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The New Protectionism

*Carl J. Green**

THE NEW PROTECTIONISM

One of the crucial challenges of the Eighties is to maintain an open and expanding international trade system. Despite the successful completion of the Tokyo Round of Multilateral Trade Negotiations in 1979,¹ the liberal principles of the General Agreement on Tariffs and

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¹ The Tokyo Round of Multilateral Trade Negotiations was the seventh round of trade negotiations held since 1948 under the auspices of the General Agreement on Tariffs and Trade (GATT). General Agreement on Tariffs and Trade, signed Oct. 30, 1947, entered into force Jan. 1, 1948, 61 Stat. A 3, T.I.A.S. No. 1700, 55 U.N.T.S. 194. It was instituted officially upon the signing of the Tokyo Declaration by ministers of more than 100 countries in September 1973. The negotiations, which were much slower than expected, were formally completed on April 12, 1979, when ministers from the developed countries and some developing countries initialed the results. See S. REP. NO. 249, 96th Cong., 1st Sess. 1 (1979), reprinted in [1979] 6A U.S. CODE CONG. & AD. NEWS 8 [hereinafter cited as S. REP.].

In American legal doctrine, the multilateral trade agreements (MTAs) reached in the Tokyo Round are non-self-executing and thus do not have independent effect under U.S. law. See H.R. REP. NO. 317, 96th Cong., 1st Sess. 41 (1979) [hereinafter cited as H.R. REP.]. For a discussion of non-self-executing international agreements see generally RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 141-45 (1962). The substance of the MTAs was incorporated into the laws of the United States through the instrumentality of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 2501 *et seq.*

Trade (GATT)² are under increasing attack. Protectionism has become increasingly prevalent in Europe and is mounting rapidly in the United States. The principal targets of protectionism are Japan, the newly industrialized countries of Asia³ and the developing countries generally, whose expanding exports represent serious challenges to traditional industrial sectors in the mature industrial countries. Unless the doors of the trading "club" remain open to new entrants, there is great danger that the system will break down into blocs, such as a Japan-centered Asian bloc or an EEC-African bloc, or that it will collapse in a grim replay of the 1930s.

The growing dangers of protectionism are still not generally recognized, partly because protectionism has been successful in concealing itself behind new and sophisticated masks. Euphemisms such as "fair trade," "orderly marketing" and "voluntary restraints," which we will examine below, have given a new cover of respectability to protectionism and hidden its inroads from public view. Schooled in the history of an earlier era, we tend to associate protectionism with the high tariffs and quotas of the past and to draw comfort from the relative absence of such practices today. While the classical forms of protectionism have been rendered largely obsolete by the GATT, protectionism itself has not been defeated; rather, it has adapted itself to the new international environment through a protean capacity to assume new forms.

The Tokyo Round of Multilateral Trade Negotiations was successful in curtailing a variety of non-tariff barriers restricting international trade.⁴ The Multilateral Trade Agreements (MTAs) that resulted from the negotiations are designed to reduce or eliminate such non-tariff forms of protectionism as overly restrictive product standards,⁵ domes-

(Supp. III 1979)). See generally deKieffer, *GATT Dispute Settlements: A New Beginning in International and U.S. Trade Law*, 2 NW. J. INT'L L. & BUS. 317 (1980).

² General Agreement on Tariffs and Trade, signed Oct. 30, 1947, entered into force Jan. 1, 1948, 61 Stat. A 3. T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter cited as GATT].

³ The term "Asian NICs" is often used to refer to South Korea, Taiwan, Hong Kong, and Singapore. See S. OKITA, *THE DEVELOPING ECONOMICS AND JAPAN: LESSONS IN GROWTH* 271 (1980).

⁴ "The principle object of the Tokyo Round was the elimination, reduction, or 'harmonization,' i.e., uniformity, of certain nontariff barriers (NTBs), although further tariff cutting was also contemplated." S. Rep., *supra* note 1, at 2.

⁵ The Agreement on Technical Barriers to Trade (relating to product standards) entered into in Geneva, April 12, 1979. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE TEXTS OF THE TRADE AGREEMENTS NEGOTIATED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, PURSUANT TO SECTION 102 OF THE TRADE ACT OF 1974, H.R. DOC. NO. 153, PART I, 96TH CONG., 1ST SESS. 1 (1979) [hereinafter cited as *Transmission of the Trade Agreements*].

tic purchase requirements in government procurement,⁶ questionable standards and procedures in customs valuation⁷ and restrictive import licensing.⁸ The MTAs also advance the harmonization⁹ of laws among trading countries with respect to trade distortions such as dumping¹⁰ and subsidies.¹¹ But despite these successes,¹² other forms of protectionism continue to grow. My focus in this Perspective is on two such forms of the new protectionism which, for convenience, I have designated "bilateralism" and "legal protectionism."

BILATERALISM

During the 1930s, unilateral import quotas, often of a highly discriminatory nature, were commonly used to protect domestic industries. Unlike tariffs, which represent a hurdle that can be surmounted by more efficient lower-cost producers, quotas generally place an absolute bar on trade expansion. When the GATT negotiators set about to reshape the international trade system after World War II, they took special aim against the use of quotas by agreeing to a general prohibition of quantitative restrictions. Article XI(1) of the GATT¹³ provides:

No 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.

Although prohibiting in general the unilateral imposition of quantity restrictions by contracting parties, Article XI is silent about consensual

⁶ The Agreement on Government Procurement, *done* Apr. 11, 1979, GATT Doc. MTN/NTM/W/211/Rev. 2, *reprinted in* Transmission of the Trade Agreements, *supra* note 5, at 69.

⁷ The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (relating to customs valuation), *done* April 12, 1979, GATT Doc. MTN/NTM/W/192/Rev. 5, *reprinted in* Transmission of the Trade Agreements, *supra* note 5, at 3.

⁸ The Agreement on Import Licensing Procedures, *done* Apr. 10, 1979, GATT Doc. MTN/NTM/W/231/Rev. 2, *reprinted in* Transmission of the Trade Agreements, *supra* note 5, at 191.

⁹ See note 4 *supra*.

¹⁰ The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (relating to antidumping measure), *done* Apr. 9, 1979, GATT Doc. MTN/NTM/W/232, *reprinted in* Transmission of the Trade Agreements, *supra* note 5, at 309.

¹¹ The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures), *done* Apr. 9, 1979, GATT Doc. MTN/NTM/W/232, *reprinted in* Transmission of the Trade Agreements, *supra* note 5, at 257.

¹² Other MTAs deal with trade in agricultural products and other specific industries that are outside of the scope of this Perspective.

¹³ GATT, *supra* note 2, art. XI(1).

arrangements having the same effect.¹⁴ Through the use of this "loop-hole" a considerable and growing portion of international trade has become subject to quantity restrictions.¹⁵ Whether trade restricting agreements, particularly those negotiated between highly industrialized importing countries and less developed exporting countries, are truly consensual in substance, as opposed to form, may indeed be questioned. Nonetheless, the widespread use of such arrangements has given them a certain measure of legitimacy.

A fundamental objection to bilateral arrangements is that, by their nature, they undercut the GATT's basic principle of non-discrimination.¹⁶ A trade restricting agreement between an importing country and any one exporting country is inherently discriminatory. In this respect, bilateralism is perhaps worse than quotas, which, in principle, may be equitably apportioned among exporting countries in accordance with the shares which they might be expected to obtain in the absence of such restrictions.¹⁷ But because in consensual arrangements, the exporting country "agrees" to be discriminated against, it thereby relinquishes any basis for crying "foul play."

The most comprehensive set of bilateral restraints are those applied to the textile and clothing exports of less developed countries under the Multifibre Agreement of 1974¹⁸ (MFA) which, though multi-lateral in appearance, consists, in fact, of a worldwide network of separate bilateral arrangements. Textile and clothing manufacturing, because of its usually labor-intensive nature, typically has been the "take off" industry for low wage developing countries seeking to ex-

¹⁴ Professor John Jackson notes that "it has been argued that these arrangements are technically illegal under the GATT, but in general these arguments have had little effect." Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 L. & POL'Y INT'L BUS. 21, 31 n.49 (1980).

¹⁵ As Olivier Long, former Director-General of GATT, has asserted, "[i]t is difficult to arrive at even an approximate measure of the restrictions imposed. They vary greatly and are frequently unpublicized. That they are extensive is obvious. . . ." Long, *International Trade Under Threat: A Constructive Response*, 1 THE WORLD ECON. 251, 252 (1978).

¹⁶ Article XIII of the GATT, which embodies the principle of non-discrimination, provides in part as follows:

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

GATT, *supra* note 2, art. XIII.

¹⁷ *Id.* art. XIII(2).

¹⁸ Arrangement Regarding International Trade in Textiles, *done* Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840, *extended by* Protocol of Feb. 1, 1978. *See generally* Perlow, *The Multilateral Supervision of International Trade: Has the Textiles Experiment Worked?* 75 AM. J. INT'L L. 93 (1981).

pand their industrial base and to improve their balance of payments through exports.¹⁹ It has therefore attracted many new entrants. In accordance with the economic theory of comparative advantage,²⁰ the world economy would benefit if mature industrial countries ceded this industry to developing countries and concentrated their resources in more capital- and technology-intensive industrial sectors. But in practice, most industrial countries have been slow to do so, preferring instead to protect their domestic textile industries through restrictions on imports from developing countries.

The Multifibre Agreement had its origins in the Short Term Arrangement of 1961²¹ and the Long Term Arrangement of 1962,²² both of which applied to cotton textiles. Originally these were intended to be temporary measures needed to allow time for phase-out adjustments to take place in the developed countries.²³ Their persistence is evidence of the difficulty of pursuing adjustment and protection at the same time. The Multifibre Agreement, though incorporated in the GATT arrangements, flouts the spirit, if not the letter of Article XI's prohibition of quantity restrictions; it is also highly discriminatory since the restrictive bilateral agreements negotiated under it generally restrict only the textile and clothing exports of less developed countries. The negotiations for extension of the MFA taking place this year will determine whether this restrictive regime expands or contracts.²⁴ With protectionist sentiment continuing to grow in the developed countries, the negotiations promise to be long and hard.

Japan and the newly industrialized countries such as Korea, Taiwan, Singapore and Hong Kong have posed the sharpest competitive challenges to European and American industries and have been among the most frequent targets of bilateral restraints.²⁵ It is impossible to

¹⁹ See Perlow, *supra* note 18, at 93-94.

²⁰ A brief discussion of the theory of comparative advantage is presented in A. LOWENFELD, *PUBLIC CONTROLS ON INTERNATIONAL TRADE* 3-9 (1979).

²¹ General Agreement on Tariffs and Trade, Arrangements Regarding International Trade in Cotton Textiles, July 21, 1961, 12 U.S.T. 1675, T.I.A.S. No. 4884.

²² Long-Term Arrangements Regarding International Trade in Cotton Textiles, Feb. 9, 1963, 13 U.S.T. 2673, T.I.A.S. No. 5240, *extended by* Protocol of May 1, 1967, 18 U.S.T. 1337, T.I.A.S. No. 6289 and June 15, 1970, 21 U.S.T. 1971, T.I.A.S. No. 6940.

²³ Article I of the Long-Term Arrangements states, "... the participating countries are of the opinion that it may be desirable to apply, during the next few years, special practical measures of international cooperation which will assist in any adjustment that may be required by changes in the pattern of world trade in cotton textiles." *Id.*

²⁴ See Lalith, *Forthcoming Negotiations on the Multi-Fibre Arrangement*, 3 *THE WORLD ECON.* 1 (1980).

²⁵ Japan is often described as a practitioner rather than a mere target of protectionism. The recent report to the President of the United States and the Prime Minister of Japan by the Japan-

gauge the extent of European restrictions against the exports of these countries since the restrictive arrangements are generally informal and usually secret. It is widely understood that such arrangements cover a variety of industrial products including, *inter alia*, steel, ships, automobiles and consumer electronics.²⁶ While many of these restrictions are imposed by "agreement," there are also many that are imposed by unilateral actions in clear disregard of GATT rules. A survey on automobile trade released by the United States Department of Commerce in June 1980 showed, for example, that France has kept Japanese automobile imports to less than 3 percent of its market, that Italy limited Japan to a mere 2,200 cars in 1980, and that the United Kingdom, under a "gentlemen's agreement," limits imports of Japanese cars to approximately 10 percent of its market.²⁷

One of the principal aims of the Tokyo Round was to replace these under-the-table arrangements with a new and more effective safeguards system.²⁸ Safeguards, that is, restrictions on imports that cause injury to a domestic industry, are permissible as an emergency measure under Article XIX of the GATT, subject to specified conditions.²⁹ Article XIX does not authorize departures from the GATT's principle on non-discrimination: import restrictions adopted under the authority of Article XIX must apply to all foreign sources of a given product on a non-discriminatory basis. Moreover, the country invoking Article XIX must consult with the exporting countries affected and provide compensation or face retaliation for its action. Because of these conditions and limitations, the GATT's safeguard clause has been relatively little used; most countries have simply bypassed it in favor of informal arrangements for import restriction.³⁰ The effort made in the Tokyo Round to negotiate a new, more workable safeguards provision ended in failure as a result of unresolvable differences between protection-

United States Economic Relations Group (the "Wisemen Group") concludes, however, that Japan "now is far more the victim of other countries' formal and informal quotas than a perpetrator of quota restrictions in international trade in manufactured goods." REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP ("WISEMEN'S REPORT") 57 (1981).

²⁶ See Hindley, *Voluntary Export Restraints and the GATT's Main Escape Clause*, 3 THE WORLD ECON. 313, 316 (1980).

²⁷ OFFICE OF INT'L SECTORAL POLICY, U.S. DEPT. OF COMMERCE, SURVEY OF AUTOMOTIVE TRADE RESTRICTIONS MAINTAINED BY SELECTED NATIONS 1-3 (1980).

²⁸ See Hindley, note 26 *supra*.

²⁹ Article XIX, § 2 of the GATT directs the party seeking to restrict imports to give advance notice to the exporting party and to other exporters of the product. If delay would cause damage, unilateral action may be taken, so long as it is followed immediately by consultation between the parties. See note 2 *supra*.

³⁰ On the inadequacies of the GATT's existing Safeguard Clause, see generally Tumlin, *A Revised Safeguard Clause for GATT?*, 7 J. WORLD TRADE L. 404 (1973).

mind European countries and less developed countries that feared a more effective safeguards provision would be used too often against them.³¹

In the case of the United States, Section 1 of the Sherman Act,³² with its broad prohibition of agreements in restraint of trade, precludes the industry-to-industry arrangements that often serve as informal safeguards in Europe. Under the so-called Escape Clause,³³ a provision based upon Article XIX of the GATT, the International Trade Commission (ITC) is empowered to investigate claims by domestic industries that increased imports are a substantial cause of serious injury and, in the case of an affirmative finding, to recommend that the President provide relief. The forms of relief authorized by the statute include the negotiation with foreign countries of orderly marketing agreements (OMAs)³⁴ to limit imports of the product in question. Under the authority of the Escape Clause, OMAs are currently in effect covering a relatively small group of products including color televisions from Korea and Taiwan, certain footwear, certain industrial fasteners and various other items.³⁵

During the 1960s and early 1970s the United States Government negotiated voluntary restraint agreements (VRAs)³⁶ on steel and other imports. The legality of such VRAs was called into serious question in *Consumers Union of the United States v. Kissinger*,³⁷ in which the consumers group challenged the VRA negotiated in 1972 by the State Department with foreign steel producers. The original complaint

³¹ See Corbet, *The Importance of Being Ernest about Further GATT Negotiations*, 2 THE WORLD ECON. 319, 329-35 (1979).

³² 15 U.S.C. § 1 (1976).

³³ Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, §§ 201-03 (1974) (codified at 19 U.S.C. §§ 2251-53 (1976)).

³⁴ 19 U.S.C. § 2253(a)(4) (1976).

³⁵ Products currently covered by OMAs are listed in the Tariff Schedules of the United States ("TSUS") Appendix 9, Part 2.A.

³⁶ There is considerable overlap and confusion in the terms used to designate informal quantity restraints. Unlike OMAs which, by statutory definition, are agreements negotiated "with foreign countries," see note 34 *infra*, the term "voluntary restraint agreements" or "arrangements" (VRAs) is used by some authorities to designate nongovernment to government arrangements, such as the government to industry arrangements described in the *Consumers Union* case (see text accompanying note 37 *infra*), and by others to embrace both those arrangements and OMAs. See [1978] PROCEEDINGS AM. SOC. INT'L L. 1, 12 (remarks of John H. Jackson, Chairman, and Julius L. Katz). The term voluntary export restraints (VERs) is frequently used in the context of the Multifibre Agreement, see notes 21, 22 *supra*, to denote export restraints adopted pursuant to that government agreement, but it is also used more generally to refer to all bilaterally negotiated measures of export limitations. See Hindley, *supra* note 26, at 339 n.5. In Europe, bilateral restraint arrangements are generally known as "Selective Safeguards."

³⁷ 506 F.2d 136 (D.C. Cir. 1974).

contained two separate claims: (1) that the VRA violated the Sherman Act and (2) that the VRA was *ultra vires* the Executive Branch because of failure to conform to the procedural requirements of the Escape Clause. For reasons not stated in the record, plaintiff stipulated the dismissal with prejudice of its antitrust claim and filed an amended complaint limited to the second claim. Nevertheless, the District Court observed in dictum that "very serious questions can and should be raised as to the legality of the arrangements under the [Sherman] Act."³⁸ With respect to the *ultra vires* claim, the Court of Appeals conceded that "Congress has by statute occupied the field of *enforceable* restriction" but it, nevertheless, upheld the authority of the Executive Branch to negotiate the VRA on the grounds that it was "essentially precatory" and "non-binding."³⁹

Bilateralism in the United States has now taken a great leap forward with the recent conclusion of an arrangement to restrict imports of Japanese automobiles.⁴⁰ Detroit's demands for protection, which were strongly supported in the Congress,⁴¹ presented the Reagan Administration with an early and crucial test of its professed commitment to open markets and liberal trade. Pressure on the Administration was compounded by a bill introduced by Senators Danforth, Bentsen and others which would have imposed unilateral quotas on Japanese automobiles⁴² in clear violation of America's obligations under Article XI(1) of the GATT and Article XIV of the Japan-United States Treaty of Friendship, Commerce and Navigation.⁴³

The options available to the Administration were narrowly restricted. The possibility of an Orderly Marketing Agreement, as au-

³⁸ *Id.* at 140. In response to this dictum, Congress added to the Trade Act of 1974 a provision specifically exempting the participants in the steel VRA from potential antitrust liability. See Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, § 607 (1974) (codified at 19 U.S.C. § 2485 (1976)).

³⁹ 506 F.2d at 143.

⁴⁰ See *Car Import Limit Eases U.S.-Japan Trade Rift; Domestic Makers Gain Leeway to Boost Prices*, Wall St. J., May 4, 1981, at 3, col. 1. Generally, the plan called for Japan to limit for two years auto exports to the United States. The parties would later consider a third year of limitations. Shipments in the first year of the plan are to be held to 1,680,000 cars, compared with 1,820,000 units in 1980. *Id.*

⁴¹ Senator John Danforth (R-Mo.) and Senator Lloyd Bentsen (D-Tex.) introduced S. 396 on Feb. 5, 1981. Reps. Robert Traxler (D-Mich.) and William Brodhead (D-Mich.) introduced H.R. 1823 on Feb. 6, 1981. These would have established auto import quotas. See [1981] 64 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-2-5, M-1.

⁴² *To Impose Quotas on the Importation of Automobiles from Japan During 1981, 1982, 1983*, S. 396, 97th Cong., 1st Sess. (1981).

⁴³ 4 U.S.T. 2063, T.I.A.S. 2863, Apr. 2, 1953. Article XIV(2) states:

2. Neither Party shall impose restrictions or prohibitions on the importation of any product of the other Party, or on the exportation of any product to the territories of the other Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited.

thorized by the Escape Clause,⁴⁴ had been eliminated in late 1980, when the International Trade Commission heard and rejected Detroit's claim for relief under that statute.⁴⁵ Moreover, in the wake of *Consumers Union*,⁴⁶ a VRA based on the voluntary cooperation of Japanese exporters would clearly have raised serious antitrust risks both for the exporters and for the U.S. officials who negotiated with them.⁴⁷

The solution ultimately adopted is a piece of legal legerdemain involving an agreement which is not an agreement and restraints which are both voluntary and mandatory at the same time. Since any restraint agreement between the United States and Japanese Governments which did not meet the statutory standards for an OMA would probably be an *ultra vires* act under the *Consumers Union* rationale,⁴⁸ the Administration carefully avoided using words such as "negotiations" or "agreement" in describing its arrangements with Japan.⁴⁹ The restraints adopted by Japan are "voluntary" (in the somewhat dubious sense in which that word is used in the contemporary international trade context) so far as the Japanese Government is concerned but are to be regarded as involuntary so far as the automobile manufacturers are concerned so that, if they are sued under the American

⁴⁴ See note 33 *supra*.

⁴⁵ Certain Motor Vehicles and Certain Chassis and Bodies Thereof, Report to the President; Investigation No. TA-201-44 (I.T.C. Dec. 3, 1980), 45 Fed. Reg. 85,194 (1980). In their separate opinions, all of the ITC Commissioners were in agreement that the increased imports were a cause of serious injury to the domestic automobile industry. But the Escape Clause authorizes relief only if the increased imports are "a substantial cause" of serious injury or threat thereof. Substantial cause is defined to mean "a cause which is important and not less than any other cause." Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, § 201(b)(4) (codified at 19 U.S.C. § 2251(b)(4) (1976)). Since a majority of the Commissioners found that other causes (e.g., the overall decline in demand, a shift in consumer preferences toward smaller cars, etc.) were more important causes of injury than increased imports, they were constrained to deny relief. 45 Fed. Reg. 85,194 (1980).

⁴⁶ 506 F.2d 136 (D.C. Cir. 1974).

⁴⁷ The Attorney General of the United States, William French Smith, in a letter to United States Trade Representative William E. Brock dated February 18, 1981, stated:

In summary, this Department believes that although the President has inherent legal authority to negotiate directly with foreign governments to seek import restraints, where such negotiations are implemented through voluntary private behavior serious antitrust risks arise. Foreign or United States governmental "approval," "urging," or "guidance" of such behavior cannot safely be relied on as a defense; if the foreign government does not provide adequate protection by mandating the restraints in a legally binding manner, private antitrust suits could jeopardize the effective implementation of any agreements that are negotiated.

Letter from Atty Gen. Smith to U.S.T.R. Brock Concerning Relationship Between Voluntary Import Restraints and U.S. Antitrust Law [hereinafter cited as Attorney General's Voluntary Restraint Letter], reprinted in [1981] 70 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at M-1.

⁴⁸ The Attorney General's letter also states: "No authority [to negotiate an orderly marketing agreement] currently exists with respect to automobiles." *Id.*

⁴⁹ See Clyde H. Farnsworth, *Auto Talks with Japan: A Drama of Euphemisms*, N.Y. Times, Mar. 26, 1981, at D-1, col. 1 (city ed.).

antitrust laws, they can claim the defense of foreign legal compulsion.⁵⁰

There was some anomaly in the American demand that Japan impose sanctions under its own law to enforce restrictions desired by the U.S. in order to protect Japanese companies from American antitrust suits. Nevertheless, the Japanese Government undertook to comply with the American request by issuing directives to its automobile exporters indicating the maximum number of exportable units and by threatening to impose export licensing under an amended Export Trade Control Order if the companies fail to adhere to the directives.⁵¹ To allay Japanese fears that this arrangement might not pass muster in an antitrust action, the U.S. Department of Justice issued a letter indicating its opinion that the arrangement would satisfy the conditions of the legal compulsion defense.⁵² On this basis the Department concluded that the arrangement "would not give rise to violations of American antitrust laws" and that American courts "would likely so hold."⁵³

It would be bold to speculate whether the latest view expressed by the Justice Department will be the last word on the antitrust aspects of the automobile arrangement. Since the question of antitrust violation may be raised by private treble-damages plaintiffs before any federal district court,⁵⁴ the possibility of a contrary result can hardly be ruled out. But aside from any antitrust questions surrounding the arrangement, it was clearly a departure from the liberal trade principles which the Reagan Administration espouses and it provided European countries an excuse to follow suit in imposing further bilateral restrictions on Japanese exports.⁵⁵

It is difficult to say much that is positive about bilateralism. No doubt quantitative restrictions on imports may be useful to help ease a declining industry out of existence or to assist in the rehabilitation of an

⁵⁰ Under the doctrine of foreign legal compulsion, United States courts "recognize an antitrust defense for actions taken or compelled by a foreign sovereign within its territory." See U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, reprinted in [1977] 266 II TRADE REG. REP. (CCH) at 54 (Feb. 1, 1977). See also Letter of Att'y Gen. Smith to U.S.T.R. Brock, *supra* note 47, stating "we believe that if . . . an agreement [to reduce automobile exports] were formally mandated by a foreign government, the formal mandate would provide a defense to any subsequent antitrust challenge."

⁵¹ See exchange of letters between Ambassador Yoshio Okawara of Japan and Attorney General William French Smith (May 7, 1981), reprinted in [1981] 70 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at M-1.

⁵² *Id.*

⁵³ *Id.* at M-2.

⁵⁴ See 15 U.S.C. § 15 (1976).

⁵⁵ See Paul Lewis, *Europeans Welcome Auto Pact—Car Makers See Hope of Export Limits by Japan*, N.Y. Times, May 4, 1981, at D-1, col. 6 (city ed.).

industry experiencing serious short term problems. In such circumstances, temporary restraints, such as those authorized by the GATT's Safeguard Clause⁵⁶ or the United States Escape Clause,⁵⁷ may be useful. Unfortunately, under both those provisions, the legal tests on which relief depends have more to do with injury and causality than with prospects for adjustment or rehabilitation,⁵⁸ and thus are not well designed to distinguish appropriate cases for relief. If a new international safeguards regime can be established under the GATT, it would be desirable to link safeguard actions clearly with adjustment or rehabilitation requirements for the affected domestic industry, for example by limiting the period in which emergency actions may be put into effect and by making restrictions degressive during that period.⁵⁹

In an interdependent world, bilateralism usually does not solve trade problems; it merely shifts them onto others. Relief for one market translates quickly into an import surge for another.⁶⁰ Thus, what consenting sovereign states do in private is a matter of general concern. An international trade system fraught with bilateralism carries with it all of the dangers of the "beggar my neighbor" practices of the 1930s.

LEGAL PROTECTIONISM

Perhaps the most sophisticated new form of protectionism is that which masquerades as the defense of fair trade. The concepts of "fair trade" and of its opposite, "unfair trade" are so elusive and subjective that it has been all too easy for the defense of fair trade to become the basis of a broad attack on foreign competition. The problem was succinctly put in a famous headline in *The Economist* reading: "I export; he dumps."

The phenomenon which I have described as "legal protectionism" may be defined as the use of the unfair trade laws to achieve broad protectionist goals.⁶¹ It has been a phenomenon more prevalent in the United States than in Europe, perhaps because the Europeans have

⁵⁶ GATT, *supra* note 2, art. XIX.

⁵⁷ See Trade Act of 1974, 19 U.S.C. §§ 2251-53 (1976).

⁵⁸ See, e.g., *Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771 (E.D.N.Y. 1978).

⁵⁹ See Hindley, *supra* note 26, at 337-39.

⁶⁰ For example, in recent months European officials have warned Japan against restraining automobile exports to the United States, N.Y. Times, Sept. 2, 1980, § D, at 8, col. 1, and American officials have warned the Japanese against restraining exports to Europe, *Japanese-EC Auto Talks Concern U.S.*, J. OF COMM., Jan. 28, 1981, at 1, col. 3. Once the agreement was set into place, various EEC countries warned that their countries should not be used as alternative markets for autos. Japan agreed not to sell in the United States. See [1980] 76 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-4.

⁶¹ See Green, Legal Protectionism in the United States and Its Impact on United States-Japan

been less constrained in applying informal quantity restrictions of the kind we have described as "bilateralism." In contrast to those quota-like arrangements, the weapons of legal protectionism, particularly countervailing duty and antidumping actions, resemble tariffs in that they discourage imports through exerting upward pressure on prices, for example by limiting the period in which emergency actions may be put into effect and by making restrictions depressive during that period.⁶²

The basic unfair trade laws of the United States, the countervailing duty law⁶³ and the antidumping law⁶⁴ are themselves of venerable age, but their expanded use as general instruments of protectionism is largely a development of the late 1970s. Following the defeat of the Burke-Hartke bill,⁶⁵ which would have protected the United States market with a comprehensive set of quotas and high tariffs of the classical variety, the steel industry and other protection-minded groups undertook a massive advertising and lobbying campaign attacking "unfair trade" by foreign competitors and demanded more vigorous enforcement of the unfair trade laws. This campaign bore fruit in the 1974 Trade Act⁶⁶ which expanded and strengthened the remedies available to domestic industries to cope with both "fair" and "unfair" import competition.⁶⁷

Economic Relations, Appendix to the Report of the Japan-United States Economic Relations Group, April, 1981.

⁶² See Hindley, *supra* note 26, at 337-39.

⁶³ §§ 701-707 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. §§ 1671(a)-(f) (Supp. III 1979)). The United States' first comprehensive countervailing duty law was enacted as part of the Tariff Act of 1897, ch. 11, 30 Stat. 151 (1897).

⁶⁴ §§ 731-740 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. §§ 1671, 1673(a)-(i) (Supp. III 1979), (which repealed the Antidumping Act of 1921).

⁶⁵ The Foreign Trade and Investment Act (popularly known as the Burke-Hartke bill) was originally introduced in 1971, see S. 2592, 92d Cong., 1st Sess. (1971) (by Sen. Hartke); H.R. 10914, 92d Cong., 1st Sess. (1971) (by Rep. Burke).

⁶⁶ Pub. L. No. 93-618, 88 Stat. 1978 (1974) (codified at 19 U.S.C. § 2201 *et seq.* (1976)).

⁶⁷ The innovations of the 1974 Act are too numerous to catalogue, but the following examples illustrate the thrust of the legislation:

- (1) A new provision, section 301 of the Act, was added to give the President sweeping authority to take "all appropriate and feasible steps within his power to obtain the elimination of [foreign] restrictions and subsidies." 19 U.S.C. § 2411(a) (1976);
- (2) The standard of causality between increased imports and serious injury for purposes of the Escape Clause (§§ 201-203 of the Act) was lowered from "major factor" to "a substantial cause." 19 U.S.C. §§ 2251-2253 (1976);
- (3) The applicability of section 337 of the Tariff Act of 1930, providing for the exclusion of products which are the subject of "unfair import practices" was expanded, 19 U.S.C. § 1337 (1930), as amended by § 341 of the 1974 Act. See also Note, *A Roadmap to the Trade Act*, 8 L. & POL'Y INT'L BUS., 125, 174-76 (1976); and
- (4) The countervailing duty law was extended to apply to duty-free goods as well as goods subject to duties. See *id.* at 171-72.

Legal protectionism was given a further boost by President Carter's handling of the steel import crisis of 1977. In response to the rapidly rising imports of foreign steel that followed the expiration of the VRAs described in *Consumers Union*,⁶⁸ the American steel industry made urgent demands on the Administration for new quantitative restraints. Because of its concern about the international consequences of such outright protectionist action, the Administration resisted these pressures. Instead of leaving the domestic industry empty-handed, however, the President made a statement sharply attacking unfair trade practices by foreign steel manufacturers and pledging more vigorous enforcement of the antidumping laws.⁶⁹ President Carter went so far as to charge the Treasury with a "derogation of duty" in having failed to enforce adequately the antidumping law.⁷⁰ In effect, the President converted the industry's demand for quantity restraints into a strategy for limiting imports through the price mechanism.⁷¹

Legal protectionism was further enhanced by Congress in the Trade Agreements Act of 1979⁷² through the enactment of various provisions designed to make the unfair trade laws more "effective." These included provisions limiting the discretion of the Commerce Department to reject petitions for relief,⁷³ easing the standards of evidence necessary to support petitions,⁷⁴ and reducing the amount of time available for investigations.⁷⁵ In explaining these changes the House Committee on Ways and Means stated: "[t]he Committee feels very strongly that both the countervailing and antidumping duty laws have been inadequately enforced in the past"⁷⁶ and it urged "strong, aggressive and vigorous enforcement of the U.S. unfair trade practices law" in the future.⁷⁷

⁶⁸ See note 37 *supra*.

⁶⁹ See Marks, *Remedies to 'Unfair Trade': American Action Against Steel Imports*, 3 THE WORLD ECON. 223, 228 (1978).

⁷⁰ *Id.*

⁷¹ *Id.* at 229.

⁷² See H.R. REP. *supra* note 1, at 51.

⁷³ *Id.* "The Committee expects that the Authority will act upon most petitions, rejecting only those which are clearly frivolous, not reasonably supported by the facts alleged or which omit important facts which are reasonably available to the petitioner." *Id.*

⁷⁴ See S. REP., *supra* note 1, to accompany H.R. 4537 at 47 (countervailing duties) and at 61 (antidumping duties).

⁷⁵ H.R. REP., *supra* note 1, at 48.

⁷⁶ *Id.* at 51.

⁷⁷ *Id.*

THE COUNTERVAILING DUTY LAW

To describe the workings of legal protectionism, we must sketch in a rough outline of the unfair trade laws. The Countervailing Duty law⁷⁸ imposes duties on imported goods where the production, exportation or sale of those goods has benefited from foreign subsidies. In most cases, the importation must also be found to cause material injury to a domestic industry.⁷⁹ The amount of the countervailing duty is calculated to offset the effects of the subsidy.⁸⁰

The MTA on countervailing measures concluded in the Tokyo Round was designed to harmonize countervailing duty laws among the GATT countries,⁸¹ but there remain important differences between the underlying philosophy of the U.S. law and of the MTA. The latter distinguishes between "export subsidies," which are flatly prohibited,⁸² and "subsidies other than export subsidies" which the MTA signatories recognize as "important instruments for the promotion of social and economic policy objectives and [which the signatories] do not intend to restrict. . . ."⁸³ The United States countervailing duty law does not make this distinction. It treats all subsidies affecting the production, exportation or sale of imported goods as "unfair trade."⁸⁴ Under United States law, for example, "the provision of capital, loans or loan guarantees on terms inconsistent with commercial considerations" is a potentially countervailable subsidy.⁸⁵ Of course, the United States government itself provides many such subsidies routinely to small business, minority business, rural business and on occasion to industrial giants such as Lockheed and Chrysler. Normally we do not think of these non-export subsidies as unfair trading when provided by the United States. We benefit from the fact that our trading partners generally do not condemn or countervail against such subsidies, even though we would countervail against them if practiced by others.

⁷⁸ See note 62 *supra*.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See note 11 *supra*.

⁸² *Id.* art. I.

⁸³ *Id.* art. XI.

⁸⁴ See S. REP., *supra* note 1, at 37, stating:

Subsidies and dumping are two of the most pernicious practices which distort international trade to the disadvantage of United States commerce. Subsidies are bounties or grants bestowed (usually by governments) on the production, manufacture, or export of products, often with the effect of providing some competitive advantage in relation to products of another country. . . . *Id.*

⁸⁵ Section 771(5)(B)(i) of the Tariff Act of 1930, as amended by the Trade Agreement Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 1677(5)(B)(i) (Supp. III 1979)).

For some time during the 1970s it appeared that the American countervailing duty law might become applicable to a very wide range of imported products. In 1977, the United States Customs Court ruled that the Japanese practice of remitting its commodity tax on exported products constituted a countervailable subsidy under American law.⁸⁶ Japan's practice, which is similar to that followed by many European countries, is specifically exempted from countervailing by Article VI(4) of the GATT.⁸⁷ A major international trade dispute was averted when the judgment of the Customs Court was overturned by the Court of Customs and Patent Appeals, whose reversal was affirmed by the Supreme Court.⁸⁸ This landmark case reduced somewhat the scope of the American countervailing duty law as an instrument of legal protectionism. But, the breadth of application of the U.S. countervailing duty law, however, ensures that it will continue to play a major role in regulating imports, particularly those from developing countries, which often provide "subsidies" to attract and stimulate industrial investment.

THE ANTIDUMPING LAW

If fairness is in the eye of the beholder in the matter of subsidies, it is no easier to define in relation to what is called "dumping." In an economic sense, dumping is simply price discrimination between different national markets.⁸⁹ Although the word "dumping" is rich in emotive content, price discrimination as such is not an aberration in international trade, but rather a normal and frequent occurrence, often reflecting differences in demand and supply factors in particular markets.⁹⁰ Nevertheless, price discrimination causes material injury to industries in the importer's country, the provisions of the GATT permit the imposition of antidumping duties.⁹¹ In the formulation used in United States law, imported goods sold at "less than fair value" which cause or threaten to cause "material injury" to a domestic industry are subject to dumping duties equal to the amount by which the foreign

⁸⁶ *Zenith Radio Corp. v. United States*, 430 F. Supp. 242 (C.D.), *rev'd*, 562 F.2d 1209 (Ct. Cust. App. 1977), *aff'd by a unanimous court*, 437 U.S. 443 (1978).

⁸⁷ Article VI(4) of the GATT, *supra* note 2, states:

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to antidumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes. *Id.*

⁸⁸ *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978).

⁸⁹ See G. BRYAN, *TAXING UNFAIR INTERNATIONAL TRADE PRACTICES* 34 (1980).

⁹⁰ *Id.*

⁹¹ GATT, *supra* note 2, art. VI(1).

market value of the goods exceeds the United States price.⁹²

The policy behind the antidumping law, like that of its domestic analogue, the Robinson-Patman Act,⁹³ might be described as the protection of competitors rather than the protection of competition. The social utility of the policy is a controversial question. Those who view the interests of consumers as the paramount concern of market regulation would clearly find the policy of the antidumping law objectionable. Policy questions aside, however, what makes the antidumping law disastrously bad as law is its extraordinary complexity, technicality and uncertainty. It is, to begin with, exceedingly difficult to compare sales prices of "such or similar merchandise" in different markets.⁹⁴ The products may differ because of varying consumer preferences, varying safety or performance standards or other market-specific factors. Differences in distribution practices, warranty obligations and a variety of other factors complicate price comparisons. Freely floating exchange rates compound these complexities.

In addition to such factual problems, difficult legal issues arise in the determination of "fair value." Sales in the home market provide a starting point for such a determination, but if the Department of Commerce decides that there are not sufficient home market sales to form an adequate basis for comparison, it may look, at its option, to third country sales,⁹⁵ or to a "constructed value" that contains within it various arbitrary elements.⁹⁶ Under a 1974 amendment to the law, home market sales may be disregarded where they are below cost over an extended period of time.⁹⁷ Leaving aside the great difficulties in determining "cost," the 1974 amendment can have the paradoxical result that dumping may be found where United States prices are higher than cost and higher than average prices in the home market.⁹⁸

⁹² § 731 of the Tariff Act of 1930, *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 1673 (Supp. III 1979)).

⁹³ 15 U.S.C. §§ 13, 13a, 13b, 21a (1936).

⁹⁴ § 773(a)(1)(A) of the Tariff Act of 1930, *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 1677b (Supp. III 1979)).

⁹⁵ 19 U.S.C. § 1677b(a)(1)(B) (Supp. III 1979).

⁹⁶ § 773(a)(2) of the Tariff Act of 1930, 19 U.S.C. § 1677b(a)(2) (Supp. III 1979). Constructed value is computed under the statute on the basis of estimated costs of production, packing and freight but also includes minimum percentages for "general expenses" (not less than 10% of costs) and constructed profit (not less than 8% of the sum of general expenses and cost). § 773(2)(1)(B) of the Tariff Act of 1930, *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 1677b(e)(1) (Supp. III 1979)).

⁹⁷ 19 U.S.C. § 1677b(b)(1) (Supp. III 1979).

⁹⁸ Matthew Marks provides the following example:

. . . [Assume] cost in the home market is 10. Seventy-five per cent of the merchandise sold in the home market is at a price of 8 and the remainder at a price of 12. An average home-

Further, the question of what constitutes "material injury" opens up additional uncertainties.⁹⁹ Despite the efforts of some International Trade Commissioners to establish clear guideposts in their written opinions, the factors considered and the weights assigned to those factors would appear to vary considerably from Commissioner to Commissioner and from case to case.

These complexities, arbitrary rules and uncertainties make the antidumping law highly unpredictable. This unpredictability is itself a major trade barrier; the inability of buyers and sellers to know in advance whether antidumping duties may apply to a transaction has a chilling effect on trade. The chilling effect is aggravated by the fact that, in some circumstances, the law permits antidumping duties to be applied retroactively.¹⁰⁰ Moreover, the penalties for misjudging the applicability of the law are not limited necessarily to antidumping duties. In some cases, both antidumping duties and countervailing duties may be applied to the same product.¹⁰¹ Section 337 of the Tariff Act of 1930,¹⁰² a broadly worded statute providing injunctive relief and heavy civil penalties for "unfair methods of competition and unfair acts in the importation of articles into the United States" may also be applicable, in certain circumstances, to dumping cases.¹⁰³ If predatory intent can

market price is derived by weighing the two prices by the volume sold at those prices, yielding an average home price of 9 in this case.

Prior to the enactment of the 'sales below cost' provision a sale in the United States at 9 would not have been below 'fair value.' Under the new 'sales below cost' provision, however, there would be, under the same facts, a dumping margin of 3, for the sales in the home market at 8 must be ignored, because they are below cost, and the home market price would therefore be calculated at 12.

Marks, *supra* note 67, at 231.

⁹⁹ Prior to enactment of the Trade Agreements Act of 1979, the U.S. antidumping law required only a finding of "injury" to sustain imposition of antidumping duties. The inclusion of the requirement of "material injury" was one of the major concessions sought from the United States by its trading partners in the Tokyo Round. During consideration of the Act by Congress, representatives of U.S. trading partners argued that the word "material" means "important, significant, substantial." Congress rejected this formula however, and defined "material injury" to mean "harm which is not inconsequential, immaterial or unimportant." See § 771(7)(A) of the Tariff Act of 1930, as amended by Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 1677(7)(A) (Supp. III 1979)). See Marks, *Recent Changes in American Law on Regulatory Trade Measures*, 2 THE WORLD ECON. 427-30 (1980).

¹⁰⁰ Section 733(e) of the Tariff Act of 1930 as amended by Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 1673(e) (Supp. III 1979)).

¹⁰¹ *Id.*

¹⁰² 19 U.S.C. § 1337 (Supp. III 1979).

¹⁰³ See, e.g., *Certain Welded Stainless Steel Pipe and Tube*, 43 Fed. Reg. 8304 (I.T.C. Determination and Action), *disapproved by President*, 43 Fed. Reg. 17,789 (1978). In § 1105 of the Trade Agreements Act of 1979, Congress amended § 337 of the Tariff Act of 1930 to provide that the ITC should not utilize § 337 with respect to matters that are "based solely on alleged acts and effects which are within the purview of [the antidumping and countervailing duty laws]" but left open the possible use of § 337 where additional allegations are present.

be found, antitrust-type criminal penalties and treble damage remedies may be applicable under the antidumping provisions of the Revenue Act of 1916.¹⁰⁴ Indeed, actions under all of the above statutes were brought against Japanese television manufacturers over the course of the last decade, all premised on the basic allegation of unreasonably low prices.¹⁰⁵

Unfortunately for the foreign manufacturer, escaping the snares of the antidumping law is itself risky. An agreement or understanding among foreign firms to keep their prices from falling below "fair value" would fall squarely within the Sherman Act's prohibition of price fixing.¹⁰⁶ Similarly, an effort to reduce trade frictions through voluntary export restraints may also bring foreign firms into violation of Section 1 of the Sherman Act.¹⁰⁷ Thus the hapless foreign firm may be caught between the Scylla of trade laws and the Charybdis of antitrust actions.

The Trigger Price Mechanism (TPM),¹⁰⁸ which the Carter Administration fashioned for the steel industry, represents one of the more extreme cases of protectionist use of the unfair trade laws. Under the TPM, the United States government is committed to investigate sales of foreign steel for antidumping or countervailing duty law action whenever sales are made at less than the trigger price, or whenever "surges" in imports occur.¹⁰⁹ The trigger price, which is, in effect, a minimum price for imported steel, is calculated on a quarterly basis by the Commerce Department, using the costs of production of Japanese steel.¹¹⁰ As a result of adjustments made by the Commerce Department¹¹¹ to the Japanese data, however, actual trigger prices may exceed the list

¹⁰⁴ 15 U.S.C. § 72 (1980).

¹⁰⁵ See Dickey, *A Guide for Pricing Commodities to Enter the Commerce of the United States*, 11 L. & POL'Y INT'L BUS. 491, 508-10 (1979).

¹⁰⁶ Price fixing is a per se violation of § 1 of the Sherman Act. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1939).

¹⁰⁷ Foreign firms that participate in a cartel that would otherwise be a per se violation of the antitrust laws, may have a defense under the Act of State or foreign legal compulsion doctrines in cases where their actions are compelled by a foreign sovereign acting within its jurisdiction. But those doctrines are subject to various limitations and uncertainties. See U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, Case 6, reprinted in [1977] 266 II TRADE REG. REP. (CCH) at 53-57 (Feb. 1, 1977). See also, note 50 *supra*.

¹⁰⁸ Trigger Price Mechanism implemented Dec. 30, 1977, 42 Fed. Reg. 65,214, *suspended* Mar. 27, 1980, 45 Fed. Reg. 20,150, *reinstated*, Oct. 8, 1980, 45 Fed. Reg. 66,833 (1980).

¹⁰⁹ The anti-surge provisions were introduced when the TPM was reinstated in October 1980, 45 Fed. Reg. 66,833, 66,835 (1980).

¹¹⁰ The costs of Japanese steel are used because the Japanese industry is considered "the world's most efficient." 42 Fed. Reg. 65,215 (1977).

¹¹¹ See 45 Fed. Reg. 66,834 (1980).

prices established by far less efficient domestic steel producers.¹¹² Despite the plainly protectionist results of the TPM, its adoption has been privately welcomed by some foreign steel producers, particularly in Japan,¹¹³ presumably not because they like having a minimum price imposed upon them, but because they prefer to cope with a known barrier rather than with the multiple risks and uncertainties of the antidumping law itself.

CONCLUSION

Despite the continuing liberalization of the rules of the international trade system, protectionism in sophisticated new forms is becoming more prevalent. Although disguised quota arrangements are still less pervasive than the openly restrictive rules of the 1930s, the bilateralist trend is growing, and represents a serious threat to the future of the system. This bilateralist trend tells us, among other things, that the process of liberalization may have outpaced the adaptive capabilities of the West's welfare and employment oriented economies. If so, doctrine free trade answers will not suffice; we should, rather, set our sights on a liberal trade system that takes into account the vulnerabilities of developed countries as well as the legitimate aspirations of the developing and newly industrialized countries. An essential constituent of such a system is an improved safeguards regime consistent with the basic GATT principle of non-discrimination.

Legal protectionism presents an even knottier set of problems. The members of the GATT have agreed upon the necessity of curbing trade distortions such as dumping and subsidies, even though they still disagree substantially on how such curbs should be applied. My criticism of the unfair trade laws of the United States is not to deny the existence of trade distortions; rather, it is to point out that those laws can and do have the effect of chilling normal international trade. As a matter of policy, those effects, the resulting costs to consumers and the costs of administering the laws ought to be weighed against the benefits of protecting domestic businesses from subsidized or dumped imports. It is entirely reasonable to enforce unfair trade laws to the extent that they help maintain the integrity of the liberal trade system; but, when

¹¹² The Chairman of Germany's Thyssen AG Dieter Spethmann, was recently quoted as saying: "In the Great Lakes and East Coast, our traditional sales markets, the trigger prices for the first quarter for hot-rolled wired steel strips, cold-rolled steel sheets and zinc coated coils are up to 8% higher than the American prices . . . That's nothing other than protectionism." *Wall St. J.*, Feb. 6, 1980, at 23, col. 1.

¹¹³ See [1980] 62 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-4, 5.

by being overly broad, arbitrary and unpredictable, the unfair trade laws impede the workings of the system, it is time to rethink them.