The Net National Burden of Canadian Antidumping Policy: Turbines and Generators

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THE NET NATIONAL BURDEN OF CANADIAN ANTIDUMPING POLICY: TURBINES AND GENERATORS

Klaus Stegemann†

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I. INTRODUCTION

Canadian antidumping law provides for measures which are intended to protect domestic producers against "material injury" caused by foreign manufacturers that dump imported like goods on the Canadian market.1 Domestic buyers inevitably have to bear the cost of these protective measures, but the cost to buyers can easily be greater than the benefit to the protected domestic producers. Two recent and important decisions by Canada's Anti-dumping Tribunal2 (Tribunal) illustrate this proposition. One of these decisions concerned the importation of hydraulic turbines from the Soviet Union,3 while the other involved the importation of Japanese hydroelectric generators.4 In both cases, the Tribunal found that there was a likelihood of material injury from future dumping, and as a consequence, antidumping measures are now in effect for the importation of turbines from the Soviet Union5 and generators from Japan.6

The purpose of this study is to evaluate the social cost that would have accrued to Canada if antidumping measures against Soviet turbines and Japanese generators had been in effect during the time period which was the subject of the Tribunal's investigation. Evidence presented during the Tribunal's public proceedings wholly supports the observation that antidumping policy is not a zero sum game. Analysis of the potential social cost demonstrates that Canadian buyers of imported turbines and generators would have lost more than domestic producers would have gained if antidumping protection had been available during the relevant years.7

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2. The Tribunal was established by and derives its authority from the Anti-dumping Act. Anti-dumping Act, CAN. REV. STAT. ch. A-15, §§ 21-30 (1970). See infra notes 21-25 and accompanying text. It is composed of not more than five members, Id. at § 21(1).
3. Hydraulic Turbines for Electric Power Generation, Not Including Bulb Type Turbines, Originating in the Union of Soviet Socialist Republics, Anti-dumping Tribunal Inquiry No. ADT-4-76 (July 27, 1976) [hereinafter cited as Turbines Case].
4. Alternating Current Electric Generators For Use With Hydraulic Turbines Or Water-Wheels, Including Components Whether Or not Imported Separately, For Use In The Assembly, Construction Or Installation Of Such Generators, As Well As Thrust Bearings And Generator Shafts For Use In Association With Or Connected To Such Generators, But Excluding In All Cases Excitation Systems, Originating In Or Exported From Japan, Anti-dumping Tribunal Inquiry No. ADT-11-79 (February 29, 1980) [hereinafter cited as Generators Case].
5. See Turbines Case, supra note 3, at 15.
7. See infra §§ III and IV.
cle, the excess of the domestic buyers' loss over the producers' gain is referred to as the "net national burden."

The potential national burden of antidumping measures can be determined using either of two alternative assumptions. One approach assumes that, in the absence of dumping, domestic buyers would have continued to import turbines and generators from either the same sources or from other countries. This assumption for the most part is in accord with the Tribunal’s findings concerning the past contracts it investigated in the turbines and generators cases. If antidumping measures had been in effect prior to the Tribunal’s finding that material injury likely would result from future dumping, they would have caused a substantial excess burden, because buyers would have paid much higher prices for their imports. The actual beneficiaries of Canadian antidumping measures in this hypothetical situation would have been foreign suppliers. Domestic producers competing with the importers would have gained little or nothing.

The alternative assumption is that in the absence of dumping, domestic producers would have won all or most of the disputed contracts. This assumption accords with the claims made by domestic producers in the turbines and generators cases. Even if the claims proved to be accurate, however, the net result would have been a national burden in the sense that domestic producers would have gained less from antidumping protection than domestic buyers would have lost.

The analysis in this study is based on evidence pertaining to a period when antidumping protection for turbines and generators had not yet taken effect. This evidence is at least roughly indicative, however, of the potential magnitude of the burden that may result while the Tribunal’s decisions are in effect, and it is thus well-suited to illustrating the nature of the burden of antidumping measures. Although the specific conclusions in this article are based on an analysis of the two individual cases, the general considerations concerning antidumping policy lend themselves to broader application.

8. See infra § III.
9. See Turbines Case, supra note 3, at 14; Generators Case supra note 4, at 12.
10. See infra § IV.
II. THE ANTI-DUMPING TRIBUNAL’S FINDINGS CONCERNING TURBINES AND GENERATORS

A. THE ANTI-DUMPING ACT AND THE ANTI-DUMPING TRIBUNAL

Canada’s Anti-dumping Act11 provides a mechanism for domestic producers to obtain government protection when the dumping of imported goods causes or threatens to cause material injury to the production of like goods in Canada. The Act conforms to the Anti-dumping Code of the General Agreement on Tariffs and Trade (GATT),12 in that it requires a determination of dumping, and a determination of material injury to domestic production,13 prior to the imposition of antidumping duties on a foreign product. The Deputy Minister of National Revenue, Customs and Excise investigates whether a product has been dumped on the Canadian market.14 The investigation usually is conducted in response to a complaint by a domestic producer.15 Dumping of imports occurs when the export price16 of the goods in question is less than their


14. Id. at § 13. The relevant portion of the Act provides:

The Deputy Minister shall forthwith cause an investigation to be initiated respecting the dumping of any goods, on his own initiative or on receipt of a complaint in writing by or on behalf of producers in Canada of like goods, if

(a) he is of the opinion that there is evidence that the goods have been or are being dumped; and

(b) either

(i) he is of the opinion that there is evidence, or

(ii) the Tribunal advises that it is of the opinion that there is evidence,

that the dumping referred to in paragraph (a) has caused, is causing or is likely to cause material injury to the production in Canada of like goods or has materially retarded or is materially retarding the establishment of the production in Canada of like goods.

Id. at § 13(1).

15. Id. See infra Appendix A for a presentation of antidumping procedures.

16. The Act defines export prices as:
“normal value” as determined under the Act and the Anti-dumping Regulations. In the simplest case, the normal value is identical to the price at which the exporter sells like goods in its home market, although the matter is not that simple in the majority of cases. If the Deputy Minister finds that goods are being dumped, and that the margin of dumping is not negligible, he issues a Preliminary Determination of Dumping, and refers the case to the Anti-dumping Tribunal. The Tribunal then has ninety days to determine whether dumped imports have caused or threaten to cause material injury to domestic production. If the Tribunal finds either material injury or a likelihood of future injury, the Deputy Minister makes a Final Determination of Dumping. He then imposes antidumping duties to offset the margin of dumping for any imports of the subject goods.

\[\text{an amount equal to the lesser of}
\begin{align*}
&(a) \text{ the exporter’s sale price for the goods, and} \\
&(b) \text{ the importer’s purchase price for the goods, adjusted in the manner prescribed by the regulations to exclude all charges thereon resulting from or arising after their shipment from the place described in paragraph 9(1)(d) or, where applicable, the place substituted therefor in determining normal value by virtue of paragraph 9(2)(a).}
\end{align*}\]


17. 106 CAN. STAT. O. & REGS. 872 (1978). The Act states:

“For the purposes of this Act,

(a) goods are dumped if the normal value of the goods exceeds the export price of the goods.”


18. The Act defines the normal value of any goods as:

the price of like goods when sold by the exporter
\begin{align*}
&(a) \text{ to purchasers with whom, at the time of the sale of the like goods, the exporter is not associated,} \\
&(b) \text{ in the ordinary course of trade for home consumption under competitive conditions,} \\
&(c) \text{ during such period, in relation to the time of the sale of the goods to the importer in Canada, as may be prescribed by the regulations, and} \\
&(d) \text{ at the place from which the goods were shipped directly to Canada or, if the goods have not been shipped to Canada, at the place from which the goods would be shipped directly to Canada under normal conditions of trade,}
\end{align*}

as adjusted by allowances calculated in the manner prescribed by the regulations to reflect the differences in the terms and conditions of sale, in taxation and other differences relating to price comparability between the sale of the goods to the importer in Canada and the sales by the exporter of the like goods but with no other allowances affecting price comparability whatever.

Id. at § 9(1).

19. Like goods are “(a) goods that are identical in all respects to the said goods, or (b) in the absence of any goods described in paragraph (a), goods the characteristics of which closely resemble those of the said goods.” Id. at § 2(1).

20. The margin of dumping is “the amount by which the normal value of the goods exceeds the export price of the goods.” Id. at § 8(b).

21. Id. at § 14(1).

22. Id. at § 14(2)(c).


24. Id. at § 17(1).
from those countries covered by the Tribunal's finding of injury. The Anti-dumping Tribunal is a court of record. Its proceedings include public hearings at which interested parties present evidence and arguments. During the twelve year period between January 1969 and December 1980, the Tribunal considered a total of 103 antidumping cases. In thirty seven cases, the Tribunal found "no material injury;" in the remainder, the Tribunal found that dumping had caused or was likely to cause material injury to domestic production. The Tribunal's cases concern a variety of products; it has considered even such small consumer items as wooden clothes pins and high school yearbooks. In addition, major Canadian manufacturers of various chemical products, steel, machinery, and electrical products have taken advantage of the protection of the Anti-dumping Act.

The two cases analyzed in this article are in many ways representative of the Tribunal's capital goods cases under the existing Canadian procedures. In both the Soviet turbines and the Japanese generators cases, the Tribunal concluded that future dumping by the named countries would be "likely to cause material injury to the production in Canada of like goods." A brief description of the Tribunal's reasoning in these two cases will provide a factual setting for this study's argument concerning the social cost of antidumping measures.

B. THE SOVIET TURBINES CASE

The turbines case officially commenced in August 1975 when the Deputy Minister of National Revenue, Customs and Excise, gave notice that he had initiated an investigation concerning the dumping of hydraulic turbines originating in the Soviet Union. Almost nine

25. Id. at § 17(2).
26. Id. at § 27.
27. Id. at §§ 27-29.
28. 1980 ANTI-DUMPING TRIBUNAL ANN. REP. 42-51 [hereinafter cited as ADT ANN. REP.]. For a summary of the Tribunal's activities for the years 1969-80, see infra Appendix B.
29. See ADT ANN. REP., supra note 28, at 42-51. See infra Appendix B.
31. Id. at 51.
32. Id. at 42-51. Indeed, the Electrical and Electronics Manufacturers Association of Canada, [EEMAC] in a recent brief, proudly stated that the "electrical and electronics industry has had more experience than any other with the present antidumping regime. Members of our industry have been or are currently involved in a total of 12 anti-dumping cases, involving dumping from 11 countries." ELECTRICAL AND ELECTRONIC MANUFACTURERS A. OF CAN. [EEMAC] SUBMISSION TO THE HOUSE OF COMMONS SUBCOMM. ON IMPORT POL'LY 1 (1981) [hereinafter cited as EEMAC SUBMISSION].
33. See Turbines Case, supra note 3; Generators Case, supra note 4.
34. 109 CAN. GAZ. 3597 (Part I, Aug. 16, 1975).
months later, the Deputy Minister indicated that he was "satisfied that the mentioned goods have been or are being dumped and that the margin of dumping of the dumped goods and the actual or potential volume thereof is not negligible." He therefore issued a Preliminary Determination of Dumping and referred the case to the Anti-dumping Tribunal.

During three days of public and in camera hearings, the Tribunal heard presentations on behalf of Canadian producers of hydraulic turbines, the Soviet exporter and its Canadian importing subsidiary, EMEC Trading Limited (EMEC), and two provincial utility companies who were end users of the disputed imports. Dominion Engineering Works Limited (DEW) of Montreal was the complainant in the turbines case. DEW, a fully-owned subsidiary of Canadian General Electric Company Limited (CGE), is by far the larger of two turbine manufacturers in Canada. The other domestic producer, Marine Industries Limited (MIL) of Sorel, Quebec, played only a limited part in the inquiry.

The Tribunal's inquiry, like the Deputy Minister's previous investigation, focused on three contracts that the Soviet exporter had won in Canada during the 1971-75 period. Two of these were awarded by the British Columbia Hydro and Power Authority (B.C. Hydro) for its Mica Creek and Peace River "Site One" projects. The third set of turbines had been purchased by the New Brunswick Electric Power Commission for the Mactaquac project on the St. John River. The complainant DEW claimed that the entry of the Soviets into the Canadian turbine market occurred at "price levels which have had a serious impact on employment, profitability and market share, and that the survival of the domestic industry is threatened if dumping of the subject goods is allowed to continue."

Counsel for the Soviet exporter/importer countered that there was no evidence that dumping caused material injury to Canadian pro-

36. Id.; Turbines Case, supra note 3, at 2.
37. See Turbines Case, supra note 3, at 3.
38. Id.
39. MIL is controlled by Société générale d'investissement, a provincial crown corporation. Id. at 5.
40. Id. at 3.
41. Id. at 9-10.
42. Id.
43. Id.
producers of hydraulic turbines.\(^{45}\) Representatives of the Soviet trading agency contended that:

the two contracts they obtained in the B.C. market were taken from the Japanese and not from the two Canadian producers, while the contract for Mactaquac was obtained because of the superiority of the USSR-designed Kaplan turbine. In addition, they claimed that DEW and MIL were enjoying full bookings and that their production capacity had not been affected, nor had DEW's profits been affected.\(^{46}\)

The Tribunal concurred with the importer's argument that in the absence of the particularly attractive Soviet bids, a Japanese importer, rather than DEW, would have won the two B.C. Hydro contracts.\(^{47}\) Although in regard to the Mactaquac project, the Tribunal concluded that DEW would have won the contract in the absence of dumping by the Soviet Union, it determined that it was "not persuaded that the loss of this one order could have, of itself, resulted in material injury to domestic production."\(^{48}\) The Tribunal thus found that past dumping of turbines from the Soviet Union had not caused material injury to Canadian producers.\(^{49}\) However, the Tribunal reached a different conclusion with regard to the question of whether material injury might arise from future dumping. The Tribunal assumed "that unless inhibited by the imposition of antidumping duties, the USSR will continue to dump hydraulic turbines,"\(^ {50}\) and decided "that there is a likelihood of material injury being caused to Canadian producers by reason of such dumping."\(^ {51}\)

The Tribunal arrived at its conclusion on the future effects of Soviet dumping of turbines by investigating the anticipated turbine demand of Canadian public utilities for the years 1976 through 1979.\(^ {52}\) Approximately 28% of the anticipated requirements were in the province of Quebec, "where one might reasonably assume the two Canadian producers will continue to be treated preferentially."\(^ {53}\) The Tribunal did not factor B.C. Hydro into its consideration of anticipated turbine demand, because "it may be that in British Columbia . . . if the USSR do [sic] not get the business, the Japanese will."\(^ {54}\) The Tribunal concluded, however, that Canadian pro-

\(^{45}\) See Turbines Case, supra note 3, at 8.

\(^{46}\) Id.

\(^{47}\) Id. at 9-10.

\(^{48}\) Id. at 10.

\(^{49}\) Id.

\(^{50}\) Id. at 13.

\(^{51}\) Id.

\(^{52}\) Id. at 13-14.

\(^{53}\) Id. at 14. The two producers could expect favorable treatment in Quebec because Hydro Quebec, the provincial utility, maintains a policy of buying its equipment from producers who do a substantial amount of manufacturing in Quebec. Generators Case, supra note 4, at 7. See infra note 80 and accompanying text.

\(^{54}\) Turbines Case, supra note 3, at 14.
ducers ought to be protected against Soviet dumping in the rest of the country.

The attitude of B.C. Hydro is no justification for permitting the USSR to continue to dump. There are other substantial awards in the offing in other provinces in Canada, apart from Quebec. . . . In those markets, continued USSR dumping would be a severe inhibiting factor to bidding by the Canadian producers.55

The hydraulic turbines case thus resulted in the imposition of antidumping duties equal to the margin of dumping on future imports from the Soviet Union. The ruling did not interfere with existing contracts, as the Tribunal ruled that the likelihood of material injury applied only for imports of Soviet turbines "under any contracts entered into after the date of this finding."56 Application of antidumping duties to existing contracts would have been very costly for the importer, the Soviet trading agency EMEC, because the turbines for the Site One and Mactaquac projects were scheduled to be shipped after the Tribunal's decision. In addition, the margin of dumping had been set at 69.82% of the f.o.b. export price, or 41% of the normal value.57

The normal value of the Soviet turbines was determined by "ministerial prescription."58 Apparently, in April 1976, the Deputy Minister of National Revenue, Customs and Excise ruled that the Japanese producer Hitachi's bid for the Mica project in British Columbia represented the "normal value" of the Soviet turbines, and that the same margin of dumping applied to each of the three Soviet bids under investigation by the Tribunal. When the Tribunal found that future injury from Soviet dumping was likely, imports of Soviet turbines under new contracts automatically became subject to antidumping duties equal to 69.82% of the turbines' export price, for

55. Id.
56. Id. at 15.
57. Letter from James Day, Director, Policy and Systems, Special Assessment Programs, Revenue Canada, Customs and Excise, to Klaus Stegemann (Oct. 10, 1980) [hereinafter cited as Day letter]. While the importer did not have to pay antidumping duties on imports under existing contracts, normal import duties of 15% were assessed on an "advanced value," rather than on the actual export price, in accordance with § 39(a) of the Customs Act. Customs Act, CAN. REV. STAT. ch. 40, § 39(a) (1970). As the export price was "advanced," or raised, by 69.82%, the rate of duty in effect was 25.5% of the actual export price, rather than 15%.
58. Section 9(7) of the Act, in effect, applies to countries with state-controlled economies. It provides:

the normal value of any goods that are shipped directly to Canada from a country where, in the opinion of the Minister,
(a) the government of that country has a monopoly or substantial monopoly of its export trade, or
(b) domestic prices are substantially determined by the government of that country,
shall be determined in such manner as the Minister prescribes.
as long as the April 1976 ministerial prescription on normal value and the corresponding margin of dumping remained in effect. The importer could not reduce or avoid the antidumping duty by charging higher prices, which would bring the export price of the turbines above the established normal value. It is therefore not surprising, under the circumstances, that the Soviet Union has not participated in tenders for hydraulic turbines in the Canadian market since 1976.

The Tribunal's finding of future injury in the Soviet turbines case remains unchanged more than six years after the original investigation. The Tribunal has not formally reviewed its decision, nor does it plan to review it in the near future.\textsuperscript{59} The determination stands despite the fact that neither ministerial prescriptions nor findings of the Anti-dumping Tribunal are intended to be permanent.\textsuperscript{60}

C. THE JAPANESE GENERATORS CASE

The hydro-electric generators case originated in March 1979, when the Deputy Minister gave notice that he had begun an investigation into the dumping of alternating current electric generators and components for use with hydraulic turbines or water-wheels exported from Japan to Canada.\textsuperscript{61} The investigation led to a Preliminary Determination of Dumping in December 1979.\textsuperscript{62} In February 1980, the Anti-dumping Tribunal ruled that although the dumping of Japanese generators had not caused material injury to domestic production at the time of the investigation, future dumping under contracts formed after the date of the Tribunal's finding was likely to cause material injury.\textsuperscript{63} The Tribunal's determination served as a warning to Japanese suppliers of hydro-electric generators that future imports would be scrutinized closely by National Revenue,

\textsuperscript{59} Letter from R. Roy, Assistant Secretary, Anti-dumping Tribunal, to Klaus Stegemann (Jun. 9, 1981) (confirmed in a telephone interview, Sept. 16, 1982). The Tribunal reviews most decisions at certain intervals, and has rescinded many findings of material injury. Details can be found in the Tribunal's Annual Reports. See, e.g., ADT ANN. REP., \textit{supra} note 28, at 42-51. See also \textit{infra} Appendix B.

\textsuperscript{60} See Kaylor, \textit{What Can You Do About an Injury Finding by the Anti-dumping Tribunal?}, \textit{67 IMPORTWEEK} 2 (May 23, 1979). Indeed, the Deputy Minister's prescription in the Soviet turbines case was modified in March 1981, to allow for determination of the normal value by either of two methods. Interview with Mr. Alexander V. Dgebuadze, President, EMEC Trading Limited, in Vancouver (Jul. 9, 1981) [hereinafter cited as Dgebuadze Interview]. One is the "third country" principle. See \textit{infra} note 125 and accompanying text. The other, used where sufficient information is unavailable, is the assumption of a reduced margin of dumping equal to 35\% of the export price. See \textit{infra} notes 125-32 and accompanying text.

\textsuperscript{61} 113 CAN. GAZ. 1632 (Part I, Mar. 17, 1979).

\textsuperscript{62} 113 \textit{CAN. GAZ.} 7643 (Part I, Dec. 15, 1979).

\textsuperscript{63} See Generators Case, \textit{supra} note 4.
and that antidumping duties would be imposed whenever export prices were found to fall short of normal values.

The Deputy Minister found a substantial margin of dumping on four out of the five contracts won by Japanese producers during the years covered by the investigation. The margin of dumping during those years, 1975-78, amounted on the average to 52% of export prices, or 34.2% of normal values. B.C. Hydro awarded four of the five contracts, and Newfoundland Hydro awarded the fifth and smallest contract. CGE, the larger of two Canadian manufacturers of hydroelectric generators with production facilities in Ontario and Quebec, was the complainant. MIL, the second domestic producer, was located entirely in Quebec, and enjoyed an assured market in that province. It thus played only a minor role in the generators case, as it had in the turbines case. CGE, or its turbine producing subsidiary DEW, and B.C. Hydro were thus protagonists in both the turbines and generators cases. CGE acted as the dominant domestic producer of turbines and generators, while B.C. Hydro was the principal end user of power generating equipment that consistently has considered foreign bids for turbines and generators, offering no preferential treatment for domestic suppliers. The Japanese manufacturers of hydroelectric generators and their Canadian importing agents also were represented at the hearings before the Tribunal. The focus of the argument, however, rested firmly on B.C. Hydro's actions and its motives for buying Japanese rather than CGE generators.

The complainant alleged that the loss of large orders to aggressively priced Japanese imports had led to "loss of production, underutilization of engineering, design, and plant capacity, and reduced profitability." According to CGE's submission, injurious dumping was likely to continue in the future because of Japan's great uncommitted capacity for the production of hydroelectric generators. As a result, CGE would be forced to reduce or eliminate investment in research and design, as well as in the expansion of

64. Id. at 9.
65. See Day letter, supra note 57.
66. See Generators Case, supra note 4, at 9.
67. Id. at 3.
68. Id. at 5.
69. Indeed, CGE and B.C. Hydro were also the protagonists in two earlier cases concerning the dumping of heavy electrical equipment, the 1970 power transformers case, and the 1972 circuit breakers case.
70. See Generators Case, supra note 4, at 3.
71. Id. at 5-6.
72. Id. at 5.
73. Id.
production capacity.\textsuperscript{74} With respect to past dumping, the Tribunal concluded "that the dumping of Japanese hydro generators in the four cases cited by CGE has not in fact been the cause of material injury, and that if the latter occurred, it must be attributed to other causes."\textsuperscript{75} The Tribunal based its conclusion largely on evidence presented by B.C. Hydro concerning a longstanding dispute with CGE. The dispute involved a 1967 contract calling for CGE to install the first five hydrogenerators at B.C. Hydro's Portage Mountain site on the Peace River. The Tribunal found that:

By 1975, what had earlier appeared to be a relatively minor problem in the performance of the Portage Mountain generators had emerged as something much more serious, of which the full dimensions had not yet been determined. CGE's response to this emerging problem, as B.C. Hydro then saw the matter, had been unsatisfactory from both the technological and the legal and commercial points of view. Furthermore, B.C. Hydro had become concerned about two other contracts, Mica and Kootenay, which had been awarded to CGE in 1972 before the seriousness of the Portage Mountain problem was evident. The tensions and conflicts resulting from the Portage Mountain problem caused a serious deterioration in the relationship between B.C. Hydro and CGE, beginning with the specifics of generator production, operation and repair but increasingly extending to the broader aspects of relations between the two organizations. By 1975, it was asserted in evidence, B.C. Hydro would not have been prepared to enter into any new contract with CGE for the supply of hydro generators.\textsuperscript{76}

Although the Tribunal found no injury due to past dumping, it reached a different conclusion with respect to the likelihood of material injury to CGE from future dumping.

In view of the long lead times from tender award to manufacturing activity and the present state of CGE's order book, it seems almost inevitable that in a couple of years CGE will find itself with much of its generator capacity unutilized. This unfortunate situation will become more serious unless CGE is able to limit the period of reduced activity by obtaining a substantial portion of the considerable volume of business expected to be awarded over the next few years in the "open" sector of the Canadian market. It is the Tribunal's expectation that CGE will in fact be able to obtain much of this business provided it does not have to compete with dumped imports, but that if Japanese dumping continues CGE will be able to capture little if any of this important market.\textsuperscript{77}

The Tribunal viewed consideration of available business in the "open" sector as particularly important, given the structure of the Canadian hydrogenerator market.\textsuperscript{78} The Tribunal defined the "open" sector of the Canadian market as "those provinces which have significant hydro-electric potential still to develop but lack

\textsuperscript{74} Id.
\textsuperscript{75} Id. at 9.
\textsuperscript{76} Id. at 9-10.
\textsuperscript{77} Id. at 12.
\textsuperscript{78} Id. at 6-8.
hydro generator production facilities.” In Ontario, only minor sites remain undeveloped. Quebec, of course, still has a large unrealized potential for hydro-electric development. The government of Quebec, however, has insisted, and is likely to continue to insist, on limiting contracts to firms with substantial production facilities in Quebec. The Tribunal also excluded the lower Churchill River area of Labrador from its definition of the open sector, because the federal government, which participates with Newfoundland in developing the area, is expected to require preferential treatment for domestic producers. With regard to the other Canadian provinces, the Tribunal said: “In contrast . . ., the governments of the remaining provinces have no direct responsibility for the well-being of Canada’s hydro generator industry but they do have a natural and legitimate interest in buying; other things being equal, from the cheapest source.”

The Tribunal estimated that between the years 1980 and 1985 CGE would face unmitigated Japanese price competition in 30% of the Canadian market if only the Atlantic and Prairie provinces were counted. The market percentage would rise to over 50% “if B.C. Hydro should again be willing to purchase CGE hydro generators.” The Tribunal anticipated this second possibility:

At the hearing, B.C. Hydro asserted its unwillingness to buy hydro generators from CGE for the foreseeable future. This is perhaps not surprising considering the present dissension between the two parties. Following a settlement, the situation should change. As in the past, B.C. Hydro continues to place substantial orders with CGE for other types of heavy electrical equipment. In light of these various factors, the Tribunal anticipates that at some future date B.C. Hydro may, once again, be willing to purchase CGE hydro generators. In light of that prospect, CGE should not be required to face the competition in the B.C. market of Japanese imports offered at dumped prices.

Thus, both the generators and turbines cases had the same end result; CGE no longer had to worry about future dumping from the source countries mentioned in the rulings. The domestic producer, however, was not satisfied with this result. In its view, existing antidumping procedures permit foreign producers to obtain “free bites” by dumping in the Canadian market before antidumping procedures have a chance to be invoked.

79. Id. at 7.
80. Id.
81. Id.
82. Id. at 8.
83. Id. at 13.
84. Id.
85. Id.
measures have been activated. The Tribunal, in refusing to find past dumping by the Japanese in the generators case, and by the Soviets in the turbines case, did nothing to eliminate the "free bites" problem.

The remainder of this article draws on the facts of the turbines and generators cases to determine the net national burden of antidumping measures in the Canadian hydroelectric equipment market. The net national burden or benefit is analyzed under two alternative assumptions, to account for two conflicting claims concerning the effects of antidumping measures. The first assumption is that the Tribunal's findings were correct. This assumption implies that the domestic buyer would have continued to import in the absence of dumping. The alternative assumption is that CGE was correct in alleging that, in the absence of dumping, domestically produced turbines and generators would have been substituted for the disputed imports.

III. THE NET NATIONAL BURDEN IN CASE OF CONTINUING IMPORTATION

A. No Direct Gain for Domestic Producers

The intent behind imposing antidumping protection evidently is to transfer income from potential buyers of dumped imports to the beneficiaries of the protection, such as CGE, a domestic producer. This rationale, however, presupposes that antidumping measures cause domestic buyers to switch from foreign to domestic suppliers. If importation continues after the invocation of antidumping protection, buyers likely will face higher import prices, while domestic producers can expect no corresponding benefit. The loss to the domestic buyer that is attributable to higher import prices thus constitutes the net national burden of antidumping measures.

In the two hydroelectric equipment cases reviewed in the previous section, the Anti-dumping Tribunal concluded that the dominant domestic producer, CGE, or its subsidiary DEW, would suffer

86. See Stegemann, supra note 11, at § II. See id. at § III for an analysis of deterrence arguments. If the proposed amendments had been in force during the period under investigation, they might have prevented the reported dumping of turbines and generators, without any visible enforcement activity. It thus seems particularly appropriate to use the evidence concerning the disputed electrical equipment contracts to determine the potential burden of antidumping policy.

87. Although it is conceivable that antidumping measures may serve objectives beyond protecting the income positions of domestic producers at the expense of domestic consumers, the existing procedures do not suggest any other intent. See Stegemann, The Efficiency Rationale of Antidumping Policy and Other Measures of Contingency Protection, in NON-TARIFF BARRIERS AFTER THE TOKYO ROUND ch. 2 (J. Quinn and P. Slayton eds. 1982).
material injury if the dumping of Soviet turbines and Japanese generators were allowed to continue. As a consequence, the Tribunal held that antidumping duties could be applied to protect CGE against future dumping of these items. Yet in both cases, the Tribunal accepted forceful evidence supporting the importer's argument that CGE would not have won any of the disputed B.C. Hydro contracts, even in the absence of dumping. For instance, if an antidumping ruling for Soviet turbines had been in effect during 1971-75, the years from which the evidence was compiled, B.C. Hydro almost certainly would have awarded the turbine contracts for the Mica Creek and Peace River “Site One” projects to Japanese suppliers. Indeed, since 1965, B.C. Hydro had awarded all other contracts, covering twenty-one turbines, to Japanese bidders.\(^8\) The Tribunal also acknowledged that B.C. Hydro was unlikely to purchase domestic turbines following a finding that Soviet dumping would cause material injury to domestic producers in the future.\(^8\) It concluded, however, that the “attitude of B.C. Hydro” did not justify permitting the Soviet Union to continue dumping turbines.\(^9\) The Tribunal reasoned that there were “other substantial awards in the offing in other provinces” which CGE (DEW) might win if the Soviet Union were prevented from dumping.\(^9\)

The evidence in the Japanese generators case supports conclusions similar to those drawn concerning the turbines case. CGE would not have won any additional B.C. Hydro contracts had antidumping measures against generator imports from Japan been in effect during the years in question. Whether B.C. Hydro would consider buying CGE generators in the future was a matter of the Tribunal’s conjecture. Income transfers from B.C. Hydro, the domestic buyer, to CGE, the domestic producer, however, would take place only to the extent that B.C. Hydro was willing to purchase from

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\(^8\) B.C. Hydro, Complete List of Authority Turbine Tenders and Awards (Oct. 12, 1979) (unpublished memorandum) [hereinafter cited as List of Turbine Tenders]. The total of 21 turbines includes two for the Mica project. The Soviet Union had to share that contract with Hitachi, the second-lowest bidder, because the Authority lacked experience with the new entrant’s performance.

\(^9\) See Turbines Case, supra note 3, at 14.
CGE rather than from foreign producers. If B.C. Hydro and other provincial power authorities continue to import Japanese or other generators, in spite of the antidumping ruling against Japan, CGE will gain no additional orders. Hydro authorities, however, may pay higher prices for imported equipment.

**B. THE BURDEN OF HIGHER IMPORT PRICES**

The potential magnitude of the burden of higher import prices in the absence of dumping in the turbines case can be calculated using the data available to the Tribunal when it made its finding that past dumping of turbines did not cause material injury to domestic producers. For each of the turbine contracts under investigation, there was a winning (dumped) bid, a domestic producer's bid, and, in most cases, at least one “potentially intervening” bid from a third party. A potentially intervening bid is a bid that the domestic buyer would have accepted, in preference to the domestic producer's bid, if the dumped bid either had not been available or had not been as low. In this discussion, information on potentially intervening bids will be used to determine how much more the provincial utility would have had to pay for imported equipment if dumping had been prevented.

For both the Mica Creek and the Peace Site One contracts, which B.C. Hydro awarded to Soviet producers, the Japanese pro-

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92. See Turbines Case, supra note 3.

93. See infra note 95 and accompanying text.

94. Although this approach involves hypothesizing the potential price burden to the utility using actual figures from past contracts, it is the best way to approximate what the utility would have paid in the absence of dumping. The reasons for the superiority of this method are as follows. Antidumping rulings concerning heavy electrical equipment tend to remain in effect for many years, and domestic buyers may continue to accept foreign bids from third parties or former dumpers. It is not possible, however, to determine the burden of higher import prices when antidumping protection has been activated, because it is no longer possible to observe the dumped prices that would prevail in the absence of the antidumping measures.

When exporters know that an antidumping duty equal to the margin of dumping will be collected by the importing country, dumping will disappear or at least be reduced. It will disappear if the end user of the imported product is responsible for the duty, because the cost to the end user will equal the normal value. The exporter would rather receive the normal value for any remaining contracts than a lower price on which the importing country collects antidumping duty equal to the margin of dumping. Under current Canadian law, the end user does not have to pay the duty unless he also acts as the importer. Thus, end users might still pay less than the normal value while an antidumping ruling is in effect, because the importing agent of the foreign supplier is willing to absorb the antidumping duty. It appears that only relatively minor amounts of antidumping duty have been collected, and usually only on goods that had been “in the pipeline,” rather than on contracts concluded after the activation of antidumping protection. See Slayton, supra note 44, at 53.
producer Hitachi submitted potentially intervening bids.95 These bids were 8% lower than the Canadian bids submitted by DEW.96 The Hitachi price, however, was 51% higher than the Soviet bid in the case of Mica Creek,97 and 70% higher than the Soviet bid for Site One.98 Thus, B.C. Hydro would have incurred a substantial extra cost if the submission of Soviet bids had been prevented by an existing antidumping ruling or an acute threat of antidumping action. In 1971, B.C. Hydro had no experience with the performance of the Soviet producer. Thus, B.C. Hydro awarded only two of the four turbine contracts for Mica Creek to the Soviet Union. The remaining contracts went to Hitachi. The absolute extra cost for the Mica turbines would have been approximately $2.4 million if the Soviet bid had been withheld.99 On the Site One contract, B.C. Hydro would have incurred an extra cost of almost $18 million if the authority had been forced to take the Hitachi bid rather than the Soviet bid due to an antidumping action.100

For the Mactaquac project, there were only two bidders, DEW and the Soviet trading agency.101 Yet, DEW might not have won the contract even in the absence of dumping by the Soviet Union.

95. Table 1

Three Contracts for Hydraulic Turbines Won by USSR Trading Agency in Competition with Canadian Producer, 1971-75*

<table>
<thead>
<tr>
<th>Name of Site</th>
<th>Number of Bidders</th>
<th>Winning USSR Bid</th>
<th>Equivalent Canadian Bid</th>
<th>Fuji</th>
<th>Hitachi</th>
<th>Mitsubishi</th>
<th>Toshiba</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
<td>(4)</td>
<td>(5)</td>
<td>(6)</td>
<td>(7)</td>
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<tr>
<td>Mica Creek</td>
<td>8</td>
<td>9,472</td>
<td>15,549</td>
<td>17,899</td>
<td>14,272</td>
<td>16,100</td>
<td>15,796</td>
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<td>- $1000</td>
<td></td>
<td>61</td>
<td>100</td>
<td>115</td>
<td>92</td>
<td>104</td>
<td>102</td>
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<tr>
<td>- DEW = 100</td>
<td></td>
<td>100</td>
<td>164</td>
<td>189</td>
<td>151</td>
<td>170</td>
<td>167</td>
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<tr>
<td>- USSR = 100</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Peace Site One</td>
<td>4</td>
<td>25,384</td>
<td>47,000**</td>
<td>no bid</td>
<td>43,229</td>
<td>50,079</td>
<td>no bid</td>
</tr>
<tr>
<td>- $1000</td>
<td></td>
<td>54</td>
<td>100</td>
<td>no bid</td>
<td>92</td>
<td>107</td>
<td></td>
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<td>- DEW = 100</td>
<td></td>
<td>100</td>
<td>185</td>
<td>170</td>
<td>197</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- USSR = 100</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mactaquac</td>
<td>2</td>
<td>6,451</td>
<td>8,290***</td>
<td>no bid</td>
<td>no bid</td>
<td>no bid</td>
<td>no bid</td>
</tr>
<tr>
<td>- $1000</td>
<td></td>
<td>78</td>
<td>100</td>
<td></td>
<td></td>
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<td>- DEW = 100</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- USSR = 100</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


*Note that all prices for the three contracts won by the Soviet Trading Agency include governors and installation.

**The equivalent Canadian bid of $47,000,000 for the Peace Site One project is an escalated DEW bid. See 2 Transcript of Public Hearing, Turbines Case, at 52 (1976) [hereinafter cited as ADT Turbines Transcript].

***The equivalent Canadian bid of $8,290,000 for the Mactaquac project is a DEW bid, which has been escalated using the same ratio used in escalating the Peace Site One bid.

96. See supra note 95, Table 1, columns (3) and (5).
97. See supra note 95, Table 1, columns (2) and (5).
98. Id.
99. Id.
100. Id.
101. See supra note 95, Table 1, columns (2) and (3).
Indeed, counsel for the Soviet exporter/importer in the turbines case summarized the evidence in the following manner: "In New Brunswick N.B. Power was quite clear that price was not their prime concern in the particular Mactaquac circumstances. It was the unhappy experience it had had with D.E.W. Kaplans compared with the demonstrated design, technical quality, ability and reliability of the LMZ Kaplans." 102

The Soviet bid for Mactaquac would have been $8.5 million, rather than the actual $6.45 million, if the Soviet trading agency could have correctly anticipated the normal value prescribed by the Deputy Minister of National Revenue in accordance with Section 9(7) of the Anti-dumping Act. 103 Assuming New Brunswick Power, the buyer for the Mactaquac project, still would have preferred a higher Soviet bid to the Canadian bid because of quality advantages, the extra cost would have been $2 million. 104 This amount is 32% more than the bid the authority was able to obtain from the Soviet Union in the actual case.

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102. 2 ADT Turbines Transcript, supra note 95, at 34. "Kaplan" describes the type of turbine required for Mactaquac and "LMZ" stands for Leningrad Metal Works.

103.

Table 2
Potential Effects of Antidumping Action on USSR Bids for Three Hydraulic Turbine Contracts, 1971-75

<table>
<thead>
<tr>
<th>Name of Site</th>
<th>Actual* USSR Bid</th>
<th>Prescribed Value of Equipment</th>
<th>Absolute Margin of Dumping [41% of col(2)]</th>
<th>Additional Normal Duty [15% of col(3)]</th>
<th>Potential USRR Bid* [(1)+3] +0]</th>
<th>Equivalent Canadian Bid*</th>
<th>Potentially Intervening Hitachi Bid*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mica Creek</td>
<td>9,472</td>
<td>7,275</td>
<td>2,983</td>
<td>448</td>
<td>12,903</td>
<td>15,549</td>
<td>14,272</td>
</tr>
<tr>
<td>Peace Site One</td>
<td>25,384</td>
<td>17,228</td>
<td>7,063</td>
<td>1,060</td>
<td>33,507</td>
<td>47,000**</td>
<td>43,229</td>
</tr>
<tr>
<td>Mactaquac</td>
<td>6,451</td>
<td>4,398</td>
<td>1,803</td>
<td>271</td>
<td>8,525</td>
<td>8,290**</td>
<td>no bid</td>
</tr>
</tbody>
</table>

Information in columns (1), (6), and (7) was obtained from the DEW Turbines Brief, supra note 95, at appendix. The figures in column (2) were obtained from EMBC. See Dgebuadze Interview, supra note 60.

*The prices in columns (1), (5), (6), and (7) include installation charges.

**The $47,000,000 figure for Peace Site One, and the $8,290,000 figure for Mactaquac, are both escalated DEW bids.

Column (2) of Table 2 shows the prescribed value for the imported turbines, excluding installation. The alleged margin of dumping was 41% of the prescribed value, so the amount in column (3) that should have been added to the actual bid in column (1) to avoid dumping can be determined. Furthermore, the value for normal import duty had to be "advanced" by the amount shown in column (3), which means that 15% of that amount would have been added to the actual bid. The fictitious bid that the Soviet Union should have tendered to avoid antidumping action is in column (5).

For a discussion of ministerial prescriptions under § 9(7) of the Anti-dumping Act, see supra note 58.

104. See supra note 103, Table 2, columns (5) and (1).
The available data reveal that Mactaquac is the only case where the prevention of dumping under the Deputy Minister's prescription would have resulted in a Soviet bid which exceeded the Canadian price. For the other two hydroturbine projects, the potential Soviet bid would still have been lower than the Canadian bid, and even lower than the potentially intervening Hitachi bid.

This evidence raises several issues concerning the effects of antidumping measures. The first issue is whether B.C. Hydro still would have preferred higher Soviet bids, which would have satisfied the Deputy Minister's prescription of normal values, to the bids of the domestic producer. If B.C. Hydro would have been willing to pay the higher Soviet prices, the burden of higher import prices due to antidumping protection would be determined by computing the difference between the potential Soviet bid and the actual Soviet bid, rather than between the potentially intervening Hitachi bid and the actual Soviet bid.

The second issue concerns whether the Soviet bids were lower than necessary to secure the B.C. Hydro contracts. The Soviet trading agency may have miscalculated its own bid by assuming that other tenderers' bids would be lower than those actually submitted. The more plausible explanation is that the new entrant deliberately undercut all other bidders by a substantial margin in order to secure a foothold in the Canadian market. Either scenario suggests the argument that even without antidumping action the price advantage of Soviet turbines would not be as large for future contracts as it was during the years 1971-75. This argument implies that the burden of higher import prices due to antidumping measures would be less severe in the future than past bidding indicates.

The third issue suggested by the data on the turbines project concerns the concept of causation that the Anti-dumping Tribunal apparently applies in its deliberations. If the Soviet trading agency could have submitted the lowest bids for the B.C. Hydro contracts without engaging in dumping, then dumping turbines on the Canadian market could not materially injure domestic production, because in either case, the Soviets would have won the contracts.

105. See supra note 103, Table 2, columns (5) and (6).
106. Id.
107. See supra note 103, Table 2, columns (5) and (7).
108. See supra note 103, Table 2, columns (1) and (5).
109. See supra note 103, Table 2, columns (1) and (7). Although the additional normal import duty in column (4) would have been a burden to B.C. Hydro, it would not have been part of the national burden.
111. See supra note 103, Table 2.
Similarly, if future Soviet bids were to remain the lowest in the absence of dumping, and of antidumping measures, future dumping by the Soviet Union would not cause material injury to domestic producers. These considerations apparently were not discussed during the Tribunal's proceedings.

The Tribunal actually determined that the acceptance of Soviet bids for the two B.C. Hydro contracts did not cause any injury to domestic producers because Hitachi submitted potentially intervening bids in both cases. The Tribunal's approach in the actual turbines case presumes that the Soviet Union would not have won the two contracts in the absence of dumping. Even in the absence of dumping, however, the price advantage of the Soviet turbines over the Hitachi product for the Mica project would have been 9%. It might be argued that in 1971 the Soviets needed a price advantage of more than 9% to overcome the disadvantage of being an untried supplier of turbines in the Canadian market. It is unlikely, however, that a price advantage of 21%, which was the difference between the potential Soviet bid and the potentially intervening Hitachi bid for the Site One project, would have been insufficient to secure the Site One contract for the Soviet Union in 1975. It is equally implausible that similar Soviet price advantages, maintained in the absence of dumping, would have been insufficient if the Soviet Union had wished to win future contracts in the "open" sector of the Canadian market for hydraulic turbines.

If the data presented concerning potential Soviet bids, equivalent Canadian bids, and potentially intervening Hitachi bids correctly reflect the magnitude of the price advantages that the Soviet Union could have retained if it had been required to conform to the Deputy Minister's prescription on normal value, why did the Soviet trading agency choose not to participate in post-1975 tenders for hydraulic turbines? The answer involves the peculiar effect of a ministerial prescription, which requires that new contracts automatically become subject to antidumping duties, regardless of the prices quoted. In other words, the Soviet trading agency did not have the option of avoiding antidumping duties for new contracts by quoting prices that would conform to the prescribed normal values. After the Tribunal decided in July, 1976 that material injury to domestic production was likely to result from the dumping of Soviet

112. See Turbines Case, supra note 3, at 9.
113. See supra note 103, Table 2, columns (5) and (7).
114. Id.
115. See supra note 103, Table 2, columns (5), (6), and (7).
turbines under new contracts, the Customs and Excise Division of the Department of National Revenue regarded any imports of Soviet turbines under new contracts as dumped. Moreover, the Customs and Excise Division set the margin of dumping equal to the margin established by ministerial prescription for the three past contracts.

A calculation of the difference between the prescribed value of the equipment and the absolute margin of dumping indicates that the Soviet trading agency quoted an export price of $4,292,000 for the Mica project turbines. If the same bid had been submitted after the antidumping decision took effect, the importing agent would have had to pay the amounts represented by the absolute margin of dumping and the additional normal import duty on the margin of dumping. The net export price, that is, the bid price minus the duties, thus would have been reduced by 79.9%, to $861,000. If the Soviet trading agency had intended to realize the same net export price after the imposition of antidumping measures as it would have received before the decision, it would have had to increase its export price for the equipment to $71,533,333. In view of these figures, Customs and Excise seems to have understated the case in saying that "the nature of the prescription makes it very difficult for the Soviets to compete in the Canadian market because any future contract that they may enter into with a Canadian utility would result in automatic dumping."

In order to alleviate the situation Customs and Excise attempted to develop suitable alternative methods to estimate the value of

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117. See Turbines Case, supra note 3.
119. See id.
120. See supra note 103, Table 2, columns (2) and (3).
121. See supra note 103, Table 2, columns (3) and (4).
122. See supra note 103, Table 2, columns (1), (3), and (4). The total percentage of 79.9% is composed of a 69.5% antidumping duty on the export price, which corresponds to 41% of the prescribed value, plus 10.4%, or .15 (69.5%), of the export price for additional import duty. This second factor derives from the fact that the base value for duty would have been calculated by "advancing" the export price by an amount equivalent to the margin of dumping. The MFN (Most Favored Nation) rate of duty for hydraulic turbines at the time was 15%. For the sake of accuracy it should also be noted that the rate of antidumping duty calculated by Customs and Excise was 69.82%, rather than 69.5%.
123. The required export price (X) can be calculated with the following equation: 
\[ 4,292,000 = X \times 0.799X - 0.15(X-4,292,000) \] or 
\[ X = \frac{85(4,292,000)}{1-0.947} = 71,533,333. \] In the equation, the term .799X is the deduction due to antidumping action. See supra note 122. The term .15 (X-4,292,000) is the additional normal duty on the required price increase.
Soviet turbines. In March, 1981, five years after the initial prescription, the Deputy Minister finally issued a revised procedure. According to this procedure the normal value of hydraulic turbines originating in the USSR:

shall be determined on the basis of:

(a) the total contract price of a comparable hydraulic turbine, delivered and installed on site, manufactured in a country selected by the Minister, less all costs and charges attributable to the shipment of the hydraulic turbine from the factory to the site and its installation at the site, or

(b) where sufficient information has not been furnished or is not available to determine the normal value under paragraph (a), the export price of the hydraulic turbine, as determined under section 10 of the Anti-dumping Act, plus an advance of 35 per cent. . . . 125

While the provisions of paragraph (a) of the new procedure allow the Soviet Union to supply turbines under new contracts without automatically becoming subject to antidumping duties, there remains considerable uncertainty about its practical implementation. The Minister presumably will select a third country bid as a standard for comparison, that is, as a normal value, only after a bid has been submitted by the Soviet Union. Thus, the Soviet supplier will not know the normal value deemed by the Deputy Minister in advance. Furthermore, this "third country" approach makes it more difficult for a newcomer to enter the market, as the prescription may remove the new entrant's price advantage over competing foreign producers who are better established in the relevant market. Finally, the threat of automatic application of antidumping duties remains under the new procedure. 126 Although the procedure under section (b) reduces the prescribed margin of dumping from 69.82% of the export price to 35%, 127 the effect on the Soviet supplier may still be prohibitive, as the data for the Mica project demonstrate. 128 If the Soviet Union had submitted the same actual bid for the Mica turbines, the application of a 35% margin would have reduced the net export receipt by 40.2% from $4,292,000 to $2,265,000. 129 If, on the other hand, the Soviet agency had intended to receive the same net export price as it expected prior to antidumping action, the global bid would have been increased from $9,472,000 to $13,332,000. 130

126. See supra note 125 and accompanying text.
127. See supra note 103, Table 2.
128. See supra note 103, Table 2, columns (2) and (3). See also supra note 120 and accompanying text.
129. For the computation of the increase in the bid as a result of antidumping measures, see supra notes 122 and 123. The potential global bid is derived by adding the difference between $9,472,000 and $4,292,000 to the computed export price. A global bid is one for both the supply and installation of equipment.
All other things remaining constant, the Soviet bid still would have been the lowest in the Mica tender, but the closest Japanese bid would have exceeded the Soviet bid by only 7%, compared to a 51% advantage in the absence of antidumping action. If the new prescription had been in effect at the time, the Soviet trading agency might have been willing to absorb some additional duty to overcome the goodwill that the Japanese firms undoubtedly possessed as the established suppliers of turbines to B.C. Hydro. As a consequence, the net export price would have been reduced below the price level actually attained prior to the application of antidumping measures. In this situation, the cost to the domestic user of imported equipment would increase. The cost to the country as a whole, however, would fall, because the import price net of duties would fall. The duty collected would more than offset the price increase to the user. The difference between the price increase to the user and the gain in duties to the nation might then be called the “national gain” attributable to antidumping policy.

The prescription which was in effect from April 1976 to March 1981 most likely caused a net national burden, as it excluded the most competitive foreign bidder, the Soviet Union. The earlier prescription therefore favored more costly sources of imported hydraulic turbines. B.C. Hydro, which is the most significant purchaser of hydropower equipment to consistently entertain international bidding, has awarded two major turbine contracts since Mica and Site One. It awarded both contracts to Japanese producers. The first, a contract for three turbines for the Seven Mile project, may not be entirely relevant here, as it was awarded in May of 1975; the antidumping investigation concerning turbines from the Soviet Union officially did not begin until August of that year. The second contract involved four turbines for Revelstoke, and was awarded in September 1977. Thus, the bidding took place during the period of the prohibitive ministerial prescription. Fuji, which bid at a firm price of $26.5 million, won the Revelstoke contract.

131. See supra note 95, Table 1, columns (3)-(7).
132. See supra note 95, Table 1, column (5); see also supra note 97 and accompanying text.
133. See supra notes 127-32 and accompanying text.
134. Id.
135. See Ministerial Prescription, supra note 125.
136. See B.C. Hydro, List of Turbine Tenders, supra note 88 and accompanying text.
See also supra note 91 and accompanying text.
137. See B.C. Hydro, List of Turbine Tenders, supra note 88.
138. Id.
140. See List of Turbine Tenders, supra note 88.
141. Id.
The remaining four bids were higher and subject to escalation; they were submitted by two other Japanese producers, as well as MIL and DEW. The price the Soviet trading agency would have submitted for Revelstoke in the absence of antidumping action is impossible to determine. The lowest Japanese bids for Mica and Site One, however, exceeded the Soviet bids by 51% and 70% respectively. Calculating on the basis of the lowest potentially intervening Japanese bids for Mica and Site One, the avoidable cost attributable to antidumping measures for Revelstoke might have been as high as $9 to $11 million. The extra cost to B.C. Hydro would have represented an extra cost of the same magnitude to the country as a whole.

Essentially similar considerations apply in computing the burden of higher import prices in the Japanese generators case. The antidumping investigation in the generators case concerned competing bids for four generator contracts. B.C. Hydro awarded the

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142. Id.
143. See supra note 95, Table 1, columns (2) and (5). See also supra note 97 and accompanying text.
144. See supra note 95, Table 1, columns (2) and (5). See also supra note 98 and accompanying text.
145. See supra note 95, Table 1, columns (2) and (5). See also supra notes 97-98 and accompanying text.
146. This calculation disregards minor amounts of additional duties and taxes collected on the difference in import prices.
147. B.C. Hydro awarded the

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Table 3
Four Contracts for Hydro-Electric Generators Won by Japanese Producers in Competition with Canadian General Electric, 1975-79

<table>
<thead>
<tr>
<th>Name of Site</th>
<th>Number of Bidders</th>
<th>Winning Canadian Bid</th>
<th>Potentially Intervening Bids</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
</tr>
<tr>
<td>Peace Site One</td>
<td>6</td>
<td>Mitsubishi</td>
<td>CGE</td>
</tr>
<tr>
<td>- $1000</td>
<td></td>
<td>20,800</td>
<td>17,553</td>
</tr>
<tr>
<td>- CGE = 100</td>
<td></td>
<td>119</td>
<td>100</td>
</tr>
<tr>
<td>Seven Mile</td>
<td>4</td>
<td>Hitachi</td>
<td>CGE</td>
</tr>
<tr>
<td>- $1000</td>
<td></td>
<td>12,800</td>
<td>15,400</td>
</tr>
<tr>
<td>- CGE = 100</td>
<td></td>
<td>83</td>
<td>100</td>
</tr>
<tr>
<td>Revelstoke</td>
<td>8***</td>
<td>Fuji</td>
<td>CGE</td>
</tr>
<tr>
<td>- $1000</td>
<td></td>
<td>28,400</td>
<td>35,265</td>
</tr>
<tr>
<td>- CGE = 100</td>
<td></td>
<td>firm price</td>
<td>100</td>
</tr>
<tr>
<td>Hind's Lake</td>
<td>5</td>
<td>Hitachi</td>
<td>CGE</td>
</tr>
<tr>
<td>- $1000</td>
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<td>2,820</td>
</tr>
<tr>
<td>- CGE = 100</td>
<td></td>
<td>firm price</td>
<td>100</td>
</tr>
</tbody>
</table>


*All prices include charges for installation, and are subject to escalation, except as noted.
**These are potentially intervening bids from other Japanese companies [as per readout]. Where dumping was found on those bids, normal values should be substituted.
***Two of these bids are not presented in this table. MIL submitted one, quoting a $37,695,000 bid; the Swedish producer ASEA submitted the other, at a bid price of $54,464,000. Both bids were subject to escalation.
first three contracts, and Newfoundland Hydro awarded the fourth. Mitsubishi won the Site One contract, although CGE submitted the lowest bid. While the price difference actually appears to have been smaller than the 19% indicated by the bids, B.C. Hydro's willingness to accept the higher Japanese bid is evidence of the utility's determination not to purchase any more CGE generators, which had performed so poorly at Portage Mountain. It must be recognized that non-price considerations can be a strong factor in contract awards, and thus can complicate the analysis of the potential effects of antidumping action. B.C. Hydro might have continued to import generators in the absence of Japanese dumping, even if no potentially intervening bids with prices lower than CGE's had been submitted. On the other hand, how much more B.C. Hydro would have been willing to pay for imports, when faced with the choice of buying CGE generators, cannot be determined.

There actually were two other bids lower than Mitsubishi's for Site One, although one of these was marginally higher than CGE's. In the absence of dumping, B.C. Hydro might have awarded the contract to the Soviet trading agency, or to Westinghouse. Yet it is impossible to calculate the additional cost to B.C. Hydro that such a move would have entailed, because the decision to accept Mitsubishi's actual bid over the other two must have been based on non-price considerations. In the case of the Seven Mile generators, another complication arises. Although Mitsubishi's bid for Seven Mile might appear to be a "potentially intervening bid" as defined in the discussion of the Soviet turbines case, the antidumping ruling was directed against all hydroelectric generators imported from Japan. Thus, there is a possibility that the potentially intervening bid would also have increased as a consequence of

148. See CGE Generators Brief, supra note 147, at appendix.
149. See supra note 147, Table 3, columns (2) and (3). In December 1976 B.C. Hydro had awarded a fourth contract, for the Portage Mountain No. 10 generator, to Fuji. The Tribunal, however, did not investigate that item, because B.C. Hydro had exercised an option obtained under an earlier contract with the Japanese supplier. See Generators Case, supra note 4, at 9.
150. See supra note 147, Table 3, columns (2) and (3).
151. See supra note 147, Table 3, columns (2) and (3). During the Tribunal's public hearing it was explained that CGE's bid departed from the terms of B.C. Hydro's tender call, and that the cost of bringing the CGE bid up to specifications would have narrowed significantly its price advantage over Mitsubishi. See 2 Transcript of Public Hearing, Generators Case, at 37, 275-77 (1980) [hereinafter cited as ADT Generators Transcript]. The Tribunal called CGE "marginally the lower bidder" for Site One. Generators Case, supra note 4, at 10.
152. See supra note 147, Table 3, columns (3), (4), and (5) and accompanying text.
153. See supra note 76 and accompanying text. The Tribunal firmly rejected "the suggestion that certain individual Japanese suppliers should be exempted." Generators Case, supra note 4, at 13-14.
antidumping action. The same problem arises with Toshiba's bid for the Hind's Lake contract. In the case of the Revelstoke project, however, at least Westinghouse's fifth-ranking bid, which can be labelled a potentially intervening bid, was not threatened by antidumping measures. If antidumping action had forced B.C. Hydro to award the Revelstoke contract to Westinghouse, the additional cost of importing the equipment from the United States, rather than from Japan, would have amounted to well over $5 million, because Fuji had quoted a firm price, whereas the Westinghouse bid was subject to escalation.

Whether the importation of Japanese hydroelectric generators might have continued, or will continue in the future, in spite of the antidumping ruling remains uncertain. If Canadian utilities had continued to import Japanese generators, the imports might have cost more as a result of a decision preventing Japanese producers from competing at dumped prices. The magnitude of this extra cost is difficult to determine, but in 1980 the Tribunal reported that "according to B.C. Hydro, an injury finding would have the practical effect of precluding B.C. Hydro from future contracting with Japanese suppliers, forcing it to deal with other foreign suppliers with which it had no experience." B.C. Hydro may have had an interest in dramatizing the potential effect of a decision that would prevent Japanese suppliers from competing at dumped prices, as the authority obviously prefers to pay lower rather than higher prices. B.C. Hydro's prediction, however, might have been based on its insights concerning the way in which Custom and Excise intended to use its powers if the Tribunal found material injury.

The weighted average of the margins of dumping for the contracts subject to the investigation amounted to 52% of export prices. An official of Customs and Excise described the methodology for determining the margin of dumping: "Where possible, the normal values and export prices of the goods were determined under sections 9 and 10 of the Anti-dumping Act respectively. However, where insufficient information was provided, recourse was had to section 11." The reference to Section 11 implies that a ministerial

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155. See supra note 147, Table 3, column (6).
156. See supra note 147, Table 3, columns (2) and (4).
157. Generators Case, supra note 4, at 6. Incidentally, this quotation implies that buyers' cost arguments might not be completely lost on the Tribunal.
158. See supra note 65 and accompanying text.
159. Generators Case, supra note 4, at 6. Section 11 of the Anti-dumping Act states that "the normal value or export price, as the case may be, shall be determined in such a manner as the Minister prescribes, "if sufficient information has not been furnished or is not available for a determination under Sections 9 and 10. Anti-dumping Act, CAN. REV. STAT. ch. A-15, § 11 (1970). Sections 9 and 10 of the Act prescribe in detail the
prescription was used in the generators case as well as in the turbines case, apparently because the Japanese producers did not cooperate to the Deputy Minister's satisfaction. The margin of 52% might have been designed specifically to close the large gap between Fuji's price for Revelstoke and the firm-price equivalent of CGE's bid.\textsuperscript{160} In any event, available data suggest that B.C. Hydro would not have imported generators from Japan for the Site One and Revelstoke projects if a ministerial prescription raising all Japanese prices by 52% had been in effect during the 1975-79 period.\textsuperscript{161} Thus, those two contracts presumably would have gone to third countries. Acceptable third-country bids also might have been obtained for the Seven Mile generators if the Japanese producers had been expected to bid at much higher levels.

B.C. Hydro's prediction that the Tribunal's decision would force it to deal with untried foreign suppliers of hydroelectric generators may prove to be correct. B.C. Hydro will therefore bear the cost of changing suppliers, as well as the cost of higher import prices. There will be no offsetting gains elsewhere in Canada, so the additional cost to B.C. Hydro will represent a net national burden caused by the antidumping measures against generator imports from Japan.\textsuperscript{162}

\section*{C. Indirect Income Transfers to Domestic Producers}

CGE may not have expected to win any additional contracts for turbines and generators if dumped imports from the Soviet Union and Japan, respectively, were discontinued because of the imposition of antidumping measures. The domestic producer still may have had important reasons for obtaining antidumping protection. In particular, CGE apparently was concerned about the effect of dumping on prices for other contracts that the domestic producer hoped to win. This concern about preserving price levels was expressed most clearly in the CGE brief for the Japanese generators case:

\begin{quote}
there is not the slightest doubt whatsoever, in our appreciation of the market, that the continuing presence in that market of suppliers bidding at dumped
\end{quote}

\begin{quote}
formulæ to be used to determine normal values and export prices in various circumstances. \textit{Id} at §§ 9, 10.
\end{quote}

\begin{quote}
\textsuperscript{160}. The firm-price equivalent of CGE's bid is calculated by multiplying CGE's actual bid by a factor of 1.22, which is the ratio of two Westinghouse bids for Revelstoke, one firm and the other subject to escalation. The gap between the Fuji and CGE bids would have been closed if Fuji's export price had been increased by 52%. This would have entailed an effective increase of 59.8%, after considering the additional duty on the price increase.
\end{quote}

\begin{quote}
\textsuperscript{161}. \textit{See supra} note 147, Table 3.
\end{quote}

\begin{quote}
\textsuperscript{162}. This statement disregards minor adjustments that should be made for duties and taxes. To the extent that higher import duties and taxes are collected because of higher import prices, the burden to the country would be less than the burden to B.C. Hydro.
\end{quote}
prices has a real and depressing effect upon the prices at which domestic manufacturers bid for the same awards and in particular of course upon the prices at which they may succeed in obtaining awards in the face of dumped competition.\textsuperscript{163}

The brief also raised the possibility that Hydro Quebec, the most important customer for domestic hydroelectric equipment, might not continue its preferential procurement policy, under which domestic bids are preferred regardless of the magnitude of the price advantages the utility might obtain by inviting foreign bids. The brief concluded that “at the very least the domestic manufacturers may well be expected to quote prices to Hydro Quebec which reflect the presence of dumped Japanese competition in the Canadian market generally.”\textsuperscript{164}

Domestic producers commonly argue “price suppression” or “price erosion” before the Tribunal, which has consistently indicated that price erosion is an important factor in the determination of material injury, and ought to be prevented when it is caused by dumping. Price erosion presented a definite problem for the Canadian turbine and generator producers at the time of the Tribunal’s investigation of those products.\textsuperscript{165} Although the suggestion that Hydro Quebec might, indeed, discontinue its policy of eschewing foreign bids is not to be considered seriously, dumping very well might depress CGE’s prices, even in the “assured” sector of the domestic market. Hydro Quebec is apparently willing to subsidize MIL and CGE by purchasing Canadian equipment. Therefore, domestic producers can recover their “full” costs, and local workers can earn more than they would if MIL and CGE competed directly with foreign suppliers in the Quebec market. There appears to be a limit, however, to the margin of preference that can be justified. CGE must reduce its prices to competitive levels in Quebec, as well as in the other provinces, if certain provincial utilities are able to procure equipment at significantly lower prices by taking advantage of aggressive foreign bidding. The chief executive officer of CGE explained the reason for this phenomenon in a reference to the provincial utilities:

they are Crown corporations and they live in fish-bowls, and anything that any one of them does makes news in tomorrow’s paper, whether it is Vancou-

\textsuperscript{163} CGE Generators Brief, \textit{supra} note 147, at 17.
\textsuperscript{164} \textit{Id.} at 21. Note, this conclusion contains almost the exact wording as the conclusion in DEW’s brief in the Turbines Case. DEW Turbines Brief, \textit{supra} note 95, at 23-24.
\textsuperscript{165} During the public hearing for the Generators Case, the Vice-President and General Manager of the Power Generation Department of CGE was questioned as to whether the presence of dumping had led his company to lower its prices. His reply was: “We certainly have bid lower than we would otherwise have bid.” Counsel, however, prevented the witness from giving details in public. 2 ADT Generators Transcript, \textit{supra} note 151, at 86.
CGE, therefore, must seek a way either to avoid reducing its prices, or to restore its prices to a profitable level, without exceeding Hydro Quebec's justifiable margin of preference. In order for CGE to accomplish this end, provincial power authorities other than Hydro Quebec must be forced, through antidumping measures, to pay higher prices for their imports.

Thus, CGE can gain from antidumping action without winning even a single additional contract. In this situation, antidumping measures hide the true value of the subsidies that the domestic producers receive from Hydro Quebec. This additional hidden subsidy, which is made possible by removing dumped imports as a standard of comparison, may be regarded as a pure income transfer. CGE and MIL, or their workers, gain as much as Hydro Quebec, or the Quebec public at large, loses by subsidizing domestic production. The net national burden of this camouflaging action consists of the increase in import prices that provincial power authorities other than Hydro Quebec have to pay, plus the other costs related to protecting the subsidies.167

Deterrence of dumping by other foreign countries also results in indirect transfers of income to domestic producers. The so-called Ansaldo episode vividly illustrates that it is to CGE's advantage to obtain antidumping protection, even if it could not hope to win additional B.C. Hydro contracts.

On the last day of the public hearings in the Japanese generators case, counsel for CGE read into the record the generator bids, which had been opened on the previous afternoon, for Newfoundland Hydro's Upper Salmon development.168 The lowest bid had been submitted by Ansaldo of Italy.169 CGE submitted the second-ranking bid, which was 36% higher than Ansaldo's.170 There were also four other bids from foreign producers; three were European, and one was Japanese.171 The prices exceeded Ansaldo's bid by up to


167. These costs include litigation, administration, and costs of "rent-seeking behavior." For a discussion of "rent-seeking behavior" see Krueger, The Political Economy of the Rent-Seeking Society, 64 AM. ECON. REV. 291 (1974).


169. Id. at 224.

170. Id.

171. Id.
Counsel for CGE stated that calculations by his client suggested "unmistakably that there is a strong prima facie case that the Ensaldo (sic) price is a deeply dumped price."\(^172\) He invited the Tribunal to direct the Deputy Minister to initiate an investigation into whether the Italian producer had dumped generators.\(^174\) Counsel for the Japanese producers immediately joined CGE's counsel in making this request, and concluded:

What I'm saying, in effect, is that if that we're going to look at anybody who has caused, is causing or is likely to cause material injury, that the scope of the inquiry must necessarily be broad enough to include anyone, any and all people, who are in the marketplace.\(^175\)

Naturally, the Japanese producers' interests lay in extending the coverage of the antidumping ruling, if they were aware that their case was lost with regard to future imports.

As it happened, the Italian producer did not obtain the Upper Salmon contract. The Deputy Minister expeditiously issued a Notice of Investigation concerning hydroelectric generators from Italy.\(^176\) The Notice referred to the Tribunal's recent finding concerning Japanese generators, and suggested that the loss of the Upper Salmon contract was likely to cause material injury to CGE. Six months later, the Deputy Minister gave notice of his intention to terminate the investigation, stating that "on June 12, 1980, the contract under investigation . . . was awarded to the complainant, Canadian General Electric" and consequently, there was no longer evidence of potential injury to CGE.\(^177\) Apparently, Newfoundland Hydro wished to avoid the prospect of becoming involved in an antidumping case, and of having to pay an antidumping duty on the Italian generators. The Tribunal's Japanese generators finding left little doubt that dumped imports from Italy would be subject to antidumping duty, even if a contract award could have been granted prior to the Tribunal's decision on the new case. Furthermore, Newfoundland Hydro, not the Italian firm, would have been responsible for paying the antidumping duty, because the authority had acted as its own importer.\(^178\)

\(^{172}\) See id.
\(^{173}\) Id. at 225.
\(^{174}\) Id.
\(^{175}\) Id. at 226.
\(^{176}\) 114 CAN. GAZ. 1841 (Part I, Mar. 7, 1980).
\(^{177}\) 114 CAN. GAZ. 5943 (Part I, Sept. 27, 1980).
\(^{178}\) More experienced end users of potentially dumped goods tend to deal through the Canadian-based importing agents of the foreign suppliers. The advantages of such an arrangement follow from §§ 6 & 33(1) of the Anti-dumping Act, which state that antidumping duties must be paid by the importer. Anti-dumping Act, CAN. REV. STAT. ch. A-15, §§ 6, 33(1) (1970).
The Ansaldo episode illustrates the general proposition that a finding of material injury by the Tribunal, while narrowly focused on dumped imports from a particular country, can deter dumping from other countries. It appears, however, that CGE was not so certain that it could rely on the deterrent effect. Following the Deputy Minister's Notice of Termination, the Canadian producer asked the Tribunal to investigate the question of injury arising from, presumably, future dumping of generators by Italian producers. When the Tribunal declined to initiate the requested investigation, CGE appealed the Tribunal's decision in the Federal Court.

Applying this experience to the turbines case might suggest that, since the 1976 decision against the Soviet Union, other foreign producers have abstained from dumping in the Canadian market. CGE would have been expected to request that the Tribunal extend the finding against the Soviet turbine-producers to other suppliers, if there had been evidence of significant dumping of turbines in the bidding for B.C. Hydro's Revelstoke project.

IV. THE NET NATIONAL BURDEN IN CASE OF IMPORT SUBSTITUTION

A. THE DOMESTIC BUYERS' SACRIFICE

When Newfoundland Hydro awarded the contract for the Upper Salmon generators to CGE rather than Ansaldo, the cost of the project increased by approximately $1 million. This amount represents the sacrifice the utility decided to make because Ansaldo's bid had become an unattractive option as a result of the impending antidumping action. Although the $1 million increase represents the cost to Newfoundland Hydro of government intervention, antidumping action did not necessarily cause a $1 million burden to the country as a whole. The reason is that the Upper Salmon contract did not involve continuing importation; rather it involved

180. Id. CGE later withdrew its appeal. 116 CAN. GAZ. 5014 (Part I, Jul. 10, 1982). In May 1982, CGE filed another complaint alleging injurious dumping of hydro generators by Ansaldo, id., although CGE had just won a contract for two generators for Newfoundland Hydro's Cat Arm development project over the Italian producer. Id. at 5016. National Revenue responded by initiating an investigation. Id. at 5014-17. The Notice of Investigation made it clear that price suppression was the basis for CGE's complaint: "there is evidence that the continuing presence of allegedly dumped bids by Ansaldo in the Canadian market has prevented the recovery of Canadian prices to the level which prevailed prior to the Japanese dumping, now curtailed." Id. at 5016. The case is not expected to reach the Tribunal before the end of 1982.
181. The Ansaldo episode clearly foreshadowed the new procedures that have been proposed to increase the deterrent effect of Canadian antidumping law. See Stegemann, Special Import Measures, supra note 11.
182. See ADT Generators Transcript, supra note 151, at 224.
“import substitution.” CGE expected to benefit by winning the contract award. Factors of production directly or indirectly employed by CGE most likely also gained because of the additional order. Thus, in the case of import substitution, the national burden or benefit of antidumping action is computed by subtracting the producers’ gain from the buyers’ loss. The focus of this subsection will be the buyers’ sacrifice. A demonstration of the calculation of the producers’ gain in the case of import substitution, as well as a determination of the net burden or benefit to the country, will follow.

In the foregoing analysis of the continuing importation situation, data for turbine and generator contracts were used to quantify the cost of antidumping action to importing provincial utility companies, under the assumption that government intervention would have caused buyers to switch to other foreign sources. The same data now will be used to compute the cost of antidumping action to domestic utilities under a radically different assumption. That assumption is that antidumping action in each case would have caused the domestic buyer to award the turbine or generator contract in question to CGE rather than to a foreign producer. This assumption renders considerations such as the existence of potentially intervening bids, or the buyers’ dissatisfaction with the domestic producers’ performance, less important than they were in the case of continuing importation. At the very least, the evidence on disputed past contracts indicates the magnitude of the sacrifice that CGE must have expected the provincial power authorities to make by purchasing domestic equipment rather than dumped imports.

As previously noted, both CGE (DEW) and the Soviet trading agency submitted bids for the three disputed turbine projects; the

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183. It is not surprising that this assumption accords with CGE’s position on the dumping question. If Canadian General Electric Company Limited, Submission to the House of Commons’ Sub-Committee on Import Policy (April 1981) [hereinafter referred to as CGE Submission, Import Policy]. CGE asserted, “from 1975 to 1979 CGE lost four major orders for hydro-electric generators to Japanese manufacturers” because of dumping. Id. at 6. CGE suggested that the Tribunal should not have accepted data on potentially intervening bids as evidence that past dumping had not caused injury, unless it could be established that these “intermediate” bids also were not dumped bids. Id. at 65-66.
Soviet Union won all three contracts. For these three projects, DEW equipment and installation would have cost between 29% and 85% more than the Soviet equipment and installation. If B.C. Hydro had purchased its turbines for the Peace Site One project from DEW rather than from EMEC, the authority would have paid an additional $21.6 million on that contract alone.

A comparison of the CGE bids and the winning Japanese bids

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### Table 4

<table>
<thead>
<tr>
<th>Name of Site</th>
<th>Canadian Bid $1000</th>
<th>USSR Bid $1000</th>
<th>Difference Difference $1000</th>
<th>Difference (2)=100</th>
<th>Non-Price Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mica Creek** firm bids</td>
<td>DEW</td>
<td>Energomach</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$15,549</td>
<td>9,472</td>
<td>6,077</td>
<td>64</td>
<td></td>
</tr>
<tr>
<td>Peace Site One firm EMEC bid and DEW equivalent</td>
<td>DEW</td>
<td>EMEC</td>
<td>47,000***</td>
<td>25,384</td>
<td>21,616</td>
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<tr>
<td></td>
<td>39,691</td>
<td>22,122</td>
<td>17,569</td>
<td>79</td>
<td></td>
</tr>
<tr>
<td>Mactaquac firm EMEC bid and DEW equivalent</td>
<td>DEW</td>
<td>EMEC</td>
<td>8,290***</td>
<td>6,451</td>
<td>1,839</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$7,000,000 subject to escalation</td>
</tr>
</tbody>
</table>

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The Soviet Union shared the Mica Creek contract with Hitachi, the second lowest bidder. These are escalated DEW bids. For the Peace Site One bid, see 2 ADT Turbines Transcript, supra note 95, at 52. The Mactaquac bid has been adjusted using the same proportion. See supra note 184, Table 4, column (4).

B.C. Hydro chose EMEC's firm price for the Site One project. The escalated DEW equivalent was named during the Tribunal's hearing by Counsel for B.C. Hydro. See supra note 184, Table 4. The figure of $47 million is an *ex ante* estimate. It implies a total escalation factor of 18.4% of the global bid for a period of at least 3-4 years from contract award to expected shipment. The corresponding factor for the two EMEC bids is 14.7%. *Id.* at columns (1) and (2).
in the generators case suggests a similar conclusion.\textsuperscript{187} The percentage differences between the CGE and the Japanese prices range from minus 16\% to 61\% of the Japanese prices.\textsuperscript{188} At the time of the bidding for the generator projects, B.C. Hydro was deeply dissatisfied with the performance of generators supplied by CGE for the Portage Mountain project.\textsuperscript{189} As a result, the authority was unwilling to purchase any more CGE generators of the same design. Thus, B.C. Hydro's sacrifice in buying CGE rather than Japanese generators would have been greater than mere price differences indicate; it is difficult to discern exactly how great the additional cost would have been. The buyer's pure price sacrifice for the Revelstoke project alone would have amounted to $17.4 million.\textsuperscript{190} This figure accounts for the fact that Fuji's price was firm, whereas CGE's bid

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|l|l|l|}
\hline
Name of Site & Canadian Bid $1000 & Winning Bid $1000 & Difference $1000 & Difference (2) = 100 & Non-Price Differences \\
\hline
Peace Site One & CGE & Mitsubishi & 17,553 & 20,800 & -3,247 & -16 \\
 & & & CGE departed from terms of tender call difficulties with CGE design \\
Seven Mile & CGE & Hitachi & 15,400 & 12,800 & 2,600 & 20 \\
 & & & CGE departed from terms of tender call difficulties with CGE design \\
Revelstoke & CGE & Fuji & 35,265 & 28,480F & 17,400** & 61 \\
 & & & Fuji quoted firm price \\
Hind's Lake & CGE & Hitachi & 2,820 & 2,240F & 1,000** & 45 \\
 & & & Hitachi quoted firm price \\
\hline
\end{tabular}
\caption{Buyers' Sacrifice in Case of Import Substitution for Hydroelectric Generator Contracts, 1975-79*}
\end{table}

\textsuperscript{187.} See CGE Generators Brief, supra note 147; List of Generator Tenders, supra note 147.

\textsuperscript{188.} See supra note 187, Table 5, column (4). The negative difference for Peace Site One indicates that the CGE bid was lower than the winning bid. See supra note 152 and accompanying text.

\textsuperscript{189.} See supra notes 75-76 and accompanying text.

\textsuperscript{190.} See supra note 187, Table 5, column (3). The $17.4 million difference between Fuji's firm bid and CGE's escalated price implies a total escalation factor of 30.1\% of CGE's global bid for a period of at least 5-6 years between the contract award and the time of expected shipment. In the case of the Hind's Lake project, the difference was computed by analogy to the escalation adjustment suggested for Newfoundland's Upper Salmon project during the generator hearing. See supra note 187, Table 5, column (3).
was subject to escalation.\textsuperscript{191}

\textbf{B. THE DOMESTIC PRODUCERS' GAIN}

The gain to domestic producers in the import substitution situation also will be calculated based on the assumption that, in the absence of dumping, the disputed turbine and generator contracts would have been awarded to CGE, or its subsidiary, DEW. CGE has compiled its own estimate of the potential impact of the generator contracts that were the subject of the 1980 investigation:

In specific terms, we can document that Japanese dumping of these five hydro-electric generator orders alone would have represented at least $75 million in sales to CGE and at least 1.2 million man-hours of work to employees of our company alone. It should be understood in no uncertain terms that this represents 600 man-years of \textit{unemployment} that Japanese manufacturers have 'exported' to Canada.

In addition, the impact which this dumping constitutes in terms of orders lost to Canadian suppliers of materials such as copper bar, silicon steel, steel plate and sheet, etc. (had these hydro-electric generators been manufactured in Canada) . . . represents at least an equivalent number of man-years of indirect employment by Canadian suppliers of these materials.\textsuperscript{192}

CGE estimated that the value of foregone employment earnings to CGE employees was $15 million, as well as "at least that amount again to employees of CGE's Canadian suppliers."\textsuperscript{193} The probable loss to the federal and provincial governments of corporate, personal, and other tax revenues was estimated at $15 million.\textsuperscript{194} Finally, CGE claimed that the loss in Canadian value added, adjusting for multiplier effects, totaled $260 million.\textsuperscript{195}

In computing these losses or potential gains, CGE apparently assumed that all Canadian resources that could have been employed in domestic execution of the orders in question remained completely idle when the contracts were awarded to foreign suppliers. In economists' terms, CGE assumed that the "opportunity cost" of producing the five sets of generators domestically would have been zero.\textsuperscript{196}

\begin{thebibliography}{99}
\bibitem{191} It was observed earlier that CGE's prices probably would have been higher in the absence of dumping. For this reason, the estimates in Table 4, \textit{supra} note 184, and Table 5, \textit{supra} note 187, must be regarded as the lower bounds of the sacrifice that CGE expected the importing provincial utilities to make. The "price erosion" argument has been reconfirmed by CGE. \textit{See} CGE Submission, Import Policy, \textit{supra} note 183, at 64.
\bibitem{192} CGE Submission, Import Policy, \textit{supra} note 183, at 7. The CGE brief refers to 5 generator contracts, although only 4 were the subject of the Tribunal's investigation. \textit{See} \textit{supra} note 149.
\bibitem{193} \textit{Id.} at 8.
\bibitem{194} \textit{Id.}
\bibitem{195} \textit{Id.}
\bibitem{196} "Opportunity cost" in this case is defined as the value of other goods and services that would not have been produced if the resources in question had been used to make the five sets of generators domestically.
\end{thebibliography}
This is an extreme assumption, and it implies that the net national benefit of import substitution is very great. Indeed, the benefit, where the opportunity cost is zero, equals the cost of imports; that is, each dollar spent on imported generators would represent a dollar wasted, from the national point of view.

It would be equally extreme to assume that the domestic producers' prices were exactly equal to the opportunity cost of domestic production. This assumption would imply that all factors of production, firms, capital owners, and tax collectors, received just as much for other work as they would have received if CGE had won the disputed generator contracts. Under this assumption the domestic producers' gain obviously would have been zero, and the net national burden of import substitution would have been equal to the domestic buyers' sacrifice.

Presumably, the opportunity cost of producing the five sets of generators domestically would have fallen between the two extremes. Thus, domestic producers as well as the tax collectors would have gained something if CGE had won the disputed contracts. These total gains, however, would have been less than the sales value of the contracts. The crucial question is whether the producers' and tax collectors' gains from import substitution would have been larger than the buyers' losses. Unfortunately, this question can not be approached directly, because no concrete figures for the opportunity cost of producing equivalent hydroelectric equipment domestically are available.

The estimates that CGE provided in its brief to the Sub-Committee on Import Policy can be used in combination with other available information to demonstrate approximately how the total value of the five generator contracts would have been shared among various domestic participants, if those contracts had been awarded to

197. See infra § IV(C) and note 222 for a discussion of the various ways of calculating the net national burden or benefit of import substitution.
198. In this case, the net national burden for the four contracts listed in Table 5 would be equal to the buyer's price sacrifice in column (3) adjusted for non-price differences, plus duty collected on the imported generators. See supra note 187, Table 5, column (3).
199. See infra notes 222-44 and accompanying text, for a discussion of what evidence is available.
An examination of six important categories reveals that any claims that the total sales value could have been added to gross national product (GNP) is tenuous at best. Furthermore, a more detailed discussion of conceptual problems makes it possible to specify the information that is required to quantify the social opportunity cost of import substitution.

Transportation costs are the first category that has to be considered. Assume Canadian made generators were transported from Ontario or Quebec to the relevant power site by domestic carriers. If these carriers had spare capacity, the national gain from the generator shipments would have been equal to the freight revenue minus any incremental costs. If, in the absence of the generator orders, the carriers were employed at full capacity, a gain could have arisen only to the extent that the difference between freight revenue and incremental cost would have been larger for the transportation of generators than for the "next best" alternative use of the transport facilities. Indeed, the social cost of shipping the generators conceivably could have been greater than the freight paid if the freight rates understated the true opportunity cost, or shadow price, of using the facilities. In some instances, hydroelectric equipment, such as partly assembled turbines, would have to be shipped from the East to British Columbia sites via the Panama Canal. The use of such a lengthy route would be due to "bottlenecks" which prevent bulky loads from

\[
\begin{array}{ll}
\text{(1) Freight} & 5.0 \\
\text{(2) Installation (subcontractors' share and local labour)} & 10.0 \\
\text{(3) Wages and Salaries of CGE Employees} & 15.0 \\
\text{(4) Wages and Salaries of Employees of CGE's Canadian Suppliers} & 15.0 \\
\text{(5) Taxes (excluding taxes that would have been paid by employees)} & 9.0 \\
\text{(6) Residual for Overhead, Profit, and Imports of CGE and its Canadian Suppliers} & 21.0 \\
\text{(7) Total Value of Contracts at CGE's Prices} & 75.0 \\
\end{array}
\]

*This is a rough estimate based on information for one contract.
**These installation prices can be inferred from CGE Generators Brief, supra note 147, at appendix; List of Generator Tenders, supra note 147. For line (2) it has been assumed that two thirds of total installation costs would go to subcontractors and local labor and the remaining third would go to CGE employees and overhead.
***See CGE Submission, Import Policy, supra note 183, at 7-8. It is assumed, for the computation of taxes in line (5), that the taxes on employment income in lines (3) and (4) would have amounted to 20% of the total, or $6 million.
****See CGE Submission, Import Policy, supra note 183, at 7-8. Prices as tendered during 1975-79 would have been subject to escalation.
200. See supra note 200, Table 6, line (1).
passing overland. In that situation, the domestic portion of the freight from a West coast port to the B.C. Hydro site would have been nearly identical for both domestic and imported equipment. The sea freight would be treated as an import cost in any event. For these reasons, the total freight paid for shipping the domestic equipment to British Columbia might be regarded as an opportunity cost to the country, and no national gain could be claimed on this account.

Similar considerations apply to the cost of installation. Assume that installing imported equipment requires as much subcontracting and local labor as does the installation of domestic equipment. In this situation, the domestic producers can claim no gain. If the installation of domestic equipment would have required more local work, a gain would accrue only if the local resources would otherwise have been idle, or less productively employed. For instance, in the Soviet turbines case, the installation of CGE turbines would have put more local people to work than the Soviet design, because the CGE turbines were more bulky. Given the notorious tightness of British Columbia's construction labor market, it seems safe to conclude that little benefit would have resulted from the additional installation work if CGE had won the disputed contracts.

CGE submitted figures on wages and salaries to support its claim that, in dumping generators, Japanese manufacturers "exported" at least 1200 man-years of unemployment to Canada. In CGE's view, import substitution could have created domestic employment worth $30 million in additional earnings to domestic labor. The CGE figures, however, may vastly overstate the potential gains from producing the disputed generators in Canada. Even if materials suppliers had hired an additional 600 man-years of labor to satisfy CGE's additional requirements, a large proportion of this labor presumably would have been hired away from other employment, as unemployment tended to be low among the highly skilled workers required by the material supplies industries. Thus, the wages of CGE's suppliers' labor could, for the most part, be eliminated from the list of potential national gains.

Similarly, the wages of CGE's employees would be less of a factor in computing the national gain if CGE had created 600 man-years of additional employment by expanding its work force of highly skilled personnel. In the late 1970's, the Canadian electrical industry was "suffering from a shortage of highly-skilled exper-

202. See supra note 200, Table 6, line (2).
203. See supra note 200, Table 6, lines (3) and (4).
204. Id.
enced tradesmen and technical workers which is expected to become more pressing over the next three to five years." Thus, if CGE had hired new skilled workers, little additional employment would have resulted overall. It is not likely that any permanent layoffs by CGE would have created unemployment, because skilled labor was in great demand by other employers that were located close to CGE's plants. Claims of a potential increase in employment would look different, however, if they addressed the hiring of unskilled labor or the avoidance of temporary layoffs.

Whether or not it is valid to consider wages of CGE's employees in computing the potential national gains thus depends on how CGE arrived at its figure of 600 man-years of additional employment. During the Tribunal's hearing, the General Manager of CGE's Power Generation Department conceded that his company would not have had the capacity to produce the additional five sets of generators covered by the disputed contracts. He did contend, however, that "the extremely long cycle of the design and manufacture of hydro generators . . . brings with it an element of flexibility in both planning and carrying out of the hiring and training of personnel and the putting in place of additional key machine tools and other facilities." At least some of the 600 man-years thus would have consisted of newly hired skilled personnel; these man-years would have had an opportunity cost approximately equal to the wages paid by CGE. The General Manager's testimony emphasized that expansion of capacity would have been required only to alleviate bottlenecks in CGE's design and manufacturing operations. In other words, while the execution of additional orders would have required CGE to hire some skilled labor and to expand physical facilities, these orders also would have permitted a greater utilization of existing personnel and facilities.

One should thus distinguish three categories of labor. The first consists of those workers who might not have been laid off temporarily if CGE had won the additional orders. These workers had almost no social opportunity cost because they did not consider seek-

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206. Statement by Mr. Walter R. Fell on behalf of Canadian General Electric Limited, Public Exhibit No. CGE-5, Generators Case, at 20 (hearings 1980) [hereinafter referred to as Fell Statement]. See also 1 ADT Generators Transcript, supra note 151, at 21-89 (public portion of cross-examination).

207. See Fell Statement, supra note 206, at 21.
ing other employment during CGE's temporary lay-offs.\textsuperscript{208} Other workers who actually lost their jobs at CGE might have had an opportunity cost lower than the wages that CGE would have paid, because they had acquired job-specific skills, which were worth less in alternative employment. Finally, a third category of workers, which CGE retained only because the "costs to the business of laying off people and attempting to replace them at a later time is very high,"\textsuperscript{209} might have been used more productively if the company had won the additional orders. The measure of CGE's opportunity cost for this category of labor is the value of output that would have been foregone if these workers had been used to execute the generator orders that CGE claims it lost because of Japanese dumping. A more productive use of underemployed labor would have resulted in a gain to CGE.\textsuperscript{210} CGE employees also might have benefited by overtime pay, productivity-related premiums, and promotions.

Similar considerations apply to the utilization of existing physical facilities.\textsuperscript{211} If a machine had excess capacity, the opportunity cost of using it for the additional generator orders would have amounted to the cost of fuels, wear and tear, and additional maintenance. If other work employed the machine to capacity, CGE still might have given the production of additional generators priority. In that case, the measure of the opportunity cost of using the machinery would have been either the value of the output replaced by the disputed contracts, or the additional cost of producing the replaced output in some other fashion. If CGE could not avoid its prior commitments, or if sacrificing those commitments would have been too costly, the opportunity cost of producing the generators might have included the costs of subcontracting, importing components, or using additional facilities.\textsuperscript{212}

\textsuperscript{208} See 2 ADT Generators Transcript, supra note 151, at 24-32, 59. Much of the specific evidence on CGE's layoffs was revealed only in camera.
\textsuperscript{209} Fell Statement, supra note 206, at 10.
\textsuperscript{210} This gain should be included in the category of residual for overhead. See supra note 200, Table 6, line (6).
\textsuperscript{211} Id.
\textsuperscript{212} The residual in line (6) of Table 6 thus designates the maximum potential net gain to the domestic producer, and its suppliers, from winning the disputed contracts. See supra note 200. Subtracting the opportunity cost of using the existing facilities, the cost of alleviating bottlenecks, and the cost of importing components and services from the residual gain yields a more accurate approximation of the domestic producer's gain.

The import content of CGE generators appears to be low, as Mr. Fell testified, "For nearly forty years, C.G.E. has carried out \textit{all} engineering and manufacturing work for its hydro generators, with over 95% Canadian content in its products." Fell Statement, supra note 206, at 3.
Finally, CGE's estimate of the potential tax gain constitutes a benefit only to the extent that its $9 million figure represents a net increase in tax revenues, rather than a substitution for taxes that either accrued on alternative outputs or were paid on Japanese imports.

Data that would permit a conclusive determination of the gain that CGE could have made by executing the additional generator contracts are not available. The Tribunal's proceedings, however, provide indirect evidence suggesting that the potential gain might have been substantial. This indirect evidence pertains to CGE's pricing policy in export markets. CGE introduced evidence on export markets to demonstrate the threat of future injury from Japanese dumping in the Canadian market. The evidence indicated a growing discrepancy between Japanese production capacity and Japanese demand for hydroelectric generators, as well as increasingly aggressive Japanese bidding for projects in third countries during the late 1970's. A CGE witness concluded:

The continuous low price bidding of the Japanese manufacturers requires other manufacturers, as a matter of survival, to attack this low price strategy. As a result, each manufacturer will seek to meet the Japanese prices on an occasional project but are [sic] unable to sustain a competitive position against such a continuous barrage.

It may be inferred that market conditions occasionally forced CGE, as well as other producers, to match Japanese prices in export markets. Thus, the company might have gained substantially if it had been able to replace some of its export orders with domestic contracts. Given protection against Japanese dumping in the Canadian market, CGE presumably could have obtained domestic contracts at prices well in excess of the aggressive Japanese prices that the company had to contend with in third country export markets.

In the 1970's, export shipments accounted for approximately 40% of CGE's total shipments of hydrogenerators. The Canadian subsidiary is regarded as "the technology leader for the General Electric organization worldwide" in this field. CGE claimed, however, that its successful export business could not continue

213. See supra note 200, Table 6, line (5).
214. See, e.g., Statement by Mr. Gordon E. Drew on Behalf of Canadian General Electric, Public Exhibit No. CGE-7, Generators Case, at 1, 16 (hearings, 1980) [hereinafter cited as Drew Statement].
215. Id. at 16. See also 1 ADT Generators Transcript, supra note 151, at 206-21 (statement); 2 ADT Generators Transcript, supra note 151, at 107-45 (cross-examination).
216. See Bid Prices for Hydro Generators-Exports, Public Exhibit No. CGE-10, Generators Case. For a list of 14 export orders for hydrogenerators that CGE won during 1970-79, see CGE Generators Brief, supra note 147, at appendix.
217. Fell Statement, supra note 206, at 3.
“unless C.G.E. is able to obtain a substantial volume of orders from the Canadian domestic utilities.” Given worldwide excess capacity for heavy electrical equipment, it appears to be inevitable that incremental-cost pricing will prevail for the foreseeable future in markets that are open to foreign bidding. CGE expects that by invoking the Anti-dumping Act against Japanese manufacturers of hydrogenators, it can protect itself in all regions of the domestic market against aggressive competition “at prices which appear to bear no relationship whatever to normal cost structures or profit requirements.”

CGE regards a secure domestic market as a prerequisite to future growth of its capacity. As the General Manager of CGE’s Power Generation Department observed during the Tribunal’s hearing:

in making a presentation to our board of directors for additional equipment and facilities, we get more attention when we talk about the Canadian domestic market than about some speculative market worldwide. . . . The Canadian domestic market is much more important to us from the point of view of forward planning and credibility.

Domestic producers presumably hope that the antidumping ruling will, in addition to increasing their share of domestic orders at more lucrative prices, prevent "price erosion" in areas of the market that would have been relatively safe without the Tribunal’s decision. Prevention of “price erosion” can be expected even if antidumping measures would not enable producers to secure any additional domestic sales.

C. THE NET BURDEN OF IMPORT SUBSTITUTION

There are two essentially equivalent definitions of the net national burden or benefit of import substitution. One calculation of the net national burden of import substitution involves subtracting the buyer’s loss from the producer’s gain, then adjusting for differences in duties and taxes collected. The result of this calculation represents a national “burden” if the buyer’s loss exceeds the producer’s gain, and a “benefit” if the producer’s gain exceeds the buyer’s loss, after adjusting for differences in duties and taxes. Alternatively, the net burden or benefit of import substitution can be determined by comparing the social opportunity cost of the replaced imports with the social opportunity cost of producing substitute goods domestically. The following discussion of the net burden of

218. Id. at 23.
219. Id. at 24.
220. 2 ADT Generators Transcript, supra note 151, at 58.
221. See supra § III(C).
import substitution employs the latter approach.\textsuperscript{222}

This discussion will continue to disregard the administrative costs of litigating and implementing antidumping measures, which can be substantial. Furthermore, no attempt will be made to introduce equity considerations. Thus, the analysis is based on the assumption that a dollar gained by domestic producers or tax collectors is as valuable in terms of national welfare as a dollar sacrificed by domestic buyers.\textsuperscript{223} To simplify the presentation, assume that incremental import duties and incremental taxes may be ignored, because both amounts are either trivial or roughly cancel out. Assume also that the prices of all inputs that the domestic producer can employ or lay off reflect the inputs’ marginal social opportunity cost. These assumptions permit an analysis of the net burden or benefit of import substitution, based on a comparison between foreign bid prices and the domestic producer’s private opportunity cost.

Reliable information on the social or private opportunity cost of domestic production is not generally available. Under its current mandate, the Anti-dumping Tribunal does not concern itself with investigating the national benefit or burden that can be expected to result from its decisions. The Tribunal concerns itself solely with the

\textsuperscript{222} It is easy to show that the two definitions are equivalent. According to our first definition, the net benefit or burden of import substitution (NB) can be expressed as:

\begin{equation}
\text{NB} = \text{PG} - \text{BS} - \text{DI} + \text{DT}
\end{equation}

The definition simply says that the net benefit or burden is equal to the difference between producers' gain (PG) and buyers' sacrifice (BS), minus the amount of import duty (DI) that the government collected on the imports in question, plus any incremental domestic taxes (DT) that would have been collected had these imports been replaced by domestic production. The buyers' sacrifice is defined as the difference between the prices that buyers would have paid for domestic goods if dumping had been prevented (PD) and the prices that buyers actually paid for imports in the absence of intervention (PI).

See supra note 182 and accompanying text. Thus:

\begin{equation}
\text{BS} = \text{PD} - \text{PI}
\end{equation}

The prices should include transportation and installation costs in all cases. Furthermore, note that the definition of buyers' sacrifice disregards "welfare triangles." This definition assumes that price differences of the relevant magnitude do not affect the quantity of turbines and generators demanded by provincial utilities.

The domestic producers' gain is defined as the difference between their prices (PD) and their private opportunity cost (OC). Thus:

\begin{equation}
\text{PG} = \text{PD} - \text{OC}
\end{equation}

By substituting (2) and (3) into (1) we obtain:

\begin{equation}
\text{NB} = (\text{PD} - \text{OC}) - (\text{PD} - \text{PI}) - \text{DI} + \text{DT},
\end{equation}

or

\begin{equation}
\text{NB} = (\text{PI} - \text{DI}) - (\text{OC} - \text{DT}).
\end{equation}

Equation (5) represents the second definition in the text, as (PI - DI) is the social opportunity cost of imports, and (OC - DT) is the social opportunity cost of domestic production, assuming that the prices of all variable inputs reflect the marginal social opportunity costs of these inputs.

\textsuperscript{223} This assumption implies that it is unnecessary in this context to discuss questions such as "why should consumers of electricity in British Columbia subsidize producers of hydroelectric equipment in Ontario and Quebec"?
question of whether import-competing domestic producers would be better off in the absence of dumping. This determination is made without regard to the cost to domestic buyers, or to the national interest. Although much of the evidence considered by the Tribunal under its present mandate is also relevant to the net national burden of antidumping measures, decisive quantitative evidence usually is discussed only in the Tribunal’s in camera sessions. The following summary of a confidential comparative analysis of the contracts for the Mica Creek and Peace Site One turbines, however, is available in the Canadian producer’s public brief for the turbines case: “In each case, the estimated Russian F.O.B. factory price was less than 40% of D.E.W.’s F.O.B. factory price and was approximately equal to D.E.W.’s material costs only.”

This evidence on factory prices suggests that in the turbines case import substitution would not have been in the national interest. If the Soviet exporter sold turbines at prices approximately equal to DEW’s material costs, turbines of equivalent quality could not have been produced in Canada at a lower social opportunity cost. Any utilization of physical facilities that had an alternative use, and any employment of highly skilled production labor, would have been wasteful from a national point of view, because similar turbines could have been imported at the cost of materials only.

CGE and its subsidiary, DEW, cited the above evidence to emphasize the seriousness of the domestic producer’s situation, and concluded: “It is for sound and obvious reasons that D.E.W. fears for the continued existence of its hydraulic turbine business and contemplates the disappearance of that business if Russian dumping continues without the imposition of Anti-dumping duties.”

Given the chronic state of excess production capacity in the world market, terminating its turbine business might have been a realistic alternative for CGE. Even if the Soviet exporter, after paying its “entrance fee,” had raised its price to the market level, which is generally determined by the Japanese, CGE still would not have been able to sell in the open sector of the Canadian market at prices high enough to cover its full, or long run, costs. Hydro Quebec, which buys only from domestic producers, is expected to have diminishing requirements for hydro equipment in the future. Moreover, the utility might become tired of supporting two domestic producers.

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224. ADT Turbines Brief, supra note 95, at 18. According to Pratten, materials and components account for about 45% of the total production costs of turbo generators. C.F. Pratten, Economies of Scale in Manufacturing Industries 198 (1971). This implies that the domestic producer’s prices were set to cover at least its full cost.

225. ADT Turbines Brief, supra note 95, at 19.
CGE could hope to preserve its heavy electrical equipment business at its present scale, or at any scale, only by invoking the protection of the Anti-dumping Act, and forcing all provincial utilities to accept at least Japanese domestic prices, plus a 15% normal import duty. Although these considerations provide an adequate explanation of CGE's reasons for seeking antidumping protection, they do not explain why such protection might be in the national interest.

D. The Possibility of Market Failure

Import substitution would have created a net national benefit if the domestic producers' opportunity cost of providing equivalent turbines and generators had been lower than the prices that domestic buyers paid for the imported equipment. The evidence cited by CGE in the turbines case suggests that, in that case, the opportunity cost of domestic production would have exceeded the prices paid for imports; import substitution thus would have resulted in a net national burden.

For the generators case, no such direct evidence is available. It is worthwhile, however, to use the circumstances of the generators case to explore the conditions under which importation might have occurred, even though the opportunity cost of domestic production would have been lower than the prices paid for imports. This situation is termed "market failure"; if it had occurred, it could have resulted in importation that was wasteful from a national point of view. Market failure in this context means that the domestic producer, who lost several generator contracts to foreign bidders, quoted prices that were too high from society's point of view. The following discussion concerns the potential reasons for market failure. The essential question is why it might have been in the interest of the domestic producer to quote the prices it did, although the producer could have secured additional contracts at prices that would have covered more than its short-run opportunity cost.

The domestic producer's behavior in quoting the prices it did was probably not a result of underestimating the potential agressive-

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226. Import substitution results in a national benefit if \( (P_I - D_I) > (O_C - D_T) \). As we have assumed in the text that \( D_I \) and \( D_T \) are either negligible or roughly equal to each other, a national benefit results if \( P_I > O_C \), or \( O_C < P_I \). See supra note 222, equation (5).

227. See supra note 224 and accompanying text.

ness of foreign competitors. Although CGE could not have known in advance exactly how low it would have had to bid in order to win a particular contract, CGE's experts, in preparing any major tender, work diligently to find out what the market level is:

We have to look at those people who are qualified to bid, very often there is a prequalification and we do know who is going to be bidding and we look back at their past practice in the recent periods and look at our estimations of their shop loadings and see where they might be. Believe me, sometimes we do very well in our estimates.229

The Canadian company and its United States parent have been active and successful participants in international hydroelectric equipment markets for many years. Therefore, it is hardly believable that these companies miscalculated on all the turbine and generator contracts investigated by the Tribunal. Nor could such a miscalculation explain the large recorded price differentials.

At an early stage, CGE may have miscalculated its bids by overestimating the deterrence value of Canadian antidumping policy. In 1971, CGE apparently threatened the Canadian agent of the Japanese generator producer Fuji with an antidumping complaint during the bidding for the Portage Mountain project.230 CGE's bid for the Portage Mountain Number 9 generator was 45% higher than Fuji's.231 Apparently, the threat failed, as B.C. Hydro awarded the contract to Fuji soon after.232 It was only eight years later that CGE succeeded in activating the Anti-dumping Act against future imports of Japanese generators.233 At that time the domestic producer also succeeded in discouraging Newfoundland Hydro from awarding a generator contract to Ansaldo of Italy, whose price was 36% lower

229. 2 ADT Generators Transcript, supra note 151, at 122 (testimony by Mr. Walter R. Fell).
230. During the generator hearing, counsel for the Japanese manufacturers introduced a letter that the Canadian agent for Fuji had received in December 1971:

Re: Portage Mountain Development
Generator 9
B.C. Hydro Contract 180.
Dear Sir,

We act on behalf of Canadian General Electric Company Limited. We are advised that our client has discussed with the Assistant Deputy Minister of National Revenue, Customs Division, Ottawa, your bid for Generator 9 for the Portage Mountain Development. Our client was informed that the Department of National Revenue was prepared to conduct a full investigation under the provisions of Canadian anti-dumping laws on receipt of a formal complaint.

We will advise our client to register such a complaint in the event that your tender is successful.

2 ADT Generators Transcript, supra note 151, at 153.
231. See List of Generator Tenders, supra note 147.
232. Id. The Japanese producer's name has been used in the text to simplify identification of a bid. The B.C. Hydro contract for the Fuji generator was in fact awarded to Nissho-Iwai Canada Ltd., of Vancouver.
233. See Generators Case, supra note 4.
than CGE's.\textsuperscript{234}

Despite the low deterrence value of the Anti-dumping Act with regard to the importation of generators before the Tribunal's 1980 finding, the existence of the Act may have provided a reason for CGE to continue bidding at prices that were higher than desirable from society's point of view. Assume that CGE had an opportunity cost low enough to make additional contracts marginally lucrative at prices that were low enough to meet the foreign competition. In that situation, CGE might not have had an interest in cutting prices, because the company hoped to gain more in the long run by invoking antidumping protection. CGE may have found it necessary to claim lost contracts if it wished to claim material injury. Evidence of profits lost due to "price suppression" on contracts that CGE won might not have been enough to persuade the Tribunal that antidumping protection was warranted.\textsuperscript{235}

In the case of antidumping protection, there thus may exist a "moral hazard" problem that is familiar from the literature on commercial insurance.\textsuperscript{236} The problem is that the insured party may not have an incentive to prevent or reduce damage that is covered by insurance when the cost of prevention would be less than that of the damage. Thus, more damage occurs with insurance than would occur without insurance. In the context of antidumping policy, domestic producers may decide to forego contracts that would have been advantageous from a social point of view. They have to "lose" a certain number of contracts before they can expect the antidumping authorities to validate the producers' "right" to charge higher prices in all regions of the domestic market than they would in international markets.

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\textsuperscript{234} See supra notes 168-78 and accompanying text.

\textsuperscript{235} In the end, it was the hypothetical threat of future loss of contracts that brought about the Tribunal's finding of likelihood of future injury. See supra notes 50-55, 77-85 and accompanying text.

When CGE had decided to meet low import prices in British Columbia, Hydro Quebec and other utilities would have been pressured to insist that CGE’s prices also be reduced for its loyal, or captive, customers. This price erosion in other parts of the domestic market could have reduced substantially the marginal revenue that CGE might have obtained by cutting prices in areas open to import competition. It is plausible, therefore, that CGE’s expected marginal revenue was less than its opportunity cost, even if the prices to be met exceeded the opportunity cost of producing the equipment domestically.

This type of market failure occurs where the domestic producer enjoys a preferred position in certain provinces. Price erosion in the protected areas of the market may be a function of the company’s own defensive price cutting in “open” areas, rather than a function of aggressive price cutting by foreign suppliers alone. To this extent, market failure is independent of the Anti-dumping Act. If concern about repercussions in other provinces had been CGE’s only reason for not meeting the unusually low foreign prices in British Columbia, CGE’s most rational option would have been to withdraw from the battleground, because the preparation of tenders for custom-designed hydroelectric equipment is very costly. The fact that CGE continued bidding on B.C. Hydro tenders without any reasonable hope of winning a contract suggests very strongly that CGE’s objective was to activate antidumping protection.

The likelihood of market failure becomes more remote if the domestic producer has export opportunities. CGE has always been active in export markets for hydroelectric equipment. One aspect of the export market business that CGE understandably dislikes is the tendency of export prices to fall below full cost because of worldwide excess capacity. From a national point of view, however, a domestic company’s sale at Japanese prices in South America is just as valuable as replacing Japanese imports with domestic products in British Columbia. Differences in transport costs to the two markets might even favor export sales. Given such export opportunities, it

237. See supra notes 164-67 and accompanying text.
238. MIL, the other domestic producer, which was not a complainant before the Tribunal, made the decision not to participate in tenders that were open to aggressive foreign competition. Note, however, that it is very hard for any bidder to know in advance who else will participate in a tender. Furthermore, firms unwilling or unable to make a bid with a chance of winning still may bid to leave their “visiting card,” because they expect to do business with the same customer on future occasions. On the reasons why MIL discontinued bidding on turbine tenders open to Soviet participation, see 1 ADT Turbines Transcript, supra note 95, at 188-91.
239. See supra note 217 and accompanying text.
becomes almost impossible for CGE's opportunity cost to be less than the cost of B.C. Hydro's imports.  

Intra-industry trade thus helps to prevent market failure, which might result from a producer's monopoly power in the domestic market. CGE finds it desirable to force B.C. Hydro to pay full-cost prices by eliminating aggressive competition from foreign producers in the Canadian market. Yet, such import replacement would not increase national welfare, because B.C. Hydro would lose at least as much as CGE would gain. Government intervention thus cannot be justified on efficiency grounds when the domestic producer is in a position to export at roughly the same prices at which imports are being bought.

There appear to be some doubts, however, concerning CGE's ability to export. In 1980, the Tribunal supported its finding of future injury in the generators case by noting that:

CGE has recently suffered a slump in the acquisition of new export business. As a result, foreign orders now booked will have been almost fully processed by 1981. . . . In view of the long lead times from tender award to manufacturing activity and the present state of CGE's order book it seems almost inevitable that in a couple of years CGE will find itself with much of its generator capacity unutilized.

There are various possible explanations for CGE's failure to acquire more new export business. One possibility is that the company was less willing to meet deteriorating world market prices because it was counting on additional domestic orders, which are more lucrative than export orders. Thus, CGE's anticipation of antidumping protection may have contributed to its expectation that, without increased protection, it would suffer from low utilization of its production capacity. Another possibility is that CGE's pricing behaviour in export markets was constrained by unwritten arrangements limiting the aggressiveness of western producers. In a recent brief, CGE refers to the existence of an international cartel: "Reports have circulated for several years that the International Electrical Association, whose membership consists of many of the non-North American manufacturers of heavy apparatus, functions as a cartel to allocate orders between its members and to set prices for up to nine major product groupings of heavy apparatus."  

240. Indeed, CGE's opportunity cost might be higher than the cost of imports, as the company appears to be able to export at prices exceeding Japanese world-market prices, because its contracts are tied to Canadian development aid. See 2 ADT Generators Transcript, supra note 151, at 74.
241. Generators Case, supra note 4, at 12.
242. CGE Submission, Import Policy, supra note 183, at 23. On the existence of international price agreements for heavy electrical equipment, see Epstein, Power Plant and Free Trade, in REALITIES OF FREE TRADE: TWO INDUSTRY STUDIES 113-17 (D. Burn
author has no evidence as to whether the international General Electric organization has felt obliged to show similar restraint, and has refrained from meeting unusually aggressive Japanese prices in certain markets. CGE appears to be more reluctant than some producers, however, to secure export orders by using certain commercial practices euphemistically referred to as "commissions." "For example, there have been allegations in the media that large non-North American electrical manufacturers made ‘payoffs and kickbacks’ of up to $140 million to secure the Itaipu hydro-electric contract in South America. Canadian General Electric tendered unsuccessfully on this project." 243 If the domestic producer's export opportunities indeed have vanished because of such constraints, it might be in the national interest to replace imports in periods of underutilized domestic capacity and underemployment of specialized labor. The existence of these constraints does not, however, justify protection for expansion of capacity, or expansion of employment of skilled labor, which has a high opportunity cost elsewhere in the economy.

Finally, CGE may have been less aggressive in acquiring export orders because it calculated that the opportunity cost of filling export orders, without increased protection of domestic sales opportunities, would be higher than the prices it could obtain in competition with the most aggressive foreign producers. If that is the case, it seems likely that the domestic producer's cost also would exceed the exceptionally low prices that provincial utilities paid for the disputed imports. Replacement of these disputed imports thus would not be in the national interest, unless there was a discrepancy between the private and the social opportunity cost of domestic production, and the social opportunity cost of domestic production was less than the cost of imports. 244

E. THE MYTH OF PREDATORY PRICING

Antidumping policy is often regarded as a defense against so-called "predatory pricing" by foreign producers. The argument that it is in the national interest to protect domestic producers against

243. CGE Submission, Import Policy, supra note 183, at 23.
244. Discrepancies between private and social costs were assumed away at the beginning of this section. This assumption can be justified in view of the strong demand for highly skilled labor during the period under investigation, and in view of the extremely long lead times that are used in this industry. These factors usually make it possible for employers to avoid abrupt and massive layoffs. For a discussion of how the rationale of antidumping policy is affected in situations where the private cost of labor exceeds its social opportunity cost, see K. Stegemann, Efficiency Rationale, supra note 87, at 35-44.
predatorily priced imports is tenuous in the abstract, and invalid in the turbines and generators cases.\textsuperscript{245} Clarifying what is meant by predatory pricing will demonstrate the weaknesses of this argument.

A businessman regards the pricing practices of competitors as "predatory" if they encroach on his traditional market and "rob" him of customers that he considers his own. Businessmen try to avoid cutting prices on sales they would make anyway. Therefore, penetration of new markets, or of markets that are less secure, frequently is achieved by price differentiation in favor of new or less secure customers. Dumping is the colorful, though legally dignified, term that is applied to describe price differentiation in international markets. If dumping by foreigners causes injury to domestic producers, the latter are generally correct in complaining about "predatory pricing," provided the domestic producers simply mean that aggressive foreign pricing causes them to lose customers, or forces them to cut their own prices in defense. Yet, the fact that foreign competition is aggressive and involves selective price cutting is not a sufficient reason to conclude that protection against dumping is in the national interest. On the contrary, in many oligopoly situations very little price competition would occur if price differentiation were eliminated.\textsuperscript{246}

Narrower definitions of predatory pricing are needed to support an argument for government intervention. The narrower definitions generally focus on the use of price differentiation to defend or enlarge the market power of dominant producers. Under these definitions, selective price cutting is employed by the dominant producers to discipline unruly competitors, or to eliminate rival producers. In either case, the predator hopes to recover the cost of temporary price cutting by making higher monopoly profits in the future. Thus, buyers may lose more in the long run than they gain, while prices are unusually low in the short run.

The use of short-term price cutting as a disciplinary tool does not apply to antidumping cases. Testimony to a legislative committee on behalf of CGE, however, suggested that the elimination of Canadian production had been a primary motivation for foreign competitors involved in the company's eight antidumping cases between 1969 and 1980:

most of these cases that we have had are extraordinarily predatory; the objective apparently is 'price is not the object, but let us get rid of the Canadian competitor' and they are in there 25 and 30 per cent below the price range

\textsuperscript{245} See generally id. at 29-35 and 54-57.
and that is a red light, I think.247

It is evident that CGE used the allegation of predatory pricing, in the narrower sense, to impress the committee with the urgency of the need to increase protection against dumping. Yet, strangely enough, there is no reference to this particular reason for dumping in either the antidumping legislation or the Tribunal's Rules of Procedure. Furthermore, predatory intent apparently was not an issue in any of the Tribunal's cases.248 In the turbines and generators cases, CGE's reasons for omitting claims about predatory pricing become obvious in light of the evidence presented in those cases.249 The existence of potentially intervening bids rendered implausible any argument that foreign dumping was intended to destroy the Canadian producer. The Soviet Union's extremely low bids clearly were aimed at winning turbine contracts against traditional Japanese suppliers in British Columbia.250 Similarly, the Japanese producers of generators must have been concerned more about other foreign competitors than about CGE, as B.C. Hydro was known to be disenchanted with the domestic producer.251 Thus the argument that the most aggressive foreign bidders expected to attain a monopoly position in the Canadian market by eliminating the domestic producer is inconsistent with the evidence in both the turbines and the generators cases.

The predatory intent argument is no more plausible when applied to the alleged threat of injury from future dumping. CGE's argument in the turbines and generators cases was built on the prediction that dumping would persist for the foreseeable future, and that foreign prices could be expected to remain substantially below CGE's desired prices because of worldwide excess capacity. It would have been obviously inconsistent with this prediction to argue that the elimination of the domestic producer would leave Canadian buyers susceptible to exploitation by a particular foreign producer, or group of producers.

Furthermore, proposing that antidumping action will protect domestic buyers against future exploitation by foreign producers clearly implies that domestic buyers are shortsighted enough to become dependent on foreign monopolies. This implies another type of market failure. What grounds are there to believe that inter-

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247. Minutes, supra note 166, at 8:16 (testimony of Mr. A.J. Cartwright, Chairman of the Board and Chief Executive Officer, Canadian General Electric Limited).
249. See supra §§ II and III.
250. See supra note 110 and accompanying text.
251. See supra note 76 and accompanying text.
vention by the federal government is required to protect provincial utilities such as B.C. Hydro from their own shortsightedness? If domestic buyers were not knowledgeable of international markets, why would domestic producers be unable to convince potential customers of the long-run advantages of buying domestic products? The possible existence of a “free rider” problem suggests one answer to these questions. That is, B.C. Hydro might hope to benefit from the existence of a relatively safe domestic supply of equipment, without having an obligation to support the domestic producer when cheaper alternative supplies are available. There are several reasons, however, why the free rider problem is not applicable to B.C. Hydro’s purchases of hydroelectric equipment. First, according to CGE’s evidence, it is possible that domestic production of certain lines of equipment might not have survived foreign competition without antidumping protection. Second, any domestic production capacity for turbines and generators remaining in the absence of antidumping protection would have been made available first to “loyal” customers. Finally, in times of tight supply, B.C. Hydro could not have expected to obtain better terms from CGE than from suppliers on the world market. Thus, there is no free rider problem in the case of hydroelectric equipment.

B.C. Hydro evidently is convinced that the long-run interest of the company and its customers would be served best by unrestricted international tendering. In light of ten years of antidumping action, and recent proposals to strengthen the deterrence effect of the Act, most provincial utilities understandably express greater concern about the very real threat of becoming dependent on a domestic monopoly, than about the relatively remote risk of becoming dependent on foreign monopolies.

Another conceivable cause of market failure is the shortsightedness of domestic investors. Government intervention might be required if decision-makers within CGE, or potential sources of investment funds, such as the banks, overreacted to a temporary slump in sales or prices, and refused to approve investments that would be in the long-run interest of the company and the country. The “corn hog cycle” in agricultural production is an example of using the shortsightedness of private decision-makers to justify government intervention.252 An industrial giant like CGE, however, probably does not suffer from this type of shortsightedness.

During the generators hearing, CGE argued that its Board of Directors was unwilling to approve investments which would have been critical in expanding the company’s hydroelectric equipment

capacity for key facilities, as long as the domestic market was threatened by dumped imports.\textsuperscript{253} The attitude of CGE's Board most likely reflected a realistic assessment that without additional protection against dumping, even the relatively modest investment required to alleviate bottlenecks would have been unwise. The money would have gone to waste because free market prices under circumstances of world-wide excess capacity would not have covered CGE's incremental cost of production, including the cost of new facilities. Protection against future dumping might make additional investment profitable for the company, but still might represent a waste of resources to the nation as a whole.

V. CONCLUDING REMARKS

Waste of the country's resources is not the Tribunal's concern under its current mandate. A finding of "material injury" only requires a determination of whether or not the complainant would be better off in the absence of dumping. Past experience shows that a finding of future injury may remain in force for ten years or longer.\textsuperscript{254} Special protection over such a long period certainly will encourage new investment, and the hiring and training of highly skilled labor. The Tribunal's hearings and decisions concerning heavy electrical equipment emphasize that the intent behind antidumping action in those cases was to assure the long-run viability of expanding domestic production, rather than to assist in a temporary emergency situation.

Import substitution almost certainly would have resulted in a net national burden if antidumping action had enabled CGE to win the turbine contracts that the company claims to have lost because of dumping during the early 1970's.\textsuperscript{255} There are no reasons to believe that import substitution will be less wasteful during the period for which the Tribunal's finding of future injury will be in effect. Similarly, it has been demonstrated that the buyers of turbines and generators would have suffered from higher prices on continuing imports, if antidumping measures for these products had been in effect during the 1970's.\textsuperscript{256} To the extent that importation continues in the future, the Tribunal's decisions will cause a national burden which must be added to any burden of import substitution, because buyers of

\textsuperscript{253} See supra note 220 and accompanying text.

\textsuperscript{254} 1 ADT ANN. REP., supra note 28, at 12-51. Note particularly the transformers decision, issued in November, 1970, and confirmed in April, 1977. \textit{Id.} at 42.

\textsuperscript{255} See supra § IV.

\textsuperscript{256} See supra notes 93-162 and accompanying text.
imports will pay higher prices than they would have in the absence of antidumping action.

Measuring the burden of the existing antidumping decisions is not possible, because data on the alternative cost of importation that would have applied in the absence of antidumping action is not available. Indeed, if Canada implements certain recent proposals to "strengthen" Canadian antidumping policy, it may never again be possible to observe the most advantageous import prices that Canadian buyers could enjoy in the absence of antidumping policy. The new proposals focus on deterring dumping. CGE, in particular, has recommended a "three-pronged" deterrence approach to prevent foreign producers from obtaining "free bites" in the Canadian market.\textsuperscript{257} If deterrence becomes effective without a specific decision by the Tribunal, it would no longer be possible to observe the best opportunities that importers are missing. Consequently, it would no longer be possible to evaluate the burden of antidumping policy.

Although this article has for the most part discussed two individual cases, a number of general conclusions on antidumping policy follow from the analysis of the net national burden in those cases.\textsuperscript{258}

First, antidumping measures can cause a considerable net burden to the importing country. This result is not generally understood. Indeed, it appears that in the view of the public, including the media, politicians, senior government officials, most lawyers specialized in trade matters, and many professional economists, the prevention of "material injury" to domestic production is coincident with prevention of injury to the country. Public awareness of the true nature of the benefits and burdens of the antidumping process would facilitate clarification of the objectives of antidumping policy. Assuming that antidumping policy ought to serve the national interest, it is essential that the Tribunal be given a mandate to investigate questions concerning the national burden, rather than merely the interests of import-competing producers.

The Tribunal could handle a broader mandate within the established limits on its time and resources. The Tribunal's decisions under this broader mandate could derive from the same type of evidence that is reviewed under the present mandate. In addition, the Tribunal might consider presentations from interested government agencies, such as the Bureau of Competition Policy. Formalization of the decision-making process under a new mandate might result in

\textsuperscript{257} See generally Minutes, supra note 166, at 8:8; Stegemann, Special Import Measures, supra note 11.

\textsuperscript{258} See also Minutes, supra note 166, at 26:4 (1982) (submission of Klaus Stegemann).
greater efficiency and predictability.\textsuperscript{259}

In addition, still assuming that antidumping policy ought to serve the national interest, the merits of antidumping action must be evaluated on a case-by-case basis before the protection becomes effective. In particular, the government should be most reluctant to make changes in the law that would strengthen the deterrent effects of antidumping measures. Whenever enforcement of antidumping law depends on deterrence, ascertaining whether the implementation of protection is in the national interest becomes impossible. A policy that depends on case-by-case implementation also requires that the parties opposing protective measures be given the time and opportunity to present relevant evidence.

Third, if the government is unwilling to broaden the Tribunal's mandate, preserving the case-by-case approach remains important, because only case-by-case investigation of the cause of injury can prevent the burden of higher import prices. If CGE's "three-pronged" deterrence approach had been in effect during the 1970's, the domestic producer might not have won any additional contracts, but domestic buyers of imports would have paid substantially higher prices.

Even assuming that the government is unwilling to broaden the Tribunal's mandate, increased public awareness of the potential burden of antidumping measures should help to restrain enforcement activities and other activities, such as advance monitoring, that tend to harass importers. Furthermore, it would be wise to make use of the currently available option of assessing antidumping duties at less than the margin of dumping.\textsuperscript{260}

At the minimum, the government should use its powers under the override provision of the Antidumping Act more regularly,\textsuperscript{261} and should waive or set aside antidumping measures when they would severely damage the national interest.\textsuperscript{262} An override should account for the objectives of other government policies, such as competition policy, and for adverse repercussions for Canada's exports, which might result from antidumping action against certain

\textsuperscript{259} For instance, the decision process could be formalized by analogy to the system proposed by Oliver E. Williamson. See Williamson, Saccharin: An Economist's View, in The Scientific Basis of Health and Safety Regulation 131-51 (R.W. Crandell and L.B. Lave eds. 1981).

\textsuperscript{260} This option is provided for in Article VI of the GATT, 4 General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents, and Article 8 of the Anti-dumping Code, Code, supra note 12, at Art. 8.


\textsuperscript{262} To the author's knowledge, the current Act has been waived only for pharmaceutical products. Anti-dumping Regulations § 23, 106 Can. Stat. O. & Regs. 876 (1972).
imports.\textsuperscript{263} The override should also account for the availability of domestic measures that might provide temporary assistance for injured industries or their workers, and would not force foreign suppliers to raise the prices of Canadian imports.

Finally, protective measures must not be maintained in perpetuity. While the Tribunal has pledged repeatedly that it will examine its findings to consider a formal review in regular intervals of about three years,\textsuperscript{264} there are always pressures from the affected industries and government agencies to continue the protection long enough to make new investment profitable.\textsuperscript{265} For this reason, strengthening the review provision of the Act seems advisable. Such an amendment should include a "sunset" clause, under which all special import measures would lapse five years after the original decision, unless it can be established that their continuation is in the national interest.

\textsuperscript{263} In this context, it should be noted that Article 8(1) of the Tokyo Round Antidumping Code includes an exhortation to the participating parties to reserve to themselves discretion in deciding whether to impose antidumping duties in individual cases. See Code, \textit{supra} note 12, at Art. 8(1). In fact, the European Economic Community (EEC) antidumping law requires that, before any duty is imposed, it must be shown not only that injurious dumping exists, but also that "the interests of the Community call for intervention." Council Regulation No. 3017/79, Arts. 11(1), 12(1), 22 O.J. EUR. COMM. (No. L. 339) 1 (1979).

\textsuperscript{264} A recent submission stated that the "Tribunal has instituted the practice of examining findings of material injury which have been in place for a minimum of three years." Presentation of the Anti-dumping Tribunal to the Sub-Committee on Import Policy of the Standing Committee on Finance, Trade and Economic Affairs, \textit{reprinted in Minutes}, \textit{supra} note 166, at 22A:5 (emphasis added).

\textsuperscript{265} "In timing of its reviews of injury findings, the Tribunal should recognize the long-cycle nature of capital goods transactions. Reviews of such findings should take place much less frequently than in the case of other goods." EEMAC \textit{SUBMISSION}, \textit{supra} note 32, at 5.
Appendix A

Canadian Anti-dumping Procedures

Complaint received from Canadian producer. DM may initiate investigation on his own.

Initial Enquiries.

DM is of the opinion that there is no evidence of injury. DM is of the opinion that there is no evidence of dumping. DM is of the opinion that there is no evidence of dumping and injury.

DM terminates proceedings. DM or complainant may refer question of injury to Tribunal.

Tribunal is of the opinion that there is no evidence of injury. Tribunal is of the opinion that DM initiates an investigation.

Investigation.

DM is satisfied that goods are being dumped and the margin of dumping is not negligible. DM concludes that there is no evidence of injury. DM is satisfied that there is insufficient evidence of dumping or that the dumping is negligible.

DM makes a Preliminary Determination of Dumping. DM makes reference to Tribunal. DM makes final reference to Tribunal. Goods are entered provisionally.

Tribunal makes a finding. (Provisional period ends).

Injury finding. No injury finding. Proceedings are terminated.

Anti-dumping duties are assessed on the basis of the Final Determination. Any provisional duty collected is refunded. Any overpayment of provisional duty is refunded.


Note: DM signifies Deputy Minister of National Revenue, Customs & Excise. Tribunal signifies the Anti-dumping Tribunal.
Appendix B
Activities of the Anti-dumping Tribunal, 1969-80

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Injury Findings Subsequently Rescinded under Section 31

|                |      | 2    | 3    | 4    | 3    | 2    | 3    | 4    | 1    |      |      |      | 22    |

Vintage of Injury Findings Still in Effect on 31 December 1980

|                |      | 1    | 1*   |      |      | 1    | 3    | 11   | 9    | 8    | 9    | 43*  |

Anti-dumping Tribunal, Presentation of the Anti-dumping Tribunal to the Sub-Committee on Import Policy of the Standing Committee of Finance, Trade and Economic Affairs, *reprinted in Minutes, supra* note 166, at 22A:20.

*The 1971 injury finding on monochrome and colour television sets was set aside by the Federal Court.
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