Review Essay

The Capture of the Antidumping Law


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"International economists," Jagdish Bhagwati writes, "have long been frustrated by the dissonance between the elegance of their irrefutable demonstration of the advantages of free trade and the inelegance with which practical politics embraces protection."1 International trade lawyers, for their part, frequently have been frustrated by the apparent ivory tower impracticality of many of those same international economists. To those in the arena opposing protection, the arguments of some economists can appear so dismissive of the very real human concerns of those who seek protection as to be irrelevant at best and counterproductive at worst.

Although he is able to demonstrate both elegantly and irrefutably the advantages of free trade, Professor Bhagwati is not one of those impractical economists. To the contrary, in this publication of his 1987 inaugural Ohlin Lectures, given at the Stockholm School of Economics, Professor Bhagwati provides not only an intellectually elegant discussion of free trade and protectionism, but also a sophisticated appreciation of today's inelegant protectionist reality. Paul Samuelson, in a jacket blurb, terms Professor Bhagwati's Protectionism a "tour de force," and so it is.

The conversational tone of the six chapters of this small volume reflects their lecture origin. If Professor Bhagwati speaks as he writes, then he speaks with much grace and wit. The volume has been beefed-up with a dozen-page bibliography, several illustrative charts and graphs, cartoons from Punch, and a photograph — for those who have never

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seen their troglodytic visages — of those two stalwarts of America trade policy, Sen. Reed Smoot and Rep. Willis Hawley.

Professor Bhagwati first sets the scene with a description of the post-World War II era of trade liberalization, and then leads the reader through a discussion of the ideology, the interests and the institutions which supported that liberalization. He recounts the delegation of trade policy from the U.S. Congress — stung by Smoot-Hawley — to the executive branch, which is both less subject to protectionist pressures and institutionally more biased toward an open trading system. He takes the reader through an insightful discussion of the intellectual case for free trade, and attributes the remarkable support of the United States for the post-World War II liberal trade regime not only to the perceived economic benefits, but also to the belief that U.S. security interests were served best by such policies.2

But this is only a crisp, fresh retelling of a well-known tale. What will strike international trade lawyers as the book’s most insightful chapter is the one dealing with the rise of protectionism in the 1970s and 1980s. Here, very originally and very aptly, Professor Bhagwati discusses the “capture” of the antidumping and countervailing duty laws by the forces of protectionism. The “capture” of these laws is perhaps the most important development in trade policy in the past two decades, and Professor Bhagwati is one of the few economists who knows this and is worried about it.

He makes a persuasive case that any free trade regime, in order to survive, needs a means of preventing distortive practices. It is difficult enough, he points out, for governments to cope with the demise of their industries in pursuit of the economic gains of free trade when another country has only a market-determined advantage; it can be impossible when that advantage is derived not from the market, but from artificial government support.3 Thus he is not in sympathy with the traditional argument that government subsidies of exports are beneficial because the importing country gets the product more cheaply. Professor Bhagwati refutes this argument with a trenchant rhetorical question: “Would one be wise to receive stolen property simply because it is cheaper, or would one rather vote to prohibit such transactions because of their systemic consequences?”4 For its own good, he concludes, the world trading or-

2. Id. at 38.
3. Id. at 34.
4. Id. at 35.
der must permit "the appropriate use of countervailing duties and antidumping actions to maintain fair, competitive trade." 5

But this is the ideal. The reality is that, however legitimate their roles in a free trade regime, these laws have been captured and misused by the forces of protectionism. This is particularly true in the United States of the antidumping law.

I

The U.S. antidumping law provides for the imposition of a special duty to offset the margin of any "dumping" of imported merchandise. 6 This is the amount by which the price of merchandise sold for export to the United States is less than its "fair" value, which normally is the price for comparable merchandise in the country of export. 7 International price discrimination, then, is the gravamen of dumping. Those familiar with the domestic price discrimination statute, the Robinson-Patman Act, 8 may assume that the antidumping law is similar. They would be mistaken. The antidumping law shares with Robinson-Patman the dubious premise that differential pricing is undesirable, but beyond that the laws differ greatly. 9

Professor Bhagwati uses the term "asymmetries" to characterize the differences in the standards that determine what is unfair price discrimination for foreign firms and what is unfair price discrimination for domestic firms. 10 He does not, however, describe these asymmetries in detail. An exploratory excursion into some of the asymmetries that Professor Bhagwati might have elaborated upon shows that his characterization is more than justified.

First, the very methodology for determining the existence of price discrimination under the antidumping law is unfair, and is a major element in the protectionist capture of this law. The normal procedure of the Department of Commerce, whose International Trade Administration makes the determination, is to investigate the exporter's prices for sales in its home market and in the United States for a recent period, usually

5. Id.
7. Id. § 1677b(a).
9. See generally U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977), especially Ch. IV.
10. BHAGWATI, at 51.
The Capture of the Antidumping Law

six months. A weighted-average price is calculated for the home market for the period, and then the price of each individual sale to the United States is compared to this average. Almost inevitably a finding of dumping results because an average of different numbers necessarily will exceed some of its components. For example, if on the same day a foreign firm sold identical quantities of merchandise in the United States and in its home market for $100 a unit, and some days later it sold identical quantities in both markets for $200 a unit, the average home market price — $150 — would be termed "fair value." Each sale to the United States then would be compared to this "fair value," and the first — at $100 — would be found to be "less than fair value." No allowance would be made for the fact that the $200 sale exceeds "fair value" by exactly the same amount. This exporter, under U.S. antidumping practice, has a dumping margin of fifty percent on fifty percent of its sales. No comparable exercise is undertaken, and no violation would be found, in a domestic price discrimination case.

Another asymmetry between the antidumping law and domestic antitrust law concerns sales below cost. In an antitrust context, the issue is raised when predatory pricing practices are under consideration; the relevant question is whether sales have been below variable costs. Antidumping law, however, is not concerned with predatory intent; its absence is no defense, and the standard used is total cost, not variable costs.

Here is how it works: an antidumping investigation utilizes the cost of producing the merchandise sold in the exporter's home market, not the


12. This procedure is not readily apparent from the published text of most antidumping determinations. The issue is discussed, however, in the few cases in which a departure was made or urged. See, e.g., Certain Fresh Winter Vegetables From Mexico; Antidumping: Final Determination of Sales at Not Less Than Fair Value, 45 Fed. Reg. 20,512 (1980) (average daily prices compared); Final Determination of Sales at Less Than Fair Value; Fall-Harvested Round White Potatoes From Canada, 48 Fed. Reg. 51,669 (1983) (each sale to U.S. compared to weighted average foreign value for the day on which it occurred); Red Raspberries From Canada; Final Determination of Sales at Less Than Fair Value, 50 Fed. Reg. 19,768 (1985) (each separate sale to U.S. compared to 12-month weighted average foreign value), aff'd, Washington Red Raspberry Comm'n v. United States, 657 F. Supp. 537 (Ct. Int'l Trade 1987).


cost of producing the merchandise sold in the United States. The cost question is crucial when the price in the United States — even when measured by the unfair standards of the antidumping law — is higher than the home market price. If those home market sales are determined to be below their total cost, they are disregarded for purposes of the fair value comparison. By employing the total cost concept, the antidumping law not only denies the exporter the favorable comparison to its lower priced home market sales, it also compels use of “constructed value” — a statutory formula which adds to the exporter’s materials and fabrication costs a required minimum of ten percent for overhead and eight percent for profit. If overhead in fact is below ten percent, the exporter will be deprived of this benefit when constructed value is calculated, and if the company is earning less than an eight percent profit, the exporter will be found to be dumping.

Still another example of the unfairness of the way in which price discrimination is calculated under the antidumping law is the “ESP cap.” This concerns adjustments that are made to home market and export prices to ensure that they are compared at a proper level, that the comparison is one of “apples to apples.” For example, if a firm sells for cash in one market while extending credit in another, the cost of extending the credit will be taken into account in determining whether the net price to the credit customer is higher or lower than the price to the cash customer.

The question of the “ESP cap” arises when the export sales are made through a wholly-owned U.S. subsidiary, whose prices are termed the “exporter’s sales price” or “ESP.” That subsidiary incurs overhead expenses that usually will differ from those incurred by the seller in its home market. In order to ensure an “apples to apples” comparison, an appropriate adjustment to the price of the goods should be made for the overhead charges attributable to each market. Fair enough, but that is not what occurs. Instead, all of the overhead charges incurred in the United States are deducted when net U.S. price is calculated, but the deduction in the home market is “capped” by the amount of the U.S. deduction. In other words, if overhead is greater in the United States than in the home market, all overhead in each market will be deducted; but if the reverse is true, if home market overhead exceeds U.S. overhead,

17. Id.
18. Id.
19. Id. § 1677b(a)(2).
20. Id. § 1677b(e)(1)(B)
The Capture of the Antidumping Law

the home market deduction will be limited to the amount of expenses incurred in the United States.\(^{23}\) This is an "apples to oranges" comparison, without a counterpart in the law applicable to domestic firms; it reflects yet another way in which the antidumping law has been captured by the forces of protection.

There are other asymmetries: Robinson-Patman requires injury to competition;\(^ {24}\) the antidumping law only requires injury to competitors\(^ {25}\) — which actually may enhance competition. Robinson-Patman permits the defenses of meeting competition and cost justification;\(^ {26}\) the antidumping law does not.\(^ {27}\)

As further evidence of his claim that the trade laws have been captured, Professor Bhagwati notes that the merits of an unfair trade petition are judged by officials of the petitioner's own government;\(^ {28}\) that economically meaningless measures of fair value often are used;\(^ {29}\) and that affirmative determinations are based upon minuscule margins of dumping.\(^ {30}\) Each of these points is significant.

Perhaps removal of the power of decision in trade cases from the government of the petitioner will have to await developments in international dispute settlement procedures that do not appear at all imminent.\(^ {31}\) This does not mean, however, that there is no room for considerable improvement in the current procedures. There most certainly is. Under the present U.S. system, the same officials in the Department of Commerce who have the responsibility for investigating the petition's allegations, and for building the administrative record, also

23. 19 C.F.R. § 353.15(c) ("In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.") (emphasis added). This was upheld as "a fair and reasonable exercise of administrative authority" in Consumer Prod. Div., SCM Corp. v. Silver Reed America, 753 F.2d 1033, 1040 (Fed. Cir. 1985).
25. The injury question in an antidumping investigation is simply whether (A) an industry in the United States—
   (i) is materially injured, or
   (ii) is threatened with material injury, or
(B) the establishment of an industry in the United States is materially retarded, by reason of imports sold at less than fair value. 19 U.S.C. § 1673. An "industry" consists of the "domestic producers" of the relevant product, i.e., competitors. Id. § 1677(4).
27. See supra note 25. The law mentions no specific defenses.
28. BHAGWATI, at 48-49.
29. BHAGWATI, at 51.
30. BHAGWATI, at 52.
make the final determination. Far more fair than this inquisitorial system would be adoption of the standard American administrative law model in which the investigative function within the agency is separated from the adjudicative function.

As an example of an economically meaningless determination of fair value, Professor Bhagwati cites the famous — or infamous — case of Polish golf cars. This case presented the problem of how to measure "fair value" in Poland, a country with a centrally-planned economy where no golf cars were sold for home consumption. Professor Bhagwati notes that "there is no way in which 'true' or 'fair' costs and prices can be meaningfully determined for centrally planned economies in the first place."

Because there is no meaningful home market price for purposes of an antidumping comparison, the alternatives are either to exclude non-market economies from the strictures of the law, or to invent a measure of fair value. The first choice would be politically intolerable, so the second is followed. An economically meaningless "surrogate" country methodology was invented for non-market economy countries such as Poland. The result is that exporters in non-market economies are held to a measure of fairness — prices in a surrogate third country — which neither they, nor anyone else, is able to ascertain before the fact. This is post hoc justice at its worst, the trade policy equivalent of charging a driver with speeding on a road with no posted limits, based upon the limits posted on some other road — a road that will be chosen only after the driver has been stopped. It is difficult to dispute Professor Bhagwati's observation that for these cases "the only outcome can be a political one" for it is only because of political considerations that these cases are processed under the antidumping law at all. For any particular case, "political" probably is not the right word to describe the results. "Arbitrary" best describes what emerges from the economically meaningless exercise that is undertaken.

For a criticism of this system, and a proposal for reform, see Palmeter, Torquemada and the Tariff Act: The Inquisitor Rides Again, 20 Int'l L. 641 (1986).

See id.

BHAGWATI, at 51 (citing Electric Golf Cars from Poland; Antidumping, 40 Fed. Reg. 25,497 (1975)).

Id.


BHAGWATI, at 51.
The Capture of the Antidumping Law

As further evidence of the protectionist capture of the antidumping law, Professor Bhagwati notes that even minuscule margins have been held to justify affirmative determinations of dumping.38 This point, while not obvious, is telling. The regulations of the Department of Commerce provide that any dumping margin greater than one-half of one percent will justify an affirmative determination.39 Such a small amount may not seem onerous; after all, an additional tariff of one-half of one percent does not remind many people of Smoot-Hawley. This reasonable conclusion is erroneous, however, for the scheme of the antidumping law puts an importer of goods subject even to apparently low margins at considerable risk of much higher duties — duties that in theory have no upper limit.

The key to this somewhat obscure point is that an announced dumping margin represents only an estimated duty, not a finally determined one. If Commerce finds sales at less than fair value, it does so, of course, based only upon the sales examined during its six month investigation period.40 By the time this determination is made, approximately five to eight months will have passed since the close of that investigation period.41 Consequently, the determination is simply a finding that sales below "fair value" occurred during the earlier investigation period; it has nothing necessarily to do with what may have occurred later, or with what may occur in the future. Subsequent changes in prices or adjustments may change the margins on later sales considerably.42 The importer's payment of estimated dumping duties on these later sales is much like the payment of estimated taxes by a taxpayer. Both are estimates only — the final assessment is made, and the final bill is rendered, only after the relevant period closes.

The uncertainties connected with this system can have a substantial chilling effect on trade. While the exporter would seem to have the opportunity to change its pricing practices in order to avoid future determinations of dumping, this is not always easy, particularly since the

38. Id. at 52.
40. See supra note 11 and accompanying text.
41. In a normal case, Commerce is required to reach a preliminary determination within 160 days of the filing of a petition, 19 U.S.C. § 1673b(1), and a final determination within 75 days of the rendering of the preliminary finding. Id. § 1673d(a).
42. The statute provides for annual administrative reviews of outstanding antidumping duty orders. Id. § 1675(a)(1). During these reviews, the actual dumping margins for the review period are determined, and the weighted average margin for this new period becomes the estimated antidumping duty deposit rate for the next period. Regulations governing this complex administrative procedure are set out at 19 C.F.R. § 353.53a (1988). Ordinarily, a firm may request revocation of an antidumping order only after two consecutive years of no sales at less than fair value. Id. § 353.54.
Department of Commerce is permitted to change its methodology from one investigation or review to another, and does so. Moreover, while it is the foreign seller's home market and export prices that determine whether dumping is occurring, it is the importer who pays the duty, and the importer is essentially powerless even to know — much less to affect — either the home market prices of the exporter or the costs on which adjustments to prices will be based. Thus, any company which imports merchandise from an exporter subject to a dumping order is acquiring an open-ended contingent liability. Any company which assumes that a small estimated dumping duty deposit is the outer measure of its potential exposure under the law may be disastrously mistaken. Even a minuscule dumping margin can put an entire import trade at enormous risk. This is why petitioners fight so vigorously for affirmative determinations, no matter how small the margin, and why determinations based on small margins are further evidence of the capture of the antidumping law by protectionist interests.

Professor Bhagwati's criticism of the "fair" and "unfair" terminology of the antidumping law as inherently vague is correct, but falls short of the point. The terminology is more than vague; it is inherently pejorative. Its connotation of moral deficiency sets the tone and characterizes the nature of any discussion of the subject. In common law terms, differential pricing is merely *malum prohibitum* — an act that is wrong

43. See, e.g., Barium Chloride From the People's Republic of China; Final Results of Antidumping Administrative Review, 52 Fed. Reg. 313 (1987) ("Neither the law nor the Commerce Regulations compel us to use precisely the same method of determining foreign market value as that used in the original investigation or a previous administrative review."). The practice has been sustained on review. Uddeholm Corp. v. United States, 676 F. Supp. 1234 (Ct. Int'l Trade 1987) (allowing Commerce to change its methods and requirements when seeking data relevant to dumping margins so long as it acts reasonably and in accordance with law).

44. As long ago as 1971, the Treasury Department, which at the time administered the antidumping law, seemed almost to crow about the uncertainty created by the process. Even if an exporter claims to an importer that steps have been taken to eliminate dumping, Treasury said:

so long as the dumping finding remains outstanding, the importer can never be sure that this is true. Even if the exporter is not stating a falsehood, he may have erred in his calculations. Moreover in a fast changing market, it is conceivable that an exporter may not be entirely certain that he has, in fact eliminated his dumping margins in the case of all his sales. Given these circumstances, an American importer, if he has a choice, would prefer to deal with a supplier against whom no dumping finding is outstanding. Only then can he be absolutely sure that he will not have to pay dumping duties.


45. Bhagwati, at 50.

only because it is prohibited by law, such as driving on the left side of most highways in the United States, or on the right side of most highways in the United Kingdom or Japan. But the terminology is that of *malum in se* — an act which is inherently and essentially immoral, such as theft or murder. One does not have to look long in the legislative history or in judicial interpretations of the antidumping law to discern this approach. A Senate committee has called dumping "pernicious."47 One court has called it "predatory."48 Others have used such terms as "unfair imports"49 and "unfair trade practices."50 This, to put it mildly, is rather harsh language to describe conduct that may be perfectly legal and perfectly fair when engaged in by a domestic firm.

A "fair" interpretation of this terminology is that it is inflammatory. To be fair is to play by the rules; to be unfair is to engage in dishonorable, dishonest, or unethical conduct. An exporter found to be dumping stands condemned by a public which hears only the emotion-laden, pejorative terms: "pernicious," "predatory," "dumping," "unfair." It is rarely made clear, and very few seem to appreciate, that a double standard really is at work, that there exists an enormous asymmetry between the legal standards of unfairness that are applied to foreign firms and those that are applied to domestic firms. Professor Bhagwati is one of the few who do appreciate this. He is one of the few who know that under the trade laws of the United States, what's sauce for the foreign goose is not sauce for the domestic gander.

The ease with which policy makers and the public seem to accept the characterization of legitimate trading practices as "unfair" extends to the export side of the trade equation as well. What Professor Bhagwati describes as the "insidious growth of the 'fairness' issue" applies to efforts to open allegedly closed foreign markets by retaliation if satisfaction is not obtained.51 While many would not view this effort as protectionist, Professor Bhagwati disagrees. Once again, he points out, it is the United States that decides — unilaterally — if foreign markets are unfairly closed to its exports; this may mean that weaker countries will concede with resentment, while stronger countries will threaten a trade war by making unilateral judgments of their own.52 Nor is this kind of market-

51. BHAGWATI, at 123.
52. BHAGWATI, at 124.
opening always trade-expanding, he notes; weaker countries, forced to give in to the demands of the United States, in many cases simply will divert their purchases to the United States and away from economically more efficient, but politically less powerful, suppliers.53 Finally, he contends that the nature of these unilateral, market-opening confrontations is sector-specific, and that this often can lead to harsh confrontations over the details of trade in specific sectors; they also can lead to greater sector-by-sector trade controls, pushing the world toward a mercantilist system that is likely to benefit very few.54

The insidious use of the term “fairness,” both to characterize the legitimate trading practices of foreign exporters, and to provide an excuse for many of the market failures of would-be U.S. exporters, leads some to blame foreigners for most of our economic problems. It is far easier, and much more pleasant in the short term, to indulge a sense of righteousness, to feel the victim in a binge of nationalistic finger-pointing. It is also far easier to accuse foreigners of being unfair than to acknowledge that some of the more successful among them simply study longer, work harder, and save more than we do.55

The double standard that exists in the treatment of foreigners under the antidumping law, as compared to the treatment of domestic firms engaged in comparable behavior, is so great that it obscures problems with the other major trade law, the countervailing duty law. This law provides for duties to offset or “countervail” foreign subsidies.56 Professor Bhagwati argues that this law, like the antidumping law, has been captured by protectionism.57

At first glance this may not be readily apparent. What, after all, is protectionist about offsetting subsidies? Why should private firms, and their employees, have to compete with companies backed by the resources of government treasuries? First glances, however, do not constitute analysis. The issue of subsidies is far more complicated.

53. BHAGWATI, at 124-25.
54. BHAGWATI, at 125.
55. While the typical U.S. school year is 180 days, Japan’s is 240 and Korea’s is 250 days. Frederick, United Press International Wire Service, July 4, 1988 (Nexis Gen. File). The standard U.S. 40 hour work week is exceeded both by Japan’s 48 hours and by Korea’s 54 hours. Bernstein, Labor: Japan’s Rengo a Model for Unity, Strength, L.A. Times, Apr. 5, 1988, at 1, pt. IV, col. 1; Kraar, Korea: Tomorrow’s Powerhouse, FORTUNE, Aug. 15, 1988, at 74. The U.S. personal savings rate in 1987 of three and a half percent was dwarfed by Japan’s 16 percent. Karmin, A Silver Lining, U.S. NEWS & WORLD REPORT, Feb. 1, 1988 at 48.
57. BHAGWATI, at 48.
Subsidies do distort trade, and they can do so to the detriment of unsubsidized traders. But almost any governmental activity amounts to a subsidy, indirect if not direct. Are we really ready to do without government? Until we are, there is little benefit in railing against subsidies and ending the discussion at that point. Governments, Professor Bhagwati notes, have legitimate social objectives.\(^{58}\) When they support these objectives, they may engage in indirect subsidization. This should not be the end of the analysis, however. It should be the beginning.

The issue of indirect — or domestic — subsidization is indeed complex. Domestic subsidies and export subsidies are the two kinds recognized by the countervailing duty law.\(^{59}\) Export subsidies, as their name implies, are those that are conferred because of the export of merchandise. Domestic subsidies confer a benefit upon an industry regardless of its export performance. Most agricultural production subsidies fall into this group, as do those designed to aid depressed regions.\(^{60}\) The rationale for countervailing the benefits conferred by these programs is that they cause an increase in production beyond what it would be in their absence, thereby creating or adding to an export surplus. Any goods produced with the benefit of these programs, the reasoning goes, whether exported or sold domestically, benefit from these subsidies. All of this may be true, but it hardly justifies wholesale condemnation of domestic subsidies as "unfair." After all, even the 1987 U.S. proposal to end all agricultural subsidies by the year 2000 included an exception for "a safety net against natural disaster."\(^{61}\) A year later, when severe drought struck American farmers and disaster relief was provided,\(^{62}\) this exception seemed prescient rather than unfair.

The case for export subsidies is, perhaps, more difficult to make. These are not justified by such lofty goals as disaster relief. They share

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58. BHAGWATI, at 126-27.
with dumping the condemnation of a Senate committee as “pernicious.” But even here the matter is not without ironies. As Professor Bhagwati notes, largely at U.S. insistence one of the major exceptions to the overall rules of the General Agreement on Tariffs and Trade (GATT) was made for agriculture. In 1955, the United States obtained a waiver that exempted its agricultural programs entirely from GATT’s discipline. And even the 1979 U.S.-engineered GATT Subsidies Code permits export subsidies on “primary products,” i.e., agricultural products. A double standard also appears to be at work here.

II

Professor Bhagwati attributes both the protectionist sentiment behind the capture of the trade laws and the search for “fairness” to the “diminished giant syndrome” of the United States as its economic dominance recedes relative to other nations. He draws a striking parallel to nineteenth-century Britain where the syndrome also coupled a protectionist backlash with demands for fairness. The advocacy of “fair” trade, he observes, “is more reflective of the psychological mood of a nation losing hegemony in the world economy.” Professor Bhagwati sees disturbing signs of a weakened U.S. commitment to multilateralism in trade that is fueled in part by the “fairness” ideology that flows from the diminished giant syndrome. Even the harnessing of export interests to stave off protectionism has its price, he notes, in the form of provoking bilateral market-opening confrontations where the fairness issue reappears.

But Professor Bhagwati sees some positive signs as well. The growth of direct foreign investment both in the United States and elsewhere, he argues, has created increasingly important pro-trade interests. Moreover, the success of Asia’s newly industrialized countries, with their bias toward trade liberalization, is conquering the ideology of import substitution that has been the mainstay of the trade regimes of most developing

65. Id.
67. BHAGWATI, at 65.
68. Id. at 68.
69. Id. at 82.
countries. In this regard, he notes particularly the "compelling contrast" between the trade-liberalizing system of Korea and the protectionist system of India, and contends that examples such as these are reducing the attractiveness of protectionism.\(^7\)

If trade liberalization eventually is to win-out over protectionism, institutional reform is necessary. In Professor Bhagwati's words, "the pro-protectionism bias of the current institutions needs to be corrected."\(^7\) He devotes his final chapter to a discussion of this subject; it is a perceptive discussion.

The first reform he advocates is the recapture of the antidumping and countervailing duty laws from the protectionists. One remedy Professor Bhagwati suggests is the imposition of penalties for frivolous complaints.\(^7\) One problem with this reform is that — given the existing bias of the laws — few complaints really are frivolous. They just appear so to any rational, fair-minded person. More important would be the elimination of the double standard in the treatment of foreign and domestic suppliers, so that action is taken only against those practices which indeed are "pernicious" and "predatory."

Professor Bhagwati suggests that referral of such complaints to international tribunals would lead to greater impartiality in the administration of the laws.\(^7\) The idea is intriguing, and perhaps not as utopian as it at first sounds. The bilateral appeals panel established by the Canada-United States Free Trade Agreement is a small step in this direction.\(^7\) Perhaps the Committee on Anti-Dumping Practices established by the GATT Antidumping Code\(^7\) and the Committee of Signatories to the Subsidies Code\(^7\) provide an institutional base on which to build. Care would have to be taken, however, lest the substantive law administered by these tribunals become protectionist and defeat the benefits of an international tribunal. The U.S. trade laws are not the only ones that have been captured by the protectionists.\(^7\) We could end, if not careful, with an international tribunal fairly administering an unfair law.

\(^7\) Id. at 93.  
\(^7\) Id. at 115.  
\(^7\) Id. at 116.  
\(^7\) Id.  
\(^7\) See supra note 31.  
\(^7\) See TOKYO ROUND AGREEMENTS, supra note 66, at 307-09 (relating to antidumping measures); 26 GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 171 (1980).  
\(^7\) See Interpretation Agreement, supra note 66, at art. XVI.  
\(^7\) An experienced Brussels practitioner has observed:

The European Community's enforcement of its anti-dumping rules is an example of hidden protectionism which deserves to be exposed. In the eyes of the public the "dumper" is seen as a quasi "white collar criminal" who must be punished. Yet, with the methodol-
Professor Bhagwati also would reform the current procedures for safeguard actions, institutionalize the consumer issue in trade, and provide for "repayment to the exchequer of the social costs incurred by protection" in those cases where it has benefited industry.78 The billions of dollars that went to the U.S. automobile industry as a result of the "voluntary" export restraints on Japanese cars during the 1980s, under Professor Bhagwati’s policy, would have gone to the U.S. Treasury and not to giant bonuses for industry executives.

Professor Bhagwati’s suggested improvement in the safeguard mechanism is a particularly sound one. The safeguard provisions, authorized by Article XIX of the GATT79 and embodied in Section 201 of the Trade Act of 1974,80 authorize increased import restraints for the protection of an injured domestic industry without a showing of "unfairness" by the exporters. Safeguard actions have been comparatively few because the biased rules of the antidumping and countervailing duty laws have made relief under those statutes fairly easy to obtain. These duties are not considered "protectionist," but merely remedies for "unfairness." Consequently, antidumping and countervailing duties can be imposed by governments without adverse international consequences. Under the safeguard law, on the other hand, the "unfairness" justification is lacking; accordingly, international rules require that governments compensate their trading partners for protective safeguard actions.81 U.S. law in turn requires approval by the President before safeguard relief can be granted,82 making it more difficult to obtain; by contrast the President has no role in antidumping and countervailing duty determinations.

This compensation requirement hinges totally on the distinction of "fairness," which is essentially meaningless because of the capture of the antidumping and countervailing duty laws. An important international institutional reform of the safeguard provision could begin with modification of the GATT compensation requirement. This could be done in conjunction with one of Professor Bhagwati’s most important domestic institutional reform recommendations—effective adjustment assistance.

If governments are to resist protectionist pressures, they will need effective institutional mechanisms to ease the consequences on workers.


78. BHAGWATI, at 117.
79. See GATT, supra note 64, at art. XIX.
81. See GATT, supra note 64, at art. XIX, paras. 2, 3.
82. 19 U.S.C. § 2252.
firms and communities of the changes wrought by a more open and inte-
gerated world economy. Professor Bhagwati sees the need for adjustment
assistance as critical; he is not impressed with traditional arguments that
adjustment assistance is inefficient, and that since all change requires ad-
justment, there is no reason to favor those impacted by imports over oth-
ers. Here his realism once again is apparent. The traditional ob-
jection to adjustment assistance for import-related problems

is valid in a cosmopolitan world that does not differentiate between foreign
and domestic communities. However, in the real world the refusal to ac-
cept change — and hence the need to accommodate to it and facilitate it
through adjustment assistance — is greater when the source of the distur-
bance is presumed to be foreign. If you import cheap steel and I lose my
job in Pennsylvania, that is not quite the same as if I lose my job because
you build a steel mill in California; it leads to greater resentment and more
resistance to change. Here his realism once again is apparent. The traditional ob-
jection to adjustment assistance for import-related problems

Safeguard protection, in Professor Bhagwati's scheme, would be pro-
vided only as increased tariffs, not as quotas, and the proceeds of the
increased tariffs would be used to fund the adjustment assistance. The
tariff increase would decline over a specified period as adjustment took
place. Here is where GATT reform could contribute to the success of Profes-
sor Bhagwati's adjustment program. If Article XIX's compensation re-
quirements were suspended during the period of adjustment, implementa-
tion of this adjustment package would be facilitated. This
modification of Article XIX, in conjunction with Professor Bhagwati's
adjustment program, would be well worth its apparent derogation of
GATT, for it could aid in the retaking of the trade laws, whose capture is
the real derogation of GATT.

Professor Bhagwati's survey of what is wrong with the world trading
system, and what can be done to correct it, is impressive. The pith and
penetration of his insights into the protectionist nuances of the system
are particularly impressive. Despite it all, he remains optimistic, citing
what he calls the "Dracula Effect: exposing evil to sunlight helps to de-
In this book, Professor Bhagwati has indeed exposed evil to much sunlight. He also has sharpened considerably the point of the stake that may one day be driven into the vampire’s protectionist heart.

87. BHAGWATI, at 85.