Case to Repeal the Antidumping Laws, The

Robert W. McGee
ARTICLES

The Case to Repeal The Antidumping Laws

Robert W. McGee*

I. INTRODUCTION

Antidumping laws were designed to protect domestic industry from foreign competition. They protect producers at the expense of consumers, which results in higher prices, lower quality products, less consumer choice and a general lowering of the standard of living for the vast majority of people. Antidumping laws also destroy more jobs than they create.

Part II reviews the theory and practice of antidumping law in the United States. It looks at the economic and legal background of the area, the administration of the antidumping laws, and computational problems involved in arriving at an antidumping decision. It also provides examples of antidumping investigations in the areas of autos, steel, textiles, agricultural products, and televisions and discusses the harmful effects of antidumping policy. It also explores the predatory pricing argument as applied to antidumping.

Part III discusses some philosophical issues relating to antidumping law and policy. It views the antidumping laws as a club that can be used to batter the competition at the expense of consumers and questions the ethics of using government for this purpose. It also points out the sill-

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ness of antidumping policy, since it in effect protects consumers from low prices, and develops a rights-based argument against antidumping laws.

Part IV concludes that antidumping laws are harmful, serve no useful purpose and should be repealed, the sooner the better.

II. ANTIDUMPING POLICY IN THE USA: THEORY AND PRACTICE

A. Economic and Legal Background

Antidumping laws have been on the books in the United States, in one form or another, for decades. Perhaps the first major antidumping law in the United States was included in the Revenue Act of 1916,\(^1\) which is sometimes referred to as the Antidumping Duty Act of 1916.\(^2\) This law was passed in response to alleged German predatory dumping during the First World War,\(^3\) and made it a crime to import foreign products for prices that were less than wholesale or actual market value.\(^4\) Since it was a criminal statute, perpetrators could be found guilty only upon a finding that there was an intent to harm or destroy an industry in the United States or to prevent such an industry from being formed.

Although this law has not yet been repealed, it was not used much until Zenith and National Union Electric Corporation filed charges against Japanese television manufacturers in 1974.\(^5\) The prohibition portion of the Act reads as follows:

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production,


\(^3\) Richard Dale, supra note 1, at 12. Also see Jacob Viner, Dumping: A Problem in International Trade 242-46 (1923; 1966).


or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: Provided, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States. 6

Because this law is a criminal statute, it has a penalty provision. That provision reads as follows:

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney’s fee. 7

Because the Antidumping Duty Act of 1916 was a criminal statute and had an intent requirement, it was difficult to convict anyone of dumping. Thus, the need was seen for another antidumping law, civil in nature, that would lower the level of proof needed to convict. The Antidumping Act of 1921 was passed to fit this purpose. 8 Curiously, though, the various Congressional hearings and investigations that were held at this time were unable to uncover much dumping.

In all the hearings that we had before the Committee on Finance there was not in any instance any showing of any dumping of foreign goods into this country... The price of almost every manufactured commodity is so much higher in the United States than anywhere else in the world that it is not necessary for the exporter from a foreign country to export it into this country at a less price than the same article is sold for in the markets of the producing country. 9

The Antidumping Act of 1921 is conceptually and institutionally similar to present-day antidumping law. 10 For example, it established the sanction of an offsetting duty that is equal to the adjusted price differential of the goods that are dumped and a two-pronged legal process

7 Id.
10 Knoll, supra note 2, at 269.
whereby one government agency (originally the Treasury Department but now the Department of Commerce) decided whether a product was being dumped and another government agency (originally the Tariff Commission but now the United States International Trade Commission) decided whether the dumping caused injury.\textsuperscript{11} Foreign manufacturers could not sell their products in the United States for less than fair value, which was defined as the price charged for the product in the home market. If a domestic industry was materially injured by the sale by the foreign company, the import was subjected to a duty that was equal to the difference between the price charged in the United States and the foreign market value of the product. For example, if the product sold in the foreign country for $10 and in the United States for $7, the duty would be $3. The Antidumping Act of 1921 was subsequently amended by the Trade Act of 1974,\textsuperscript{12} which was later superseded by the Trade Agreements Act of 1979.\textsuperscript{13}

The Tariff Act of 1930, also known as the Smoot-Hawley Tariff,\textsuperscript{14} affected trade in a different way, by placing penalties on foreign producers who received export subsidies from their governments. The Smoot-Hawley Tariff is generally recognized as deepening the depression in the United States by closing off the U.S. borders to foreign trade and causing other countries to retaliate by raising trade barriers of their own.\textsuperscript{15} U.S. foreign trade dropped by more than fifty percent the year after the Smoot-Hawley Tariff was passed.\textsuperscript{16} The Trade Agreements Act of 1979 added sections 731-740 to the Tariff Act of 1930. Most provisions of the Antidumping Act of 1921 were later merged into the Tariff Act of 1930 as well.\textsuperscript{17}

Antidumping investigations became relatively infrequent after passage of the Reciprocal Trade Agreements Act of 1934. Between the beginning of 1934 and October 1, 1954, only 146 dumping cases were brought against foreign companies, and only seven of them resulted in the imposition of dumping duties. In the next twenty-seven months, only one of the fifty-two cases the Treasury examined found both dumping

\textsuperscript{11} Id.
\textsuperscript{16} JAMES BOVARD, THE FARM FIasco 23 (1989).
\textsuperscript{17} See S. REP. No. 249, 96th Cong., 1st Sess. at 60-61, \textit{reprinted} in 1979 U.S. CODE CONG. & ADMIN. NEWS at 446-47.
and injury. 18

The Trade Agreements Act of 1979 incorporated the 1930 Tariff Act's dumping provisions and extensively amended the antidumping law in an attempt to improve its application and procedures. 19 It took effect January 1, 1980, the same day the GATT Antidumping Code entered into force in the USA. 20 The one major change brought about by the 1979 Act was the addition of an injury test 21 for countervailing duty cases. To determine whether an investigation should proceed, the ITC looks to see whether there is a reasonable indication that an industry in the United States (1) is materially injured, or (2) is threatened with material injury, or (3) if the establishment of an industry in the United States is materially retarded by imports. If not, the investigation is terminated. 22

Previously, subsidized imports were subject to a countervailing duty automatically. But since the passage of the 1979 Act, countries are entitled to an injury test 23 for subsidized imports if they signed the GATT Subsidies Code or subscribe to rules equivalent to those of GATT. Countries that do not fall into this category are still subject to a countervailing duty automatically. 24 A minor revision brought about by the 1979 Act resulted in giving domestic industries a greater interest in administrative procedures and increased court access. 25

The present antidumping law in the United States is based on the 1979 Act, with minor modifications, the most important of which is a 1984 amendment that requires injuries to be assessed by cumulating imports from competing countries that are subject to investigation. 26 Ever since 1967, when a number of industrial countries signed the Antidumping Code 27 as part of the Kennedy Round of GATT, the United States has enacted numerous trade laws and regulations aimed at preserving

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18 Bovard, supra note 9, at 114.
19 Note, supra note 5, at 512.
20 Id. at 513, n. 64.
25 Knoll, supra note 2, at 269; Victor, supra note 5, at 347-48.
26 Knoll, supra note 2, at 269-70 and n. 31.
“fair” competition or protecting various domestic industries from “unfair” competition.

The government’s attitude toward dumping has grown more protectionist in recent years. The 1979 revision to the antidumping laws made them more protectionist and Congress shifted the administration of the antidumping laws from the Treasury Department to the Commerce Department mainly because it wanted to see foreign companies get hit with more dumping penalties.28

B. Administration of the Antidumping Laws

Imagine a system of civil litigation in which a party serves a massive discovery request, consisting of interrogatories and requests for production of documents. Imagine further that the serving party has the sole authority to prescribe the time within which response must be made and the format (such as to require multiple copies and translation into English of all requested documents originally prepared in a foreign language). Imagine still further that the serving party is the sole judge of the adequacy of the response and of the merits of all objections as to relevancy or burdensomeness of the request; that the serving party also is the imposer of sanctions for failure to comply, and the ultimate decision-maker in the underlying matter for which the information is sought.

Such a system would be intolerable in the state or federal courts of the United States. It would raise serious questions of due process in a system of administrative law that separates the investigative from the judicial function within a single agency. But this is the inquisitorial system that was ordained by Congress for the administration of the antidumping and countervailing duty provisions of Title VII of the Tariff Act of 1930. Torquemada, no doubt, would be right at home with it. But this is hardly a recommendation for the system. It should be changed.29

One problem with the present system is the short period of time in which to conduct and complete the investigation. The law calls for the Commerce Department to make a preliminary determination within 160 days from the time the petition is filed and to reach a final determination seventy-five days after that, for a total of 235 days from the date the petition is filed until the matter is finally determined.30 The Commerce Department may extend a preliminary antidumping investigation for fifty more days and the final determination for sixty days, under certain

28 Bovard, supra note 9, at 114.
That might be sufficient time if the Commerce Department just asked for a few bits of basic information, and the short time deadlines would speed up the process. But it demands much more than just a few pieces of information. The standard questionnaire demands information covering all U.S. sales as well as sales in the company’s home market for a six month period. The data must be in a mandatory computer tape format. It will accept only IBM-compatible computer tapes.\(^2\) Much of what it demands is not useful, but is demanded so as to avoid criticism from the petitioner for not being thorough enough.\(^3\) If the target of the investigation thinks that the requirements being imposed by the Commerce Department are too onerous, there is no effective appeal, because the Commerce Department determines what is enough, when it should be presented and in what format it should be presented. Of course, the target company can go to the Court of International Trade,\(^3\) but that is costly and time-consuming, and the Commerce Department can exclude any information the target company wishes to present as not being in conformity with its own administrative requirements.\(^3\)

But the time element is not the main problem. It is the way the Commerce Department administers the antidumping laws, especially the demands for data that it places on foreign producers, which is sometimes unreasonable. In one case, it imposed a 115.82% dumping duty on uranium imports from six republics of the former Soviet Union.\(^3\) The prices the Commerce Department looked at were from the period before

\(^{31}\) The procedure actually can be a bit more complicated than that, and the final determination by the U.S. International Trade Commission may be made as late as 420 days after the petition is filed. For the specifics, see U.S. International Trade Commission, \textit{SUMMARY OF STATUTORY PROVISIONS RELATED TO IMPORT RELIEF} 8-16 (Washington: U.S. International Trade Commission, no date).

\(^{32}\) Palmeter, \textit{Torquemada and the Tariff Act, supra} note 29, at 644.

\(^{33}\) \textit{Id.} at 646.

\(^{34}\) At least one commentator has called for the abolition of the Court of International Trade because the multilayer review process that results from its existence is too time consuming and costly. He suggests its duties can be just as well performed by administrative law judges, and regular district courts, with appellate review. See Kevin C. Kennedy, \textit{A Proposal to Abolish the U.S. Court of International Trade,} 14 \textit{Dick. J. Int’l L.} 13-37 (1985).

\(^{35}\) Palmeter, \textit{supra} note 29, at 646-47.

these republics came into existence. As a result, they were being punished for Soviet pricing behavior.

As part of its investigation, the Commerce Department sent the six governments a sixty-six page questionnaire — in English, of course — that demanded detailed information regarding their uranium operations. It violated U.S. law by failing to provide them with copies of the full petitions that were filed by the domestic producers and a labor union that initiated the proceedings. The six CIS countries were found guilty of dumping because they failed to provide the thousands of pages of documentation demanded. The information could have been obtained, theoretically, from the Soviet Ministry of Atomic Power and Industry. However, that ministry was abolished a few months previously, and much of the information would have been top secret anyway.

The Commerce Department arrived at the 115% figure by taking some unsubstantiated numbers offered by the parties who filed the petition, and determining what their costs would have been if they had used Portuguese electricity, Namibian labor costs, and performed the work with Canadian efficiency. In arriving at its calculation, the Commerce Department assumed that, since Canadian uranium miners are four times as efficient as Czech miners, and since Czechoslovakia is also a nonmarket economy, then CIS miners must be only twenty-five percent as efficient as Canadian miners. Thus, they require four times as much labor, so the Commerce Department computed CIS labor costs accordingly. Bovard estimates that keeping uranium from CIS countries out of the United States will cost the fifty million American consumers of nuclear power up to $300 million a year for electricity.

The information demanded (not requested) by the Commerce Department can be overly burdensome. And companies that refuse to supply it do so at their own risk, since the Commerce Department has no qualms about pulling numbers out of the air to construct estimated figures if the company involved will not provide them. The average antidumping questionnaire is more than seventy pages long, single spaced. Companies have forty-five to sixty days to reply. But before they can reply, they must translate the questionnaire into their language, distribute it to numerous company employees who will be working on various aspects of the questionnaire, determine what information has to be

reported, then gather it, read and digest it. It is only then that they will be able to respond to the Commerce Department's demands for data.39

The Commerce Department can demand practically an infinite amount of information — and any refusal to comply is taken as a confession of guilt, after which it imposes the highest possible dumping margins. The Commerce Department collects vast amounts of confidential information from foreign businesses and has frequently allowed this information to fall into the hands of American competitors.40

Matsushita withdrew from an antidumping case involving small business telephone systems,41 thereby abandoning more than $50 million in export sales, because of the onerous requirements imposed by the Commerce Department.42 On a Friday afternoon, it received a demand by the Commerce Department to translate 3,000 pages of Japanese financial documents into English by the following Monday morning.

If the company in question does not provide the information the Commerce Department wants, the Commerce Department will construct the numbers it needs, using the "best information available" (BIA).43 But in many cases, this information is not very close to what the actual numbers would have been. In many cases, the Commerce Department uses data that is provided by the very companies that filed the petition, which means it has a high probability of being biased against the foreign producer. In fact, because of the way the Commerce Department can construct imaginary prices, it is entirely possible that it can find dumping even when prices are the same worldwide.44

The Commerce Department placed a particularly onerous and burdensome reporting requirement on SKF, a Swedish bearings manufacturer. Commerce demanded, and SKF supplied, information on more than 100 million separate sales. The first submission weighed three tons, was more than 150,000 pages in length, and included more than 4 billion pieces of information.45 As might be expected, there were a few mistakes in the data, which the company put together in about a week, the amount of time the Commerce Department gave it to respond. About one percent of the data from its German sales were in a form that was not suitable to the Commerce Department, so it ignored all the data the company

39 BOVARD, supra note 9, at 135.
42 BOVARD, supra note 9, at 136.
44 Knoll, supra note 2, at 280.
45 BOVARD, supra note 9, at 137.
supplied and worked up its own numbers, using the best information available. The result was a 180% dumping margin.

Another criticism that can be made of the way the Commerce Department administers the antidumping laws is the way it determines what data to use to compute a dumping margin. It usually examines just the data for the larger companies, and uses that data to determine what the dumping duty should be for smaller companies in the same country. These small companies can defend themselves by offering information on their own costs, but the Commerce Department does not have to consider these responses and can reject this information for any reason. In an action filed by the National Knitwear and Sportswear Association against Hong Kong sweater manufacturers, hundreds of Hong Kong companies were assessed a 5.86% duty because one company earned less than eight percent. Some small companies in Taiwan have also felt the wrath of the Commerce Department because they were not able to supply the information required. In one case, the Commerce Department demanded that the companies respond to a 100-page questionnaire, written in English, that required more than 200,000 pieces of information. The management of one of these companies consisted of a husband and wife team, but the Commerce Department found that lack of sufficient management was no excuse for not responding to the questionnaire. The Commerce Department imposed a duty on another Taiwanese company because it did not supply information. The fact that its factory had burned down and its records destroyed was not a sufficient excuse for failure to provide information. As a result of these and other cases, many Taiwanese sweaters now have a 21.94% dumping duty which, coupled with a thirty-four percent tariff, makes it very difficult, if not impossible, for Taiwanese sweater manufacturers to compete in the U.S. market. Within a year after the Commerce Department started its investigation of the Taiwanese acrylic sweater industry, more than two-thirds of the Taiwanese companies that produce acrylic sweaters went out of business. As a result of the investigation, the United States imported forty million fewer acrylic sweaters from Taiwan, Korea and Hong Kong in 1990 than in 1989.

Another criticism that has been made of the way in which the an-

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46 Id. at 138.
48 Bovard, supra note 9, at 139.
49 Id. at 155.
The antidumping law is administered both by the Commerce Department and the United States International Trade Commission. Sometimes there is a dispute about which agency is to do what. The Tariff Act bifurcated, or split, the duties for administering the antidumping law between these two agencies. The Commerce Department initiates antidumping and countervailing duty investigations, determines whether there has been dumping or subsidization, and publishes whatever orders result. The ITC determines whether a domestic industry has been materially injured or threatened with injury, or whether the growth of a domestic industry is being materially retarded. But which agency has the authority to decide whether a petitioner has standing to petition for relief? This issue is by no means clear, and comes up when it comes time to decide whether an investigation should be terminated for lack of standing.

C. Computational Problems

There are a number of problems with the way that dumping duties are computed. Many of the computations the Commerce Department uses violate generally accepted accounting principles, the principles companies have to use with their published financial statements. But the government does not have to follow generally accepted accounting principles, since these rules are promulgated by private groups, such as the American Institute of Certified Public Accountants and the Financial Accounting Standards Board. Some of the computations the Commerce Department uses to arrive at a dumping decision violate common sense as well. Below is a discussion of some of the major problems.

I. Shifts in Exchange Rates

In order to compare the foreign price with the domestic price, the foreign price has to be converted into dollars. The method used to make this conversion sometimes results in a charge of dumping. And it is a problem that cannot be avoided by the foreign seller because exchange

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50 For example, see Algoma Steel Corp. v. United States, 865 F.2d 240, 241 (Fed. Cir), cert. denied, 492 U.S. 919 (1989).

51 At least two commentators take the position that the Commerce Department has the sole statutory power to make standing determinations. See Edwin J. Madaj and Charles H. Nalls, Bifurcation Without Direction: The United States International Trade Commission and the Question of Petitioner Standing in Antidumping and Countervailing Duty Cases, 22 LAW & POL’Y INT’L BUS. 673-88 (1991). Curiously, both authors of this article are employees of the U.S. International Trade Commission.

52 For more on this point, see N. David Palmeter, Exchange Rates and Antidumping Determinations, 22 J. WORLD TRADE 73 (1988).
rates cannot be predicted in advance, and even if they could, it would not always be possible to avoid a charge of dumping, as we shall see shortly.

Let's take the case of the German Mark. If the exchange rate at the time the contract is signed is DM2.0 equals $1 and the price of the product in Germany is DM2.0 and in the United States is $1.00, then there is no dumping because the product sells in each market for the same price. But if the price of the Deutsche Mark appreciates against the dollar to 1.6, then there is dumping because the product then sells on the German market for DM2.0, which is now the equivalent of $1.25, which is $0.25 higher than the price in the United States. Thus, it appears that the German company is selling in the United States for a lower price than on the German market.**

In 1989, General Chemical de Puerto Rico, Inc. initiated an antidumping suit against a Venezuelan company for exporting aluminum sulfate to the United States for less than fair value. A weighted average dumping margin of 259.17% was arrived at by using the official exchange rate of 14.5 bolivares to the dollar rather than the 39.5 free market rate. In effect, the Venezuelan government's unrealistic exchange rate policy led to the expulsion from the United States of one of its companies. But that is not to say that the Commerce Department was justified in what it did, because it should not have used the official exchange rate anyway, since it deviated so drastically from the market rate.

Companies in countries that have hyperinflation can be especially hard hit by the Commerce Department's methodology. In one dumping case involving a Brazilian company that made steel wheels, the Commerce Department computed the selling price in the United States using the exchange rate in effect at the sale date, but based the company's cost of production on the rate that existed when the product was exported, several months later. Such methodology can result in a major distortion when the exchange rate declines rapidly as a result of hyperinflation.

What seems unfair about the Commerce Department's methodology is that foreign companies can be hit with a dumping charge even if there was no intent to dump. The number of dumping cases can increase if the Federal Reserve Board takes actions that result in driving down the value of the dollar in comparison to other currencies. In effect, the Com-

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53 If 1.6DM = $1, then 1.0DM = $0.625 [1.0/1.6] and 2.0DM = $1.25 [2 x $0.625].
See also BOVARD, supra note 9, at 116-17; DESTLER, supra note 41, at 394.
55 See Gilbert B. Kaplan, Lynn G. Kamarck and Marie Parker, Cost Analysis under the Antidumping Law, 21 GEO. WASH. J. INT'L L. & ECON. 357, 409-10 (1988) (suggesting a different methodology would be more appropriate where there is hyperinflation).
56 BOVARD, supra note 9, at 117.
merce Department has delegated the exchange rate determination to the Federal Reserve Bank, a private organization (nominally, at least).\textsuperscript{57} And the Commerce Department adjusts its exchange rates only once each quarter, so the rates it uses may be much different than those actually used in the marketplace. And if companies purchase currency futures contracts to protect themselves against fluctuations in exchange rates, the Commerce Department may impute a foreign exchange loss even though no loss has occurred.\textsuperscript{58} As a result, price comparisons can be distorted. This was the result in the case brought by the Floral Trade Council against a fresh cut flower exporter from Colombia.\textsuperscript{59}

N. David Palmeter points out an inherent flaw in the Commerce Department's methodology:

\ldots [T]he main problem \ldots [is that] the regulation requires conversion from foreign currency into U.S. dollars, rather than \textit{vice versa}. Conversion into dollars is necessary for valuation purposes, but it makes no sense in antidumping proceedings. \ldots

Theoretically, if the proper exchange rate is chosen, the result should be the same, but in practice it rarely, if ever, is chosen: in the real world it rarely, if ever, can be chosen. One problem lies in the notion that any single exchange rate will permit an accurate dollar-to-dollar comparison. Elements of the dollar-denominated export price, such as insurance and freight, are normally incurred in the exporter's currency, and consequently must also be converted into dollars. However, these items are likely to be contracted and paid for some time after the sales agreement for the exported merchandise. The Department's regulation calls for use of a single conversion rate for all elements of the transaction, i.e. the one in effect the day the exported merchandise was sold. Because a different rate was probably in effect on the day arrangements were made for insurance and freight, the practice is inherently distortive.

Even if this frequent problem is not present in a particular case, realistically it is not possible for the rate determined by the Federal Reserve to be the "proper" rate in any event; consequently, the claim that use of a proper rate prevents distortion collapses in the face of reality.\textsuperscript{60}

\textsuperscript{57} See Palmeter, \textit{supra} note 52, at 75 (raising the point that the Commerce Dept. uses exchange rates as determined by the Federal Reserve Bank). The present author was unable to find anything in the literature that explores the legality of the Commerce Department's delegation of authority to the Federal Reserve Bank. An exploration of this issue would make an interesting article.

\textsuperscript{58} BOVARD, \textit{supra} note 9, at 118.

\textsuperscript{59} Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, The Netherlands, and Peru, USITC Pub. 1877, Inv. No. 731-TA-327-334 (July 1986) (hereinafter "Certain Fresh Cut Flowers"); See also BOVARD, \textit{supra} note 9, at 118; DESTLER, \textit{supra} note 41.

\textsuperscript{60} Palmeter, \textit{supra} note 52, at 75-77 (citations omitted).
The Commerce Department departs from the quarterly rate only if there is a fluctuation of five percent or more between the daily rate and the preset quarterly rate. But in order to be liable for a dumping penalty, a company’s price need be only 0.5% lower than the home market price, or one-tenth the exchange rate fluctuation. So it is possible for the Commerce Department to find that a product has been dumped solely on the basis of its exchange rate computation, which is not sufficiently precise, given the narrow acceptability band used to determine the presence or absence of dumping.61

The courts have had problems with the Commerce Department’s exchange rate methodology. It is not reasonable for Commerce to find dumping by a firm with only ten relevant home market sales during the period of the investigation solely because of Commerce’s use of quarterly exchange rates. In this case the purpose of the antidumping laws would be violated if Commerce found a dumping margin based on the use of quarterly rates, while no margin would result if Commerce were to use the rates prevailing at the time of transactions.62

A more equitable approach would be to ignore price differentials that result merely from exchange rate fluctuations.

2. Computing the Cost of Production

In 1974, Congress added a cost of production test to determine whether dumping was taking place. For the first few years, this test was seldom used, but its use increased since 1980, when the Commerce Department took over the responsibility for investigating dumping allegations. Now, about two-thirds of all dumping investigations involve looking into a company’s cost of production or constructing value analyses.63 The Commerce Department allows a foreign company to charge a price that is high enough to cover its cost of production plus allow for a “reasonable profit,” which it considers to be eight percent.64 Companies that charge this price are considered to be charging a fair price. Anything less is considered unfair. Interestingly enough, many American companies do not make an eight percent profit, and would feel lucky if they could. To arrive at this fair price, the Commerce Department begins by estimating the material production cost,65 then it adds ten per-

61 Id. at 77.
63 Kaplan, Kamarck and Parker, supra note 55, at 358.
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cent for administrative overhead. The Commerce Department will not penalize companies that have an administrative overhead of more than ten percent, but if it is less than ten percent, they could be in trouble. In effect, the more efficient a company is, the greater its chances of being penalized for keeping its administrative overhead low.

After adding ten percent for administrative overhead, it adds an eight percent profit margin. It then adds the cost of all containers and coverings of whatever nature, and all other expenses that are incidental to placing the product in condition, packed ready for shipment to the United States. If the resulting total is higher than the price the company actually charges for its product in the United States, it will be punished for selling at a loss. Companies that charge a lower price are considered to be selling at lower than production cost. So if a company makes a six percent profit, the Commerce Department considers it to be incurring a two percent loss.

This methodology can be criticized on several counts. For one thing, the ten percent overhead allocation is totally arbitrary and has nothing to do with the overhead cost a particular company might incur. Ironically, companies that have an overhead of significantly more than ten percent might actually be selling at a loss in the U.S. market, although the Commerce Department figure might show them making a profit. And companies that keep their overhead low are penalized for being efficient. And the Commerce Department will ignore the evidence if a company attempts to show that it is actually making a profit if the Commerce Department’s computations show that it is taking a loss.

The eight percent profit requirement also can be criticized on several counts. For one thing, it is totally arbitrary. Profit margins are different for different industries, yet the Commerce Department does not take that into account. Many of the top American companies listed in the Fortune 500 do not make that high a return. The Big-three automakers often make a negative return, in the sense that they lose hundreds of millions or even billions of dollars in some quarters.

The Commerce Department uses several questionable accounting techniques as well, which sometimes result in inflating a foreign company’s cost of production. For example, if a foreign company is able to reduce its labor costs by using part-time labor for the product being in-

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67 BOVARD, supra note 9, at 126.
70 BOVARD, supra note 9, at 127.
vestigated, the Commerce Department might decide to compute the company's labor cost by using a company-wide weighted-average labor cost, which tends to inflate the labor cost figure. In effect, companies are penalized for cutting their costs by using part-time labor if the Commerce Department thinks they are using too much of it.

The method the Commerce Department uses to compute production costs in agriculture also is much different from the method an accounting firm would use. Rather than averaging such costs, it computes production cost by using the costs incurred in a single year. Its rationale is that yields are unpredictable and depend on many variables.

Its costing methods are far from scientific. It determined the production cost for red raspberries by taking a random sample of ten Canadian farmers. But an International Trade Commission study found that raspberry production costs for U.S. farmers varied by nearly 100%. Part of the wide variance depended on how the farmer financed the business. Mortgage interest was included in the cost of production if the farm had a mortgage. But if there was no mortgage, interest would not be imputed on the farm property. Because of this inconsistent practice, two farmers, selling raspberries for the same price, could wind up with different results from a Commerce Department investigation. The farmer with the mortgage could get hit with a dumping charge, while the farmer without a mortgage, and therefore with lower production costs, would not be liable for dumping. But if they sell their raspberries for the same price, how can it be said that one is selling at a fair price and the other is not?

The Commerce Department also artificially boosts the farmers' cost of production by imputing wages that are never paid. Farmers don't earn anything until the end of the season. Their income consists of whatever they have left after paying expenses. But the Commerce Department imputes a wage expense to them anyway — the farmer plus family members — then adds a ten percent overhead figure and an eight percent profit. This methodology raises their production cost, on paper, and enhances the possibility that they will be found guilty of dumping, since the definition of dumping is selling for less than the cost of production plus an eight percent profit.

The Commerce Department sometimes includes other unlikely

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71 Kaplan, Kamarck and Parker, supra note 55, at 394.
72 BOVARD, supra note 9, at 128.
73 Red Raspberries from Canada, 50 Fed. Reg. 19,768 (Dep't Comm. 1992), reported in BOVARD, supra note 9, at 128 and 164 n. 89.
74 BOVARD, supra note 9, at 128-29.
items into the cost of production. For example, it included Suzuki’s costs of defending itself against charges by the U.S. Consumer Product Safety Commission that it made unsafe all-terrain vehicles. And it included in production costs the donations that two Korean sweater manufacturers\(^7\) made to local charities, claiming that it was part of the cost of making sweaters.\(^6\) Any CPA who made such classifications could be sued for malpractice.

Another problem with the Commerce Department’s methodology is that it is not consistent. Its cost accounting has been known to shift from case to case, and even within the same investigation. When it investigated some Brazilian companies, it used more than ten different approaches to measure their cost of production.\(^7\) A problem with using so many different methods is that the company trying to avoid a dumping change never knows in advance which method will be used, which makes it difficult to plan. Even if the company uses one of the cost accounting methods that the Commerce Department uses, it may still have to defend itself because the Commerce Department investigator decides to use a different method for that particular investigation.\(^8\)

Another flaw in the Commerce Department’s methodology is that it sometimes compares the cost of production for one period with the price charged in another period. For example, in one semiconductor case, it compared the sales price currently being charged with cost of production figures for semiconductors that were made three months previously.\(^7\) For some industries, a three-month lag would not be significant, but for the semiconductor industry, it was, because the cost of production declined rapidly for the period being investigated. Between 1984 and 1985, the average variable cost of producing semiconductors dropped by sixty-six percent from $8.0313 to $2.7376. And from 1985 to 1986, the costs were estimated to drop by another fifty-two percent, from $2.7376 to $1.2989.\(^8\) Thus, the cost of production was substantially overstated, thereby enhancing the probability that the company in question would be found guilty of dumping for selling below production cost (plus eight percent).

A further criticism of the Commerce Department’s cost of produc-

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\(^7\) Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, The Republic of Korea, and Taiwan, USITC Pub. 2577, Inv. No. 731-TA-448-450 (Sept. 1990) (hereinafter “Sweaters”), reported in DESTLER, supra note 41, at 396.

\(^6\) BOVARD, supra note 9, at 129.

\(^7\) Id.

\(^7\) Id.

\(^9\) Id. at 130.

\(^8\) Id.
tion methodology is its emphasis on total costs rather than variable costs. For a particular project, companies measure whether they can make a profit by comparing the selling price (variable revenue) to variable cost (the cost of making one additional unit). Production and sale decisions are made on the basis of variable data. But the Commerce Department measures profit for a particular project on the basis of total cost, which includes both fixed and variable cost. Yet companies ignore fixed costs when they compute the viability of making their next sale, because fixed costs will remain constant regardless of which decision they make, and are therefore irrelevant to the outcome of the decision.

For example, if a company's fixed costs are $100 million a year, and it is faced with the decision of whether to sell an additional 100 units of product at five dollars each, it will decide to make the sale if its variable unit cost is four dollars, and it will decide not to sell if its variable unit cost (the cost to make an additional unit) is seven dollars. The fact that its fixed cost is $100 million is irrelevant as far as the sell/not sell decision is concerned. Of course, over the long-run, all fixed costs must be recouped, but fixed costs are ignored when making decisions regarding an individual sale/production decision. Indeed, they must be ignored. Otherwise, companies would sometimes make the wrong decision, since they would be comparing marginal revenue to marginal cost plus a portion of fixed cost.\(^8\) In cases where the marginal profit (the excess of marginal revenue over marginal cost) is small, adding a portion of fixed cost to the cost figure being used in the comparison might make it appear that the company would be selling at a loss when in fact it might make a small profit. Corporate accountants would never include fixed costs in their determination of the profit calculation for an individual project, yet the Commerce Department does it routinely.

Some industries are more adversely affected than others by this questionable policy of adding fixed costs to the production cost of a particular project. For example, in high-tech industries like semiconductors, the variable cost may constitute only twenty-five percent of the total aggregate cost of production.\(^8\) Allocated fixed cost represents the other seventy-five percent of total cost, although unit fixed cost is a meaningless number for decisionmaking purposes.

\[\ldots\] Irrelevant future costs include fixed costs that will be unchanged by such considerations as whether Machine X or Machine Y is selected, or whether a special order is accepted.\(^8\) Fixed costs are relevant whenever

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\(^8\) See Bovard, supra note 9, at 130. This 25% figure was arrived at by Motorola in the Commerce Department’s 1985-86 investigation of the semiconductor industry, Id.
they differ under the alternatives at hand.\textsuperscript{83}

Fixed costs are irrelevant in the case of sell/not sell decisions because the fixed costs will remain the same regardless of the decision made. Only on rare occasions will fixed costs change, and therefore become relevant. For example, if a company is already operating at full capacity and could not produce even one additional unit without adding to plant capacity, then the individual in charge of making the sell/not sell decision would have to consider fixed costs in determining whether it would be profitable to expand plant capacity in order to fill an additional order.

Many other problems are also involved when an attempt is made to allocate fixed costs. There are a number of arbitrary decisions that must be made for any fixed cost allocation. For example, let's say that a company purchases a machine for $17,000 on September 30, 1992. The machine is expected to last for five years, after which it can be sold for $2,000. It is also expected to produce 10,000 units of product over its useful life. In 1992, it actually produces 800 units. How much of the machine's cost should be allocated to depreciation in 1992? At least six arbitrary decisions must be made before this question can be answered.

* What will the salvage value be in five years? In this example, the salvage value is $2,000, but that is just a guess. It is impossible to accurately determine how much the machine will be worth in five years. A new machine may make this machine obsolete well before five years elapses, especially if the machine is a computer. Its value five years down the road is also determined by how much the machine is used over that timespan and how well it is maintained. If it is beat into the ground, it will be worth less than if it is well kept and maintained. Also, the more it is used, the more value will be lost. The machine may well fall apart long before the five years is up.

* How long will the machine be used? The five years in this example is an arbitrary number. There is no way to tell in advance how long the company will use a particular machine. The company itself may no longer be around in five years. The machine could fall apart before the end of five years, or the company may decide to keep it for more than five years. But the estimate has to be made and made soon because depreciation has to be reflected in each year's financial statements. If the company's accounting year ends on December 31, it must determine how much depreciation to report within three months of purchase, since it was acquired on September 30 in this example.

\textsuperscript{83} \textsc{Horngren and Sundem}, \textit{supra} note 81, at 136-37.
How many units will the machine crank out over its useful life? In this example, the answer is 10,000, but that is only an estimate, a guess that is almost totally arbitrary. Perhaps the average machine of this sort is capable of cranking out 10,000 units of product before it falls apart. But what if the company only gets orders for 8,000 units? If the machine is well-maintained, it may be able to produce more than 10,000 units.

Which depreciation method should be used to compute annual depreciation? There are any number of possibilities. Someone has to make an arbitrary decision to determine which method to use in this particular case. Let's just take four possibilities that are commonly used and discussed in standard accounting texts.

**Straight-line Method**

\[
\frac{17,000 - 2,000}{5} \times 3/12 = \$750
\]

Depreciation for the first year using the straight-line method is $750. Under this method, salvage value is subtracted from cost, then divided by 5 to arrive at an annual depreciation charge. But this machine was acquired on September 30, so depreciation can be taken for just 3 months in 1992 — October 1 through December 31.

**Sum of the Years Digits Method**

\[
\frac{17,000 - 2,000}{5} \times \frac{5}{15} \times 3/12 = \$1,250
\]

Using this method results in a depreciation charge of $1,250. This is one of several accelerated depreciation methods that are in keeping with generally accepted accounting principles. The “15” in the denominator is arrived at by adding 1+2+3+4+5 = 15. Depreciation of 5/15ths is taken in the first 12 months of the asset’s life. In the second 12 months, it is 4/15ths, and so forth.

**Double Declining Balance Method**

\[
17,000 \times \frac{2}{5} \times 3/12 = \$1,700
\]

Depreciation using this method is $1,700. The depreciation rate used — 2/5 — is twice the straight-line rate of 1/5. Thus, the name double declining balance. Salvage value is not subtracted, although the asset may not be depreciated below salvage value.

**Units of Production Method**

\[
\frac{17,000 - 2,000}{10,000} \times 800 = \$1,200
\]

The depreciation allowed using this method is $1,200.

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84 The depreciation chapter of any good financial accounting or intermediate accounting text will illustrate several acceptable depreciation methods, including the ones discussed here. Taxation texts also discuss this topic at length.
A review of these four methods illustrates that there are at least four possibilities (there really are many more) that may be used to determine annual depreciation. Which method is chosen is more or less arbitrary. Many accountants choose to use the straight-line method because it is the easiest, even though the double declining balance method may better reflect the decline in the asset's value.

Another problem inherent in choosing a depreciation method involves how the resulting expense should be treated — as fixed or variable. While most methods treat depreciation as a fixed cost, since the expense is the same regardless of volume, depreciation expense can also be treated as a variable expense, as when the units of production method is used. The more units that are produced, the higher the depreciation expense. Thus, depreciation is a variable rather than fixed cost in this case. So even the decision as to whether depreciation expense should be treated as fixed or variable is arbitrary in some cases, since the answer depends on the depreciation method chosen.

Another arbitrary decision that must be made is when to start depreciating the asset. In the above example, depreciation was taken based on when the asset was purchased. But that is not the only possibility. Some companies take six months depreciation in the year of acquisition regardless of when the asset is purchased. Other companies take a full twelve months if the asset is placed in service before July 1 and take no depreciation the first year if it is placed in service after June 30. It all averages out, so none of these methods distorts the financial statements. But choosing which possibility to adopt involves an arbitrary decision.

Another arbitrary decision must be made if the machine in question produces more than one product. How should total depreciation be allocated (or even computed??) On the basis of units? Raw material cost? Time used to make each product? Relative market value of each unit produced multiplied by the number of units?

Another arbitrary decision that must sometimes be made is whether depreciation should be treated as a product cost or a period cost. If it is treated as a period cost, it is deducted at the end of the accounting period. If treated as a product cost, it is built into the cost of the product and deducted as part of cost of goods sold when the product is sold, which might not be until the next accounting period.

Computing the cost of production involves many such arbitrary decisions and there is no way around it.
3. **Comparing Apples To Oranges**

a. Comparing Prices of Dissimilar Products

Another problem with the Department of Commerce methodology is that it sometimes compares products that are not all that similar. For example, an Italian company was found guilty of selling woodwind musical instrument pads for 1.16% less than fair value. The Commerce Department computed the dumping margin by comparing the cost of smaller pads sold in the United States with larger pads sold in Italy. Naturally, the larger pads would cost more than the smaller pads, all other things being equal. But that did not make any difference to the Commerce Department. It treated the smaller pads and the larger pads as identical for computation purposes. It explained away its position by stating that the Commerce Department has unlimited discretion to make or not make adjustments for differences in merchandise.

The Commerce Department sometimes disregards the differential quality of products when it computes its dumping margins. For example, it has compared grade B Canadian raspberries sold in the United States to make juice to grade A raspberries that are sold in Canada to make jam. The grade B raspberries were harvested by machine, whereas the grade A raspberries were harvested by hand. The cost of hand-harvesting is twice the cost of machine harvesting, yet the Commerce Department denied any adjustment for the difference in harvesting cost, and assessed a dumping duty because of a 0.002% price differential, which amounts to less than one cent per 500 pounds of raspberries.

In the 1986-87 fresh flowers cases involving Colombia, the Netherlands, Kenya, Chile and Ecuador, the Commerce Department basically considered the price of a fresh flower in Amsterdam and the price of a wilted flower in New York to be equivalent. At the end of the day,

85 Bovard, supra note 9, at 119.
87 Bovard, supra note 9, at 119-120.
88 Id. at 121.
89 See Certain Fresh Cut Flowers, supra note 59; Destler, supra note 41, at 374.
90 See Destler, supra note 41. This Investigation was not listed in Destler as an antidumping Investigation. However, Destler does list antidumping investigations taken against Canada, Costa Rica, Mexico and Peru by the Floral Trade Council on May 21, 1986. Id. at 374-76. Destler does list the Netherlands and several other countries as being on the receiving end of countervailing duty Investigations initiated by the Floral Trade Council on May 21, 1986. Id. at 315-17.
91 See Certain Fresh Cut Flowers, supra note 59; Destler, supra note 41, at 375.
92 Id. at 374.
93 Id. at 375.
94 Bovard, supra note 9, at 120.
flower mongers were faced with the choice of either selling their rapidly wilting flowers for whatever price they could get or throwing them away and receiving nothing. But if they sold a wilting flower in the United States, the price they got was compared to the price they would get for a fresh flower sold in the country of origin.

The Commerce Department also compared the selling price of new forklift trucks in Japan and forklift trucks in the United States that were three years old.95

b. Comparing Prices in Dissimilar Markets

The Commerce Department sometimes compares the prices the exporting company receives in the United States market to those it receives in some third country market. Such comparisons are often made when the exporting country does not have much of a home market for its product. It penalized some Korean sweater companies because they sold their sweaters in the United States market for a little less than what they sold for in foreign markets. One company sold its sweaters for 1.20% less in the United States than in Mexico. Another company sold for 1.11% less in the United States than in Canada. A third company was found guilty for selling its sweaters for 0.73% less in the United States than in the United Kingdom.96 In arriving at its guilty verdict, the Commerce Department conveniently ignored several facts — like the fact that each shipment of sweaters was a custom order, and that there were significant differences in the sweaters the companies shipped to different countries. It merely assumed the sweaters were identical. And, of course, it ignored any cases where the price in the United States was higher than the price in another country, which had the effect of understating the average United States price.97

This different market comparison is especially questionable when the product involves a nonmarket economy,98 where prices cannot be determined with any degree of accuracy and the exchange rate calculation involves a currency that is not recognized beyond its own borders. For example, Polish golf carts were the subject of an antidumping investigation in 1975.99 Whether they were being sold in the United States at

95 Id. See also Internal Combustion Forklift Trucks from Japan, USITC Pub. 2082, Inv. No. 731-TA-377 (May 1988); reported in Destler, supra note 41, at 383.
96 Bovard, supra note 9, at 121. See also Sweaters, supra note 75; Destler, supra note 41, at 396.
97 Bovard, supra note 9, at 121-22.
98 See Kaplan, Kamarck and Parker, supra note 55, at 410-14 (discussing measurement problems involved with a nonmarket economy).
99 See Richard Pompret, International Trade: An Introduction to Theory and
a fair price could not be determined with reference to the prices charged in Poland — which has no golf courses\(^{100}\) — or a third country because the carts were sold only in the United States. So the investigator computed what it would cost a Canadian company to make similar golf carts, and determined that Poland was dumping its golf carts in the U.S. market. A problem arose when the Canadian producer whose costs were being used in the computation went out of business the next year, because no other company made golf carts that could be used for comparison purposes with the Polish golf carts. So the investigator constructed some costs that would have existed if a producer in another country at about the same stage of economic development as Poland would have made carts (Spain was chosen). It was then determined, using these new cost calculations, that the Polish carts were not being dumped, with the result that the earlier antidumping finding was revoked in 1980.\(^{101}\)

The use of surrogate countries to assess “fair value” is a dubious process, because countries at similar levels of economic development have differing relative prices and comparative advantage. In an antidumping case against potassium chloride imports from East Germany, the US Department of Commerce made a preliminary assessment, based on West German prices, of a 112 percent duty, but in the final assessment, based on Canadian prices, a zero margin was calculated and the case dismissed. In the Polish golf cart case the two surrogates led to opposite findings, illustrating the potentially arbitrary outcome of antidumping cases using this approach.\(^{102}\)

This problem is inherent in any nonmarket economy. With the change in recent years of many nonmarket economies into market economies, one might think that this problem would be reduced. But the problem is not limited to nonmarket economies. Comparing prices and costs in one economy with those of another will always produce skewed results because different economies have different comparative advantages. What might be relatively inexpensive to produce in one country might be relatively expensive to produce in another, even if the two countries are at the same level of economic development.

Another facet of this problem emerges if you pretend you are the


\(^{101}\) See Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, at 409-10 (D. Del. 1978). The judge reasoned that, in applying the 1916 Antidumping Act [15 U.S.C. § 72], the statute requires that the import price must be compared to some actual foreign market price in order to establish whether dumping had occurred. Since there was no home market for the Polish golf carts and since they were sold only in the United States, there was no foreign price to compare to the United States price. Therefore, there could be no dumping. Id.

\(^{102}\) POMFRET, supra note 99, at 133.
foreign producer and are trying to determine what price to charge in the United States market. If you think that the Commerce Department might compare your prices and costs to those of another country, how can you determine which country it will choose, so you can make the correct pricing decision? Obviously, it is impossible. Who would have guessed that Canada (or Spain) would have been chosen as the surrogate country in the Polish golf cart case? And even if one could guess which country would be chosen as the surrogate, it would still be impossible to determine which costs the Commerce Department will choose to look at. The mere use of this questionable surrogate test increases instability in the international market.

Gary Horlick, who was Deputy Assistant Secretary of Commerce for Import Administration from 1981 to 1983, described the process to the Senate Finance Committee: “I can tell horror stories about how one goes about choosing a surrogate; it is usually done about 10 at night when one has run out of any reasonable alternative. Just to take an example, for Chinese shop towels we went through in order: Pakistan, Thailand, Malaysia, Hong Kong, the Dominican Republic, Colombia, and wound up with a hypothetical Chinese factory in India. It just doesn’t make any sense.”

With such arbitrariness, it would be very easy for Commerce Department officials to choose a surrogate country that would result in the assessment of a dumping duty. “Selection of the surrogate country provides boundless opportunity for biasing the outcome, and there is more than a little evidence that Commerce has availed itself of this opportunity on several occasions.”

The Chinese manhole cover case provides an illustrative example of how attempts by a manufacturer to comply with U.S. law can be thwarted. In 1986, the Commerce Department computed a dumping duty of eleven percent on Chinese manhole covers. It arrived at the eleven percent figure by comparing Chinese manhole cover prices with those of Belgium, Canada, France and Japan. As a result, China raised its prices so that it would avoid future problems. But in 1990, the Commerce Department reviewed its work, changed its methodology and decided to retroactively raise the duty to ninety-seven percent. It arrived at this figure by comparing Chinese prices to the imaginary price that


105 BOVARD, supra note 9, at 133-34.
would be charged in the Philippines. It ignored the fact that labor costs in the Philippines are much higher than those in China. As a result of this changed figure, Chinese companies were effectively banned from the United States market and faced with millions of dollars in dumping duties.

Another aspect of comparing costs in different countries is the quality or reliability of the data. In the case that Timken Company initiated against a Hungarian manufacturer of tapered roller bearings and parts, the Commerce Department chose Portugal as the surrogate country and got its cost data on Portugal from a telephone call someone at an American Consulate made to a Portuguese engineer, who gave an estimate of the Portuguese production cost for steel pipes, small motors and steel hand tools. The Embassy official also passed on the rumor he heard that factory material overhead in Portugal was between forty to forty-five percent and labor overhead was between thirty to thirty-three percent. The final weighted average dumping margin was determined to be 7.42%.

The same day that Timken initiated an action against Hungary, it initiated actions against Italy, Japan, the People's Republic of China, Romania and Yugoslavia. It determined the dumping margins in each case to be: Italy, 124.75%; Japan, various, on a case-by-case basis; People's Republic of China, 0.97%, on average; Romania, 8.7%, on average; Yugoslavia, 33.61%, on average. The Commerce Department got a 100% conviction rate, although its evidence was based on questionable data.

c. Comparing U.S. Wholesale and Foreign Retail Prices

Another criticism of the Commerce Department's pricing methodology is that it has been known to compare U.S. wholesale prices with foreign retail prices. Such comparisons often result in the appearance of dumping when none in fact exists. Motorola initiated an antidumping action against Toshiba for selling cellular mobile telephones and subas-

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107 BOVARD, supra note 9, at 133.
109 Investigation 731-TA-343, listed in Destler, supra note 41, at 377.
110 Investigation 731-TA-344, listed in Id. at 378.
111 Investigation 731-TA-345, listed in Id..
112 Investigation 731-TA-346, listed in Id..
113 Destler, supra note 41, at 377-78.
sembles for less than fair value. When Toshiba sold in the Japanese market, it sold to small local dealers directly. But when it sold in the United States market, it sold to a single purchaser, who then resold to distributors. But the Commerce Department did not take this fact into account in computing the appropriate dumping duty.\(^{114}\)

d. Disregarding Volume Discounts

It is standard practice for companies to give volume discounts for large purchases. Yet the Commerce Department has been known to disregard this fact when determining whether dumping has occurred. If a company charges a lower price for a large sale in the United States than for a small one in its own country, it can be found guilty of dumping. In an antidumping action initiated by the Specialty Tubing Group,\(^{115}\) the Commerce Department compared the prices a Swedish company, Avesta, charged for small purchases of stainless steel pipe and tubing in Sweden to those charged for large purchases in the United States.\(^{116}\) More than two-thirds of the sales in Sweden were for quantities of less than 500 kilograms. On small sales such as this, the company charged an average of over twenty-two percent more than for sales of quantities between 501 and 5,000 kilograms. And it charged more than sixty percent more for sales of less than 500 kilograms than for sales of over 5,000 kilograms. The company was found guilty of selling in the United States for less than fair value. The Commerce Department's reason for disregarding such differences is that such adjustments are not easy to make.\(^{117}\)

e. Classifying Costs as Direct or Indirect

The classification of costs as direct or indirect has long been a problem for accountants. For example, depreciation expense may be treated as a direct product cost if the units of production method is used, and as an indirect cost if the straight-line method is used. If a company has two identical machines, one depreciated under the units of production method and the other under the straight-line method, the depreciation

\(^{114}\) Bovard, supra note 9, at 122.

\(^{115}\) Investigation 731-TA-354, initiated October 20, 1986, listed in Destler, supra note 41, at 318; see also Stainless Steel Pipes and Tubes from Sweden, USITC Pub. 1919, Inv. No. 731-TA-354 (Dec. 1986). The Specialty Tubing Group also filed a countervailing duty Investigation against Avesta on September 4, 1986: Investigation 701-TA-281, listed in Destler, supra note 41, at 318. In this Investigation, there were affirmative preliminary injury and subsidy determinations, net subsidy 1.24% ad valorem (Dec. 5, 1986); affirmative final subsidy determination, net subsidy 2.18% ad valorem (Feb. 26, 1987); negative final injury determination (Apr. 3, 1987).

\(^{116}\) Destler, supra note 41, at 122-23.

\(^{117}\) Bovard, supra note 9, at 122-23.
for one machine will be treated as a direct cost and the other as an indirect cost, even though the machines perform the exact same function.

Accountants use cost accounting techniques to make management decisions, such as pricing, break-even points, profit margins, and so forth. One problem, which cannot really be overcome completely, is the problem of determining whether a particular cost is direct or indirect. Determining whether a particular cost is direct or indirect sometimes involves a certain amount of arbitrary decisionmaking. However, when a particular company decides how a particular cost should be classified, whether direct or indirect, it usually treats the cost consistently throughout its operations. It does not treat it as direct for Department A and indirect for Department B. Or direct in one year and indirect in the next. This approach is in keeping with the basic accounting principles of consistency and comparability.

The Commerce Department is not bound by such rules. In arriving at a decision of whether a particular price is fair for antidumping purposes, an initial determination must be made regarding which costs are to be included in the price and which should be omitted. One criticism that has been made of the Commerce Department's approach to this calculation is that it often subtracts the sales costs a company incurs when it computes the U.S. sales price, but includes similar sales costs when it computes the foreign market value. Thus, the price in the United States is consistently understated whenever this approach is used.

The Commerce Department often imputes a cost for various reasons, such as when the cost data is not available. In one case, it imputed the cost of carrying Brother typewriters in inventory in the United States, but did not impute inventory carrying costs for Brother typewriters that were sold in Japan. It justified not imputing an inventory cost for the Japanese market because it did not have any information with which to quantify the adjustment. But it did make an inventory carrying cost adjustment for the typewriters sold in the United States even though it had no information on that market either. In another case, it subtracted the cost of shipping the product to regional warehouses in the United States from the United States price but did not subtract similar shipping costs incurred in Japan from the Japanese price. It reasoned that the Japanese costs were not attributable to specific sales under consideration. In a case initiated by American Telephone and Telegraph

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118 Id. at 123.
119 Id. at 123-24.
120 Id. at 124.
Company and Comdial, Inc., the Commerce Department deducted from the United States price the cost of inland freight for Korean small business telephone systems sold in the United States, but did not make a reduction for similar costs incurred in Korea.

The companies initiating the antidumping actions sometimes try to convince the Commerce Department to adjust downward the United States price in order to create or increase a dumping duty. For example, in the suit initiated by Zenith against several Japanese television companies, Zenith tried, unsuccessfully, to convince the Commerce Department that it should subtract the Japanese companies' legal defense costs from its U.S. selling price, thus increasing the dumping charge. In effect, this would have resulted in making the Japanese U.S. prices increasingly unfair as they continued to incur legal defense costs.

Another inconsistency is in the way the Commerce Department classifies warranty costs. Foreign companies that contract out their warranty costs have them classified as direct selling expenses, but companies that provide their own warranty services have their warranty expenses split between direct (allowable) and indirect (nonallowable) costs. Both the Court of International Trade and the General Accounting Office have called this practice unfair.

4. Using Average Prices

Merely selling a product in the United States for the same price it sells for at home is not sufficient to avoid a dumping charge. The Commerce Department can allege dumping anyway because of the way it computes selling price. One common methodology it uses is to compute the average foreign price over a six-month period with individual domestic prices. It's another way to compare apples to oranges.

It is rare for a company to sell a particular product at the same price in all locations at all times during a six or twelve-month period. It is far more common to find a range of prices. But if a company sells any product in the United States at a price that is below the average foreign price for the period under investigation, it will give the Commerce Department the ammunition it needs to compute a dumping margin. And if the

121 Investigation 731-TA-427, initiated December 28, 1988, listed in Destler, supra note 41, at 393. See also Certain Telephone Systems and Subassemblies Thereof from Korea, USITC Pub. 2254 Inv. No. 731-TA-427 (Jan. 1990). AT&T and Comdial initiated similar Investigations against Taiwan (731-TA-428) and Japan (731-TA-426) the same day, listed in Destler, supra note 41, at 393.

122 Bovard, supra note 9, at 124.

123 Id. at 124-25.

124 Id. at 125.

125 Id. at 120-21.
price charged for a product is not uniform — if it varies — the chances are that about half of the units sold will be below average in price, and thus subject to penalty. The use of average prices to determine the existence of dumping is inherently unfair.\textsuperscript{126}

In the 1989 Tokyo Juki investigation, the Commerce Department found that the company sold a few typewriters for less than “fair value,” although the vast majority of typewriters were sold for more than “fair value” (which leads to an interesting question — why would anyone buy something for more than fair value?). The Commerce Department saw fit to ignore the vast majority of sales that were above the minimum (safe) price and assess a 0.0004% dumping margin on the company, which amounts to less than a tenth of a cent difference between the price charged for a typewriter in Japan and that charged in the United States. Usually, the Commerce Department’s band of tolerance is 0.5%, but that figure only applies to initial investigations. Since Tokyo Juki was previously investigated for dumping, the 0.5% tolerance did not apply.\textsuperscript{127}

The Commerce Department’s average pricing method has been controversial. The General Accounting Office has criticized the method because it tends to increase existing margins or create margins where none previously existed.\textsuperscript{128} The Court of International Trade has said that the Commerce Department’s price comparison method is not reasonably fair.\textsuperscript{129}

When Congress amended the 1979 provision to authorize Commerce under § 1677f-1 to average both U.S. price and foreign market value in making comparisons, Congress did not direct Commerce to apply a stricter set of prerequisites when ascertaining the U.S. price. Legislative history discloses that by extending the use of averaging with respect to the U.S. price, the lawmakers wanted to “expand the instances in which the administering authority may use sampling and averaging techniques.” H.Rep. No. 725, 98th Cong., 2d Sess. 45, \textit{reprinted} in 1984 U.S. Code Cong. & Admin. News 5127, 5172 (1984). Despite this, it appears that Commerce almost universally averages only the foreign market value. The Court questions whether the impact of Commerce’s current averaging policy relieves administrative burden to the extent that it leads to “loss of reasonable fairness in the results.”\textsuperscript{130}

The method the Commerce Department uses to average prices re-


\textsuperscript{127} \textit{BOVARD, supra} note 9, at 121.

\textsuperscript{128} U.S. General Accounting Office, \textit{U.S. Administration of the Antidumping Act of 1921} 21 (March 15, 1979), \textit{also cited in BOVARD, supra} note 9, at 122, 163 n. 59.

\textsuperscript{129} \textit{NAR, S.P.A. v. United States}, 707 F.Supp. 553 (CIT 1989), \textit{also cited in BOVARD, supra} note 9, at 122, 163 n. 60.

sults in a consistent bias which tends to increase the dumping margin. Rather than comparing average prices in the United States to average prices in some foreign country, it compares the average foreign country market value to the price at which each sale is made in the United States. When sales are made at a price above fair value, it treats them as if made at fair value and assigns a less than fair value (LTFV) amount of zero rather than a negative value. So when it combines sales made at less than fair value with those made at more than fair value, it skews the statistical result in favor of a higher dumping margin. In some cases, the result is a dumping margin where none should exist.

D. Examples of Dumping

1. Autos

The auto industry is one of the most prominent examples that can be given where special interests (the auto industry and the auto unions) seek the assistance of government to shelter them from the effects of foreign competition. The protection has taken many forms, ranging from tariffs and quotas to allegations of dumping. One of the more recent examples involving allegations of dumping in the auto industry is the case of Japanese minivans. On the basis of a preliminary investigation brought by General Motors, Ford and Chrysler that alleged dumping margins of between 5.4% and 30.5%, the International Trade Commission determined that there was a reasonable indication that a U.S. industry was materially injured because of Japanese minivans that were allegedly sold in the United States for less than fair value. It based its preliminary determination on the basis of the best available information.

The International Trade Commission’s final determination, though, was that no domestic industry was materially injured or threatened with material injury as a result of Japanese minivan imports, although the ITC found that more than ninety percent of the home market sales were made at prices below the cost of production. It reached its not guilty finding by comparing U.S. sales of new minivans to fair market value

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131 Knoll, supra note 2, at 278.
134 Investigation 731-TA-522. The preliminary findings are reported in Minivans from Japan, USITC Pub. 2402 (July 1991).
based on constructed value. The computations the ITC used to arrive at its findings were extremely complex and, in some cases, of questionable validity from an accounting standpoint.\textsuperscript{137} But it is one of the few cases where a foreign producer was found not guilty. But the case is not over yet. General Motors, Ford and Chrysler have appealed.

Regardless of the legal outcome of the dumping case, Detroit’s auto makers believe they’ve already scored a victory in the market by pressuring Japanese companies to boost the prices of their vehicles. “On dumping, we’ve already won that one,” Chrysler Chairman Lee A. Iacocca said in an interview yesterday. “They [Japanese auto makers] have raised their prices 12%.”\textsuperscript{138}

This victory snatched from the jaws of defeat means that the Big Three automakers will feel less pressured to compete on price because the Japanese minivan makers feel compelled to raise their prices in order to avoid being hit with an antidumping penalty. The only loser is the American consumer, who must now pay twelve percent more for a Toyota minivan, or somewhat more for an American-made minivan.\textsuperscript{139}

There have been several other investigations of dumping in the auto industry as well. For example, Southampton Coachworks, Ltd. initiated an investigation of Canadian limousine dumping.\textsuperscript{140} The ITC found the weighted average dumping margin to be 5.78%. Polaris Industries initiated an investigation against Japanese manufacturers of all terrain vehicles. While the ITC determined that the vehicles were being sold for less than market value, no injury to an American producer was found.\textsuperscript{141}

### 2. Steel

Foreign imports of steel and steel products have been the subject of many dumping investigations in recent years. Bethlehem Steel Corporation initiated an antidumping investigation against Canadian producers

\textsuperscript{137} The adjustments the ITC made are outlined in New Minivans from Japan, 57 Fed. Reg. 21937, 21937-21958 (1992); reproduced in Minivans from Japan, USITC Pub. 2529, Inv. No. 731-TA-522 B-5 to B-26 (July 1992).

\textsuperscript{138} Big Three Auto Firms Move to Appeal Decision on Sales of Toyota Minivans, WALL ST. J., August 7, 1992, at B-3.

\textsuperscript{139} The mischief of the Big Three American auto companies is not limited to the United States. They have also been known to initiate antidumping investigations in other countries. For example, in Canada, General Motors and Ford (but not Chrysler) caused the Canadian government to initiate an antidumping action against the Hyundai Motor Company. Curiously, Chrysler did not join in this petition, perhaps because at the time, it owned a 25% interest in Mitsubishi Motors, which owned 15% of Hyundai. For more on this case, see Matthew S. Kronby, Kicking the Tires: Assessing the Hyundai Antidumping Decision from a Consumer Welfare Perspective, 18 CANADIAN BUS. L. J. 95 (1991).

\textsuperscript{140} Investigation 731-TA-438, initiated July 24, 1989, listed in DESTLER, supra note 41, at 394.

\textsuperscript{141} Investigation 731-TA-388, initiated February 9, 1988, listed in Id. at 385.
of new steel rail.\textsuperscript{142} The ITC found a preliminary weighted average dumping margin of 2.72% and a final injury and determination margin of 38.79%.\textsuperscript{143} Wyman-Gordon Corporation initiated investigations against Brazilian, German,\textsuperscript{144} Japanese\textsuperscript{145} and UK\textsuperscript{146} manufacturers of forged steel crankshafts. The ITC found dumping margins and injury in some cases but not in others. The dumping margins ranged from 1.9% to 14.67%.\textsuperscript{147} Several steel companies initiated an antidumping investigation against Chinese,\textsuperscript{148} Polish\textsuperscript{149} and Yugoslavian\textsuperscript{150} manufacturers of steel wire nails. A dumping margin of 6.3% was found against the Chinese companies. The other two cases were withdrawn.\textsuperscript{151} Several steel companies also initiated investigations against Polish,\textsuperscript{152} Portuguese\textsuperscript{153} and Venezuelan\textsuperscript{154} manufacturers of carbon steel wire rod. The preliminary investigations revealed that an American company was injured. All three cases were later terminated.\textsuperscript{155} The ITC also terminated three investigations initiated by U.S. Steel Corporation against Austrian,\textsuperscript{156} Romanian\textsuperscript{157} and Venezuelan\textsuperscript{158} manufacturers of oil country tubular goods. Numerous other examples could be given.

In one recent example, the U.S. International Trade Commission reached a preliminary determination to continue seventy-six of the eighty-four cases it has opened on imported flat-rolled steel. These cases involve 6.5 million tons of steel having an annual value of almost three billion dollars.\textsuperscript{159} Only Taiwan has been cleared of the twenty-one countries under investigation. The cases the ITC decided to drop represented only five percent of the imports listed in the petitions, based on tonnage and dollar value. These cases originated on June 30, 1992, when twelve U.S. flat-rolled steel producers filed forty-eight anti-dumping petitions

\textsuperscript{142} Investigation 731-TA-422, initiated September 26, 1988, \textit{listed in Id.} at 392.
\textsuperscript{143} Investigation 731-TA-350, initiated October 9, 1986, \textit{listed in Id.} at 379.
\textsuperscript{144} Investigation 731-TA-351, initiated October 9, 1986, \textit{listed in Id.}.
\textsuperscript{145} Investigation 731-TA-352, initiated October 9, 1986, \textit{listed in Id.}.
\textsuperscript{146} Investigation 731-TA-353, initiated October 9, 1986, \textit{listed in Id.}.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} Investigation 731-TA-266, initiated June 5, 1985, \textit{listed in Id.} at 363.
\textsuperscript{149} Investigation 731-TA-267, initiated June 5, 1985, \textit{listed in Id.}.
\textsuperscript{150} Investigation 731-TA-268, initiated June 5, 1985, \textit{listed in Id.}.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} Investigation 731-TA-256, initiated April 8, 1985, \textit{listed in Id.} at 361.
\textsuperscript{153} Investigation 731-TA-257, initiated April 8, 1985, \textit{listed in Id.}.
\textsuperscript{154} Investigation 731-TA-258, initiated April 8, 1985, \textit{listed in Id.}.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} Investigation 731-TA-249, initiated February 28, 1985, \textit{listed in Id.} at 360.
\textsuperscript{157} Investigation 731-TA-250, initiated February 28, 1985, \textit{listed in Id.}.
\textsuperscript{158} Investigation 731-TA-251, initiated February 28, 1985, \textit{listed in Id.}.
\textsuperscript{159} Rose Gutfeld and Dana Milbank, \textit{U.S. Steel Firms Get Early Boost In Import Fight}, \textit{WALL ST. J.}, August 11, 1992, at A-2.
and thirty-six countervailing duty petitions, alleging serious and material injury. The companies were feeling pressure from the foreign producers partly as a result of the lapsing of voluntary restraint agreements a few months previously,\(^{160}\) and by the collapse of discussions to form a Multilateral Steel Agreement. A final determination of injury could lead to tariffs of between $600-900 million on foreign steel.

Two of the six commissioners told the steel companies that the evidence presented was weak and that their cases would have to be stronger in the future. But even though the cases of dumping are weak, they may still be having some effect. As USX Chairman Charles Corry said:

> If you're going into my hen house and stealing my eggs, and I accuse you of that before a magistrate, probably you're not going to keep going into my hen house tonight and next week and next week.\(^{161}\)

The mere fact that a dumping action has been instigated will probably place a chilling effect on the foreign steel companies. Many of them may decide to raise their prices just to avoid future antidumping investigations, even if they are found innocent this time. The probability that they will engage in aggressive price competition will be greatly reduced. Even if the foreign steel producers do not raise their prices, domestic steel prices might increase anyway. According to John Jacobson, a steel industry consultant, these antidumping actions might reduce steel imports by as much as nineteen percent, which could boost prices by five percent to ten percent.\(^ {162}\)

Filing of the petition is having some adverse effects on the domestic steel industry. Although the petitioners refrained from filing petitions against their Korean and Japanese joint venture partners, the partners are irritated by the antidumping action. A spokesman for Korea's Pohang Iron & Steel Company said the petitions put its California joint venture with USX in jeopardy. As a result, hundreds or perhaps thousands of jobs could be at stake. The filings could also lead to retaliation. The Canadian government is starting to investigate retaliatory complaints. Companies that use steel also stand to lose, since their raw material prices are likely to increase, making them less competitive on world markets, and possibly leading to job losses.

3. **Textiles**

The American textile industry is known for filing dumping petitions.

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\(^{160}\) The Voluntary Restraint Agreements limiting imports lapsed March 31, 1992. Id.

\(^{161}\) Gutfeld and Milbank, supra note 159.

\(^{162}\) Id. Jacobson estimates that the preliminary ITC determination could shrink foreign steel imports from the 1991 level of 16 million tons to between 13 and 14 million tons.
The National Knitwear and Sportswear Association has filed petitions against sweater manufacturers in Hong Kong,\textsuperscript{163} Korea\textsuperscript{164} and Taiwan.\textsuperscript{165} In all three cases dumping was found.\textsuperscript{166} Century Martial Arts Supplies, Inc. filed a petition against martial arts uniform manufacturers in Taiwan.\textsuperscript{167} The ITC found that the uniforms were being sold in the United States for less than fair value but did not find any injury to a domestic producer. The Headwear Institute of America initiated an investigation against sewn cloth headgear from the People's Republic of China.\textsuperscript{168} It was determined that the product was sold for less than market value, although no injury to an American producer could be proven.

One major development in the textile industry in 1990 was the large decline in the number of sweater shipments. Sweater imports fell by more than twenty percent in volume and value — by $573 million — based on 1989 levels.\textsuperscript{169} The decline was attributed to a soft sweater market, a shift in fashion to other knit goods, and the antidumping petitions that were filed against sweater manufacturers in Hong Kong, Taiwan and Korea. Sweater imports from these three countries fell substantially — by forty-one percent in 1990 — and their share of imports slid ten percentage points, to forty-four percent. But although there have been a number of antidumping and countervailing duty actions initiated against foreign textile companies, most of the trade restrictions that have been placed on the textile industry have been from tariffs and quotas rather than dumping and subsidy actions.\textsuperscript{170}

4. Agricultural Products

a. Frozen Concentrated Orange Juice

In 1986, Florida Citrus Mutual brought an antidumping action against a Brazilian company for dumping frozen concentrated orange juice on the American market.\textsuperscript{171} The company was found guilty of dumping it on the market for 1.96\% less than fair value (the price it sold

\textsuperscript{163} Investigation 731-TA-448, initiated September 22, 1989, listed in Destler, supra note 41, at 396.
\textsuperscript{164} Investigation 731-TA-449, initiated September 22, 1989, listed in Id..
\textsuperscript{165} Investigation 731-TA-450, initiated September 22, 1989, listed in Id..
\textsuperscript{166} Id.
\textsuperscript{167} Investigation 731-TA-424, initiated November 23, 1988, listed in Id. at 393.
\textsuperscript{168} Investigation 731-TA-405, initiated May 26, 1988, listed in Id. at 389.
\textsuperscript{170} WILLIAM R. CLINE, THE FUTURE OF WORLD TRADE IN TEXTILES AND APPAREL 59 (revised ed. 1990).
for in Brazil). But what was curious is how it arrived at the 1.96% figure, since the sales price was at least forty-five percent higher in the United States than in Brazil. In order to arrive at the unfairly low selling price in the United States, the Commerce Department subtracted the forty percent tariff that is imposed on orange juice, the Brazilian government's 3.5% export tax and a few percentage points for shipping, freight and insurance. So even though the selling price in the United States was at least forty-five percent higher than the price in Brazil, the company was found guilty of dumping.

b. Pistachio Nuts

In 1985, the California Pistachio Commission initiated an action against an Iranian company for selling in-shell pistachio nuts in the United States for less than fair value. The Commerce Department computed the dumping margin to be 317%, which means that the Iranians sold $4.17 worth of nuts for one dollar in the U.S. market. The only problem was that the Commerce Department used the official Iranian exchange rate of ninety rials to the dollar when it made its computation, whereas the real-world exchange rate was 600 rials to the dollar. The U.S. Court of International Trade concluded that the official rate was irrelevant and threw out the case.

c. Kiwi Fruit

Imports of kiwifruit from New Zealand are also under attack. On April 25, 1991, the Ad Hoc Committee for Fair Trade of the California Kiwifruit Commission and several individual California kiwifruit growers filed a petition with the ITC, alleging that an industry in the United States was materially injured or threatened with material injury because of New Zealand fresh kiwifruit being sold for less than fair value. Most of the growers who completed the ITC questionnaire said that the large shipments of kiwifruit from New Zealand in December, 1990 caused a delay of their kiwifruit sales and resulted in lower prices

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172 BOVARD, supra note 9, at 115.
174 BOVARD, supra note 9, at 116. I.M. Destler, in AMERICAN TRADE POLITICS 366 (1992), lists the average duty at 192%. N. David Palmeter also discusses this Investigation in Exchange Rates and Antidumping Determination, 22 J. WORLD TRADE at 73-75 (1988).
175 Fresh Kiwifruit from New Zealand, USITC Pub. 2394 at 1 (June 1991).
176 Certain other domestic industries, such as those involved in the importation of kiwifruit, tend to be helped by such imports, but the ITC does not look at this side of the coin when making its determinations of damage.
for kiwifruit. Sixty-four of the sixty-seven responding U.S. growers said that they anticipated a negative impact from New Zealand kiwifruit imports.\textsuperscript{177} In its preliminary investigation,\textsuperscript{178} the ITC determined that there was a reasonable indication of injury.

It arrived at its preliminary conclusion by using a constructed value methodology.\textsuperscript{179} The petitioners (Ad Hoc Committee, etc.) based their estimates of U.S. prices on actual invoices and customer orders. They then adjusted the U.S. price for foreign inland freight, foreign brokerage and handling, ocean freight, marine insurance, U.S. Customs user fees, U.S. brokerage and handling charges, U.S. inland freight, and U.S. selling expenses, such as advertising, financing, marketing and other selling expenses.

The petitioners claimed that evidence of less than fair market value prices was present regardless of whether U.S. prices are compared to home market prices, third country prices or constructed value. However, they claimed that home market prices could not be used as the basis for estimating foreign market value because:

- The home market was not viable,
- The majority of the kiwifruit sold in the home market was not of comparable quality, and is therefore not similar to that exported to the United States, and
- Home market sales of kiwifruit of comparable quality were made at prices below the cost of production.\textsuperscript{180}

The petitioners also argued that third country prices should not be used to compare to U.S. prices because they, too, are below the cost of production. At this point, any rational individual might question how an industry could stay in business if it sold its product at prices below the cost of production both in the home market and abroad. One might also ask how consumers are harmed if this is true. But such questions have no place in an ITC investigation.

The petitioners based their dumping margin estimates on constructed value, which consists of the cost of production, general expenses, packing and profit. They obtained cost of production figures from various studies and reports published by the New Zealand Ministry of Agriculture and Fisheries and the New Zealand Kiwifruit Marketing Board.

To arrive at constructed value, the petitioners added the statutory

\textsuperscript{177} Fresh Kiwifruit from New Zealand, USITC Pub. 2394 at B-9 (June 1991).
\textsuperscript{178} Id. at 1.
ten percent for selling, general and administrative expenses to the cost of production, and an eight percent profit margin. They then subtracted packing, principal repayments and general expenses from grower costs and added general expenses from one of the New Zealand studies because they exceeded the statutory ten percent. They then added the eight percent profit margin and the packing expenses that were deducted from the grower costs.

On the basis of these calculations, the petitioners arrived at a dumping margin of 255.02%. Some ITC adjustments whittled that margin down to 220%. With such high dumping margins, one might wonder how the industry could stay in business year after year. One might question the accuracy of such a high figure. But the ITC did not question its accuracy. It decided to move forward with its investigation.

The final investigation found that fresh kiwifruit from New Zealand was being, or was likely to be, sold in the United States at less than fair value. It determined the dumping margin to be 98.6%.

The data upon which the grower information was based was from the responses to questionnaires that were sent to 204 of the 572 domestic kiwifruit growers, which were selected as a stratified random sample. Packers, cold storers and handlers also received questionnaires. The Hayward variety of kiwifruit was the only variety compared, since the Hayward variety is the only variety that is grown on a commercial basis worldwide. It is the kind grown both in New Zealand and California, so the products being compared were similar, although some purchasers who returned the ITC questionnaire indicated that the New Zealand variety was often superior to the U.S. product in terms of size, shape, color consistency and shelf life.

New Zealand kiwifruit represents about ninety percent of all kiwifruit imports to the United States. About 600 farmers grow kiwifruit in California, which represents ninety-nine percent of U.S. production. About seventy-nine firms pack kiwifruit in California, and

181 It should be kept in mind that the 10% overhead charge and the 8% profit margin might have nothing to do with reality in the kiwifruit industry, either in the U.S.A. or in New Zealand. But they are the percentages the law allows for any industry, regardless of circumstances or location.
184 Pub. No. 2510, at 7.
185 Id. at I-16.
186 Id. at I-4.
187 Id. at I-9.
188 Id. at I-10.
roughly fifty handlers are active in the California kiwifruit trade.\textsuperscript{189} It was these three groups — growers, packers and handlers — that stood to be injured as a result of New Zealand imports.

The methodology the ITC used in its final determination was somewhat different from that used in the preliminary investigation. For example, it decided to use a third country market for comparison purposes, a methodology that it rejected at the preliminary stage of the investigation. The country it chose was Japan.\textsuperscript{190} It decided to use the best information available to determine cost of production because it did not receive all the information it requested from New Zealand growers. From an examination of the cost of production data, the ITC determined that between ten percent and ninety percent of the respondent's sales were at prices above the total cost of production.\textsuperscript{191} (The only respondent was the New Zealand Kiwifruit Marketing Board [NZKMB]).

A number of criticisms could be made about the way in which the dumping margin was determined. For example, NZKMB argued that Germany, rather than Japan, should have been used as the third country market for comparison purposes because the German market has more in common with the United States market than does the Japanese market.\textsuperscript{192} It said that German sales are a closer match because they provide more matches by time period, count size, and packing type. Furthermore, the Japanese and U.S. markets have different pricing mechanisms, organization, and levels of development, and NZKMB does not control sales from coolstores in Japan as it does in the USA. The market organization in Japan has a significant effect of Japanese kiwifruit prices. NZKMB has a earlier upstream exit from the sales process in Japan, whereas in Germany and the United States, the first unrelated sale takes place farther downstream, after importation. Japan also has higher retail prices, which allows it to charge a higher price to importers. The ITC chose Japan because it was New Zealand's largest third country market. It found that the differences between the German and Japanese markets were not significant.

The NZKMB contended that the ITC should only compare U.S. sales to contemporaneous Japanese sales — those within six days of the U.S. sale, or at least within the same month or pricing period — because kiwifruit is perishable.\textsuperscript{193} As support for its position, it cited the Mexi-

\textsuperscript{189} Id. at I-11.
\textsuperscript{191} Id. at 13697.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 13699.
can vegetable case, the Canadian white potato case and the Norwegian salmon case where the ITC compared prices for the same time period.

The NZKMB wanted the ITC to exclude from its computations the U.S. sales that were shipped from the Pioneer Reefer. It wanted these sales to be classified as distress sales because the fruit was in danger of rotting and had to be sold at a deep discount. The ITC responded that, while it had the authority to exclude aberrational sales from the comparison, it had no obligation to do so.

The NZKMB argued that because kiwifruit is a perishable product, the Commerce Department should disregard sales that are below the cost of production only if such sales exceed fifty percent of total sales volume. To support its argument, it cited the Canadian potato case, in which the fifty percent ratio was used. The Ad Hoc Committee argued that a ten percent threshold is appropriate for kiwifruit. It supported its position by pointing to the Mexican vegetable case, where the Commerce Department allowed below-cost sales of up to fifty percent for products where the sellers were unable to control output or storage, and for which below cost selling is a normal part of operations. It pointed out that in the Norwegian salmon case, the Commerce Department determined that the ten percent threshold was appropriate because salmon farmers could control the time of the sale of their output. Since kiwifruit is storable and the NZKMB exercises control over the distribution and price of its product, it argued that the fifty percent threshold is not appropriate in the case of kiwifruit. The ITC decided that the ten percent threshold was more appropriate. While it acknowledged that kiwifruit has much in common with potatoes, it said that there is no clear rationale for departing from the ten percent threshold, and the decision to apply the fifty percent threshold in the potato case cannot serve as a basis for decision in the kiwi case.

The Ad Hoc Committee argued that the expenses the NZKMB incurred in hiring a Japanese advertising agency to conduct a survey of Japanese consumer attitudes toward kiwifruit should not be classified as a direct advertising expense. The NZKMB said that it should be classified as a direct advertising expense. The ITC categorized it as an indirect selling expense.

197 Id.
198 Id. at 13700.
The Ad Hoc Committee convinced the ITC to reduce the NZKMB’s indirect selling expenses in Japan because the amount reported incorrectly included corporate general and administrative expenses and an amount miscategorized as unrecovered Japanese shipping expenses, which actually were related to a shipment that was eventually sold in the United States.\textsuperscript{199} It wanted the misclassified G&A expenses to be added to the costs that would be used in determining the cost of production. The NZKMB had argued, unsuccessfully, that the Auckland office administrative expenses were allocated to the sales division, which mostly serves the Japanese market, and should therefore be treated as a direct cost of selling in the Japanese market. It pointed out that similar costs were reported as an indirect selling expense for U.S. sales. It also argued that unrecovered shipping costs were directly related to Japanese sales, since they consisted of the costs incurred for the Pioneer Reefer, which was originally bound for Japan.

Because the NZKMB could not document a reported rebate for one preselected sale, the Ad Hoc Committee asserted that all rebates reported on Japanese sales should be disallowed.\textsuperscript{200} The ITC agreed that all such rebates should be disallowed. It concluded that, since the sale in question was the only one selected for verification in which a rebate was reported, the assumption must be made that the rebates were incorrectly reported for all sales. Such an assumption is highly debatable, but there is no appeal from the holding.

The NZKMB argued that the stratified sample the Commerce Department used to compute the cost of production was not representative or based on generally recognized sampling techniques.\textsuperscript{201} It pointed out that eighty percent of U.S. exports came from New Zealand’s Bay of Plenty region, and only farms greater than two square hectares in size are real businesses. Anything smaller than that is a hobby farm. There also was some miscategorization of farms by size or region in the database that was used to make the sample selection. But it was held that the selection was reasonable.

Some growers did not respond to the questionnaire.\textsuperscript{202} In other cases, their responses could not be verified. The NZKMB argued that these growers should not be factored into the Commerce Department’s cost of production calculation. It argued that the NZKMB had cooperated in the investigation and had done its best, so the Commerce Depart-

\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.} at 13702.
\textsuperscript{202} \textit{Id.}
ment should not use adverse or punitive best information available (BIA) for uncooperative or unverifiable growers over which it had no control, since doing so would be unfair to the NZKMB and would further distort the sample. The Ad Hoc Committee contended that the Commerce Department must use adverse BIA, since the use of verified growers' costs as BIA would reward the uncooperative growers. It was determined that, based on 19 CFR 353.37, the Commerce Department is required to use BIA when information is not reported.

Accounting for capitalized cultivation costs was another disputed issue. The Ad Hoc Committee argued that the cost of support structures and shelter belts should be amortized over the actual useful life of these assets, not the life of the kiwifruit vines. The NZKMB argued that capitalized cultivation costs should be allocated over a minimum of forty-five years, and pointed out that a properly maintained orchard has an indefinite useful life, and capitalized cultivation costs should not be amortized at all because the land's value has been permanently enhanced. The Commerce Department decided that amortization should be over twenty years, which, it determined, was the life of a kiwi vine.

Allocation of most general expenses was also debated. The Ad Hoc Committee took the position that allocating most general expenses on the basis of area is not appropriate because most of these expenses bear no relationship to farm area. The Committee suggested that it would be more appropriate to allocate costs based on the cost of sales. The NZKMB contended that allocating costs on the basis of area is the best and most reasonable method to apportion costs among different products. The Commerce Department sided with the Ad Hoc Committee, for the most part.

With all these issues in dispute, it is easy to see that there can be much arbitrary judgment involved in a dumping investigation. Even reasonable accountants and economists might disagree on how to resolve some of these issues. But the issues become even more complex when one adds the confrontational dimension, as is the case with all antidumping petitions. The petitioner wants to clobber the respondent and the respondent wants to be cleared of all charges at minimal cost. The Commerce Department and International Trade Commission have near absolute power and need not be concerned with due process because they are exempted from the due process rules. Many Commerce Department officials consider it a goal to find a dumping margin, and this mindset biases their judgment and leads to a finding of dumping where none exists.

203 Id. at 13703.
204 Id. at 13703-04.
What is the likely effect of this holding on the marketplace? New Zealand kiwifruit growers anticipate a twenty-five to thirty percent drop in sales to the United States. The antidumping holding forced them to raise their prices by twenty percent or more. Before the dumping order, they charged fifteen to eighteen dollars for a three-tray equivalent. After the dumping order, they are charging between $19.50 and $22.50.

New Zealand farmers are mad. They say it is unfair to force them to sell their fruit for more than their Chilean and California competitors. Chilean farmers are gobbling up market share in the United States by selling their kiwifruit at prices that are far lower than any price ever charged by New Zealand growers — between eight and twelve dollars for a three-tray equivalent. Chilean sales of kiwifruit in 1992 are expected to be more than 400% higher than they were in 1991. New Zealanders are also upset because the Chileans are gaining market share without having to spend anything to promote their product. Historically, New Zealanders have borne eighty percent of the worldwide cost of promoting kiwifruit.

5. Televisions

The American television industry has often used the antidumping laws to protect itself from foreign competition. During the 1980s, American manufacturers either went out of business or shifted their production overseas. As its share of the American market diminished, what remained of the U.S. television industry began to accuse Japanese, Taiwanese and Korean television manufacturers of dumping their products on the market in violation of the antidumping laws. In one case, a Japanese company had its dumping margin increased because it gave some television sets to charity. The Commerce Department treated the TVs as having a selling price of zero in the American market. Companies also have had their dumping margins increased by selling damaged TVs at a discount or giving their employees a discount.

A classic case in this area is Matsushita v. Zenith. The facts in this case are as follows. In 1974, Zenith and several other companies brought an action in the federal district court, alleging that Matsushita and twenty other Japanese manufacturers and/or sellers of consumer electronic products had illegally conspired over a twenty-year

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205 Ai Leng Choo, New Zealand Braces for Loss In Kiwi Sales, WALL ST. J., July 20, 1992, at A10B.
206 Note, Managing Dumping in a Global Economy, supra note 5, at 506.
207 BOVARD, supra note 9, at 120.
period to drive American firms from the market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by the Japanese companies in Japan and, at the same time, to fix and maintain low prices for the sets they exported and sold in the United States. The action was brought under §§ 1 and 2 of the Sherman Antitrust Act, § 2(a) of the Robinson-Patman Act and § 73 of the Wilson Tariff Act. In holding that Matsushita and the other companies were not guilty of predatory pricing, the Supreme Court stated:

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The foregone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.210

The court also pointed to the empirical evidence uncovered by a number of commentators over the years, namely, that predatory pricing conspiracies almost never occur, and when they do, they are almost never successful. Further, the facts in Matsushita showed that the company did not drive competitors out of business and that its market share remained about constant over the twenty-year period in question, which made it impossible to charge monopoly prices. Even if Matsushita had attained monopoly power, the opposition was not able to prove that entry barriers were high enough to prevent other competitors from entering the market.

The Matsushita case did have some interesting effects on the market, though. Between 1971 and 1991, the inflation-adjusted price of television sets dropped by 25.6%.211 While American companies continued to build large televisions that doubled as livingroom furniture, the Japanese built the small televisions that American consumers wanted. While American producers were investing their resources in politics and lawsuits, the Japanese were investing in better quality control and improved technology. The American antidumping laws forced the Japanese to raise their prices, thus adding to their profits, which played a major role in financing their videocassette recorder production, according to the Organization for Economic Cooperation and Development.212

210 475 U.S. at 588-589.
211 BOVARD, supra note 9, at 157.
E. Harmful Effects of Antidumping Policy

1. The Chilling Effect on Competition

A strong case can be made that antidumping law, rather than promoting competition, actually impedes it. The cost of entering and competing in the American marketplace might be too high if the foreign producer stands a good chance of being hit with an antidumping action. As a result, some foreign producers rationally decide not to enter the American market rather than face the risk of an antidumping action, which could spawn numerous lawsuits that take years to settle.\(^{213}\) As soon as an antidumping case is filed, customers and importers face an unknown liability and price for an indefinite future period. Because American importers could get hit with dumping penalties, they hesitate to do business with a foreign supplier that has an outstanding dumping investigation, or one that has been found guilty of dumping, because the liability could increase and shift to them with no warning or due process.\(^{214}\) The possibility of being hit with large unknown liabilities somewhere down the road also reduces importers' ability to borrow or make new commitments.\(^{215}\) The antidumping laws are exempt from the Administrative Procedures Act, which would guarantee due process. In effect, the antidumping laws punish American importers for doing business with foreign suppliers.

Another aspect of the chilling effect that antidumping laws have on trade is the possibility that an accused foreign supplier will have to reveal cost of production data. While such disclosures are supposed to remain confidential, the information foreign suppliers provide often winds up in the hands of their American competitors.

2. Higher Prices

Antidumping policy results in higher prices for several reasons. For one, foreign producers have a tremendous incentive to raise their prices in order to lower the probability of being hit with an antidumping action. Also, the chilling effect that antidumping policy has on competition results in reduced competition, and where there is reduced competition, there are higher prices. Initiating an antidumping action allows domestic producers to increase their own prices and profit margins. In the case of foreign imports of antifriction bearings, for example, industry profits increase by twenty million for each one percent increase in price. Tor-

\(^{213}\) Caine, \textit{supra} note 126, at 700.
\(^{214}\) Bovard, \textit{supra} note 9, at 147-48.
\(^{215}\) Caine, \textit{supra} note 126, at 701.
rington Corp., which initiated the dumping action, alleged that dumping margins were as high as fifty percent, which would have increased its share of profits due to price increases of $250 million.\(^{216}\) All for the price of a postage stamp, since Torrington did not have to pay anything to prosecute the case. The government picked up the entire cost of prosecution.

Another effect antidumping policy has is to weaken American competitiveness. If American companies cannot get the products they want at a reasonable cost, it raises their cost of production. Auto makers have to pay more for steel. Company cars cost more, as do raw materials for numerous industries. Retail clothing stores have to pay more for textile products. As a result, profit margins are squeezed and companies make less profit, which means they have less to invest in research, development, expansion and job creation. Antidumping policy amounts to a form of price control that affects hundreds of billions of dollars in imports each year.

3. **The Effect on Employment**

The relationship between antidumping legislation and employment might not seem obvious at first glance. However, antidumping laws do have an effect on employment. On the positive side, a certain number of jobs can be saved by making it difficult for foreign producers to sell in the domestic market. If Japanese automakers, for example, had to increase the price of their cars by $3,000, they would sell fewer cars and the big-3 domestic auto manufacturers would be able to sell more cars. And the domestic producers would be able to raise their prices because the Japanese would not be competing as aggressively on price.

However, antidumping laws also destroy jobs. Slapping on antidumping duties has the same effect as slapping on a tariff or imposing import quotas. Foreign producers that decide to sell in the American market anyway, even in the presence of antidumping laws, will merely raise their prices, which has the same effect on consumers as if the government imposed a tariff. But in the case of raising prices to avoid antidumping duties, the foreign producers receive more cash, thereby strengthening their bottom line, whereas in the case of a tariff, the government gets the money. So, from a domestic producer point of view, antidumping laws are actually more harmful than a tariff because antidumping laws strengthen the financial position of their foreign competitors. For foreign competitors that decide to stay away from the

\(^{216}\) BOVARD, *supra* note 9, at 155.
American market rather than risk the possibility of an antidumping action, the effect is similar to a quota, in the sense that fewer units of product enter the country.

Several studies have found that the number of jobs saved by imposing tariffs or quotas is less than the number of jobs lost. There is a net decrease in welfare and employment because of tariffs and quotas. Every steel job saved costs $113,622 annually.\textsuperscript{217} Saving a textile job costs $134,686 a year.\textsuperscript{218} Each dairy job saved costs $220,000 a year.\textsuperscript{219} Were the money spent where it would be more productive, it is reasonable to expect that more jobs would be created than those lost.

Some studies that have been done in this area attempt to measure the job gains and losses. For example, imposing voluntary restraints on the steel industry in 1984 actually destroyed more jobs than it saved — 16,900 steel production jobs saved versus 52,400 jobs lost in industries that use steel.\textsuperscript{220} Another study estimated that the passage of a certain trade bill would save 36,000 apparel manufacturing jobs, but destroy 58,000 apparel retailing jobs.\textsuperscript{221}

One particularly enlightening example where antidumping laws destroy jobs is the case of flat panel display screens.\textsuperscript{222} In this case, the International Trade Commission found that Japanese companies were dumping flat panel display screens, which are used in laptop computers, on the U.S. market.\textsuperscript{223} The ITC recommended a 62.7% dumping duty. As a result of this ruling, American computer manufacturers were unable to get the flat panel displays they needed to manufacture laptop computers. So Toshiba's production facility in Irvine, California decided to shut down its plant and move back to Japan. Apple Computer abandoned plans to make laptop computers in Colorado and decided to make them in Ireland instead. IBM said it was also considering moving its production facilities to another country. But what is really irrational is the fact that there were no domestic suppliers for the panel in the first


\textsuperscript{218} \textit{Cline, supra} note 170, at 194.

\textsuperscript{219} GARY C. HUFBAUER ET AL., \textit{TRADE PROTECTION IN THE UNITED STATES: 31 CASE STUDIES} 15 (1986).


\textsuperscript{221} L.M. DESTLER AND JOHN S. ODELL, \textit{ANTI-PROTECTION: CHANGING FORCES IN UNITED STATES TRADE POLITICS} 56, n. 43 (1987).

\textsuperscript{222} Certain High-Information Content Flat Panel Displays and Display Glass Therefor from Japan, USITC Pub. 2413, Inv. No. 731-TA-469 (Aug. 1991).

\textsuperscript{223} This case is also discussed in Bryan T. Johnson, \textit{A Guide To Antidumping Laws: America's Unfair Trade Practice}, Heritage Foundation Backgrounder No. 906, July 21, 1992, at 11-12.
place. The two American companies that manufactured the screens were both small and had the U.S. government as their only customer. American computer manufacturers decided not to give their business to the two American producers because they concluded that the American suppliers could not give them the product and service they required. So the Japanese suppliers could in no way be considered to have harmed the domestic industry. Yet the International Trade Commission saw fit to impose an antidumping duty on the Japanese suppliers.

A Brookings Institution study estimated that one particular technical amendment to the 1987 trade bill would destroy 880,000 jobs in the import portion of the wholesale and retail distribution industries. This amendment, which would have artificially lowered U.S. prices by subtracting selling expenses from U.S. sales prices but not from foreign sales prices and deducting a subsidiary's profit from the U.S. sales price, would make it appear that there was dumping where in fact there was none. This amendment also was estimated to reduce domestic living standards by $39 billion and increase affected import prices by twenty percent. The chilling effect the amendment would have on direct foreign investment also would endanger 2.7 million jobs that are provided by foreign affiliates.

Antitrust enforcement is another area that may be compared to antidumping. In both cases, the market becomes less efficient. To avoid charges of predatory pricing (in antitrust) or dumping (in antidumping), companies raise their prices, which means that the consumers of their products have reduced standards of living. They must spend more for the product in question, so they have less to spend on other things. One study in the antitrust area estimated that, for every one percent increase in enforcement, 7,000 jobs were destroyed.

While coming up with exact numbers to measure the job gains and

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224 The Brookings Institution study was conducted by Robert Lawrence and is reported by Mary Alexander in No Dumping on Consumers, Houston Post, Nov. 24, 1987. See also Mary Alexander, Antidumping Amendment Dumps on Consumers, Capitol Comment No. 32, Citizens for a Sound Economy, November 5, 1987.

225 For more on the inefficiency of antitrust laws, see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); DOMINICK T. ARMENIAN, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (2d ed. 1990). Basically, the argument goes like this. The antitrust laws do not prevent monopoly, they encourage it. They reduce competition because companies keep their prices high enough to avoid being prosecuted for predatory pricing. Antitrust laws raise barriers to entry rather than reduce them, thus reducing competition and economic efficiency.

226 The Shughart-Tollison study, "The Employment Consequences of Antitrust," covered the 1947-81 period. This study, in manuscript form, was cited in Robert D. Tollison, Public Choice and Antitrust, 4 Cato J. 905, 914 (1985).
losses of a particular policy may be difficult, it is not too difficult to see that implementing a policy that results in higher prices reduces total welfare and employment. If consumers have to spend an extra $3,000 for a Japanese (or American) car, then they will have $3,000 less to spend on something else. They will not be able to buy the motorboat they want because they will have to spend the $3,000 on the car. What is seen is the automobile purchase. What is not seen is the boat, which cannot be bought — or even made — because of the policy to raise auto prices. The company that manufactures motorboats, the retailer who sells them and the sales person who works for the retailer all lose because the boat is not purchased. Yet they do not even know they are losing because they have no way of knowing that the consumer who bought the car would have also bought a boat if only there were enough money to buy both.  

It is easier to identify the jobs that will be lost by a particular policy than the jobs that will be gained by not adopting the policy because job losses are visible. All one need do is count the number of people on the unemployment line. Auto companies can see that adopting a certain policy will save X number of jobs in their industry, and they lobby accordingly. But the people who stand to gain by rejecting a protectionist policy aimed at saving jobs in the auto industry do not see how the policy will affect them. The boat manufacturer and dealer do not see that they stand to increase their sales if the protectionist auto policy is not adopted.  

Another phenomenon that has a built-in bias in favor of the protectionists is the relative cost and benefit of doing anything to protect your interests. For example, a textile manufacturer may stand to gain millions of dollars if Congress passes a particular trade bill that might result in raising the cost of a shirt by five dollars. It is in the textile manufacturer's interest to spend time, effort and money to see that such a bill becomes law. But the individuals who wear shirts, even if they are aware that the pending legislation will cost them five dollars a shirt, tend not to do anything about it. For a mere five dollars, it is not worth their while to take time off from work and travel to Washington to lobby their elected representatives. For them, the cost exceeds the benefit. Thus, there is a built-in bias in favor of the concentrated special interests and against the consumers.  

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4. Efficiency Losses

The antidumping laws result in efficiency losses because companies that are under attack must shift their resources from productive activities to defensive, asset-protecting activities. Efforts shift from income-producing activities to income redistribution activities. The dozens or hundreds of individuals who must compile data for the Commerce Department cannot spend their time performing wealth creating activities. Research and development, planning and any other number of activities must receive fewer resources, as resources are drained away for compliance. The funds that are spent for attorneys and accountants cannot be spent for engineering or marketing. Colombian flower growers, for example, spent more than one million dollars just in legal fees between 1987 and 1989 to defend themselves against a charge of dumping. Ecuadorian flower growers spent more in legal fees than the entire value of the contested flowers they exported to the United States.\footnote{228} Productivity suffers, making the company less competitive.

F. The Predatory Pricing Argument

The predatory pricing argument is an especially curious one, curious in the sense that the economic literature of the past few decades seems to conclude that predatory pricing either does not exist because such behavior is irrational or, if it does exist, it has usually or always failed when tried.\footnote{229} James Bovard points out that, while the fear of predatory pricing permeates the dumping laws and regulations, there are no known cases in the last hundred years where a company has dumped its products on the U.S. market, bankrupted American producers, and then driven up prices and squeezed consumers for a long period of time.\footnote{230} Yet much of the theory upon which antidumping policy is built takes for granted that predatory pricing both exists and is widespread. Along with the notion that predatory pricing exists is the belief that predatory pricing is somehow evil. At least one federal judge believes that dumping is predatory and involves some element of wrong-doing.\footnote{231} U.S. trade representative Clayton Yeutter has called dumping a "predatory pricing

\footnote{228} Bovard, supra note 9, at 149.
\footnote{230} Bovard, supra note 9, at 157.
\footnote{231} Algoma Steel Corp. Ltd. v. United States, 865 F.2d 240, 242 (Fed. Cir. 1989), cert denied, 492 U.S. 919 (1989); Bovard, supra note 9, at 107.
practice condemned under U.S. law.\textsuperscript{232} The evidence seems to suggest that allowing companies to charge low prices benefits consumers without leading to monopoly. The only ones harmed are inefficient producers who cannot meet the competition's price. One might even go so far as to call predatory pricing a victimless crime, in the sense that no one's rights are violated by it.

When is pricing predatory? Perhaps never. The economic theory underlying the prohibitions against predatory pricing is that an established company can price its product below cost (whatever that is) until competitors are driven from the marketplace. It can then raise its prices above the market price because there is no competition. The strategy is considered effective if the predatory pricer gains more after competitors have been purged from the market than it lost in its attempt to drive them away.

There are several problems with this argument. For one thing, a company that prices below cost loses money on every sale. If its price is lower than that of its competitors, it will gain market share, so every sale it makes will push it closer to bankruptcy. Even if its price-cutting does force all competitors from the market, the former competitors' assets don't just vanish when they go out of business. Someone purchases the assets at fire-sale prices, which makes the purchaser a low-cost competitor. So companies that resort to predatory pricing harm themselves on two counts: they lose money on every sale, and they help create new, low-cost competitors. Even if the predator buys competitors' assets at ten percent of market value, it must still worry about new competition, which will enter the market if the predatory company's prices are high enough. In almost no case are the barriers to entry so high that new competitors cannot enter the market, unless some government denies a license or prohibits entry in some other fashion.

The predatory pricing argument is especially weak when applied to antidumping. When applied to domestic antitrust, the predatory pricing argument might have some superficial plausibility because the domestic market in widgets or whatever might consist of just a few competitors that dominate the market. In the United States, for example, there are just three major auto manufacturers, General Motors, Ford and Chrysler. So it might be possible to argue that General Motors might resort to predatory pricing in an attempt to drive Ford and/or Chrysler out of business, leading to the conclusion that the antitrust laws should prohibit such activity. While there is no evidence to support this posi-

tion, and since such behavior would be irrational, as was pointed out above, the predatory pricing argument, even in the case of domestic industry, is a weak one, which will not stand up to analysis.

But when the predatory pricing argument is applied to international markets, the argument becomes even weaker. As long as trade barriers are low or nonexistent, it is impossible to drive out all competitors and capture the market. Even if General Motors were able to bankrupt Ford and Chrysler, it would capture only a small portion of the domestic market for autos. Foreign auto manufacturers like Honda, Toyota, Nissan, Fiat, Hyundai, Mercedes Benz, Volkswagen, Volvo, and so forth, would still maintain a strong position in the American market, unless the government prevented their products from entering the United States (quotas) or unless it raised tariffs so high that foreign autos were priced out of the market. The antitrust literature of the last few decades seems to conclude that it is impossible to achieve a monopoly position or to maintain it without receiving protection from government against foreign competition.233 So the real threat to consumers is not that some foreign company will capture a market, but that the United States government will assist some inefficient and high-cost domestic producer in capturing a market that would not be possible in the absence of such support.

When one looks at the rationale behind the antidumping laws — predatory pricing — and then looks at a list of the companies, industries, products and countries that have been the subject of antidumping actions, the predatory pricing argument for having antidumping laws becomes a mockery. Oftentimes, the target of an antidumping action is some company or product in an industry that has a very small share of the American market. Sometimes the target is in the third-world and poses little or no threat of bankrupting American companies. The antidumping suits are invariably filed by some American company or companies that want to use government as a tool to keep competitors from chipping away at their market share.234 Below are a few examples of the products, countries and initiators.


234 For a listing of the antidumping Investigations filed between 1979 and 1990, which includes a listing of the product involved, the date initiated, the country involved, the initiator of the Investigation and the action taken, see Destler, supra note 41, at 326-403. Destler also gives a listing of countervailing duty Investigations filed between 1979 and 1990.
## A Sampling of Antidumping Actions 1979-1990

<table>
<thead>
<tr>
<th>Product</th>
<th>Country</th>
<th>Initiator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Melamine in crystal form</td>
<td>Austria, Italy, Netherlands</td>
<td>Melamine Chemicals, Inc.</td>
</tr>
<tr>
<td>Sodium hydroxide, in solution</td>
<td>Germany, France, Italy, United Kingdom</td>
<td>Linden Chem. &amp; Plastics</td>
</tr>
<tr>
<td>Carbon steel plate</td>
<td>Belgium, France, Germany, Italy, United Kingdom</td>
<td>Lukens Steel Company</td>
</tr>
<tr>
<td>Carbon steel plate</td>
<td>Czechoslovakia, Germany, Hungary, Poland, Venezuela, Finland</td>
<td>U.S. Steel</td>
</tr>
<tr>
<td>Carbon steel plate</td>
<td>Romania</td>
<td>U.S. Treasury</td>
</tr>
<tr>
<td>Certain carbon steel products</td>
<td>Belgium, Germany, France, Italy, Luxembourg, Netherlands, United Kingdom</td>
<td>U.S. Steel Corp.</td>
</tr>
<tr>
<td>Frozen winter vegetables</td>
<td>Mexico</td>
<td>S.W. Florida Winter Vegetable Growers Assn.</td>
</tr>
<tr>
<td>Natural or synthetic menthol</td>
<td>PR China</td>
<td>Haarman and Reimar Corp.</td>
</tr>
<tr>
<td>Cotton shop towels</td>
<td>PR China</td>
<td>Milliken Industries, Inc.</td>
</tr>
<tr>
<td>Cotton printcloth</td>
<td>PR China</td>
<td>American Textile Manufacturers Institute</td>
</tr>
<tr>
<td>Canned mushrooms</td>
<td>PR China</td>
<td>Four &quot;H&quot; Corp.</td>
</tr>
<tr>
<td>Certain iron-metal castings</td>
<td>India</td>
<td>Pinkerton Foundary, Inc.</td>
</tr>
<tr>
<td>Truck trailer axle-and-brake assemblies and parts</td>
<td>Hungary</td>
<td>Rockwell International Corp.</td>
</tr>
<tr>
<td>Tapered roller bearings and parts</td>
<td>Hungary</td>
<td>Tinker Co.</td>
</tr>
<tr>
<td>Item</td>
<td>Countries</td>
<td>Organization</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>------------------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>Carbon steel wire rod</td>
<td>Poland, Argentina, Mexico, Spain</td>
<td>Six domestic steel producers</td>
</tr>
<tr>
<td>Fresh cut roses</td>
<td>Colombia</td>
<td>Roses, Inc.</td>
</tr>
<tr>
<td>Certain fresh cut flowers</td>
<td>Canada, Chile, Colombia, Costa Rica, Ecuador,</td>
<td>Floral Trade Council</td>
</tr>
<tr>
<td></td>
<td>Kenya, Mexico, Peru</td>
<td></td>
</tr>
<tr>
<td>Hot-rolled carbon steel plate</td>
<td>Belgium, Bethlehem, France, Italy, Luxembourg,</td>
<td>U.S. Steel, Bethlehem</td>
</tr>
<tr>
<td></td>
<td>Netherlands, Romania, United Kingdom, Germany</td>
<td>Steel and other steel</td>
</tr>
<tr>
<td></td>
<td></td>
<td>corporations</td>
</tr>
<tr>
<td>Hot-rolled carbon steel sheet</td>
<td>Finland, Hungary, Romania, Venezuela</td>
<td>U.S. Steel</td>
</tr>
<tr>
<td>Cold-rolled carbon steel sheet and strip</td>
<td>Belgium, France, Italy, Luxembourg, Netherlands,</td>
<td>U.S. Steel, Bethlehem</td>
</tr>
<tr>
<td></td>
<td>Romania, United Kingdom, Germany</td>
<td>Steel and other steel</td>
</tr>
<tr>
<td></td>
<td></td>
<td>corporations</td>
</tr>
<tr>
<td>Cold-rolled carbon steel sheets and plates</td>
<td>Austria, Czechoslovakia, Germany, Finland,</td>
<td>U.S. Steel</td>
</tr>
<tr>
<td></td>
<td>Romania, Venezuela</td>
<td></td>
</tr>
<tr>
<td>In-shell pistachio nuts</td>
<td>Iran</td>
<td>California Pistachio Commission</td>
</tr>
</tbody>
</table>

It is unlikely that the United States is about to be overrun with Romanian carbon steel plate\(^{236}\) or Chinese cotton shop towels. And fresh cut flowers hardly pose a threat, either. It would be interesting to delve into the reasoning behind the argument to keep Iranian nuts out of

\(^{235}\) Id.

the United States (not to be confused with nutty Iranians). And it appears that the various domestic steel producers have made a concerted effort to bring antidumping charges against just about anyone that tries to sell steel products in the domestic market. But can it honestly be said that any of these foreign producers are engaged in predatory activity, or do they just want to sell their products in the American market?

III. THE PHILOSOPHY OF ANTIDUMPING POLICY

The philosophy behind antidumping policy is a curious one. Those who advocate antidumping policy do so for a number of reasons. Some advocates support antidumping on the basis of fairness; they subscribe to some variation of the "fair trade" theory, and honestly believe that there is such a thing as fair trade, just as medieval scholars believed that there was such a thing as a fair price. For example, when Congress was debating the merits of what was to become the Trade Agreements Act of 1979, an antidumping advocate said that antidumping laws were "vital to the maintenance of fair trade because they deter and offset the value of predatory dumping and subsidization in the United States market by foreign governments or exporters."237

Other advocates support antidumping because they find it useful as a club, a threat that they can use against countries that have trade barriers (perceived or real) against the importation of American products or services. They advocate using the antidumping laws as a bargaining chip. Another group favors antidumping laws because they see that jobs are being lost to foreigners who sell their products at such low prices that American companies cannot compete. Then there are the special interest groups, the rent-seekers, who want to use the antidumping laws to increase their profits and reduce the competition that is causing their companies to lose sales and market share, even if it means that consumers will have to pay higher prices for lower quality products.

On the other side of the coin are the free traders, who see antidumping laws as an impediment to economic growth and/or individual freedom. James Bovard sees the antidumping laws as a "sword of Damocles" that hangs over every foreign country that exports to the United States and says that the Commerce Department views cheap foreign products as Trojan Horses that insidiously try to undermine the U.S. economy.238

238 BOVARD, supra note 9, at 107.
A. Using the Law as a Club to Batter the Competition

The United States has imposed more antidumping penalties on low-priced foreign goods than has any other government.\textsuperscript{239} And the rules are so biased that nearly all the foreign companies that were investigated for dumping between 1980 and 1989 were found guilty.\textsuperscript{240} So, as a practical matter, it is only a matter of time between the time the petition is filed and the foreign company is found guilty. And even if the company is ultimately exonerated, the time, money and hassle involved in settling the case can bankrupt a small or medium-size company, and can make even a large company think twice about doing business in the American marketplace. So the antidumping laws have a definite chilling effect on foreign competitors.

Domestic companies are aware of this situation, and sometimes use the antidumping laws to punish foreign competitors or scare them away from the American market. It is a classic case of rent-seeking, the term Public Choice economists use to describe situations where individuals or special interest groups seek special privileges or protection from government, or get someone else to pay for their benefits.\textsuperscript{241}

Rent-seeking activity is likely to pop up whenever the cost is low and the potential benefits are great. Rent-seeking activity has been common in the area of antitrust, where a private company accuses a competitor of some anticompetitive practice and the government conducts the prosecution at its own expense. If the government wins the case, the accusing company can collect up to three times the amount of damages that can be proven. The accuser does not have to spend anything except the cost of a postage stamp or telephone call. The accused has to spend years, and perhaps millions of dollars, to defend itself in court. Even if the accused is able to win the case, its resources will be strained, and it will be a weaker competitor for the experience. With this kind of low downside risk and high potential gain, it is no wonder that more than 90% of all the antitrust cases filed in recent years were started by a pri-

\begin{itemize}
\end{itemize}
private company rather than the federal government.242

The ratio of antidumping cases initiated by private parties is also more than ninety percent of all the antidumping cases filed.243 And as is the case with antitrust, the government pays all the costs of prosecution, so the company that starts the proceeding does not incur any cost, but stands much to gain if a competitor can either be bloodied by the Commerce Department and forced to raise its prices, or exits the U.S. market altogether, thus reducing the competition, and the need to keep prices low.

Nearly all of the antidumping petitions that U.S. companies file with the Commerce Department result in an investigation — ninety-six percent according to a General Accounting Office study.244 And companies are never penalized for submitting incorrect or knowingly false information.245 But once a company is convicted of dumping, it can be penalized for perhaps a decade or more, even though the dumping may have occurred just once.246

William Baumol and Janusz Ordover wrote an article a few years ago titled "Use of Antitrust to Subvert Competition."247 Were we to substitute the word "antidumping" for "antitrust," much of what Baumol and Ordover said would still be true. The same is true of the following quote:

There is a specter that haunts our antitrust institutions. Its threat is that, far from serving as the bulwark of competition, these institutions will become the most powerful instrument in the hands of those who wish to subvert it. More than that, it threatens to draw great quantities of resources into the struggle to prevent effective competition, thereby more than offsetting the contributions to economic efficiency promised by antitrust activities. This is a specter that may well dwarf any other source of concern about the antitrust processes. We ignore it at our peril and would do well to take steps to exorcise it.248

The antitrust laws and the antidumping laws are basically mecha-
nisms for wealth redistribution — from strong, competitive companies to weaker, inefficient companies that want government to protect them from the competition. Robert Bork calls this phenomenon predation through government processes.249 I prefer to call it using government as a club — to batter your opponents and get what you want. William Shughart has also written about this phenomenon at length.250

Whatever label you wish to attach to it, it is just a case where interest groups lobby government for privileges. Companies, industries or trade groups are sufficiently concentrated and have sufficient interest to make the investment necessary to lobby government for favors. They use government to increase their wealth at the expense of others — consumers in this case — who are not mobilized to lobby government. The special interest groups gain at the expense of the consumers, who have to pay higher prices, and who have a reduced choice of products, since some foreign manufacturers are driven out of the American market by the antidumping laws. These lobbyists will continue to invest resources into lobbying efforts as long as the return they receive is more than the cost of their efforts.251 This phenomenon is not new, and it will persist as long as the people who elect government officials continue to elect people who think that this kind of activity is a legitimate function of government.

One case in particular where using the antidumping laws as a weapon proved to be profitable involved the investigation started by Timkin against Koyo Seiko and several other Japanese tapered roller bearing exporters.252 The Treasury Department investigated Koyo Seiko for dumping as far back as 1969. The initial investigation, which concluded in 1971, found no evidence of dumping. But Timkin Co., one of Koyo Seiko’s major competitors, convinced the Treasury Department to investigate Koyo Seiko and other Japanese roller bearing exporters again in 1973.253 Three years later, it found Koyo Seiko to be guilty of dumping and imposed a 3.2% dumping penalty, although only one of its tapered roller bearing models was found to have been sold for less than fair value, and even that model was sold below fair value for just one month.254 As a result of the investigation, Koyo Seiko adjusted its tapered roller bearing prices so that it would be able to avoid future dumping penalties.

249 BORK, supra note 225, at 347-64.
250 SHUGHART, supra note 233, at 157-76.
252 BOVARD, supra note 9, at 143-46.
253 Id.
254 Id.
Between then and 1989, six different investigators at either the Treasury Department or Commerce Department continued to work on the Koyo Seiko case, in an attempt to find more evidence of dumping.\textsuperscript{255} Over that timespan, Koyo Seiko had to comply with more than fifty different requests for data. Various government officials paid visits to the company's headquarters in Japan nine times in order to verify the data supplied by the company. After these repeated examinations, the government imposed no dumping duty deposits on the company's imports, which indicated that it could not find evidence of dumping.\textsuperscript{256}

But in 1982, it was told that the investigation, which ended in 1979, had found some dumping margins of up to two percent. Curiously, the Commerce Department never published its findings because a Commerce Department bureaucrat thought that it would be advisable not to make the findings public until the Commerce Department was able to resolve all points of contention, due to Timkin Company's intense interest in the case.\textsuperscript{257}

A year later, in 1983, Timkin Company alleged that the sales Koyo made in its home market were below its cost of production. Because of that allegation, the Commerce Department demanded Koyo's cost of production information starting as far back as 1978. Upon examining the data, the Commerce Department could find no evidence of dumping, and in the summer of 1985, it said that it would close the case within forty-five days unless someone protested. As a result, Timkin protested, and urged the Commerce Department to start another investigation of Koyo's bearing exports as far back as 1974.\textsuperscript{258}

In July, 1986, the Commerce Department announced that it would conduct a new investigation of Koyo and said that it would issue its findings within a year. But the following month, the Commerce Department announced that it was changing its methodology and expanding its investigation to include additional bearing models. As a result, it would require much new data. However, in response to the previous investigations, Koyo had adjusted its prices so that it could avoid future liability for dumping under the old methodology. Because of the change in the Commerce Department's methodology, seventeen years of experience — 1973 to 1986 — in adjusting prices to conform to Commerce Department requirements was rendered useless. And in June, 1987, the Commerce Department changed its methodology again, and greatly ex-

\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
panded the number of bearing models under investigation.\textsuperscript{259}

In March, 1989, the Commerce Department announced its findings. It determined that Koyo's dumping margin for its exports for the 1974-79 period was as high as 22.9%. It later raised that margin to 35.9%. As a result, Koyo faced an antidumping penalty in the millions of dollars, which was perhaps more than the total value of the bearings it sold in the United States during the mid and late 1970s.\textsuperscript{260}

The means by which the Commerce Department arrived at its dumping duty figure is especially enlightening, since it illustrates how the system works in practice. The Commerce Department found minor discrepancies among the vast quantities of data that Koyo provided — information that had been verified over and over again both by Treasury and Commerce Department officials over the years — and used the discrepancies as an excuse to reject much of the data and substituted its own data instead based on the "best information available." It treated Koyo's vast quantities of data as though it had never been filed. In fact, in some cases, it appears that the Commerce Department was unaware that it had the information it was requesting. As a result, the Commerce Department sometimes constructed the information it needed — which involved much guesswork — even though it already had received precise data from Koyo.\textsuperscript{261}

To make matters worse, Koyo no longer retained much of the data it needed to defend itself against the Commerce Department's dumping charges. United States tax law generally requires companies to retain financial data for just three years, and while many companies retain such information a little longer than that, there is seldom any legitimate business reason for keeping data much longer than five years because most information is no longer relevant by then. So it is not surprising that Koyo did not retain information that was as much as fifteen years old. But even if it did retain the information, the Commerce Department ignored it, for the most part, and relied on the "best information available," which, as previously discussed, often consists of highly inaccurate information that is either taken out of thin air or from the competitor that called for the investigation in the first place.\textsuperscript{262}

To make matters worse, shortly after the Commerce Department announced the dumping penalties, Timkin took the opportunity to inform Koyo's customers that Koyo would soon file for bankruptcy, and

\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Id.
\textsuperscript{262} Id.
attempted to get Koyo's customers to switch their business to Timken.\textsuperscript{263}

Using the antidumping laws as a club does not take much of an investment on the part of the petitioning company. And the Commerce Department is very sensitive to any allegations made by a domestic company or industry, regardless of the truth or quality of information. Administrative reviews can be continued even after no wrongdoing is found. All it takes is a letter from a company that might stand to be harmed by a foreign competitor. And since the government pays for the full cost of the investigation (by this I mean that Timken did not have to pay anything, although Koyo incurred considerable expense), the present policy encourages domestic companies to use the system to batter their competitors at the expense of consumers.

B. The Ethics of Using the Antidumping Laws as a Weapon

Are there any ethical issues to be discussed in connection with using antidumping laws as a weapon to reduce competition? I think there are, although the literature has ignored this point. In fact, a cursory search of the literature failed to reveal a single article that has been written about the ethics of initiating an antidumping investigation.

The management of a company has a fiduciary duty to its shareholders. Indeed, some commentators would say that their only duty is to the shareholders.\textsuperscript{264} Friedman would say that the only responsibility of the board of directors and corporate officers is to increase shareholder wealth. But there are ethical ways to increase shareholder wealth, and there are unethical ways. Ethical means would consist of things like acting diligently and making products that consumers want in the most efficient manner available. Unethical ways would consist of stealing and putting the proceeds into the corporate checking account.

Under which category, ethical or unethical, would using the antidumping laws to batter the competition fall? Clearly, using the antidumping laws against a competitor tends to weaken the competitor, which benefits the shareholders of the company that instigates the antidumping action. Competitors must expend perhaps millions of dollars to accumulate the information the Commerce Department requests, which means that resources must be taken away from other areas, such as research and development, product enhancement, quality control and the search for more cost-effective ways of doing business. Rather than

\textsuperscript{263} Id.

using their resources to create wealth, competitors that are under the Commerce Department’s microscope must expend resources merely to protect what they already have.

There are ethical ways to batter the competition, and there are unethical ways. An ethical way to batter the competition would be to sell a better product at a lower price. An unethical way to batter the competition would be to blow out the kneecaps of the competitors’ board members. Using the antidumping laws to batter the competition is akin to asking the government to blow out the competitors’ kneecaps.

A good rule of thumb to use to determine whether conduct is ethical would be to determine whether anyone’s rights are violated, or whether anyone’s property is being taken without the consent of the owner. In the case of antidumping laws, the company initiating the antidumping investigation is clearly causing the competitor to expend assets in an inefficient manner, to preserve resources rather than to create shareholder wealth. If the competitor is violating some right of the company instigating the antidumping action, such action could be justified on the part of the instigating company. But if no rights of the instigating company are violated, then the company instigating the action is merely using the force of government to dissipate a competitor’s assets, which, in effect, is not much different than burning down the competitor’s warehouse or destroying its property.

Are the instigating company’s rights violated when a competitor sells a product to a consumer who might otherwise buy the instigator’s product? I think not. Clearly, the instigating company is harmed, in the sense that the competitor is causing it to lose profits. But being harmed is not the same as having rights violated. The competitor has the right to sell to anyone who will buy. If the instigating company uses force, or the threat of force, to prevent the competitor from making the sale, then it is the instigator, not the competitor, who is acting unethically. Asking the Commerce Department to initiate an antidumping investigation against a competitor is resorting to force or the threat of force to block a competitor’s right to sell, since the Commerce Department has the power to block the competitor from entering the market, or can force the competitor to pay a fee—a dumping duty—for offering consumers a product at a better price than the instigating company.

So it appears that it is not the dumping company that is acting unethically; it is the company that initiates the antidumping investigation. Of course, “companies” cannot act unethically, any more than companies can eat, sleep, breathe or walk up stairs. Only individuals can act ethically or unethically, so it is the individuals at the company initiating
the antidumping action who are acting unethically, not the company itself. The individual or individuals who do anything to move the antidumping investigation forward are acting unethically, just like anyone who takes part in the planning or torching of the competitor's warehouse is acting unethically. Just because the damage is done with a telephone call or letter rather than a match does not change the unethical nature of the act.

C. Antidumping as Silliness

When looked at rationally, antidumping laws are really silly. In effect, they protect consumers from low prices. But do consumers really need such protection? If consumers wanted higher prices, all they would have to do is tell the sellers that their prices are too low, and the sellers would gladly meet the consumer's needs by raising them.

But the antidumping laws have nothing to do with consumers. Antidumping laws are advocated by producers and are made for their benefit, at the expense of consumers. In effect, the Commerce Department works for the benefit of producers and at the expense of consumers. Public Choice economists would say that the special interests have "captured" the Commerce Department because it is they, the special interests (producers) who control policy.

Dumping, when it actually exists, is merely an exercise in price discrimination, selling the same product in different markets at different prices, which is rational economic behavior. It is a policy that, when properly followed, maximizes a company's profits. Yet when it is done across national borders, it is considered sinister or evil. Antidumping laws reward companies that sell 100 units at an eight percent profit and punish companies that sell one million units at a 7.9% profit. Antidumping laws twist rational economic behavior by making it more attractive to earn a higher unit profit than a higher total profit. It is better to sell many units at a lower unit profit than a few units at a higher unit profit. Antidumping laws reward companies for raising consumer prices.

Another aspect of price discrimination that is often overlooked by antidumping enthusiasts is that price discrimination can actually enhance competition. One reason a company may engage in price discrimination is so that it can gain a foothold in a new market. It can facilitate entry by dropping its profit margin. Another procompetitive feature of price discrimination is that it can help to erode the cohesiveness of collusive pricing arrangements. Yet this fact is often overlooked, perhaps

because the intent of antidumping laws is to protect domestic producers, not to enhance competition.

D. A Rights Approach To Antidumping

So far, the discussion has taken a utilitarian approach to antidumping policy, for the most part. It tries to answer questions like "does antidumping policy do more good than harm," or "does antidumping policy provide the greatest good for the greatest number?" But really, such questions are beside the point. They were addressed because economists tend to speak in terms of utilitarianism. But utilitarianism is not the only approach that can be taken to the policy of antidumping. Indeed, it is not even the best approach that can be taken.

Utilitarianism suffers from several weaknesses. For example, it is impossible to measure whether the good to be gained by a particular policy exceeds the bad. So it is impossible to tell whether a policy would result in the greatest good for the greatest number. Jacob Viner merely assumes that dumping laws generally do not result in the greatest good for the greatest number in most cases. He must make the assumption, since there is no way to prove it mathematically. One strength of Viner's position, though, is that he looks at both sides of the coin — consumers as well as producers. Many commentators on the antidumping laws just look at the effect the laws have on producers and ignore consumers.

It should not be necessary to elaborate on the proposition that a gain to the consumer is by so much a gain to the country as a whole, and that cheap imports are an advantage to the importing country provided the injury to domestic industry is not as great as the gain to the consumer . . . From the point of view of the importing country as a whole, there is a sound economic case against dumping only when it is reasonable to suppose that it will result in injury to domestic industry greater than the gain to consumers. Only on the crudest of protectionist reasoning can it be argued that the desirability of allowing the importation of dumped goods should be decided with reference solely to its effect on domestic producers and without taking into account its benefit to consumers.

Another weakness of utilitarianism is that it tends toward majoritarianism. Because it cannot measure the degree of utility or disutility each individual receives in a particular case, there is a tendency to assume out of necessity that all individuals receive equal utility, so it then becomes a question of how many individuals are harmed and how many are helped by a particular policy. For example, if 50,000 steelworkers will lose their

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266 For a detailed critique on the weaknesses of the utility concept, see MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE: A TREATISE ON ECONOMIC PRINCIPLES 260-68 (1970).
267 Viner, supra note 3, at 138.
jobs if a particular policy is adopted but 250 million consumers will be able to buy steel products at lower prices, the conclusion might be that the policy should be adopted that will aid consumers even though steel workers will lose because of the concept of the greatest good for the greatest number. But the steelworkers lose a lot and the average consumer gains only a little bit. While the correct policy might be adopted, it might be adopted for the wrong reason. There is no way to measure the extent of gain or loss in individual cases, yet these individual gains and losses must somehow be added together to determine whether the policy results in the greatest good for the greatest number.

Perhaps the greatest weakness of the utilitarian approach is that it sometimes disparages individual rights. When choosing the policy that will result in the greatest good for the greatest number, it sometimes becomes necessary to violate someone’s rights. If two wolves and one sheep vote on what’s for dinner, the wolves will win, but only at the expense of the sheep’s rights.

A property rights approach to antidumping avoids problems like this because majoritarianism never enters into the discussion. In the case of dumping, the question is not “who is harmed” or “who is helped.” The question is “do consenting adults have the right to trade or don’t they, and if they don’t, who has the right to prevent them from doing so and where does this authority come from”?

Being harmed is not the same as having rights violated. An American textile manufacturer might be harmed if Chinese or Korean textile manufacturers are permitted to sell their products in the American market. But it does not follow that American producers are having their rights violated by allowing foreigners to sell in America. American producers have a right to sell their products to anyone who is willing to buy and so do Chinese manufacturers. The right to life, liberty and property includes the right to sell the fruits of your labor. Preventing people from selling the fruits of their labor is a violation of their rights. And preventing such sales also violates the rights of anyone who might buy the product if it were available for sale. The fact that some majority (or the majority’s elected representatives) might approve of limiting sales of foreign products does not change the fact that rights are being violated because rights do not come from governments or majorities, they are in-
herent. That is the strength of the rights position and the weakness of the utilitarian position.

Antidumping laws are a form of theft because they prevent individuals from doing with their property as they see fit. While it may not be the property itself that is being stolen, the right to acquire, trade or dispose of property is being hindered or prevented, in order to protect some group that has no right to protection. Which brings us to another question — what is the legitimate function of government?

E. Antidumping Laws and the Legitimate Functions of Government

One aspect of antidumping law and policy that is rarely discussed is the relationship between antidumping laws and the legitimate functions of government. Most commentators just assume that governments can legitimately pass antidumping laws if they want to. While the scope of this paper precludes a detailed discussion of the legitimate functions of government, a few preliminary points should be made in order to open up this aspect of the topic to further discussion.

Many believers in liberal democracy believe that government should do whatever individuals cannot do for themselves. This view is widespread, at least in America, and is generally not challenged. However, reflection on this view of the legitimate functions of government would reveal that the argument is flawed because it ignores the possibility that some functions that cannot or would not be performed by individuals or groups of individuals on their own should not be performed by governments either. For example, it is unlikely that private individuals would willingly spend their own money to build multimillion dollar monuments or subsidize the activity of some foreign government. But it does not logically follow that government should do it just because individuals will not voluntarily do it on their own. In fact, if there is no market demand for building a particular monument or subsidizing a particular activity, a strong argument can be made that that particular expenditure should not be made because consumers have determined that the value of funding the activity is less than the value of using the funds for some other purpose.²⁷⁰

Others believe that government has no legitimate functions.²⁷¹ Still

²⁷⁰ Some economists call it “market failure” when the market does not provide something that they think should be provided. For a critique of this theory, see THE THEORY OF MARKET FAILURE: A CRITICAL EXAMINATION (Tyler Cowen, ed. 1988). A variation on the market failure theme is the idea that some things are public goods, and that government must provide them. For a critique of the public goods argument, see DAVID SCHMIDTZ, THE LIMITS OF GOVERNMENT: AN ESSAY ON THE PUBLIC GOODS ARGUMENT (1991).

²⁷¹ Anarchists take this view. For example, see COLIN WARD, ANARCHY IN ACTION (1988).
others believe that government should become involved to a certain extent in the redistribution of wealth. Utilitarians believe that the government should work toward the greatest good for the greatest number.

Another view on the legitimate scope of government argues that government should be limited to the defense of life, liberty and property. This view has been expressed by John Locke and, more recently, by Harvard philosopher Robert Nozick. The Locke and Nozick views are based on natural rights. This view of government has been referred to as minimal government or the nightwatchman state.

Frederic Bastiat, a nineteenth century French political economist and antiredistributionist in the broad sense of the term, expresses his view on the legitimate scope of government as follows:

See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime. Then abolish this law without delay, for it is not only an evil itself, but also it is a fertile source for further evils because it invites reprisals. If such a law — which may be an isolated case — is not abolished immediately, it will spread, multiply, and develop into a system.

Based on the Bastiat definition of the legitimate scope of government, it appears that many present-day government functions that are taken for granted are actually illegitimate. Strictly speaking, any government action that redistributes income would fall into this category. Unfortunately, the scope of this paper precludes exploring this concept in depth.

Ludwig von Mises, the Austrian/American economist and philosopher, took a different approach. He believed that a particular government policy is good if it enhances social harmony and cooperation and bad if it reduces such harmony and cooperation. His approach is

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based in utilitarianism, but does not go so far as to advocate the greatest good for the greatest number because Mises realized that majoritarianism can sometimes be in conflict with social harmony and cooperation.

Western democracies incorporate all of these views into their governments to a certain extent, although these views are in conflict with each other. How do antidumping laws measure up when using any of these viewpoints as the standard?

Antidumping laws definitely are illegitimate from the anarchist perspective, since all laws having less than 100% approval fail the anarchist test. However, anarchist views are not mainstream views in modern liberal democracies, and if such ideas are discussed at all, it is only as a benchmark with which to measure and compare other views.

Antidumping laws are redistributionist in that they transfer wealth from consumers to producers. Consumers have to pay higher prices because of antidumping laws. Foreign producers raise their prices so that they can avoid running afoul of the antidumping laws, and domestic producers can get away with charging higher prices because the antidumping laws reduce the downward pressure on prices that would otherwise result if competition were more free and unrestrained. Some foreign producers are precluded from even entering the American market, which also reduces competition and reduces the downward pressure on prices.

But the antidumping laws do not fit the traditional redistributionist model because the redistribution—the transfer of wealth—goes in the other direction. Rather than going from the rich to the poor, the wealth transfers go from consumers to producers which, in many cases, means from the poor and middle class to the rich. So antidumping laws cannot be justified on traditional redistributionist grounds either, because the redistribution goes in the wrong direction.

Antidumping laws are also outside the legitimate scope of government from the nightwatchman state perspective because they go beyond the mere protection of life, liberty and property. Antidumping laws actually violate property rights, since they prevent a willing buyer and a willing seller from entering into a contract at a mutually agreed upon price. Either the price must be raised in order to avoid an antidumping penalty, or the transaction cannot take place at all because the foreign producer is.

For a discussion of the anarchist philosophy from a Public Choice perspective, see Explorations in the Theory of Anarchy (Gordon Tullock, ed., 1972). James M. Buchanan, the co-founder, with Tullock, of the Public Choice School of Economics, has also written on the place of anarchy in economic theory. For examples, see James M. Buchanan, The Limits of Liberty: Between Anarchy and Leviathan (1975); James M. Buchanan, Liberty, Market and State: Political Economy in the 1980's (1986); James M. Buchanan, Freedom in Constitutional Contract: Perspectives of a Political Economist (1977).
not allowed to ship goods into the domestic market. So rather than protect property rights, antidumping laws disparage them.

It is also difficult to justify antidumping laws on utilitarian grounds — the greatest good for the greatest number — because a minority is benefitting at the expense of the majority. While it is true that the minority benefits a lot by antidumping laws and the majority is hurt a little by them, there is no calculus that can measure whether the benefit received by the minority — the domestic producer — outweighs the harm done to the majority — the consumers — who must now pay five dollars more for a shirt or $2,000 more for an automobile.

Even the argument that saving 10,000 jobs in the textile industry is worth having consumers pay five dollars more for a shirt does not hold up under analysis. The studies that have been done are consistent in finding that there is a deadweight loss, jobwise, when some protectionist measure is allowed to distort the market. If a particular policy can save 10,000 jobs in the steelmaking industry, the policy will also destroy 15,000 or 20,000 jobs in the steel using industries.\(^2\)

It seems that antidumping laws cannot pass the Misesian version of utilitarianism either. Mises would say that a policy is good if it enhances social harmony and cooperation. But the antidumping laws do just the opposite. They pit producers against consumers. Rather than allowing or assisting producers and consumers to enter into mutually beneficial exchange, antidumping laws put barriers in the way, either by raising the prices consumers must pay or by preventing foreign producers from entering into mutually beneficial exchange with domestic consumers at all.

Antidumping laws seem to fit the Bastiat definition of legal plunder — using the law to help you steal — which was quoted above. Antidumping laws benefit one person or group — a particular company or industry — at the expense of others — consumers or foreign producers. It would be a crime for a private individual or group of individuals to use force to prevent a foreign company’s product from crossing the border, or to threaten to penalize a foreign producer if it did not raise prices. Yet when government does it, it is not called a crime, it is called an antidumping penalty.

Since antidumping laws cannot be justified on any theory of liberal democracy, or on economic grounds, the logical conclusion is to abolish them, the sooner the better. Economically, antidumping laws result in a deadweight loss. There are more losers than gainers. Rather than being a zero-sum game, antidumping laws are a negative-sum game. Such laws

\(^{278}\) For some specifics, see I.M. Destler and John S. Odell, Anti-Protection: Changing Forces in United States Trade Politics (1987); Hufbauer et al., supra note 219.
reduce rather than enhance social cooperation and harmony, raise prices and reduce the standard of living for virtually everyone. Even auto companies, which benefit by having the antidumping laws applied to foreign imports, are harmed when such laws are applied to foreign steel or any of the many other components that go into the making of automobiles.\footnote{James M. Buchanan, Free Trade and Producer-Interest Politics, in Essays on the Political Economy 52, 52-66 (1989).}

While the case for outright and immediate repeal is obvious, antidumping laws are not only still on the books, but are gaining in popularity. More nations are enacting them each year, and those nations that have antidumping laws are strengthening them. While the solution — repeal — is clear, implementing it seems difficult, if not impossible.

For one thing, consumers, for the most part, do not realize that the antidumping laws are reducing their standard of living. And even if they did realize it, they are unorganized and unable to compete against the special interests that have a high stake in keeping the antidumping laws on the books. And since consumers also usually work for some company, they might also see that antidumping laws are protecting their jobs, so they are extremely hesitant to call for their repeal. In their view, it is better to pay five dollars more for a shirt than to lose their job and not have the five dollars extra to spend.

Our political leadership could repeal the antidumping laws, yet they do not, for a variety of reasons. Many of them do not realize that the antidumping laws are a deadweight loss. They fall victim to the widespread economic fallacy of what Bastiat calls "what is seen and what is not seen."\footnote{See Chapter 1 of Frederic Bastiat, Selected Essays on Political Economy 1-50 (1964). This chapter was originally published in French in 1850. For more on this fallacy, see Henry Hazlitt, Economics in One Lesson (1946), reprinted several times.} What they see is 10,000 jobs being saved if they adopt a certain policy. What they do not see is the 20,000 jobs that will be destroyed or never created if they adopt the policy. So they adopt the policy because they can see only one side of the coin.

Politicians also fall victim to the various special interest groups — the steel industry, the steel unions, the auto industry and auto unions, the textile industry and unions, various farm lobbies, and so forth — who give campaign contributions or threaten to back their opponent in the next election if they do not support this view or that. There seems to be no easy solution to this dilemma. We must find individuals who understand how the antidumping laws work and who are willing to give up substantial time and effort to become elected so they can be in a position to make the necessary changes. But more than just intelligence and en-
ergy are required. They must convince voters that they should be elected, which will not be easy, since many of them fear losing their jobs if the antidumping laws are repealed. They must also be honest and able to withstand the onslaught of the many special interest groups that are waiting for them once they get elected. They must somehow get elected without compromising themselves to the special interest groups that are willing and able to give them the funding they need to get elected. How this can be accomplished would be a good subject for another paper.

IV. Conclusion

After analyzing both the theory and practice of antidumping, there is only one conclusion that can be drawn. The antidumping laws must be repealed, the sooner the better. They serve no public interest, but merely protect producers at the expense of everyone else. They result in a deadweight loss to the economy, destroy more jobs than they create and lower living standards. Reform is not called for because the goal of antidumping — protecting domestic industry at the expense of everyone else — is not a worthy goal.

The way the antidumping laws are administered is a crime, or would be if they were administered by anyone other than government. There is no due process because the Administrative Procedures Act exempts the antidumping laws from the due process requirement. The government can ask for any amount of information it wants, relevant or otherwise, and can demand it practically on the spot. And it can choose to ignore any information a company or industry provides for the flimsiest of reasons. It can impose penalties without recourse. Investigations can be started easily by competitors who merely want to reduce the pressure of competition. The charges do not have to be well-founded or even accurate. The government absorbs the costs of prosecution, so the initiator gets a free ride, at the expense of the target of the investigation and the consumer, who must pay the price in the form of higher prices and reduced choice. Investigations can drag on endlessly and can be restarted after they have been closed. The mere threat of an antidumping action chills commerce, reduces competition and raises prices.

The antidumping laws are ambiguous and vague. Producers never know by which standard they will be held accountable because there are so many standards. The Commerce Department can choose to use one standard for one case and an entirely different standard for another case involving the same company or industry. It can decide to change standards retroactively and there is no recourse.

Many of the rules and procedures used to arrive at a conclusion of
dumping are irrational. In order to avoid a dumping duty, a company must have an eight percent profit, which is often higher than the profit achieved by its domestic competitors. A foreign producer can charge the same price as domestic producers and still be found guilty of dumping.

The way in which a fair price is arrived at is also subject to question because of the way the Commerce Department computes it. It often compares apples to oranges. The method by which the cost of production is sometimes computed could result in a malpractice suit if the computation were done by a certified public accountant. Cost allocations are totally arbitrary and inconsistent from case to case. The Commerce Department can choose to use the "best information available" and can totally disregard better information that is provided by the target of the investigation. The Commerce Department's methodology punishes rational economic behavior and rewards irrational behavior. It bases its actions on outdated theories such as predatory pricing, which has been discredited for several decades. It looks at only one side of the coin — that of the domestic producer — and totally ignores the other side — how the policy will affect consumers. Most importantly, from a rights standpoint, antidumping laws prevent consenting adults from entering into contracts at a mutually agreed upon price. The law allows producers to unethically use antidumping as a weapon to batter the competition. Antidumping laws cannot be justified by any theory of liberal democracy. They are not utilitarian because they do not result in providing the greatest good for the greatest number. Indeed, they provide good for the minority (producers) at the expense of the greatest number (consumers). They reduce rather than enhance social cooperation and harmony. They violate rights. Even redistributionists would argue against them because they redistribute income in the wrong direction — from the poor and middle classes to the rich. There is no rational reason why antidumping laws should exist.