Aduaneira (CPA) estabelecerá o imposto the importação adicional a que se refere o artigo 1, e definirá os termos, limites e condições de sua aplicação.
Parágrafo único - O imposto de importação adicional será calculado mediante a aplicação de alicuota ad valorem, fixada pela CPA, sobre o valor aduaneiro da mercadoria.”

“Article 2 - The Comissão de Política Aduaneira (CPA) shall establish the additional import duty referred to by article 1, and shall define the terms, limits, and conditions for its application.
Paragraph 1 - The additional import duty, to be fixed by the CPA, shall be calculated and applied through ad valorem criteria over the customs value of the goods.”
28 - See Chapter 3 supra, at 49.

29 - See Chapter 1 supra, at 10.

30 - Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 10 - Retroactivity. See Chapter 2 supra, at 35.

31 - Decreto 61.574/67 - “Artigo 1 - O imposto sobre importação incide sobre mercadoria estrangeira e tem como fato gerador sua entrada em Território Nacional.”

“Article 1 - The import duty is applied to foreign goods, and the fact that generates its levy is the entry of foreign goods in the national territory.”

32 - Lei 9.019, de 30 de março de 1995, “Artigo 1º, Parágrafo único - Os direitos antidumping e os direitos compensatórios serão cobrados independentemente de quaisquer obrigações de natureza tributária relativa ‘a importação dos produtos importados.”

“Law 9.019, March 30, 1995, Article 1, Unique Paragraph - The antidumping and countervailing rights shall be levied independent of any ordinary duty related to the import of foreign goods.”

33 - See supra Chapter 2, at 32.

34 - Constituição Brasileira, “Título II - Dos Direitos e Garantias Fundamentais, Capítulo I - Dos Direitos e Deveres Individuais e Coletivos: Item XXXV - A lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça de direito.”

Brazilian Constitution, Title II - Fundamental Rights and Guarantees, Chapter I - Individual and Collective Rights and Obligations: Item XXXV - The law shall not exclude from adjudication by the Courts the violation or the threat of violation of rights.

35 - See article 1 of the “Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes.”

36 - Data from Fundação Comércio Exterior, Brasília, 1996.

37 - The Circulares n° 19, 20 and 21 deal, respectively, with the procedures for the initiation of process for the imposition of safeguards (19) and countervailing duties (20 and 21).

38 - Portaria Interministerial 14 (Ministério da Fazenda e Ministério de Indústria e Comércio), artigo 3º.

Inter-Ministry Act n° 14 (Ministry of Finance and Ministry of Industry and Commerce), article 3.
Chapter 4

A - Dumping in the U.S.

Tariff Act of 1816

In the early 1800s, England was exporting huge volumes of goods to the United States “without waiting for orders and (the goods) were sold by agents in the ordinary way of auction for whatever prices they would bring.1" Such a speculative practice, which was interpreted as an evidence “that the primary purpose of the English exports to the United States had been to destroy the newly developed American manufacturing industries2”, led to the enactment of the first protectionist law in the United States, the Tariff Act of 1816.

U.S. Antitrust Laws

In 1890 Congress passed the Sherman Antitrust Act3. Under Section 2 of the Sherman Act, “whenever pricing is a basis for a challenge as attempted monopolization, it is established that such price must be predatory4.” However, the Sherman Act must be considered as an American law designed to repeal domestic unfair practices of commerce rather than to repeal dumping practices from abroad.

Indeed, in deciding American Banana Co. v. United Fruit Co.5, the Supreme Court stated that “(A) conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the local law.” The Court, therefore, refused to validate the extraterritorial application of the Sherman Act, on the grounds that the law did not contain an express provision for such application6.

Moreover, under the generally accepted characterization of dumping, predatory price is not to be condemned by itself. It is possible to assume, for instance, that an intentional attempt to monopolize through predatory-pricing will not be repealed under anti-dumping laws, as long as the export price, even being a predatory one, is not lower than
the domestic price in the exporting country. In this sense, the Robinson-Patman Act, which was passed by Congress in 1936, is more concerned with anti-dumping laws, in that it deals with price-discrimination rather than with predatory-pricing. However, Rainer M. Bierwagen points out fundamental distinctions between the Robinson-Patman Act and anti-dumping laws, as follows:

“i) - Price comparisons under the antidumping law are made on an ex-factory basis, not on the basis of actual selling price;

ii) - Antidumping is concerned with primary line injury, i.e., injury to competitors. Secondary line injury, i.e., injury to competitors of the U.S. purchasers of the dumped product, is not considered;

iii) - The injury standard, a ‘harm which is not inconsequential, immaterial, or unimportant’, is significantly lower in antidumping and not directed to take competition as such into account;

iv) - Product differences may lead to different results: due allowance under Robinson-Patman but not under the antidumping statute;

v) - To meet an equally low price is usually irrelevant under antidumping law. Also, no basis is in antidumping for permitting distress sales, and sales to move obsolete inventory. Prices quoted are not actual prices but based on an investigation covering typically six months in the past;

vi) - Potential differences lie in the notion of like and competitive product. This may lead to a finding of (no) dumping and/or adjustments for physical differences."

Furthermore, the Robinson-Patman presents the same problems for its extraterritorial application, and it must be seen as a domestic antitrust law rather than as an antidumping law.

There are American scholars who defend the principle that anti-dumping laws are redundant, on the grounds that domestic anti-trust laws would be good enough to repel foreign practices of dumping. We do not agree. The idea of having an uniform anti-
dumping code, the GATT Antidumping Code, means, above all, international commitment. If countries started applying their domestic anti-trust laws against unfair practices of trade from abroad, areas of conflict would be unavoidable such as, for instance, problems with extraterritorial jurisdiction for the enforcement of domestic laws abroad or, even, the spread of over-protectionist laws that could arise in differing domestic legislation. At least we understand that it would conspire against the current effort for the globalization of the international market.

Tariff Act of 1894

Also known as the “Wilson Tariff Act, Section 73 of the Tariff Act of 1894 “makes unlawful every conspiracy, combination, etc., of persons or corporations when any of them is engaged in importing articles into the United States and when such conspiracy or combination is intended to operate in restrain of lawful trade or to increase the market price in the United States of any imported article or of any manufacture of such article.” However, “except for the unimportant difference in the penalties provided, it does not appear...that Section 73 of the Wilson Act added anything to the Sherman Act.”

Revenue Act of 1916

The Revenue Act of 1916 marked the first attempt to provide specific antidumping legislation in the United States, in order to control the dumping of imports into the country. During World War I, “the disclosure of the unfair methods of competition, and above all the practice of predatory dumping, which has supposedly been widely prevalent in the export trade of foreign countries - and specially Germany - led to a widespread demand in the United States for more effective protection to American industries against such unfair foreign competition.”

By utilization of the same principle present in the Canadian Antidumping Law, Sections 800-801 of the Revenue Act consider unlawful the import in the United States of any article at a price “substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the
country of their production, or of other foreign countries to which they are commonly exported... \(^{15}\), which means the introduction of the “normal value” criteria for the characterization of dumping. In addition, under this act it is not necessary to prove material injury in the local industry in order to consider the import as unlawful. It is necessary, nevertheless, to prove that “such act or acts be done with intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States. \(^{16}\) Consequently, “while there is no need to show injury per se, it is necessary to prove predatory intent”, which is “exceedingly difficult to meet” and, therefore “there has never been a successful prosecution under the 1916 Act. \(^{17}\)

Another criticism of the anti-dumping provision of the 1916 Act, was made on the grounds that “in confining its penalties to the common and systematic practice of predatory dumping it fails to provide remedies against sporadic dumping even though predatory in character and against other types of dumping which may be injurious to American industry though not predatory in intent or not probable to be so. \(^{18}\)”

As a matter of fact, it is possible to assume that the 1916 Act was really designed as an anti-trust law.

Antidumping Act of 1921

The Antidumping Act of 1921 is found in Title II of the Emergency Tariff Act of 1921\(^ {19}\). The Act establishes that the investigative Anti-dumping process is conducted by the Secretary of the Treasury, who decides when “an industry in the United States was being or was likely to be injured or was prevented from being established by such dumping. \(^{20}\)”

Unlike its predecessor, the Antidumping Act does not require the finding of predatory intent, it being enough the proof to prove the causal link between less than fair value sales and injury to the domestic industry. Moreover, for the first time an anti-
dumping legislation was being effective and, "(U)p to the end of 1922 the Secretary of the Treasury had made findings with respect to some twenty commodities."

The Antidumping Act of 1921 "was seen in comparison with the Canadian legislation of 1904 and not in the light of anti-trust. However, the legislative history of the Act "clearly demonstrated that the Congress only sought to control predatory dumping and not every instance of price discrimination."

B - The Current U.S. Anti-Dumping Law

Trade Agreements Act of 1979

The Antidumping Act of 1921, "remained the principal statutory basis for antidumping actions until it was repealed in 1979 in the wake of the Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, the Tokyo Round Antidumping Code.

As observed by Raj Bhala, the Tokyo Round Antidumping Code "required significant changes in U.S. antidumping law which were implemented by the Trade Agreements Act of 1979. These changes took the form of amendments to Title VII of the 1930 Act, and it established the current framework for anti-dumping procedures in the United States."

The Trade Agreements Act of 1979, inter alia, provides:
1) more expeditious administrative proceedings;
2) the formalization of review proceedings;
3) the expansion of the role of the International Trade Commission;
4) a great public participation in proceedings;
5) for greater detail concerning the suspension of investigations.

Moreover, the Act establishes that two different U.S. federal agencies are in charge of antidumping procedures, the Department of Commerce (DOC), and the International Trade Commission (ITC). The DOC is responsible for determining whether "a class or
kind of foreign merchandise is being or likely to be sold in U.S. at less than its fair value. The ITC, on the other hand, is responsible in determining that, due to imports at less than fair value, an American industry has been: i) materially injured, ii) threatened with material injury, or iii) that the establishment of an industry in the U.S. has been materially retarded.

Therefore, if both the DOC’s final dumping determination, and the ITC’s final injury determination are affirmative, then the DOC issues an anti-dumping order.

Trade and Tariff Act of 1984

Significant amendments were introduced by the Trade and Tariff Act of 1984, which were designed to:

"a) assist small U.S. business and petitioners generally by reducing the complexity and cost of antidumping proceedings;
b) clarify the scope of antidumping laws;
c) expand the authority of the Commerce Department in addressing certain discrete situations, including persistent dumping and the utilization of certain calculation techniques."

Omnibus Trade and Competitiveness Act of 1988

Article 12 of the Tokyo Round Antidumping Code established a mechanism by which special anti-dumping actions can be taken on behalf of a third country. To clarify the mechanism, it applies to a situation as the following: Country A is dumping a certain product in Country B; Country C (the third country), however, also exports the same product to Country B and, therefore, the domestic industry in Country C is being injured by such dumping. Consequently, Country C is entitled to formally request Country B to proceed to an anti-dumping investigation against Country A. The implementation of the mechanism is possible whenever countries B and C are member-states of the GATT. It is not necessary that Country A be a member of the GATT.
Interestingly enough, the possibility of taking anti-dumping actions on behalf of a third country was introduced in the U.S. law through the Trade Agreements Act of 1979\textsuperscript{33}, becoming Subtitle D of Title VII of the Tariff Act of 1930 (Section 771, [7] iii) Effects of Dumping in Third-Country Markets).

However, with the advent of the Omnibus and Competitiveness Act of 1988, the legal language dealing with the issue “anti-dumping actions on behalf of the United States” became substantially stronger than that adopted in article 12 of the Antidumping Code. Indeed, where in article 12, paragraph 4, of the Tokyo Round Antidumping Code it is established that “(T)he decision whether or not to proceed with a case shall rest with the importing country...”, Section 1317, (e), of the 1988 Act states that “if the appropriate authority of an Agreement country refuses to undertake antidumping measures (by request of the United States)...the Trade Representative shall promptly consult with the domestic industry on whether action under any law of the United States law is appropriate.”\textsuperscript{34}

Further, the meaning of the U.S. law can be interpreted in the sense that it is not enough that the authority in the importing country starts an anti-dumping investigation when requested by a third country; by the U.S. law it is necessary, in fact, to “undertake antidumping measures” which, at least, withdraws from the importing country’s authority the discretionary power to decide whether or not dumping is taking place. The American law expresses, as a matter of fact, the possibility of unilateral retaliation, which is inconsistent with the GATT/WTO rules, as we will analyze below. Such a possibility, we believe, is also inconsistent with elementary principles of sovereignty.

**Uruguay Round Agreements Act\textsuperscript{35}**

The Uruguay Round Antidumping Code, as well as the other Uruguay Round Agreements, was ratified by Congress in December, 1994\textsuperscript{36}. The most important feature of the current Antidumping Code is the introduction of dispute settlement procedures, “which strengthen the ability of governments to challenge antidumping actions by other member nations.”\textsuperscript{37}
The new framework required changes in U.S. anti-dumping laws in order to accommodate:

1) a five years sunset review\(^{38}\);
2) new adjustments for startup costs;
3) new standards for de minimis margins of dumping;
4) more detailed treatment of the methodology used in analyzing certain injuries and dumping factors\(^{39}\).

Another important aspect is that until the Uruguay Round the Antidumping Code did not bind all the GATT members, but only those countries who ratified the Code. Now, all members are bound. Indeed, article 1, paragraph 2 of the Uruguay Round Agreement Establishing the World Trade Organization states that “(T)he agreements and associated legal instruments included in Annexes 1, 2 and 3 (the Multilateral Trade Agreements) are integral part of this Agreement, binding on all Members.”

Furthermore, in spite of the fact that the provisions for antidumping investigation on behalf of a third country have been altered in order to accommodate the current article 14 of the Uruguay Round Antidumping Code, the provisions foreseen in the above mentioned Section 1317 (e) of the Omnibus Trade and Competitiveness Act of 1988 (unilateral retaliation) remain in effect\(^{40}\).

As noticed by Raj Bhala, “(T)he 1994 Uruguay Round Antidumping Agreement and Uruguay Round Agreements Act supersede the Tokyo Round Antidumping Code and the 1979 Act amendments, respectively. Given the difficulty of meeting the intent requirement of the 1916 Act, the 1930 Act, as amended, is by far the most important U.S. antidumping statute.\(^{41}\)”
Conflicts

President Harry Truman signed the original GATT in 1947, under the authority of the Reciprocal Trade Agreement Act of 1934 which was extended in 1994\(^4\)\(^2\). However, Truman never submitted the agreement for Senate approval\(^4\)\(^3\), which means that the GATT 1947 could never be considered the “Law of the Land” as defined by the Constitution of the United States\(^4\)\(^4\). Consequently, whenever it was possible to identify a potential conflict between the GATT Agreement and an U.S. law, the latter would always prevail.

In fact, it was only in September 1994, i.e., almost fifty years after the advent of the original GATT 1947, that President Clinton submitted to the Senate the GATT/WTO Agreements as conceived in the Uruguay Round, which include, of course, the General Agreement on Tariffs and Trade 1947 (as amended and including notes and supplementary provisions) and the Uruguay Round Agreement Establishing the World Trade Organization. The approval was given by the Senate in December, 1994.

Therefore, through the Implementation of the Uruguay Round Agreements\(^4\)\(^5\), one could assume that the GATT/WTO Agreements became also the “Law of the Land”, and eventual conflicts of laws would supposedly be the object of the same criteria utilized to solve domestic conflicts of laws as, for instance, the “last in time” principle.

Unfortunately, this is not true. In ratifying the GATT/WTO Agreements, the Senate made very clear that these Agreements will never preempt U.S. domestic laws. Indeed, Section 3512 (Relationship of the Agreements to the United States law and State law) establishes that “(N)o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."\(^4\)\(^6\)

Also, Section 3512 determines that “(U)pon the enactment of this Act [enacted Dec. 8, 1994] the President shall, through the intergovernmental policy advisory committees on trade ...consult with the States for the purpose of achieving conformity of States laws and
practices with the Uruguay Round Agreements. This means that whenever the Uruguay Round Agreements are in conflict with a state law, the state law will prevail until (and if) the aforementioned committee decides to advise the states to seek conformity, which seems very unlikely to occur.

Consequently, one can assume that Congress introduced the Uruguay Round Agreements into the U.S. law not as an “International Treaty” but, rather, as an “International Agreement.” Such a technical distinction creates a contradictory legal situation whereby the Uruguay Round Agreements will always be susceptible to preemption by American laws, even though these agreements are now supposed to be considered as U.S. domestic law.

Section 301

The above mentioned Section 3512 of the Implementation of the Uruguay Round Agreements also establishes that the Uruguay Round Agreements shall not “…limit any authority conferred under any law of the United States, including Section 301 of the Trade Act of 1974...”

Section 301 of the Trade Act of 1974 has been the object of the most severe criticism by the GATT members, according to the argument that Section 301 is a mechanism for the implementation of unilateral retaliation, a remedy that is totally inconsistent with, and condemned by, the GATT/WTO Agreements. As matter of fact, Section 301 has been considered as “the most potent and controversial weapon in the U.S. trade remedy arsenal.”

By Section 301 the President of the United States can take unilateral measures against unfair practices of trade from foreign countries whenever “the rights of the United States under any trade agreement are being denied;” or “an act, policy, or practice of a foreign country (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under any agreement, or (ii) is unjustifiable and burdens or restricts United States commerce.”
Among the actions authorized by Section 301, the United States can, for instance unilaterally impose duties or any other import restrictions on the import goods, which includes the possibility of adopting quantitative restriction (quotas) for imports. However, in order to remedy unfair practices of trade, any import restriction other than tariff barriers (anti-dumping and countervailing duties) is rejected by the GATT/WTO Agreements.

Consequently, it is possible to assume, for instance, that the United States would be technically and legally capable of adopting unilateral quantitative restrictions on imports to remedy dumping practice from abroad, as long as Section 301 could be utilized to preempt the Uruguay Round Antidumping Code as introduced into the U.S. law by Congress.

Furthermore, when Section 1317, (e), of the Omnibus Trade and Competitiveness Act of 1988 (third country dumping) states that “if the appropriate authority of an Agreement country refuses to undertake antidumping measures ... the Trade Representative shall promptly consult with the domestic industry on whether action under any law of the United States law is appropriate...”, it is obvious that such a proviso, which sounds like a threat, hides the possibility of utilization of Section 301.

Curiously, Congress tried to accommodate Section 301 and Uruguay Round Agreements through the introduction in Section 301 of a mechanism by which the Section will not be utilized if the Dispute Settlement Body (DSB) of the WTO “has adopted a report, or a ruling issued under the formal dispute settlement proceeding...” However, it goes farther and establishes that such an exception will be applied as long as “the rights of the United States under a trade Agreement are not being denied, or the act, policy or practice - (I) is not a violation of, or inconsistent with, the rights of the United States, or (II) does not deny, nullify, or impair benefits to the United States under any trade agreement..."
Thus, the interpretative power to find whether or not the United States commercial interests are being threatened relies on the discretion of the United States Trade Representative (USTR).

Additionally, there is no prevision in Section 301 concerning judicial review, and "it could be inferred that Congress did not want Section 301 determinations to be reviewed."56

Nevertheless, we have to recognize the strong political character of Section 301. Historically, the President of the United States has carried the authority to promote unilateral retaliation against discriminatory foreign trade. Indeed, "President George Washington was empowered by statute to lay embargoes and other restrictions on imports and exports whenever he felt that foreign countries were discriminating against the United States."57 Perhaps, then it is possible to find in historical precedents the explanation for the Senate’s delay in approving the GATT 1947.

On the other hand, in spite of the fact that since its creation in 1974, "... the USTR has undertaken roughly 100 Section 301 investigations"58, we assume that such a number is more likely to be reduced after the introduction of the Uruguay Round Agreements into the U.S.

Even considering the lower status that was given by Congress to the Uruguay Round Agreements in the ambit of American laws, we can expect that the United States will try to avoid, whenever possible, areas of conflict with the World Trade Organization, in as much as the harmonization of the world market is the main goal to be achieved in these times of world trade globalization.
Final Comment

We finalize this paper with some personal thoughts as to what could be the evolution of anti-dumping laws in the future.

There are many scholars who criticize anti-dumping laws for several reasons. As a matter of fact, the issue "dumping" in the GATT has been the object of a permanent controversy. The number of people who defend its total elimination is not small, based on the idea that, since anti-dumping laws have a protectionist character, they should be withdrawn from the GATT. Therefore, the great challenge of anti-dumping laws is the minimization of protectionist abuse, which can be done through a permanent improvement of anti-dumping laws in order to "differentiate the protectionist abuser from the meritorious petitioner...".

Further, the fabulous arsenal introduced into the GATT by the advent of the "Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes", certainly tends to inhibit future protectionist and abusive utilization of anti-dumping laws.

One of the most common attacks is made under the allegation that anti-dumping laws, far from protecting citizens, are elaborated only to protect industry. Such an allegation is made on the grounds that the citizens of the importing country would always be favored by the low dumped prices of imported goods.

We do not agree. Economically, it is not easy to justify the fact of having a country exporting products at lower prices than those existent in its own market. Furthermore, although it is true that dumping can benefit citizens in the importing country, a rigorous and neutral anti-dumping policy can favor, on the other hand, the citizens of the exporting
country (or even the citizens of a third country, in the absence of a domestic price). Indeed, it is possible to imagine a nearly utopian situation where the exporting country would have to lower its domestic prices in order to be able to export its products.

Another common criticism is that anti-dumping laws are redundant as long as domestic anti-trust laws would be good enough to repeal dumping practices from abroad. Again we do not agree, for the reasons mentioned in Chapter 3 supra60, which are based on two basic concepts. First, there are problems with the extraterritorial jurisdiction of domestic anti-trust laws. Indeed, it has to be observed that, unlike what occurs under anti-dumping laws, anti-trust laws punish the seller, i.e., the active agent of the practice of predatory or discriminatory pricing. Second, there is a lack of international commitment to anti-trust laws, which could lead to international conflict about different domestic legislation, and also to the proliferation of protectionist and abusive laws.

However, what could be the future of anti-dumping laws? We believe that the keyword for the issue “anti-dumping law” is prophylaxis. Therefore, the permanent improvement of the Antidumping Code through mechanisms to prevent the practice of dumping is the challenge for the future.

In order to make preventing dumping more effective, maybe some principles of anti-trust laws could be brought into the Code. For, instance, the current system established in the Antidumping Code, by which the imposition of anti-dumping penalties is limited, at the maximum (and under special situations61), for the imports occurred in the period after the start of the investigative process, could be changed. Indeed, sporadic dumping, which is a very common type, can easily escape from punishment in the current system, which can lead to a stimulation of such a practice.

An ideal situation would be, we believe, the introduction of a system by which a dumping practice could be punished in a more effective retroactive manner, without the limitation ruled by the Code. Maybe, the Code could establish a period of two years or so for the prescription of the rights for the application of penalties.
Another suggestion is related to the possibility of having the exporter also penalized, as occurs in anti-trust laws. As we know, the GATT/WTO has no power to enforce the DSU decisions, as long as there is no international court in the WTO framework that could do that. Maybe in the future we will see the creation of such a court.

Additionally, the GATT/WTO agreements are a matter of public law, which makes it impossible for a WTO decision to reach a private person (the exporter) of any member-state. However, in order to prevent dumping, the DSU could devise a special procedure by which, whenever a dumping practice is confirmed, the WTO would apply a penalty against the member-state in which the dumped export was made. In a second step, the penalized member-state would pursue indemnification by suing the exporter through its domestic legal system, perhaps by utilizing its own anti-trust laws.

However, in a free exercise of futurism, it can be imagined that the world trade market tends to be more and more open in the future. Indeed, the expansion of regional treaties, such as NAFTA and MERCOSUL, by the progressive inclusion of new members, allows the conclusion that the time is not far when international commercial borders will be totally eliminated. How long it will take, we do not know, but we guess that, when this time comes, anti-dumping laws will still be there, maybe in the form of a huge international anti-trust uniform code, as an essential weapon to guarantee a free and healthy market.
Notes (Chapter 4)


2 - Id., at 41.

3 - 15 U.S.C.A. § 2 “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.”

4 - Bierwagen, Rainier M., GATT Article VI and the Protectionist Bias in Anti-Dumping Laws, at 135 (1990).

5 - 213 U.S. 347.

6 - Viner, Jacob, *op. cit.*, at 240. “A Supreme Court decision, however, denied the jurisdiction of the United States under this act (the Sherman Act) over acts done in foreign countries, even if done by citizens of the United States, and even if there were conspiracy in the United States to perform these acts elsewhere, provided that these acts were not in violation of the law of the country where they were committed.”


8 - Bierwagen, Rainier M., *op. cit.*, at 138.


10 - Viner, Jacob, *op. cit.*, at 241.

11 - Id. “In any case it (Section 73 of the Wilson Act) has proved to be without practice significance. Proceedings against an importer have been instituted under it in only one instance, and in this instance, the Brazilian coffee valorization case, the abandonment of the allegedly unlawful act resulted in a dismissal of the proceedings.” The Brazilian coffee valorization “was a case not of predatory dumping but of the association of American bankers and importers, in co-operation with the state of São Paulo, to control the importation of Brazilian coffee and to finance the withholding of surplus stocks thereof from the market, with the objective of raising its price in the American market.”


14 - See supra Chapter 1, at 16.
16 - Id.
17 - Bhala, Raj, *op. cit.*, at 684.
18 - Viner, Jacob, *op. cit.*, at 245 (Quoting Culbertson, W.C., Commercial Policy in War Time and After, at 152, 1919).
20 - Viner, Jacob, *op. cit.*, at 259.
21 - Id., at 246.
22 - Bierwagen, Rainier M., *op. cit*, at 123.
25 - Bhala, Raj, *op. cit.*, at 685. “Title I of the Trade Agreements Act of 1979 repealed the 1921 Act and added a new Title VII to the 1930 Act that implemented the provisions of the Tokyo Round Antidumping Code.”
26 - Id.
28 - Id.
29 - Id.
37 - Pattinson, Joseph E., *op. cit.*, at 1-15. See also Bhala, Raj, *op. cit.*, at 620, “A key feature of the DSU is that dispute settlement is binding. The term ‘binding’ does not mean that the losing party must comply with an adverse WTO panel report. Rather, it means that a losing party in a WTO dispute settlement proceeding cannot prevent the DSB from adopting the WTO panel report. Thus, the U.S. cannot block the adoption. This result is
significant because adoption is the key prerequisite for the establishment of legal obligations incumbent on a losing party. Until the Uruguay Round, reports of GATT panels could be blocked by the losing party. That is, the losing party could prevent the adoption of the report by the contracting parties because GATT decision-making, including dispute resolution, operated on a consensus basis."

38 - Bhala, Raj, *op. cit.*, at 678, 679. “Traditionally, the U.S. has revoked a minority of outstanding antidumping orders, and then only after a long period. As two practitioners point out: between January 1, 1980 and July 31, 1994, a total of 533 antidumping and countervailing duty orders had been, at some time, placed into effect. During this same period of time, 162 orders (30.39 percent) were revoked. The average period of time a revoked duty order remained in effect was 8.28 years. Another observer’s results were even more startling: over 90 percent of all companies convicted of dumping since 1980 are still (as of 1991) restricted by dumping orders...”


41 - Bhala, Raj, *op. cit.*, at 685.

42 - See Bhala, Raj, *op. cit.*, at 85.

43 - U.S.C. Const. Article II, § 2, “...He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...”

44 - U.S.C. Const. Article VI, “...This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land...”


50 - Bhala, Raj, *op. cit.*, at 1096. “The unilateral nature of Section 301, coupled with the types of retaliatory measures it authorizes, renders it susceptible to the criticism that it is inconsistent with GATT 1947 and the Uruguay Round DSU.”


53 - See supra Chapter 4, at 71,72.

55 - 19 U.S.C. § 2411, (a), (2), (A), (l) and (II), (1994).

56 - Bhala, Raj, *op. cit.*, at 1117. “Scholars remain divided on the question of whether the USTR’s determination under the statute are subject to judicial review by the CIT and Court of Appeals for the Federal Circuit... On the other hand, courts have reviewed escape clause decisions by the ITC and President in spite of the lack of a judicial review provision in Section 201.”


58 - Bhala, Raj, *op. cit.*, at 1096. “The most common target has been the European Union. Japan, Korea, and Taiwan have been the second, third, and fourth most common targets, respectively.”

59 - Id., at 610. “To differentiate the protectionist abuser from the meritorious petitioner, antidumping laws must avoid two pitfalls. First, it must be clear and unequivocal. A protectionist abuser is sure to exploit ambiguities... Second, it must be grounded on microeconomic theory. Specifically, it must draw on the theory of the cost structure of a firm to isolate and sanction predatory cases...”

60 - See supra Chapter 3, at 70, 71.

61 - See supra Chapter 2, at 35.
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