Chicago-Kent College of Law

Scholarly Commons @ IIT Chicago-Kent College of Law

All Faculty Scholarship | Faculty Scholarship

1-1-2009

Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition

Sungjoon Cho
IIT Chicago-Kent College of Law, scho1@kentlaw.iit.edu

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/fac_schol

 Part of the Antitrust and Trade Regulation Commons, and the International Trade Law Commons

Recommended Citation

Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N.C. L. Rev. 357 (2009).
Available at: https://scholarship.kentlaw.iit.edu/fac_schol/734

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

ANTICOMPETITIVE TRADE REMEDIES: HOW ANTIDUMPING MEASURES OBSTRUCT MARKET COMPETITION*

SUNGJOON CHO**

Through trade policies such as antidumping remedies, the United States government often protects domestic producers at the expense of market competition. Yet a judicially created antitrust immunity, the Noerr-Pennington *doctrine, obstructs the Federal Trade Commission's antitrust investigations of these trade remedies. This Article argues that judicial and administrative interventions are needed to restore antitrust oversight when implementing trade remedies. This Article does not propose a repealing of the current antidumping statute, an act that would be politically infeasible in the current protectionist atmosphere of Congress. Instead, it takes a more modest yet realistic stance: antidumping remedies must be sanitized by bringing certain abusive behavior in antidumping proceedings—such as deliberate misrepresentations of facts and data—under antitrust rules. In order to prevent domestic producers from abusing antidumping remedies, courts should interpret the sham exception broadly enough to effectively foreclose non-price predation. At the same time, the Federal Trade Commission, under its vested antitrust authority, should strengthen its surveillance and enforcement activities to guard against the abuse of trade remedies. In the long-term, these targeted judicial and administrative interventions will lead the public and legislators alike to rethink the antidumping statute itself.*

---

* Copyright © 2009 by Sungjoon Cho.

** Associate Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. This Article has greatly benefited from discussions with former Chairman of the Federal Trade Commission Robert Pitofsky and Professor David Gerber. Christopher Leslie, Keith Hylton, Mark Rosen, Daniel Kessler, Jonathan Barnett, Jide Nzelibe, Kari Aamot, and participants of the 2007 Stanford/Yale Junior Faculty Forum provided valuable comments on an earlier draft. I am also grateful to Dean Harold Krent for his generous support through the Dean's Challenge Grant. Garrett Hahn and Deborah Ginsberg provided excellent research assistance. Finally, I deeply thank the staff of the North Carolina Law Review for their unremitting efforts in the editorial process. All errors are mine.

"The heart of our national economic policy long has been faith in the value of competition."[1]

INTRODUCTION

In the early 1990s, ferrosilicon producers in the United States, who had formed a price-fixing cartel faced an obstacle when Brazilian producers, began exporting the metal cheaply.[2] The U.S. cartel members soon asked Brazilian exporters to join their cartel under the threat of an antidumping petition in which the former would argue that the latter had unfairly dumped their ferrosilicon in the U.S. market.[3] When Brazilian producers rejected the offer, the U.S. producers successfully executed their threat.[4] Upon the U.S. producers' petition, the U.S. government imposed antidumping duties on Brazilian ferrosilicon, effectively excluding all Brazilian ferrosilicon producers from the U.S. market.[5] This antidumping remedy was revoked only after a whistleblower later divulged the cartel's existence.[6] This case aptly illustrates how effortlessly domestic producers may abuse trade remedies for anticompetitive purposes.

Since the birth of the Union, competition has served as the ideological foundation of this nation's economic governance. Both the people and the government of the United States believe that "the unrestrained interaction of competitive forces" will bring them prosperity and progress.[7] Based on this belief, the United States

1. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951)).

2. *See* Richard J. Pierce, Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 ANTITRUST L.J. 725, 726–28 (2000).

3. *See id.* at 727–28.

4. *See id.*

5. *See id.*

6. *See id.* at 728.

7. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

enacted the Sherman Act,[8] established the Federal Trade Commission ("FTC"),[9] split Standard Oil[10] and AT&T,[11] and, more recently, challenged Microsoft's abusive monopoly in the personal computer operating system market.[12]

Nonetheless, international trade has seldom been the subject of antitrust law. While internal competition is highly protected in the domestic market, *external* competition from foreign producers has been largely neglected and, thus, has avoided antitrust scrutiny. In fact, the government, through its trade policies, often hampers foreign competition, protecting domestic producers at the expense of all the benefits that foreign competition might bring to the economy.[13] For example, the antidumping statute enables the government to impose additional tariffs on foreign imports, neutralizing the imports' price competitiveness under the euphemistic rhetoric of remedying unfair trade.[14] In addition to its *de facto* price-fixing effect,[15] the antidumping regime restrains trade through a strategy labeled "non-price predation," in which domestic producers file spurious

8. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006). The Sherman Antitrust Act was originally enacted on July 2, 1890. *Id.*

9. Federal Trade Commission Act, 15 U.S.C. § 41 (2006). The Federal Trade Commission Act was originally enacted on September 26, 1914. *Id.*

10. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 78–82 (1911) (affirming the lower court's dissolution of Standard Oil's ownership of stock, which constituted an attempt to create a monopoly).

11. United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 223 (D.D.C. 1982) (severing "local Operating Companies from the Bell System").

12. United States v. Microsoft Corp., 253 F.3d 34, 45 (Fed. Cir. 2000).

13. *See* Einar Hope, *Introduction* to COMPETITION AND TRADE POLICIES: COHERENCE OR CONFLICT 1, 3 (Einar Hope & Per Maeleng eds., 1998) (observing that a captured, protectionist policy undermines competition policy and, hence, market inefficiency as well as deteriorated consumers' welfare).

14. *See* Bernard M. Hoekman & Michael P. Leidy, *Antidumping and Market Disruption: The Incentive Effects of Antidumping Laws*, *in* THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE 155, 164 (Robert M. Stern ed., 1993) [hereinafter THE MULTILATERAL TRADING SYSTEM] (viewing the fair trade rationale as "red herring"); *see also* JAMES BOVARD, THE FAIR TRADE FRAUD 139, 158–60 (1991) (noting that the definition of fair trade differs depending on whether it is being applied to Americans or foreigners).

15. The fact that domestic prices preserved by antidumping petitions are not identical does not necessarily indicate the absence of price fixing. In other words, domestic producers can still demonstrate the semblance of competition among themselves by maintaining multiple prices while they effectively drive out foreign rivals charging low prices. *See* U.S. DEP'T OF JUSTICE, ANTITRUST RESOURCES MANUAL (Oct. 1997), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title7/ant00008.htm; *see also* BOVARD, *supra* note 14, at 158 (noting that antidumping law indirectly controls prices of imported goods).

antidumping petitions to terrorize foreign rivals.[16] Nearly half of all antidumping petitions turn out to be without merit.[17]

Confronted by the disturbing anticompetitive effects of these trade remedies, one might suggest that the FTC should exercise its latent jurisdiction over international trade, thereby subjecting trade remedies to antitrust scrutiny. Following this approach, the FTC would protect *competition* itself, not *competitors*.[18] However, the FTC's antitrust regulation of trade remedies is obstructed by a judicially-created antitrust immunity: the *Noerr-Pennington* doctrine.[19] A legal reincarnation of political pluralism crafted by the Warren Court,[20] this doctrine exempts private parties from antitrust scrutiny when they lobby the government for certain benefits, even if the lobbying inhibits competition.[21] Thus, the doctrine effectively immunizes antidumping petitioners from any antitrust investigations of their trade-restraining behaviors. The doctrine has a limitation—the "sham exception,"—which disapplies the doctrine in the context of sham petitions that have the sole purpose of harassing rivals. Nevertheless, courts have interpreted the exception so narrowly as to render it ineffective in antidumping cases.[22]

Given the notoriously loose standards for determining dumping and injury[23]—the central issues of antidumping remedies—this gap in

16. *See generally* Pierre F. de Ravel d'Esclapon, *Non-Price Predation and the Improper Use of U.S. Unfair Trade Laws*, 56 ANTITRUST L.J. 543, 547–49 (1987) (citing the harsh effects of antidumping measures on foreign rivals and describing efforts to avoid "sham" petitions, filed for the purpose of harassing foreign trading rivals).

17. Elizabeth L. Gunn, *Eliminating the Protectionist Free Ride: The Need for Cost Redistribution in Antidumping Cases*, 28 B.C. INT'L & COMP. L. REV. 165, 177 (2005).

18. A. Paul Victor, *Task Force Report on the Interface Between International Trade Law and Policy and Competition Law and Policy: Introduction*, 56 ANTITRUST L.J. 463, 464 (1987).

19. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 140–44 (1965); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669–70 (1960). For a case employing the doctrine, see *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379–80 (1990) (holding that federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government, because, while appropriate in a business context, it is not appropriate in the political arena).

20. *See* Gary Minda, *Antitrust at Century's End*, 48 SMU L. REV. 1749, 1765 n.81 (1995).

21. *See United Mine Workers*, 381 U.S. at 670 (holding that the *Noerr-Pennington* doctrine protects joint efforts to influence public officials from the Sherman Act).

22. *See Omni Outdoor Adver.*, 499 U.S. at 380 (holding that the sham exception only applies to the process and not the outcome); *see also* de Ravel d'Esclapon, *supra* note 16, at 547–48 (describing the effects a petition has on trade competition and articulating the need for accurate petitions to avoid shams).

23. *See generally* Pierce, *supra* note 2, at 729 (describing the ease with which domestic business can assert antidumping claims).

enforcement of antitrust rules to trade remedies is highly troubling. Currently, petitioners may manipulate antidumping proceedings by inflating, exaggerating, and even misrepresenting facts and data so as to prevail in dumping and injury determinations.[24] Because there is no antitrust enforcement as a backstop to the illegitimate trade remedies created by these potential misrepresentations, restraints on competition pass into the marketplace. If left unchecked, the frequent abuse of trade remedies and corresponding stifling of market competition will result in tremendous damage to the economy.

Against this backdrop, this Article argues that the government, via both judicial and administrative intervention, must implement effective antitrust oversight of abusive trade remedies. It does not propose repealing the current antidumping statute; such a drastic measure would be politically infeasible in the current protectionist atmosphere of Congress.[25] Instead, this Article takes a more modest, yet realistic, stance: antidumping remedies must be sanitized by holding abusive behaviors in antidumping proceedings—such as deliberate misrepresentations of facts and data—accountable under antitrust law.[26] In order to prevent domestic producers from abusing antidumping remedies, courts should interpret the sham exception broadly enough to effectively foreclose non-price predation. Courts can achieve this goal by focusing on antidumping petitioners' fraudulent, unethical, or tortious use of misstatements or misrepresentations in antidumping proceedings. At the same time, the FTC, under its vested antitrust authority, should strengthen its surveillance and enforcement activities to guard against the abuse of trade remedies by domestic producers. In the long-term, these targeted judicial and administrative interventions will lead both the public and legislators to rethink the antidumping statute itself.

This thesis of correcting trade remedies via enhanced antitrust disciplines provided by the courts and the FTC is presented in four

24. *See* BOVARD, *supra* note 14, at 136, 139 (noting that "American companies have not been penalized for submitting knowingly false information" in antidumping petitions).

25. *See* RAINER M. BIERWAGEN, GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTIDUMPING LAWS 157 (1990).

26. The proposal in this Article is basically in sync with the beliefs of other scholars who argue for antitrust checks against trade policies. *See, e.g.*, Hoekman & Leidy, *supra* note 14, at 170 (emphasizing cooperation between domestic antitrust agencies and trade authorities); Konstantinos Adamantopoulos & Diego de Notaris, *The Future of the WTO and the Reform of the Anti-dumping Agreement: A Legal Perspective*, 24 FORDHAM INT'L L.J. 30, 55 (2000) (proposing involvement by a domestic antitrust agency in injury determinations to ensure "competition principles").

parts. Part I exposes the flawed rhetoric of fair trade behind the antidumping regime. This Part illustrates that antidumping remedies lack economic sense, because they neglect or misinterpret firms' cost structure. Part I will also show that antidumping remedies lack legal sense because their ultimate normativity hinges not purely on the validity of an underlying transaction (dumping), but cumulatively on their commercial effect (injuries). Part I concludes with an analysis of the antidumping remedies' protectionist *modus operandi*, which evinces elusive concepts of prices and injuries, as well as procedural injustice.

Absent a genuine fair trade justification, current antidumping measures remedy nothing while creating distortions in market economies. Part II first defines antidumping remedies as a Madisonian failure because they only serve the special interests of a handful of domestic producers; specifically, the remedies aid economic factions at the expense of the entire economy. Part II then explains a more serious antitrust failure in which domestic producers harass and exclude foreign rivals through non-price predation. This process of harassment and intimidation may eventually lead to cartelization of an industry.

Next, Part III suggests a course of action to remedy the flaws of trade remedies. Radical measures, such as repealing the antidumping statute, are politically infeasible. Therefore, this Part suggests that the FTC should expand its statutory authority more vigorously into the area of international trade. At the same time, however, this Part highlights how the *Noerr-Pennington* doctrine may potentially obstruct the FTC's oversight of antidumping remedies.

Finally, Part IV argues that the courts should adopt a broader interpretation of the sham exception to the *Noerr-Pennington* doctrine to facilitate the application of antitrust rules to trade remedies. When determining whether a petition is a sham, courts currently consider whether the claim is baseless.[27] However, Part IV argues that courts should adopt a more unequivocal test that would better detect fraud and other unethical aims of petitioners, such as harassing and excluding rivals. This Part also suggests that the FTC should target certain abusive behaviors by antidumping petitioners, such as deliberate misrepresentations and repetitive petitioning, because the current *Noerr-Pennington* jurisprudence reserves room for antitrust liability for these unethical behaviors. The FTC can also monitor petitioners' behaviors by requiring them to register before

27. *See infra* Part III.C.2.

they file antidumping complaints, in tandem with a similar requirement under the Webb-Pomerene Act.[28] Part IV concludes by raising the possibility of disapplying the *Noerr-Pennington* doctrine to private rights of action based on abusive behavior that may constitute a tortious interference with business.

In sum, this Article concludes that a political marketplace ideal should not unduly absolve patent antitrust violations in apolitical areas, such as antidumping proceedings.

I. DEMYSTIFYING TRADE REMEDIES: A FAIR TRADE RHETORIC WITH PROTECTIONIST SUBSTANCES

A. Outlining the U.S. Antidumping Regime

1. Origin and Evolution

The historical development of the antidumping regime in the United States offers a powerful elucidation of its protectionist nature. The genesis of U.S antidumping regulation derives from antitrust concerns rather than from the protection of domestic industries. Influenced by the antitrust sentiments in the late nineteenth century, which led to the enactment of the Sherman Act in 1890, the first U.S. antidumping statute, the Antidumping Act of 1916, required the existence of predatory intent to punish foreign dumping and also imposed criminal liability for violations.[29]

The Antidumping Act of 1921 superseded the 1916 Act and provided a prototype for the current antidumping statute.[30] To protect infant U.S. industries from "powerful European cartels,"[31] the 1921 Act only required that foreign dumping allegedly cause "injuries" to domestic industries *without* a separate requirement of

28. *See* Webb-Pomerene Act, 15 U.S.C. §§ 61–65 (2006) (requiring export businesses to register with the FTC and allowing the FTC to summon businesses if there is reasonable belief of a trade restraint).

29. *See* J. Michael Finger, *The Origins and Evolution of Antidumping Regulation* 12–13 (Trade Policy Div., Country Econ. Dep't, The World Bank, Working Paper Series No. 783, 1991) (noting the Act's requirement of "an intent to injure, destroy, or prevent the establishment of an industry in the United States or to restrain competition"); Douglas A. Irwin, *The Rise of U.S. Antidumping Activity in Historical Perspective*, 28 WORLD ECON. 651, 652–53 (2005).

30. *See* Finger, *supra* note 29, at 15.

31. Roy L. Prosterman, *Withholding of Appraisement Under the United States Antidumping Act: Protectionism or Unfair-Competition Law?*, 41 WASH. L. REV. 315, 316 (1966) (internal quotation marks omitted).

predatory intent.[32] The only remedy provided for by this new law was the imposition of duties equivalent to the magnitude of dumping on violators.[33] It was this softened standard under the 1921 Act that ushered in the administrative flexibility that enabled the government to manage trade policies in the interests of domestic industries and in tune with protectionist political climates.[34] The 1921 Act also provided a basis for Article VI of the General Agreement on Tariffs and Trade ("GATT"), which authorizes domestic antidumping measures.[35]

Nonetheless, protectionist enlistment of antidumping measures did not fully materialize until the 1970s.[36] Tariff barriers provided effective import relief in the 1950s and 1960s, before the average tariffs began to significantly fall under the Kennedy Round of trade talks in the late 1960s.[37] Despite the relatively steady number of antidumping cases filed in the 1950s and 1960s, actual determinations of injuries were rare during this period.[38] This phenomenon may be explained by the lingering effects of the 1916 Act, which required the existence of predatory intent.[39] Although the text of the 1921 Act did not require the existence of predatory intent, the legislative intent of the 1921 Act was still to address "commercial warfare." For example, the Act sought to redress potentially aggressive or predatory exporting by foreign producers.[40] The goal of the 1921 Act was to prevent a situation where, "while temporarily cheaper prices are had[,] our industries are destroyed[,] after which we more than repay in the exaction of higher prices."[41] This antitrust relic of the antidumping statute maintained, at least on a *de facto* basis, the predatory intent requirement. Until the 1960s, the Tariff Commission (the predecessor of the International Trade Commission ("ITC")) often based its injury determination on the existence of predatory

32. *See* Finger, *supra* note 29, at 19.

33. *See id.* at 15.

34. *Id.* at 21 (noting that the shift from a legal standard to an administrative one broadened the application of antidumping laws).

35. *Id.* at 15 (finding that the current antidumping law traces back to the Antidumping Act of 1921).

36. *See generally id.* at 29–30 (recounting how actions against below-cost imports were federally approved).

37. *Id.* at 25–26.

38. Irwin, *supra* note 29, at 9.

39. *See* Finger, *supra* note 29, at 12–13.

40. Antidumping Act, ch. 14, § 201(a), 42 Stat. 11 (1921).

41. H.R. Rep. No. 67-1, at 23–24 (1921).

intent.[42] The absence of predatory intent frequently led the Tariff Commission to a negative finding of injury.[43]

Yet, the 1921 Act began to be stretched to serve a protectionist purpose as the level of import penetration in the U.S. market (the import/GDP rate) increased from three percent in the 1950s and 1960s to eight percent in the 1980s.[44] "New protectionism,"[45] or "administered protection,"[46] with a litany of non-tariff barriers ("NTBs"), such as antidumping measures, emerged in the 1970s and 1980s as traditional protectionist devices (tariffs) waned through trade rounds.[47] In 1980, Congress transferred the task of dumping determinations from the Department of Treasury to the Department of Commerce ("DOC").[48] The Department of Treasury seldom delivered affirmative findings of injury. Frustrated by the Department of Treasury's reluctance to use the antidumping statute in a protectionist manner, Congress took away the Treasury Department's authority over antidumping proceedings and accorded it to the DOC whose major constituency is domestic producers.[49]

Moreover, in the 1970s, Congress expanded the scope of antidumping investigations from conventional price discrimination to include sales below cost. U.S. domestic firms often price their products below full cost to be more competitive.[50] Yet, domestic producers pressured the government to revise an administrative interpretation to exclude the same kind of transaction (sales below cost) by *foreign* producers from the calculation of normal value on the grounds that these sales were not made "in the ordinary course of trade."[51] This exclusion naturally led to a higher probability of finding positive dumping margins. Originally, the Treasury Department wished to limit use of this expansive definition of

42. *See, e.g.*, Bicycles from Czechoslovakia, 25 Fed. Reg. 9782 (1960); Carbon Steel Bars & Shapes from Can., 29 Fed. Reg. 12,599 (1964).

43. *See, e.g.*, Portland Cement from Dom. Rep., 27 Fed. Reg. 3872 (1962); Portland Cement from Can., 25 Fed. Reg. 2191 (1960); Rayon Staple Fiber from Fr., 24 Fed. Reg. 10,092 (1959).

44. Irwin, *supra* note 29, at 10.

45. *See* Dominick Salvatore, *Import Penetration, Exchange Rates, and Protectionism in the United States*, 8 J. POL'Y MODELING 125, 125 (1987).

46. ANNE O. KRUEGER, AMERICAN TRADE POLICY: A TRAGEDY IN THE MAKING 33–35 (1995).

47. DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 187 (1999).

48. KRUEGER, *supra* note 46, at 36–37.

49. Irwin, *supra* note 29, at 655–56.

50. *See* KRUEGER, *supra* note 46, at 6.

51. Finger, *supra* note 29, at 29 (internal quotation omitted).

dumping under its reserved discretion.[52] However, Congress, led by the powerful Senator Russell Long, then chairman of the Senate Finance Committee, codified the expansive definition in the 1974 Trade Act.[53] The protectionist impact of this change can be attested to by the fact that more than half of the U.S. antidumping cases that followed concerned sales below cost.[54]

In sum, as J. Michael Finger trenchantly observed, the very history of antidumping reveals that the major purpose of the antidumping statute is sheer protectionism, although this purpose is camouflaged by a "grand public relations program."[55] Finger noted that, "[a]dding this or that technical amendment—tailor-made to fit the situation of a particular and powerful constituent—soon became another vehicle for constituent service, the lifeblood of congressional politics."[56]

2. The Current System

The current U.S. antidumping statute[57] is designed to protect domestic producers from imports offered for sale at "less than fair value," a practice known as "dumping." The antidumping statute allows domestic producers to petition relevant government agencies to investigate alleged dumping practices by foreign producers known as "dumpers."[58] If these agencies determine that dumping is occurring, and that it threatens or actually inflicts material injury[59] to the petitioner, the government will execute a remedial action by imposing antidumping duties on the foreign producer's imports in accordance with the magnitude of dumping that has occurred.[60]

In most cases, except for a self-initiation by the DOC,[61] individual producers file an antidumping complaint on behalf of a specific industry[62] that, as a whole, produces a specific product that is

52. *Id.* at 30.

53. *See generally id.* at 30 (noting that Senator Long amended the 1974 trade bill to "require that sales below cost be considered dumping").

54. *Id.* at 33.

55. *Id.* at 42.

56. *Id.* at 27.

57. 19 U.S.C. §§ 1673–1673h, 1675–1675a, 1677–1677n (2006).

58. 19 U.S.C. § 1673a(b)(1).

59. 19 U.S.C. §§ 1673(2)(A), 1677(7)(A).

60. 19 U.S.C. § 1673.

61. 19 U.S.C. § 1673a(a)(1) (authorizing the DOC to self-initiate investigations).

62. 19 U.S.C. § 1677(9)(C)–(F) (defining the term "interested parties" as, among others, those manufacturing a "domestic like product"); 19 U.S.C. § 1677(4)(A)–(B) (defining the terms "industry" and "related parties").

like, or competitive with, an alleged dumped product.[63] Two different government agencies—the International Trade Administration ("ITA"), which is under the DOC, and the ITC—are involved in the investigative process.[64] Upon the initiation of an investigation, the ITC preliminarily decides whether the alleged dumped import has caused material injury or a threat of injury to the petitioner.[65] If the ITC determines there is a threat of or actual material injury, the ITA in turn decides on a preliminary basis whether there is dumping—a sale in the U.S. at less than fair value.[66]

The ITA also calculates the dumping margin, which determines the amount of antidumping duties.[67] The dumping margin is the difference between an imported good's home market price (normal value)[68] and its price in the U.S. market (export price).[69] When the imported product is not consumed in the exporting country's home market, the ITA will substitute the product's price in a third market in which it is sold to calculate normal value.[70] If the ITA considers home market prices unreliable,[71] the ITA will "construct" normal values by adding production costs and profits of its own reckoning.[72] In calculating export price, the ITA makes certain adjustments to ensure that the export price is "ex factory," meaning it does not include post-factory expenses, such as transportation costs.[73] The ITA's preliminary determination on dumping and dumping margins is followed by a final determination.[74] If, after the ITA's final determination, the ITC also issues a final determination finding a

63. 19 U.S.C. § 1677(10) (defining the term "domestic like product").

64. 19 U.S.C. § 1673 (referring to the "administrative authority" and the "commission" as determining facts about dumping); 19 U.S.C. § 1677(1) (defining the "administering authority" as the Secretary of Commerce); 19 U.S.C. § 1677(2) (defining the "commission" as the International Trade Commission).

65. 19 U.S.C. § 1673b(a).

66. 19 U.S.C. § 1673b(b).

67. 19 U.S.C. § 1677(35)(A) (defining and explaining the calculation of the term "dumping margins"); 19 U.S.C. § 1677(35)(B) (explaining the calculation of the weighted average dumping margin).

68. 19 U.S.C. § 1677b(a)(1) (explaining the calculation of "normal value").

69. 19 U.S.C. § 1677(35)(A); *see also* 19 U.S.C. § 1677a(a) (defining "export price"); 19 U.S.C. § 1677a(c) (explaining the calculation of export price).

70. 19 U.S.C. § 1677b(a)(1)(C) (allowing the ITA to use a third market to determine normal value); 19 C.F.R. § 351.404 (2008) (deciding which third market to use).

71. 19 U.S.C. § 1677b(b) (finding unreliability in below cost sales); 19 U.S.C. § 1677b(c) (finding unreliability in nonmarket economies).

72. *Id.* Constructive normal value calculations are carried out by the ITA, taking into account general factors set forth in the statute. *See* 19 C.F.R. § 351.405.

73. 19 U.S.C. § 1677a(c)(2)(A) (concerning costs that are deducted to arrive at export price); 19 C.F.R. § 351.402.

74. 19 U.S.C. § 1673d(a).

material injury or a threat thereof,[75] the Customs Office will collect antidumping duties (tariffs) equivalent to the ITA's final dumping margin.[76]

Antidumping orders remain in effect unless they are revoked pursuant to a review of the order.[77] A foreign producer may request a review to revoke a final determination resulting in an antidumping order by the ITA and ITC no earlier than two years after the issuance of the order, absent a showing of good cause.[78] However, an interested party,[79] including foreign and domestic producers, may request that the ITA conduct an annual administrative review to recalculate the exact amount of antidumping duties.[80] Five years after an antidumping order is issued, the ITA and the ITC will initiate a mandatory review of the order, often called a "sunset review."[81] In the meantime, foreign producers may challenge both the ITC's and the ITA's final determinations before the Court of International Trade and subsequently appeal to the Federal Circuit and eventually to the Supreme Court.[82] However, the U.S. courts afford both the ITC and the ITA determinations great deference under the *Chevron* doctrine.[83]

---

75. 19 U.S.C. § 1673d(b).

76. 19 U.S.C. § 1673e(a).

77. 19 U.S.C. § 1675(d) (explaining the process for revocation of an antidumping order subject to a review based on changed circumstances under 19 U.S.C. § 1675(b), a review of the amount of duties under 19 U.S.C. § 1675(a), or a five year "sunset review" under 19 U.S.C. § 1675(c)).

78. 19 U.S.C. § 1675(b)(4).

79. 19 U.S.C. § 1677(9) (defining an "interested party").

80. 19 U.S.C. § 1675(a).

81. 19 U.S.C. § 1675(c) (obligating the ITA and the ITC to review an antidumping order five years after issuance).

82. The Court of International Trade has jurisdiction pursuant to 28 U.S.C. § 1581(c), and the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction pursuant to 28 U.S.C. § 1295(a)(5). The Supreme Court has jurisdiction pursuant to Article III, Section 2, Clause 2 of the U.S. Constitution and reviews cases by granting a writ of certiorari.

83. *See* Chevron U.S.A., Inc. v. Nat. Ress. Def. Counsel, Inc., 467 U.S. 837, 842–43 (1984). For an example of *Chevron* deference applied in the antidumping context, see *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993) *appeal after remand at* 152 F.3d 1511, 1516 (Fed. Cir. 1993); *see also* Smith-Corona v. United States, 713 F.2d 1568, 1582 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984) (according "tremendous deference to the expertise of the Secretary of Commerce in administering the antidumping law").

B. *Analyzing the Fallacy of the Unfair Trade Rationale*

1. An Economic Analysis

Advocates for the antidumping regime, including the U.S. government, attempt to cloak its protectionist nature in unfair trade mantra.[84] The rationale of antidumping remedies is based on a notion of "fairness," which proponents believe is achieved through a "level playing field" of their own reckoning.[85] In other words, these remedies are imposed on the assumption that foreign producers have engaged in certain unfair practices without which they could not have produced such cheap products. It is argued, therefore, that antidumping remedies should neutralize this unfair price advantage by imposing duties at the border.[86] The corollary of this position is that producers who compete in the market, global or local, should be given *identical* conditions for production, including socioeconomic arrangements influenced by labor-management and government-business relations. In this regard, the U.S. government contends that

> [a] government's industrial policies or key aspects of the economic system supported by government inaction can enable injurious dumping to take place. Although these policies take on many different forms, they can provide similar artificial advantages to producers. For instance, these policies may allow producers to earn high profits in a home "sanctuary market," which may in turn allow them to sell abroad at an artificially low price. Such practices can result in injury in the importing country since domestic firms may not be able to match the artificially low prices from producers in the sanctuary market.[87]

Although this ostensibly clear-cut argument may appeal to ordinary people in its most abstract terms, it is seriously flawed. First, one must not forget that the benefit of trade stems from the fact that

---

84. BOVARD, *supra* note 14, at 158–60.

85. *See* BRINK LINDSEY & DANIEL J. IKENSON, ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW xi (2003).

86. *Id.* at vii–viii.

87. Communication from the United States, *Basic Concepts and Principles of the Trade Remedy Rules*, TN/RL/W/27, ¶ 13 (Oct. 22, 2002); *see also* Jeffrey E. Garten, *Is America Abandoning Multilateral Trade?*, FOREIGN AFF. Nov.–Dec. 1995, at 50, 57 ("Our standards of openness are higher than others' because our market is more open. We want foreign countries to come up to our level, not to settle for the lowest common denominator."). The DOC's website instructs how to file antidumping claims against imports in the name of "Ensuring a Level Playing Field." Department of Commerce Home Page, Ensuring a Level Playing Field, http://www.commerce.gov/field.html (last visited Jan. 3, 2009).

trading partners are *different*, not identical, in many ways,[88] such as their levels of development and natural endowment. These differences bring price competitiveness to certain producers, because they are capable of producing their products more cheaply than their rivals.[89] These superior conditions, collectively labeled as "comparative advantage," are the very engine of trade.[90] Therefore, these conditions must not be leveled and these cheap prices must not be neutralized or countervailed if we truly mean to engage in trade.[91] In a broader sense, market economy forces dictate that domestic industries losing their competitive edges should give their places in the market to more efficient and innovative competitors, be they foreign or domestic.[92] This is a fundamental rule of market economy and should not be breached. And, perhaps more importantly, it *is* fair. According to this rule, countless firms disappear and at the same time newly emerge in this country.[93] Consumers and the U.S. economy benefit from this seemingly simple, yet powerful, process.

In addition, the "sanctuary market" argument employed by the U.S. government is nothing but a smokescreen hiding protectionism. The antidumping advocates believe that dumpers can set lower prices in the exporting market than they do in the domestic market only because they can manipulatively assign lower costs to export prices than to domestic prices.[94] Advocates contend that this manipulative allocation of cost is possible thanks to dumpers' monopoly profits in the sanctuary (home) market. Therefore, such cost structure is an outcome of "subsidization," which is unjustified and thus should be counteracted by imposing antidumping duties.[95] However, this is a "fallacy of cost-plus pricing," as John Barceló III aptly posited. If one duly takes into account the "demand" side in this picture, he or she will soon realize that this cost allocation is purely a legitimate

88. *See generally* Paul R. Krugman, *What Do Undergrads Need to Know About Trade?*, 83 AM. ECON. REV. 23 (1993) (discussing economic misconceptions, including the belief that countries compete "in the same way companies in the same business are in competition").

89. Hoekman & Leidy, *supra* note 14, at 164.

90. *See* WORLD TRADE ORG., UNDERSTANDING THE WTO 13 (2007), *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf.

91. *See* Hoekman & Leidy, *supra* note 14, at 164.

92. *See, e.g.*, Richard Squire, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77, 112 (2006) ("[I]n an open market, competition will cause firms to enter and exit until the cost of producing a given amount of output is optimized.").

93. *Id.*

94. John J. Barceló III, *Antidumping Laws as Barriers to Trade—The United States and the International Dumping Code*, 57 CORNELL L. REV. 491, 503–06 (1972).

95. *Id.*

business practice.[96] In other words, to maximize his or her profits, an exporter tends to charge a lower price in the more elastic foreign market and a higher price in the less elastic home market.[97]

Close scrutiny of a foreign producers' *cost* structure reveals that dumping, whether by price discrimination or sales below cost, is in fact normal business behavior in the absence of any predatory intent.[98] In the case of price discrimination, if extra transaction costs accompanied by foreign sales are not too high, the actual sale price in the foreign market may be lower than in the home market.[99] Also, firms often respond to market depression or pursue sale maximization despite short-term loss of profits through sales below average or marginal cost.[100] As for a foreign producer's potential predatory intent to drive out domestic rivals by underselling them, it is often inconceivable, perhaps laughable, considering that a foreign product's share of the importing market is often insignificant.[101] Even in the domestic setting, "predatory pricing schemes are rarely tried, and even more rarely successful."[102] In conclusion, the economic rationale for antidumping remedies rings false, while the economic harms of protectionism, such as inefficiency and costs to consumers, rings clear.[103]

In fact, those transactions described as dumping occur in the domestic arena all the time.[104] For instance, airplane companies routinely engage in price differentiation through various discounts over the same quality of seats. A shirt's price can vary depending on points of sale—for example, from an outlet store to a department store. Many stores undersell their rivals even below the cost level to secure certain market share. However, these practices are all deemed

96. *Id.*

97. *Id.*

98. Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 1, 14 (1995) ("As long as the exporter's *marginal revenue* from sales in the importing country *exceeds* its *marginal cost* of production, the exporter is behaving in an economically rational fashion." (emphasis added)); *see also* William J. Davey, *Antidumping Laws in the GATT and the EC*, *in* ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY 295, 296 (John H. Jackson & Edwin A. Vermulst eds., 1989).

99. Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, *in* THE MULTILATERAL TRADING SYSTEM, *supra* note 14, at 135, 139.

100. *Id.* at 144–48.

101. Patrick Messerlin, *The EC Antidumping Regulations: A First Economic Appraisal, 1980–85*, 125 WELTWIRTSCHAFTLICHES ARCHIV 563–87 (1989); Pierce, *supra* note 2, at 733 (observing that, in most successful antidumping cases, "none of the foreign suppliers accounts for a dominant share of the market").

102. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

103. Deardorff, *supra* note 99, at 154.

104. Pierce, *supra* note 2, at 731.

legitimate as a profit-maximization strategy in the United States in the absence of "predatory intention," as stipulated by domestic statutes such as the Robinson-Patman Act.[105] In other words, domestic dumping practices are perfectly legal unless dumpers intend to eventually drive out their rivals. Yet, a double standard is evident in cases where those rivals are *foreign*. Imported products that enjoy price competitiveness—namely, cheap goods—are often accused of being "dumped."[106]

In sum, without economic support for the alleged "unfair trade" rationale, the motivation for antidumping measures is reserved only to protectionism. The unfair trade mantra, in fact, comes from those interest groups seeking protection from foreign rivals.[107] As Kenneth Dam observed over three decades ago, "the concern with dumping is ... a concern with the protection of domestic industry from international competition."[108] More often than not, such protectionist rationale is associated with a deprecatory image that the term "dump" carries with it, and even serves as xenophobic propaganda.[109] By framing cheap imports as fruits of illicit activities through complex arbitrary regulations, antidumping measures give legal cover to the institutionalization of protectionism.[110] Likewise, a bellicose myopia of "us versus them," as seen in the Cold War mentality, blinds both policy-makers and the public from the important benefits of trade, including consumer welfare and efficient allocation of resources

105. *See* 15 U.S.C. § 13a (2006) (prohibiting underselling "for the purpose of destroying competition, or eliminating a competitor").

106. *See, e.g.*, Kelley Beaucar Vlahos, *Tariff on China Unlikely to Impact Cheap Imports*, FOXNEWS.COM, June 30, 2005, http://www.foxnews.com/story/0,2933,161160,00.html.

107. Diane P. Wood, *"Unfair" Trade Injury: A Competition-Based Approach*, 41 STAN. L. REV. 1153, 1171 (1989); *see also* CANDIDO TOMAS GARCIA MOLYNEUX, DOMESTIC STRUCTURES AND INTERNATIONAL TRADE: THE UNFAIR TRADE INSTRUMENTS OF THE UNITED STATES AND THE EUROPEAN UNION 39–40 (2001) (observing that U.S. trade policies based on fairness in fact impose "standards embedding implicit parochial views on the behavior of political institutions and market actors").

108. KENNETH DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 168 (1970).

109. BOVARD, *supra* note 14, at 35; *see also* Frederick Davis, *The Regulation and Control of Foreign Trade*, 66 COLUM. L. REV. 1428, 1439 (1966) (observing that the antidumping remedy is based on the "tortious or quasi-criminal quality" of dumping and thus insinuates the "official moral sense" in its allegation); Michael S. Knoll, *Dump Our Anti-Dumping Law*, 1991 CATO INST. FOREIGN POL'Y BRIEFING NO. 11 (noting that domestic interests are "using the rhetorical concept of dumping as the basis for their moral and emotional appeal to justify ... the existing anti-dumping law"); Pierce, *supra* note 2, at 735 (noting that "[the word 'dumping'] conjures up an image of an evil foreign corporation that is using the United States as a toxic waste dump").

110. LINDSEY & IKENSON, *supra* note 85, at ix.

rendered by cheap imports.[111] Unsurprisingly, most mainstream economists and policymakers, including former Federal Reserve Board Chairman Alan Greenspan, recognize in unison that antidumping measures are nothing but protectionism.[112] Alan Deardorff also observes that, ever since the classical study by Jacob Viner, economists have viewed dumping as harmless and without predatory, monopolistic intent.[113]

2. A Legal Analysis

Admittedly, low-priced foreign products are not and should not always be immune from government regulations or countermeasures. If, according to international trade law or, sometimes, local statutes of importing countries, an underlying production process at home involves any illicit or illegitimate activities, imports may be halted. If an import's low prices are attributable to government subsidies, they may be banned or subjected to countervailing duties.[114] Likewise, if low prices are attributable to prison labor or piracy, the imports may be prohibited.[115] If low prices are the result of predation, and are deliberately aimed at driving out rivals in a given market to enjoy a monopolistic position afterward, domestic antitrust statutes may provide punitive measures.[116] If low prices on imports are otherwise legal, but nevertheless cause serious injury to domestic industries, an importing country's government may still rely on safeguard measures under certain conditions.[117]

However, the above-mentioned scenarios, apart from safeguards, all relate to the "illegality" of underlying production activities, not the

111. Mark Philip Bradley, *Narrow Idealism*, CHI. TRIB., June 6, 2004, § 2, at 1.

112. Alan Greenspan, testifying before the U.S. Senate Committee on Finance on July 4, 2001, stated "[t]hese forms of protection have often been imposed under the label of promoting 'fair trade,' but oftentimes they are just simple guises for inhibiting competition." *International Trade and the American Economy: Hearing on International Trade and the American Economy Before the S. Comm. on Finance*, 107th Cong. 44 (2001) (prepared statement of Alan Greenspan, Chairman of Fed. Reserve).

113. Deardorff, *supra* note 99, at 149–51; JACOB VINER, STUDIES IN THE THEORY OF INTERNATIONAL TRADE, 145–47 (1965). This predatory dumping is a kind of "intermittent" dumping that Jacob Viner viewed as harmful because it lasts long enough to injure other producers (unlike "sporadic" dumping) yet not long enough for consumers' welfare to materialize (unlike "continuous" dumping). Barceló, *supra* note 94, at 508–09.

114. LINDSEY & IKENSON, *supra* note 85, at 42–43

115. General Agreement on Tariffs and Trade art. XX(d)–(e), Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (allowing general exceptions for products of prison labor and piracy, respectively).

116. *See supra* notes 5, 85–86 and accompanying text.

117. General Agreement on Tariffs and Trade art. XIX(1)(b), Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (allowing emergency action on imports of particular products).

commercial impact that imports exert on rival domestic producers. If these underlying production activities are illegal in the importing country, for example, production by prison labor, the importation of such products can be banned regardless of their injurious effect to rival domestic industries. It is an established principle that any violation of international trade rules *ipso facto* nullifies or impairs the benefits of other trading partners.[118] In other words, complaining parties need not demonstrate injuries that violations under international trade law may have caused them or their domestic industries.[119] As a corollary, defending parties cannot escape their legal responsibilities from those violations, even if they generate no damages to other trading partners. However, very few allegations of unfair or illegal practices leading to dumping have ever been brought before the WTO dispute settlement mechanism or under the U.S. domestic trade statutes, such as section 301.[120] These underlying practices are seldom mentioned even in the United States Trade Representative's ("USTR") annual report on foreign trade barriers, the National Trade Estimates ("NTE").[121]

In stark contrast, antidumping laws predicate their foundation on the very existence of "injuries." If certain imports, no matter how unfair they may be, do not cause injury or the threat of injury to domestic rivals, the petition fails. In other words, the existence of injuries is a litmus test for affording domestic producers protection. Only after a preliminary injury determination does the DOC begin examining whether dumping has really occurred and, if so, to what extent (the dumping margin).[122] In nearly all cases, domestic industries initiate antidumping investigations with petitions that allege injury by unfair foreign imports.[123]

The protectionist attributes of antidumping laws can also be discovered in the very structure of these processes, which tend to burden and disadvantage the respondents. The ITC's affirmative preliminary injury determination triggers an issuance of long and complicated DOC questionnaires to the mandatory respondents, who are major foreign producers and, at the same time, market

118. *See* Tarcisio Gazzini, *The Legal Nature of WTO Obligations and the Consequences of their Violations*, 17 EUR. J. INT'L L. 723, 731–32 (2006).

119. Report of the Panel, *United States—Taxes on Petroleum and Certain Imported Substances*, ¶¶ 5.1.3–5.1.12, L/6175 (June 5, 1987), GATT B.I.S.D. (34th Supp.) at 136 (1987).

120. Trade Act of 1974 § 301, 19 U.S.C. § 2411 (2006).

121. LINDSEY & IKENSON, *supra* note 85, at 33.

122. 19 U.S.C. § 1673b(b).

123. 19 U.S.C. § 1673a(b)(1).

competitors of domestic producers.[124] The questionnaires are not voluntary surveys. Any omissions and insufficiencies will militate against the interests of foreign respondents, because the DOC habitually relies on adverse information provided by the petitioners (domestic producers) to fill in gaps. Such information is euphemistically referred to as "facts available."[125] Therefore, foreign respondents are forced to spend tremendous time, energy, and money coping with this trying bureaucratic burden from a foreign government.[126]

In sum, an antidumping regime is a legalistic reincarnation of protectionism. It stigmatizes otherwise legitimate business practices under the label of "unfair trade," and, based on such label, it imposes penalties resembling the remedies available for the torts of deceptive conduct or patent violations.[127] Fair trade rhetoric serves as a façade of legitimacy, which conceals the protectionist nature of antidumping duties.[128] Once a group of domestic producers feel threatened by cheap foreign imports, they accuse foreign producers of dumping, and the ITC, in approximately eighty percent of all cases, issues an affirmative preliminary ruling that dumped imports have caused or threaten to cause injury to the petitioner.[129]

C. *Detailing Protectionism: A Flawed Modus Operandi and Its "Devilish Details"*[130]

The nuts and bolts of the antidumping statute contain numerous technicalities in both calculating dumping margins and finding injuries. Although these mechanics, including various means of analysis and computation, may appear at first glance methodical or

124. Gunn, *supra* note 17, at 175.

125. 19 U.S.C. § 1677e(b).

126. Gunn, *supra* note 17, at 175–76.

127. Barceló, *supra* note 94, at 502.

128. N. David Palmeter has eloquently demonstrated how antidumping laws masquerade as anti-unfair competition laws. *See* N. David Palmeter, *Competition Policy and Unfair Trade: First Do No Harm*, 49 AUSSENWIRTSCHAFT 417, 418 (1994); N. David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, *in* DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS 64, 65–66, 82 (Richard Boltuck & Robert E. Litan eds., 1991); N. David Palmeter, *The Rhetoric and Reality of the United States Antidumping Law*, 14 WORLD ECON. 19, 19–20, 35–36 (1991); N. David Palmeter, *The Antidumping Emperor*, 22 J. WORLD TRADE 5, 6–7 (1988). In fact, proponents of antidumping remedies deny that these remedies serve a protectionist purpose. *See, e.g.*, S. REP. No. 93-1298, at 179 (1974) ("This Act is not a 'protectionist' statute designed to bar or restrict U.S. imports; rather, it is a statute designed to free U.S. imports from unfair price discrimination practices.").

129. LINDSEY & IKENSON, *supra* note 85, at 2.

130. *Id.*

even scientific, they often prove difficult to comprehend. Therefore, they constitute nearly a self-justifying system, which is vested with vast administrative discretion and is immune to routine challenges from outside.[131] J. Michael Finger aptly observed that

> [t]he mind's eye can see a computer, programmed to run through the various iterations of the ways in which dumping, injury, industry, and other technicalities of a case might be specified. Having multiple ways to specify the technicalities mean that there is always another combination to try each time the computer receives a "No" response from the government; it just ticks over to the next iteration.[132]

Ironically, however, by scrutinizing these technicalities, which have been dubbed the "devilish details,"[133] one may unveil the antidumping regime's deceitful fair trade rhetoric and expose its substantive and procedural protectionism.[134] This will lead people to realize Mr. Hyde's monstrosity hidden behind Dr. Jekyll's gentle face.[135]

1. Phantom Injuries

As discussed above, injuries caused by dumped imports are an essential element of antidumping remedies. No matter how unfair or illegal a foreign import may be, it is off the antidumping radar as long as it causes no injury to rival domestic industries. The injury requirement is a logical corollary of the antidumping remedies' rationale to protect competitors rather than competition itself.[136] Therefore, antidumping remedies focus not on objective injuries to competition, such as those from predatory pricing, but on subjective injuries to domestic producers. The problem, however, is that such subjective injuries may also come from normal (fair) competition, not

131. BIERWAGEN, *supra* note 25, at 158 (noting that legislation and jurisprudence of antidumping may generate a misleading impression that sophisticated rules would lead to rule-oriented and fair outcome when those rules are subject to wide discretion and thus vulnerable to abuse).

132. J. Michael Finger, *Antidumping Is Where the Action Is*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 3 (J. Michael Finger ed., 1993).

133. LINDSEY & IKENSON, *supra* note 85, at 2.

134. Barceló, *supra* note 94, at 520–22.

135. BRIAN HINDLEY & PATRICK A. MESSERLIN, ANTIDUMPING INDUSTRIAL POLICY: LEGALIZED PROTECTIONISM IN THE WTO AND WHAT TO DO ABOUT IT 28 (1996).

136. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (delivering the same observation from the antitrust perspective).

necessarily from the alleged unfair trade.[137] Nonetheless, the competitor-oriented antidumping statutes make it easier for domestic antidumping authorities, such as the ITC, to find injuries even when such injuries are unreal, because they are not directly connected to the alleged dumping.[138]

Two conditions should be met to locate an injury under a given situation: injured party (injury *to whom*) and extent of injury (*how much* injury). The U.S. antidumping statute stipulates that an injury caused by dumped imports should be attributed to those domestic industries that produce "like products" of the dumped imports.[139] Therefore, a domestic salt producer may not claim injury caused by an allegedly dumped sugar import. In addition, such injury should be more than *de minimis*; it should be "material," consequential, and important.[140] However, these two parameters are inherently ambiguous, leaving the ITC enormous discretion that may be hijacked for protectionist purposes.[141] Below is an illustrative list of phantom injuries.

First, no standardized test exists to determine whether the target of an antidumping investigation and the petitioner's domestic product are like products. Petitioners can freely manipulate such likeness in a way that best serves their protectionist purpose. Therefore, there is no objective likeness test, such as the cross-elasticity of demand test used in antitrust.[142] This deficiency makes the ITC's injury test inevitably arbitrary and leads to incongruous results. For example, although galvanized carbon steel sheeting is *not* like ungalvanized carbon steel sheeting, galvanized carbon steel wire nails *are* like ungalvanized carbon steel wire nails.[143] In addition, petitioners tend to narrowly define the affected market, and thus industry, to aggrandize the injuries.[144] For example, when the same imported goods are both marketed as a final product in the merchant market and used to produce other downstream products (captive

137. Wood, *supra* note 107, at 1153.

138. Barceló, *supra* note 94, at 514–16.

139. 19 U.S.C. § 1677(10) (2006).

140. 19 U.S.C. § 1677(7)(A).

141. Bhala, *supra* note 98, at 47–48. Even an ardent advocate of the antidumping regime admits that an injury determination by the ITC is unpredictable. Terence P. Stewart, *U.S.—Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 ARIZ. J. INT'L & COMP. L. 689, 726 (1999).

142. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

143. Wood, *supra* note 107, at 1153.

144. Bhala, *supra* note 98, at 107.

production), petitioners will only focus on the merchant market sales in the antidumping petition to raise their odds for success.[145]

Second, a more serious problem lies in the lax, or often lacking, analysis of "causation" between dumping and alleged injury.[146] Astoundingly, the injury need not actually be caused by dumping: it only needs to be "by reason of" dumping.[147] This nearly nonexistent causation requirement is a true blessing to petitioners, who need not demonstrate that dumping is the "sole or even primary" cause of injury.[148] Therefore, even if a domestic industry's injury or loss of profit results mainly from consumers' changed habits or severe competition among domestic producers,[149] the industry can easily raise its fingers to foreign producers and associate its injury with their alleged dumping.[150] Under this soft causation standard, the majority of ITC commissioners do not use any economic analysis, but instead rely on a gut test to determine the existence of injury in specific cases.[151] For example, the commissioners may view an increase of imports for three years in a row as evidence of a causal relation between imports and injuries.[152]

Third, even in the absence of actual material injury, petitioners can initiate an antidumping investigation and obtain a protective action by demonstrating a mere threat of injury.[153] This inherently inferential concept requires the ITC's "prognostication" and thus attracts protectionist abuse by petitioners.[154] Under this threat of injury, any foreign imports can be subject to a potential trade restriction, even before they are shipped to the U.S. market.

145. *Id.*; *see also* 19 U.S.C. § 1677(7)(C)(iv) (2006) (setting forth that the International Trade Commission should focus "primarily on the merchant market for the domestic like product" to determine market share).

146. *See* Wood, *supra* note 107, at 1161 (observing the disagreement among the Commissioners of the International Trade Commission over the causation issue).

147. 19 U.S.C. § 1673.

148. Bhala, *supra* note 98, at 51–52.

149. "It is to be expected that when an industry expands from three to nine producers within a short period of time, severe price competition will be experienced as the new producers strive to obtain a share of the existing market." Pressure Sensitive Plastic Tapes from Italy, Determination of Injury or Likelihood Thereof, 42 Fed. Reg. 44, 854–55 (Sept. 7, 1977).

150. Bhala, *supra* note 98, at 52–53.

151. Susan W. Liebeler, *Import Relief on Imports from the People's Republic of China*, 12 LOY. L.A. INT'L & COMP. L.J. 14, 27 (1989).

152. *Id.*

153. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, art. 3.7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Implementation of Article VI]; 19 U.S.C. § 1677(F)(i) (2006).

154. Bhala, *supra* note 98, at 104–06

Understandably, petitioners usually, almost in a default fashion, include this threat claim in their petitions.[155]

Fourth, injuries can be accumulated from multiple sources (countries) in order to bestow on domestic industries a maximum level of protection. As a result, even small-scale exporters can be determined to dump after their products are lumped together with those of other producers in the dumping investigation.[156] This cumulation practice seems to be unfair to these small-scale producers in that they are penalized as dumpers even if their exports alone would not cause any damage to domestic rivals.

Fifth, an unfortunate change was made during the Uruguay Round negotiation and enshrined as Article 3.4 of the WTO Antidumping Agreement.[157] Article 3.4 mandates that the ITC consider the "magnitude of the margin of dumping" in its injury determination, which makes the ITC more likely to find injuries when the Commerce Department has come up with a large dumping margin.[158]

In sum, these lax injury standards offer the ITC various routes to locate phantom injuries. Not surprisingly, most domestic industries competing with alleged dumped imports are not truly injured by unfair imports. Federal Trade Commission economists Morris E. Morkre and Kenneth H. Kelly demonstrated that, out of 179 cases decided by the ITC from 1980 through 1988, only 21 cases involved revenue losses greater than 10 percent.[159]

2. Phantom Prices

In addition to injury, an importing government should find the existence of dumping before imposing antidumping duties on imported products. While the ITC determines the existence of injury, the ITA within the DOC investigates and decides whether foreign

---

155. *Id.*

156. 19 U.S.C. § 1677(7)(C)(iv); *see also* Fundicao Tupy S.A. v. United States, 859 F.2d 915, 917 (1988).

157. Implementation of Article VI, *supra* note 153, art. 3.4.

158. *Id.*; *see also* Bhala, *supra* note 98, at 104; Christopher M. Dumler, *Anti-dumping Laws Trash Supercomputer Competition*, 1997 CATO INST. BRIEFING PAPER NO. 32, *available at* http://www.cato.org/pubs/briefs/bp-032.html ("[W]hen the ITA finds large dumping margins . . . the ITC is almost obliged to find material injury.").

159. MORRIS E. MORKRE & KENNETH H. KELLY, FED. TRADE COMM'N, EFFECTS OF UNFAIR IMPORTS ON DOMESTIC INDUSTRIES: U.S. ANTIDUMPING AND COUNTERVAILING DUTY CASES, 1980 TO 1988, at 69 (1994); *see also* Press Release, Fed. Trade Comm'n, FTC Staff Study Estimates That Dumped, Subsidized Imports Do Not Cause Severe Injury in Most U.S. Indus. (Feb. 18, 1994) (on file with the North Carolina Law Review).

producers sold their products in the U.S. market at less than fair value—dumped—and, if so, to what extent.[160] Determining the existence of dumping and its magnitude logically requires the comparison of two "prices." The first price, which is labeled "normal value" ("NV"), is a normative, fair price, which should have been set in the home (exporting) market without any alleged unfair governmental intervention or other such practices.[161] The other price, which is labeled "export price" ("EP"), is the actual price offered in the importing country's domestic market, which is the U.S. price.[162] The difference between these two prices constitutes the dumping margin.

The problem is that prices are always fluctuating, which complicates the determination on price discrimination (dumping). The concept of normal value itself sounds somewhat oxymoronic in the free market system, because prices constantly rise and fall according to the force of supply and demand. This situation makes it hard to fix a price for a *normative* reason. Moreover, most antidumping cases, at least in the United States, concern the situation in which the imported products at issue are not sold in the exporting countries (developing countries).[163] In other words, there exists no "sanctuary market" in the exporting country, where government favoritism or intervention unduly creates price differences.[164] Accordingly, common sense dictates that there should be no "comparison" at all for the sake of determining the existence of dumping and its margin, because one of two subjects for comparison does not exist. Nonetheless, the antidumping regime's protectionist mission still forces the DOC to locate the "next most similar" products.[165] At this stage, the DOC's *own* logic and philosophy replaces common sense. The DOC uses its self-designed product code, coined "CONNUM," which categorizes distinctive characteristics or properties of each given product, such as rubber or plastic and small or big, and conducts the so-called "model matching"[166] to obtain two entities to be compared.

160. 19 U.S.C. § 1673.

161. U.S. DEP'T OF COMMERCE, IMPORT ADMINISTRATION ANTIDUMPING MANUAL, ch. VI, at 4 (1997), *available at* http://ia.ita.doc.gov/admanual/admanual_ch06.pdf.

162. *Id.*

163. LINDSEY & IKENSON, *supra* note 85, at 6.

164. The sanctuary market is a "closed home market" where foreign producers earn profits only due to government subsidization or other intervention. *Id.* at 23; Stewart, *supra* note 141, at 699.

165. LINDSEY & IKENSON, *supra* note 85, at 6.

166. *Id.*

Even assuming, *arguendo*, that the DOC can come up with two matching models to be compared, obtaining their prices requires yet another layer of fiction. As discussed above, actual market prices are hard to fix. Prices can be individual, specific, or averaged. Prices of today can be different from those of yesterday. One can pay a lot less for the same product in an outlet mall compared to a department store. Products are often on sale for various reasons. Therefore, in order to obtain prices to determine the existence of dumping and the dumping margin, the DOC conducts a "dizzying variety of adjustments."[167] The basic methodology is to strip final sale prices of all post-production expenses to acquire the so-called "ex-factory" prices. These post-production expenses include various discounts or rebates, transportation and advertisement costs, and other direct and indirect selling expenses.[168]

Although the use of these ex-factory prices aims for an equi-dimensional, or "apples-to-apples," comparison, a combination of factors—including the above-mentioned fictitious "model matching" practice, the inherent multiplicity of prices, and, finally, the DOC's unrestricted discretion in the price adjustment process—tend to entail "apples-to-oranges" comparisons.[169] For example, when the DOC compares the U.S. sale prices with third country sale prices when an investigated product is not sold in the home market, a dumping margin may easily be found solely on the grounds that the third country prices become higher due to the third country's invisible trade barriers, which have nothing to do with unfair practices by the accused dumper.[170]

This arbitrariness in calculating prices culminates when the DOC "constructs" prices.[171] When the model matching or third-party

167. *Id.* at 7, 21–24. In the same line, Bhala observes that, no matter how identical imported products may be at the time they enter into the U.S. market, they are subsequently subject to totally different commercial trajectories, which affect cost and prices. Bhala, *supra* note 98, at 38–45 (detailing various kinds of adjustments over both home market prices and U.S. prices).

168. *See, e.g.*, 19 U.S.C. § 1677a(c)(1)(A)–(B) (2006); 19 U.S.C. § 1677a(c)(2)(A); 19 C.F.R. § 351.402(b) (2008) (regarding the addition of export costs such as freight charges, insurance premiums, import duties, and warehouse expenses to the U.S. price); 19 C.F.R. § 353.41 (regarding the addition of preshipment expenses to the U.S. price); 19 C.F.R. § 353.41(d)(1)(iii) (regarding the addition of sales taxes to the U.S. price); 19 C.F.R. § 353.56(a) (regarding the circumstances of sale adjustment over the home market price); 19 C.F.R. § 353.57(a) (regarding the difference in merchandise ("DIFMER") adjustment over the home market price); 19 C.F.R. § 353.58 (regarding the level of trade adjustment over the home market price).

169. LINDSEY & IKENSON, *supra* note 85, at 8, 22.

170. *Id.*

171. 19 U.S.C. § 1677b(e).

product comparison does not work, and the DOC designates an exporting country as a nonmarket economy ("NME"), the DOC itself computes, but more accurately legislates, archetypal prices to be used in determining the existence of dumping and the dumping margin.[172] Here, the DOC wields enormous discretion in assigning all relevant costs for production, ranging from raw material, labor, and capital, as well as producers' profits.[173] No doubt, such construction is biased toward findings of dumping. In many situations, the DOC relies on information and data provided by no one but petitioners in the name of "facts available."[174] In addition, the profit rates that the DOC adopts in the construction of prices are often higher than in reality.[175]

In sum, even if one supposes that dumping in the form of price discrimination is a condemnable practice, the process of "fair market comparison" to determine the existence of such dumping is not, in fact, fair at all. Because both foreign and domestic price information is often unobtainable, it is manipulated or constructed by the DOC. Yet this artificial price information is exactly what the DOC purports to be comparing. Lindsey and Ikenson observed that

> [i]n the typical antidumping investigation, the DOC compares home-market and U.S. prices of physically *different* goods, in *different* kinds of packaging, sold at *different* times, in *different* and fluctuating currencies, to *different* customers at *different* levels of trade, in *different* quantities, with *different* freight and other movement costs, *different* credit terms, and other *differences* in directly associated selling experiences (e.g., commissions, warranties, royalties, and advertising). Is it any wonder that the prices aren't identical?[176]

On top of these structural problems, numerous bureaucratic technicalities employed by the DOC contribute to an affirmative finding of dumping by making home market value (normal value) higher and/or the U.S. market value (export price) lower. First of all, the DOC excludes most sales by domestic producers made at prices below the production cost ("below-cost" sales) in calculating normal value.[177] Such practice makes it easier to find dumping by ultimately

172. 19 U.S.C. § 1677b(b) (concerning below cost sales); 19 U.S.C. § 1677b(c) (concerning nonmarket economies).

173. 19 C.F.R. § 351.405 (calculation of normal value based on constructed value); 19 C.F.R. § 351.407 (calculation of constructed value and cost of production).

174. 19 U.S.C. § 1677e(a); LINDSEY & IKENSON, *supra* note 85, at 20.

175. LINDSEY & IKENSON, *supra* note 85, at 29.

176. *Id.* at 21 (emphasis added).

177. 19 U.S.C. § 1677b(b)(1).

exaggerating normal value, especially considering the fact that below-cost sales are not subtracted in calculating the U.S. home price unless such sales constitute at least twenty percent of total sales.[178]

However, this special treatment of "below-cost" sales as something in the extraordinary course of trade is without any economic rationale, because, as discussed above, firms often engage in sales at a loss for a variety of legitimate reasons, such as launching their products in a new market.[179] This below-cost production makes perfect economic sense if one takes a closer look at firms' *cost* structure, especially the fact that what often matters in a firm's decision making is "variable," not "total," cost of production.[180] In the absence of evidence that these firms aim for predatory pricing, the practice of below-cost sales must be allowed in the same fashion that airplane companies often undersell each other. Even more problematic is that the power to decide whether to disregard below-cost sales in calculating normal value is at the total discretion of the DOC.[181]

Second, because the antidumping remedy is based on an aggregate, collective notion of injuries to domestic industries, fair market comparison requires summing up each dumping margin separately calculated from sales in each different category (model or type) of the same product. Therefore, if such comparison is really fair, any possible *negative* dumping margins in some categories, which indicates that the U.S. market price is *higher* than the home market price, should be allowed to offset other positive dumping margins from other categories. However, under a well-established and even judicially endorsed practice[182] labeled "zeroing," the DOC disallows such offsetting by ignoring any negative dumping margins.[183] The

178. LINDSEY & IKENSON, *supra* note 85, at 23.

179. *See supra* text accompanying notes 96–97.

180. Bhala, *supra* note 98, at 72–75.

181. 19 U.S.C. § 1677b(b)(2)–(3).

182. Corus Staal B.V. v. Dep't of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005) (affirming the deference given to the DOC in calculating dumping margins and declining to be influenced by WTO decisions).

183. The WTO has recently struck down certain zeroing practices by the DOC. *See* Appellate Body Report, *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 263, WT/DS294/AB/R (Apr. 18, 2006), *available at* http://www.wto.int/english/tratop_e/dispu_e/cases_e/ds294_e.htm (follow "Appellate Body Report" link; then follow "E" link). The DOC has vowed to discontinue the practice. *See* Panel Report, *United States—Anti-Dumping Measure on Shrimp from Ecuador*, ¶ 6, WT/DS335/8 (Jan. 30, 2007), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds335_e.htm (follow "Panel Report" link, then follow "E" link). However, it remains to be seen whether the courts and Congress will follow suit. *See* Posting of Daniel Ikenson to Cato@Liberty, Antidumping Reformers Rejoice,

zeroing practice tends to inflate the actual impact of dumping. Likewise, nondumped sales in the U.S. market do not offset dumped ones, thereby increasing the possibility of the DOC finding dumping.[184]

Third, any *fair* market comparison should maintain methodological coherence in calculations between the home market and the U.S. price. Therefore, "average" home market prices should be compared with "average" U.S. prices, and "individual" home market prices with "individual" U.S. prices. However, the DOC often makes another deviation from this normative track and compares "average" home market prices with "individual" U.S. prices. Therefore, even if "average" U.S. prices exceed "average" home market prices, and no dumping exists, the DOC still creates dumping margins by selecting a couple of low-priced anecdotal transactions in the U.S.[185] This scenario is most likely to occur under an administrative review in which the DOC must determine whether it should maintain or terminate its preexisting order.[186] The bottom line is that the DOC can, and will, arrive at a finding that dumping has occurred one way or another, if it so desires.

All in all, the classic theory of justice articulated by Aristotle dictates that equals should be treated equally and unequals unequally.[187] Yet, a premise logically superseding this heuristic is that one should be able to determine whether the two subjects in question are equal or unequal before conferring on them equal or unequal treatment. If one attempts to square an unequal to an equal, any subsequent treatment based on this flawed designation is pre-ordained to be unjust. In other words, certain situations do not even warrant a comparison between what is to be compared. The fundamental defect of the antidumping regime originates from its brazen comparison of what should not be compared. This flaw

---

http://www.cato-at-liberty.org/2006/12/18/antidumping-reformers-rejoice/ (Dec. 18, 2006, 19:16 EST).

184. *See* Davey, *supra* note 98, at 298–99; Letter from Consumers for World Trade to U.S. Congress (Jan. 31, 2005), *available at* http://www.cwt.org/news/articles/2005%20March/Blast%20fax%20on%20Zeroing%20Jan05.pdf.

185. *See* Richard Boltuck & Robert E. Litan, *America's "Unfair" Trade Laws*, *in* DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS 1, 14 (Richard Boltuck & Robert E. Litan eds., 1991).

186. Bhala, *supra* note 98, at 69.

187. ARISTOTLE, NICOMACHEAN ETHICS 67–84 (Terence Irwin trans., Hackett Publishing Co., 2d ed. 1999) (1985).

explains the DOC's astonishingly high affirmative determination rate against foreign producers over alleged foreign dumping practices.[188]

3. Procedural Burdens and Injustice

The investigatory process of antidumping is inherently biased against respondents (foreign producers) in the sense that petitioners (domestic producers) are teamed up with the antidumping authorities (DOC and ITC) throughout the investigatory process.[189] Therefore, impartiality or other due process values, which are the backbone of any adjudicatory or quasi-adjudicatory proceeding, cannot be anticipated from the antidumping authorities. For example, unlike a normal litigation setting, petitioners in their own antidumping proceeding are free from heavy burdens of discovery, because the antidumping authorities perform an investigation.[190] Antidumping authorities even work with petitioners before they initiate their petition to ensure that the petition is "legally sufficient."[191]

In addition, due process and other procedural safeguards cannot be fully implemented in an antidumping proceeding. The Administrative Procedure Act ("APA") does not apply to an antidumping suit.[192] Also, the whole investigatory process is subject to a strict timetable,[193] which tends to militate against the interests of foreign respondents because tight deadlines deprive them of adequate time to defend their cases. For example, foreign respondents have only forty-five days to respond to the DOC's questionnaire.[194] In order to fully respond to such a questionnaire, foreign respondents need lawyers, economists, accountants, and translators.[195]

---

188. Dumler, *supra* note 158 (observing that the DOC rendered dumping determinations in over ninety-six percent of cases—804 out of 837 petitions—filed from 1980 to 1997).

189. Hilary K. Josephs, *The Multinational Corporation, Integrated International Production, and the United States Dumping Laws,* 5 TUL. J. INT'L & COMP. L. 51, 65–66 (1997).

190. *See* Theodore W. Kassinger, *Antidumping Duty Investigations*, *in* LAW AND PRACTICE OF UNITED STATES REGULATION OF INTERNATIONAL TRADE 1, 2 (Charles R. Johnston, Jr. ed., 1989); Josephs, *supra* note 189, at 65–66.

191. Josephs, *supra* note 189, at 66; Kassinger, *supra* note 190, at 16.

192. Elof Hansson, Inc. v. United States, 41 Cust. Ct. 519, 528 (1958) (ruling that the APA was not applicable to dumping investigations); *see* Josephs, *supra* note 189, at 66; Kassinger, *supra* note 190, at 16–20.

193. 19 U.S.C. § 1673b(b) (2006) (requiring the preliminary determination be made forty-five days from the date of filing); 19 U.S.C. § 1673d(a)(1) (setting the general rule that final determinations by the DOC are to be made seventy-five days after the preliminary determination).

194. 19 U.S.C. § 1671b(a)(2)(A)(i).

195. Gunn, *supra* note 17, at 175.

Therefore, the responding process costs respondents a vast amount of time, money, and energy. If the respondent ever lapses on the aforementioned deadline, the DOC will use data provided by petitioners ("facts available"), which is predictably self-serving and adverse to the interests of foreign producers.[196] Even if domestic industries fail to prevail in the first round of an antidumping complaint, they can refile a new petition with the same subject matter, because the doctrines of *res judicata* and collateral estoppel do not apply to antidumping proceedings, unlike other civil proceedings.[197]

This "procedural protectionism"[198] results from a captured trade policy under which domestic interest groups persuade the U.S. Congress to change various procedures, such as time limits or deadlines, to the detriment of foreign rivals.[199] Capitalizing on these time limits, antidumping petitioners often "overload" the system by filing loads of cases beyond the government's capacity in a hope that the government is forced to broker settlements, such as Voluntary Export Restraints ("VERs"), between petitioners and foreign producers, rather than determine the merits of the cases.[200]

This procedural injustice, which is potential harassment to foreign producers, severely distorts trade flows and often forces them to raise export prices to avoid antidumping investigations. In other words, a mere threat of filing antidumping petitions or initiating antidumping investigations may chill foreign producers' entry into the market or force cooperation with domestic producers on pricing, even in the absence of actual imposed antidumping duties. In fact, this threat is very effective in forming a cartel: while petitioners can abuse the antidumping proceeding with very little cost, the anticompetitive damage to consumers and the entire economy is "significant and durable."[201]

Robert Staiger and Frank Wolak empirically proved the occurrence of these trade distortions before the final determination of

196. 19 U.S.C. § 1677e(b); *see* Wesley K. Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 LAW & POL'Y INT'L BUS. 681, 698 (1981).

197. 19 U.S.C. §§ 1671a(a), 1673a(a); Josephs, *supra* note 189, at 66.

198. Barceló, *supra* note 94, at 522; Joe Sims & Edith E. Scott, *Antitrust Consequences to Private Parties of Participation in and Settlement of Selected Trade Actions*, 56 ANTITRUST L.J. 561, 575 (1987).

199. SHARYN O'HALLORAN, POLITICS, PROCESS AND AMERICAN TRADE POLICY 181 (1994)

200. Finger, *supra* note 132, at 5.

201. FEDERAL TRADE COMMISSION, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE: AN FTC STAFF REPORT 3 (2006) [hereinafter FTC STAFF REPORT]; *see* Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977–87, 990–92 (2005).

dumping and injury. Their research examined the presence of pending investigations (the "investigation effect") and the suspension of investigations in exchange for foreign producers' commitment to raise export prices (the "suspension effect").[202] They observed that many domestic producers file antidumping petitions as a means of harassing foreign producers into cooperation rather than as an attempt to procure the actual imposition of final duties.[203]

Shi Young Lee and Sung Hee Jun have also demonstrated this investigation effect through their research, yet in a more dynamic fashion. First, they show that a petitioner's mere initiation of an antidumping complaint can increase the uncertainty for the "trade prospects" as to targeted products, since an importer might be forced to pay antidumping duties in the future.[204] These additional transaction costs created by uncertainty tend to drive the export production to other non-petitioned foreign producers ("first order investigation effect").[205] Yet, news of the petition will soon reach non-petitioned foreign producers who export competitive or substitutable products. Even though the petition does not directly affect these non-targeted foreign producers, they nonetheless tend to fear any possible future petitions toward themselves.[206] This fear may be explained by a social psychology phenomenon called "priming effects," under which the salience of the previous event influences, or "primes," a non-targeted foreign producer's perception of risks.[207] Therefore, even non-targeted firms tend to reduce their exports or raise their prices to avoid any possible antidumping attacks in the future. This is called the "second order investigation effect."[208]

Thus, the antidumping mechanism inflicts high costs and uncertainty on foreign exporters throughout its investigatory process.[209] It also tends to convert the U.S. adversarial system of justice into an inquisitorial one, which is biased against respondents (foreign producers).[210] As Frederick Davis avowed forty years ago, "this area of law condones practices inconsistent with due process and

202. Robert W. Staiger & Frank A. Wolak, *Differences in the Uses and Effects of Antidumping Law Across Import Sources*, *in* THE POLITICAL ECONOMY OF AMERICAN TRADE POLICY 385, 386–87 (Anne O. Krueger ed., 1996).

203. *Id.*

204. Staiger & Wolak, *supra* note 202, at 386–87.

205. *Id.*

206. *Id.* at 434–37.

207. *Id.*

208. *Id.*

209. *See* Finger, *supra* note 29, at 34.

210. Gunn, *supra* note 17, at 176.

equal protection notions that are so punctiliously observed in other areas of the public law."[211] Without proper checks on this administrative abuse, the antidumping remedy results in maltreatment of foreign producers.[212]

II. TWO FAILURES OF THE ANTIDUMPING REGIME

A. *Economic Factionism*

James Madison began the Federalist Paper No. 10 by submitting that, "among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction."[213] Antidumping remedies embody the very evil that Madison so passionately preached against. Without any true foundation for their ostensible "fair trade" rationale, as discussed above,[214] antidumping remedies have become "little more than an excuse for special interests to shield themselves from competition at the expense of both American consumers and other American companies."[215] Through antidumping measures, federal economic welfare is hijacked by a handful of special interests, which can be depicted as economic "factions."[216] Therefore, antidumping remedies precipitate a Madisonian failure by the government itself.[217]

Unbeknownst to them, American consumers are forced to pay higher prices for their everyday purchases, including candles, shrimp, and computers, due to additional antidumping duties, while such overpayment enriches only a small group of producers, who are losing

---

211. Davis, *supra* note 109, at 1440; *see also* James A. Kohn, *The Antidumping Act: Its Administration and Place in American Trade Policy*, 60 MICH. L. REV. 407, 421–27 (1962) (discussing that the Antidumping Act establishes no procedural guidance for the Secretary of the Treasury to consider when deciding whether dumping has occurred or injured an industry).

212. *See* Davis, *supra* note 109, at 1460.

213. THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

214. *See supra* note 23 and accompanying text.

215. N. Gregory Mankiw & Philip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, FOREIGN AFF., July–Aug. 2005, at 107.

216. Press Release, Fed. Trade Comm'n, FTC Chairman Oliver Says Protectionism Not Justified, Does Not Save Jobs, Actually Hurts Economy (April 24, 1987), *available at* http://www.ftc.gov/opa/predawn/F87/oliveraei.txt; U.N. Conf. on Trade & Dev., Policy Issues in Int'l Trade & Commodities Study Series No. 9, *Antidumping & Countervailing Procedures—Use or Abuse: Implications for Developed Countries*, iii, U.N. Doc. UNCTAD/ITCD/TAB/10 (Feb. 12, 2000) (*prepared by* Inge Nora Neufeld).

217. *See* Press Release, Fed. Trade Comm'n, *supra* note 216 ("[T]he special interests . . . have invented a national problem in order to advance their own interests.").

competitive edges but are nonetheless protected by these trade remedies.[218] This "protection tax"[219] has inflicted massive damage upon the U.S. economy. Raj Bhala pointed to the ITC's candid analysis of the antidumping regime's negative effect on the welfare of the U.S. economy.[220] The ITC estimated that, as of 1991, outstanding antidumping and countervailing duty orders deprived the U.S. economy of about $1.6 billion. Furthermore, the burden falls disproportionately onto the poor, because targeted consumer goods are often necessities, which tend to constitute a bigger portion of the poor's spending than the rich.[221]

Economic harms inflicted by antidumping remedies are also felt by American companies and their workers. Because most antidumping tariffs are imposed on parts and intermediary goods, which are used to produce other goods, producers of these final goods (the so-called "downstream" firms), such as automobile companies, face steeper costs.[222] For example, even if automakers no longer use imported steel, they still have to pay higher steel prices, because domestic steel prices have soared in light of antidumping measures.[223] As a result, each steel job saved by these antidumping tariffs costs an estimated three jobs in steel-consuming industries.[224] For the same reason, in the early 1990s, Toshiba closed its California laptop factories and moved to Japan after the 62.7% antidumping tariffs were imposed on flat-panel displays.[225] All in all, antidumping remedies "impose[] disparate transaction costs" on parties concerned, resulting in a failure to achieve an optimal level of resource allocation in the national economy.[226]

Furthermore, the remedial (protectionist) effect of antidumping measures may be questionable even to their ostensible beneficiaries. While antidumping measures may allow inefficient firms to sustain

218. *See* CONSUMERS FOR WORLD TRADE, PROTECTIONISM IN AMERICA: WATCH YOUR WALLET (2003), *available at* http://www.cwt.org/learn/CWT%20Protection%20Tax%20Study.pdf.

219. *Id.*

220. Bhala, *supra* note 98, at 11–12; The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements, USITC Pub. 2900, Inv. No. 332-344, at ix (June 1995).

221. Mankiw & Swagel, *supra* note 215, at 108.

222. *Id.* at 113.

223. *Id.*

224. *Id.*

225. *Id.*

226. *See* KEVIN SCOTT MARSHALL, ADMINISTERED PROTECTION: THE POLITICAL ECONOMY OF U.S. COUNTERVAILING DUTY AND ANTIDUMPING REGULATION 174 (1993).

themselves temporarily, they tend to eventually harm those firms in the long run.[227] Antidumping measures send the wrong signals to the firms' shareholders and employees, depriving them of any entrepreneurial efforts, such as restructuring.[228] Moreover, protectionism sustained by antidumping remedies appears quite addictive.[229] Once in place, antidumping measures are hard to revoke, despite statutory possibilities under a "sunset review" conducted every five years.[230] The U.S. trade law was amended during the 1970s and 1980s to make it easier to find dumping by adding special rules, such as the exclusion of below-cost sales and the use of constructed value.[231] The DOC repealed antidumping tariffs in only two of the 314 cases that it examined under the sunset review between 1998 and 2000.[232] Therefore, as of December 1999, Chinese "cotton shop towels" and Japanese "television receivers" had been continuously subject to an antidumping order ever since October 1983 and March 1971, respectively.[233]

The foregoing self-reinforcing propensity of antidumping remedies prompted the passing of the United States Continued Dumping and Subsidy Offset Act of 2000,[234] which is commonly known as the "Byrd Amendment," after its chief architect, Robert Byrd.[235] Though it has since been repealed, the Byrd Amendment, when it was in effect, required the U.S. government to disperse antidumping duties to petitioners on an annual basis.[236] Unsurprisingly, this extraordinary financial incentive has dramatically boosted antidumping petitions ever since its enactment.[237] Even some

227. THOMAS BODDEZ & MICHAEL J. TREBILCOCK, UNFINISHED BUSINESS: REFORMING TRADE REMEDY LAWS IN NORTH AMERICA 169 (1993).

228. MARSHALL, *supra* note 226, at 174.

229. *Id.*

230. BOVARD, *supra* note 14, at 140; Bhala, *supra* note 98, at 115–16; Mankiw & Swagel, *supra* note 215, at 112; Barbara R. Stafford & Linda S. Chang, *The Sunset Provisions, Mortality and the Uruguay Round*, *in* THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT 721, 727 n.12 (PLI 1994).

231. LINDSEY & IKENSON, *supra* note 85, at 104.

232. Mankiw & Swagel, *supra* note 215, at 112.

233. Neufeld, *supra* note 216, at 8.

234. Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment), Pub. L. No. 106-387, 114 Stat. 1549A (codified as amended at 19 U.S.C. § 1675(c) (2006)).

235. United States International Trade Commission, Trade Remedy Investigations: Byrd Amendment, http://www.usitc.gov/trade_remedy/731_ad_701_cvd/byrd.htm (last visited Dec. 14, 2008).

236. *Id.*

237. Kenneth J. Pierce & Matthew R. Nicely, Case Studies: Catfish and Shrimp Antidumping Cases, Presentation at the Georgetown University Law Center Nat'l Committee for Int'l Econ. Cooperation, World Trade Organization: Accession and Membership Conference 1–5 (Mar. 11, 2004), http://www.usvtc.org/trade/other/

government agencies have warned against the devastating economic effects that the Byrd Amendment has caused to the U.S economy. The Congressional Budget Office ("CBO") stated that

> [t]he law subsidizes the output of some firms at the expense of others, leading to inefficient use of capital, labor, and other resources of the economy. It discourages settlement of cases by U.S. firms and will lead to increased expenditure of economic resources on administration, legal representation of parties, and various other costs associated with the operation of the antidumping and countervailing-duty laws.[238]

Although this law had already been struck down as an illegal extension of antidumping measures by the WTO,[239] its unusual popularity in Capitol Hill has made it slow to disappear until recently.[240] It is reported that seven of the nine newly-elected senators officially supported the Byrd Amendment in February 2005.[241] The U.S. economy suffered as U.S. trading partners decided to retaliate against U.S. exports because of the nation's noncompliance with the WTO decision.[242] This reciprocation reveals another, much broader, negative ramification of antidumping remedies to the U.S. economy. As long as the United States uses

---

NCIEC_mar04/ (follow power point presentation link under "Important Materials"); OFFICE OF INVESTIGATIONS, U.S. INT'L TRADE COMM'N, IMPORT INJURY INVESTIGATIONS CASE STATISTICS (FY 1980–2005) 108 fig.2 (2006), *available at* http://www.usitc.gov/trade_remedy/Report-10-06-PUB.pdf (showing an increase in antidumping cases filed from thirty-five in 2000 to ninety-two in 2001) [hereinafter "INJURY STATISTICS"].

238. Letter from Douglas Holtz-Eakin, Dir. of Cong. Budget Office, to Bill Thomas, Chairman, Comm. on Ways and Means, U.S. House of Representatives (Mar. 2, 2004), *available at* http://www.cbo.gov/ftpdocs/51xx/doc5130/03-02-ThomasLetter.pdf.

239. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

240. *See Byrd-Brained*, THE ECONOMIST, Sep. 4, 2004, at 69; Dan Ikenson, *"Byrdening" Relations: U.S. Trade Policies Continue to Flout the Rules*, 2004 CATO INST. FREE TRADE BULL. No. 5, *available at* http://www.freetrade.org/pubs/FTBs/FTB-005.html (depicting trade remedy laws, such as the Byrd Amendment, as the "sacred cow" of the U.S. trade policy). The U.S. Congress finally repealed the Byrd Amendment in December 2005 (House) and in January 2006 (Senate) with a condition that permitted petitioners (U.S. companies) to collect duties on goods that were imported to the United States prior to October 1, 2007. *See* Press Release, Office of U.S. Trade Representative, Congress Takes Important Action: Byrd Repeal Brings U.S. into Compliance with WTO Ruling (Feb. 1, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/February/Congress_Takes_Important_Action.html.

241. Mankiw & Swagel, *supra* note 215, at 107.

242. *See* World Trade Organization, Arbitrator Issues Awards on "Byrd Amendment," Aug. 31, 2004, *available at* http://www.wto.org/english/news_e/news04_e/news04_e.htm (allowing certain countries to apply for a "suspension of concessions and other obligations" in light of the U.S. Byrd Amendment).

antidumping remedies as its protectionist weapon, its trading partners will follow suit and plague U.S. exporters with their own antidumping investigations and duties.[243] In sum, antidumping remedies leave the United States with many self-inflicted wounds.

B. Cartelization: An Antitrust Failure

In addition to the foregoing consequences, antidumping remedies tend to cause an antitrust breakdown by creating oligopolistic pricing patterns. The purpose of the antidumping regime is to discourage imports from being priced lower than their rival domestic products. Hence, pro-competitive pricing strategies by importers, such as "low introductory prices" or "experimental prices," are deterred, and, to that extent, new entries of foreign imports are excluded.[244] If those foreign producers decide to leave the domestic market as a result of such penalizing antidumping duties, domestic competitor petitioners can enjoy their preexisting price levels, which are higher than what they would have been without the existence of antidumping duties. After all, absent this price competition, domestic prices remain stable, to the detriment of consumers and consuming industries, while such fixed prices serve the narrow interests of a handful of domestic producers.[245] The anticompetitive effects of exclusion and *de facto* price fixing can be easily attributed to the very concept of "dumping margins," which, as a remedial criterion, eventually determine the amount of duties foreign producers are forced to pay for their alleged dumping.[246] These extra duties tend to increase domestic sale prices that would have otherwise been low.

Therefore, the antidumping statute promotes a "legal cartel," in which the government itself monitors and enforces a *de facto* price-fixing scheme for the benefit of domestic industries and to the detriment of domestic consumers.[247] Under this legal cartel, the mere act of filing an antidumping petition may induce effective cooperation

243. LINDSEY & IKENSON, *supra* note 85, at 122–23; Mankiw & Swagel, *supra* note 215, at 115 (citing research by Thomas Prusa and Susan Skeath).

244. *See* Barceló, *supra* note 94, at 510–11.

245. *Id.* at 512; Davis, *supra* note 109, at 1444 (observing the potential clash between antidumping and antitrust policies); *see also* Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 24 (1995) (observing that U.S. antidumping law tends to generate tensions with U.S. antitrust policies by chilling low pricing in order to protect domestic industries).

246. Gunn, *supra* note 17, at 171–72.

247. Pierce, *supra* note 2, at 741–42.

in price fixing among domestic and foreign producers.[248] Antidumping petitions targeting imported products are usually filed jointly by a certain critical mass of domestic producers producing similar goods.[249] In this joint effort to launch an antidumping complaint, domestic producers naturally exchange information on prices and output levels of their products. Such communication may be the onset of a *de facto* price-fixing conspiracy. Recent oligopolistic behaviors, such as "price leadership" by big companies and "open pricing" through trade associations,[250] also facilitate such collusive communication. Under these circumstances, domestic producers can comfortably engage in the so-called "conscious parallelism," in which they can effectively coordinate their price and output decisions even in the absence of overt illegal collusion.[251] Although these practices may not be illegal as they stand, they nonetheless tend to provide a fertile ground for collusive cooperation among domestic producers.

However, cartelization through an antidumping petition does not remain purely a domestic phenomenon. The prototypical collusion toward a *de facto* price-fixing cartel among antidumping petitioners may soon expand to foreign producers who produce identical or similar products. The message is blunt: if you raise your prices to a level with which we feel comfortable, we will withdraw the antidumping petition.[252] Economists have long suspected collusions among domestic and foreign producers when the former withdraw their antidumping petitions after settlements with the latter.[253]

248. This "threat" effect may explain why there are so many frivolous antidumping petitions that eventually result in a *de minimis* or zero dumping margin. *See* Gunn, *supra* note 17, at 165 (arguing that petitioners should bear the costs of discovery and investigation to eliminate "frivolous and protectionist" antidumping filings).

249. Petitioners may file jointly as an industry under 19 U.S.C. § 1673a(b)(1) (2006).

250. *See* FREDERIC M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 153–56, 160, 164, 209–10, 248–61, 347–59 (3d. ed. 1990).

251. *Id.* at 742; Donald Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 656 (1962).

252. *See* M. Herander & J.B. Schwartz, *An Empirical Test of the Impact of the Threat of U.S. Trade Policy: The Case of Antidumping Duties*, 51 S. ECON. J. 59, 59–79 (1984); Ann Harrison, *The New Trade Protection: Price Effects of Antidumping and Countervailing Measures in the United States* (World Bank, Policy Research Working Paper No. 808, 2001); Christopher T. Taylor, *The Economic Effects of Withdrawn Antidumping Investigations: Is There Evidence of Collusive Settlements?* 8 (Fed. Trade Comm'n, Working Paper No. 240, 2001), *available at* http://www.ftc.gov/be/workpapers/wp240.pdf.

253. *See* T. Calvani & R.W. Tritell, *Invocation of United States Import Relief Laws as an Antitrust Violation*, 31 ANTITRUST BULL. 327, 527–50 (1986); T.J. Prusa, *Why Are So Many Antidumping Petitions Withdrawn?* 33 J. INT'L ECON. 1, 1–20 (1992); P.B. Rosendorf, *Voluntary Export Restraints, Antidumping Procedure, and Domestic Politics*, 86 AM. ECON. REV. 544, 544–61 (1996); Taylor, *supra* note 252, at 2–3; M. Zanardi, *Antidumping Law as a Collusive Device* 2 (Boston College, Working Paper No. 487, 2000),

Likewise, to terminate antidumping investigations against them, foreign producers are often forced to conclude "price undertaking" or "suspension agreements," the economic effect of which is close to price fixing.

Why do foreign producers feel powerless when domestic producers file antidumping petitions, and why are they willing to settle rather than respond to dumping allegations and comply with the ensuing investigations? An answer to this question may be found in the Eastern District of New York's opinion in *Music Center S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp*:

> These proceedings may pose a substantial burden on their target. The foreign companies who are the subject of an antidumping investigation are presented with questionnaires seeking information about their selling practices, and, in many cases, their cost of production as well. After submission of questionnaire responses, these responses are verified by Commerce officials. The verification process sometimes involves up to five investigators reviewing source documents at the respondents' corporate offices and factories for periods ranging between three days and three weeks.[254]

In particular, small foreign companies as respondents often cannot afford lawyers, accountants, and economists, which are necessary to fully respond to the DOC's investigation, while the well-monied petitioners can.[255] The obverse side of this story is that domestic industries may be willing to spend a handsome amount of money in an antidumping suit against small foreign producers in order to scare away these foreign producers from the domestic market. This behavior, which is called "non-price predation," aims to raise competitors' cost through specious litigations.[256]

---

available at http://fmwww.bc.edu/EC-P/WP487.pdf; *see also* Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?*, 34 J. LEGAL STUD. 515, 525 (2005).

254. Music Ctr. S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp., 874 F. Supp. 543, 547 (E.D.N.Y. 1995) (citing de Ravel d'Esclapon, *supra* note 16, at 549); *see also* Dumler, *supra* note 158 (observing that lengthy questionnaires (100 to 200 pages), translation problems, American accounting standards, and a tight deadline for response (two to four weeks) bring great pains to foreign respondents who would be penalized for not cooperating by the DOC using information provided by petitioners).

255. *See* MARSHALL, *supra* note 226, at 174 (arguing that the disparate transaction costs that the antidumping measure imposes tend to favor the interests of "highly concentrated" industries to the detriment of "highly competitive" small producers).

256. *See* Calvani & Tritell, *supra* note 253, at 529 n.5; J. Hurwitz, *Abuse of Government Processes, the First Amendment, and the Boundaries of* Noerr, 74 GEO. L. J. 65, 70 (1985). The Department of Justice also acknowledged these anticompetitive effects resulting from

Non-price predation may be a superior alternative to price predation for big domestic producers in many aspects. For example, the former is relatively less expensive than the latter, since joint petitioners can share the legal costs among themselves.[257] In addition, while price predation costs are certain, there is no guarantee that these costs can be recouped even with a monopoly, as there is always the possibility of new entries to the market.[258] Moreover, in the antidumping context, petitioners can rely on the government to absorb most costs through statutory proceedings.[259] The DOC's own practice of not screening spurious petitions in the filing stage contributes to the potential proliferation of non-price predation in antidumping proceedings.[260] "[V]ery little (if any) predation is accomplished through pricing, while a good deal is achieved through litigation."[261] This non-price predation leads to the exclusion of more efficient foreign rivals from the domestic market through means other than "competition on the merits"[262] and thus aims to achieve "willful acquisition and maintenance of [monopoly] power."[263]

The pain inflicted on foreign producers by this non-price predation is so grave that they tend to react even to a mere threat of an antidumping suit.[264] In other words, even without actual antidumping petitions, a mere prospect, or threat thereof, sensitizes foreign producers in their pricing behaviors, forcing these producers to put higher price tags on their exports to avoid any potential antidumping attacks. This *tacit* communication can lead to an

---

antidumping procedures, stating "[i]t is often not the actual imposition of dumping duties that inhibits foreign competition so much as the indeterminate liability that arises from the filing of a dumping complaint." *Administration of the Antidumping Act of 1921: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means Comm. on Assessment and Collection of Duties under the Antidumping Act of 1921*, 95th Cong., 243–44 (1978).

257. Calvani & Tritell, *supra* note 253, at 529 n.5.

258. *Id.*

259. *Id.*

260. *See* de Ravel d'Esclapon, *supra* note 16, at 548.

261. FTC STAFF REPORT, *supra* note 201, at 38 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 357 (1978)).

262. *See* Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 149 (2005) (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626g(3) (1st ed. 1978)).

263. Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).

264. James Pomeroy Hendrik, *The United States Antidumping Act*, 58 AM. J. INT'L L. 914, 919 (1964) (arguing that the mere initiation of a dumping investigation may lead foreign producers to change their prices).

effective price fixing.[265] Moreover, domestic industries lobby the government to establish VERs—which are nothing but cartels[266]—with foreign countries participating under the implied threat of antidumping remedies.[267]

Some of the most preeminent antitrust scholars in the nation have illustrated foreign producers' forced participation in the cartelization. Frederick Scherer highlighted the way in which the government contributed to a cartelization through antidumping proceedings.[268] Two New Mexico potash (potassium) producers filed an antidumping suit against Canadian potash producers, in particular the Potash Corporation of Saskatchewan ("PCS"), on February 10, 1987.[269] Following the ITC's preliminary injury determination on March 23, 1987, the DOC announced preliminary dumping margins of fifty-two percent against the PCS.[270] The PCS was then required to post huge bonds on future exports, covering duties tantamount to these preliminary dumping margins.[271] The PCS was soon forced to increase its export price on potash in an attempt to reduce final dumping margins and to pay the bonds to be posted.[272] Other Canadian producers followed suit, and potash prices spiked.[273] Finally, Canadian potash producers concluded a "suspension agreement" with the U.S. government, under which they agreed to fix their export prices to the titular "fair market value" for the next five years.[274] This price hike (nearly one-hundred percent), which was precipitated in the 1990s by an ongoing antidumping suit, demonstrates the classic phenomenon of cartel-driven price fixing.[275] The government's enforcement of price fixing through the antidumping process made this cartel legal.

Richard Pierce introduced a case that vividly illustrates how the "threat" of an antidumping suit may be used to compel foreign

265. Ulrich Immenga, *Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy*, 4 PAC. RIM L. & POL'Y J. 93, 132–33 (1995).

266. *Id.* at 114.

267. Hoekman & Leidy, *supra* note 14, at 156.

268. *See* FREDERIC M. SCHERER, COMPETITION POLICY, DOMESTIC AND INTERNATIONAL 20–22 (2000); Frederic M. Scherer, *Some Principles for Post-Chicago Antitrust Analysis*, 52 CASE W. RES. L. REV. 5, 9 (2001).

269. Hope, *supra* note 13, at 20–23.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

producers to join a preexisting price-fixing cartel.[276] In 1989, a price-fixing cartel formed by U.S. ferrosilicon producers was challenged by cheap imports from China, Kazakhstan, Russia, Ukraine, and Venezuela. As discussed at the outset of this Article, U.S. producers filed antidumping complaints against foreign producers and soon succeeded in thwarting their access to the U.S. market.[277] However, such strategy failed to work when Brazilian producers tried to enter the U.S. market in the early 1990s.[278] Although U.S. producers initially succeeded in obtaining a favorable antidumping decision against Brazilian exporters who had declined the U.S. producers' invitation to join the cartel, the ITC eventually revoked this wrongly imposed antidumping remedy as a whistleblower later divulged the cartel to the public.[279] This case eloquently describes how effortlessly domestic producers may abuse the antidumping proceeding for anticompetitive purposes and how greatly the antidumping remedies may contribute to the solidification of a preexisting cartel. Perhaps this may explain why big steel companies such as Bethlehem Steel and LTV Steel dominate antidumping petitions concerning steel in the United States.[280] Considering the high success ratio for antidumping suits,[281] such dominance by big corporations in antidumping petitions tends to oust relatively small foreign rivals.

In sum, antidumping actions facilitate cartelization. Without antidumping actions, "it is difficult to create, maintain, and enforce a price-fixing cartel."[282] Thanks to a statutorily stipulated antidumping proceeding, which creates a legal cartel, domestic industries can either deter noncartel members from advancing on the cartelized market or force them to join the cartel.[283] Since a petition for an antidumping investigation should be filed by a representative number of companies producing like products, these companies tend to discuss among themselves the prices and costs of foreign competitors whose low prices threaten their own market shares.

276. Pierce, *supra* note 2, at 726–28.
277. *See* text accompanying notes 223–29.
278. *See supra* notes 2–5 and accompanying text.
279. Pierce, *supra* note 2, at 726–28.
280. Neufeld, *supra* note 216, at 12.
281. Bhala, *supra* note 98, at 106; Neufield, *supra* note 216, at 6–7.
282. Pierce, *supra* note 2, at 736.
283. *Id.* at 739–41.

III. REMEDYING TRADE REMEDIES: OPTIONS AND OBSTACLES

A. *Repealing or Revising the Antidumping Statute?*

Confronting the aforementioned flaws and damages, a camp of scholars, lawyers, and economists argue that the current antidumping statute should be repealed[284] and/or replaced by antitrust regulations.[285] Yet, these options tend to suffer either from political infeasibility or lack of reform value. First, if the antidumping statute is truly to protect domestic industries from any unfair foreign trade practices involving restraints on trade or other monopolistic behaviors, antitrust statutes, such as the Robinson-Patman Act,[286] should apply to discipline such anticompetitive behavior. Under these circumstances, however, domestic petitioners have to prove foreign dumpers' "predatory intent," which is a tremendously burdensome process, and they would certainly disfavor such an option as sharply decreasing their chances for legal protection against foreign competition.[287] Domestic industries, which are accustomed to a nearly automatic protection under antidumping remedies without the burden of proving predatory intent, would not support such a legislative change, which would be fatal to their interests.

Others argue that the antidumping statute should be replaced by the current safeguard measures under section 201. However, section 201, as an exceptional trade remedy, requires a higher threshold in demonstrating injuries to domestic producers—*serious* injuries, as

284. Raj Bhala extensively documents scholars who favor the repeal, or at least the phase-out, of the antidumping regime. CHARLES K. ROWLEY ET AL., TRADE PROTECTION IN THE UNITED STATES 268 (1995); Bhala, *supra* note 98, at 14–15 n.56; Wesley K. Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 LAW & POL'Y INT'L BUS. 681 (1981). Tomer Broude labeled these scholars who call for the abolition of antidumping remedies as "abolitionists." Tomer Broude, *An Anti-Dumping "To Be or Not To Be" in Five Acts: A New Agenda for Research and Reform*, 37 J. WORLD TRADE 305, 310 (2003).

285. *See* Bernard M. Hoekman & Petros C. Mavroidis, *Competition, Competition Policy, and the GATT*, 17 WORLD ECON. 121, 123 (1994); Bernard M. Hoekman & Petros C. Mavroidis, *Dumping, Antidumping and Antitrust*, 30 J. WORLD TRADE 27, 30 (1996) [hereinafter Hoekman & Mavroidis, *Dumping, Antidumping and Antitrust*]; Patrick A. Messerlin, *Should Antidumping Rules Be Replaced by National or International Competition Rules?*, 18 J. WORLD COMPETITION L. & ECON. REV. 37, 37 (1995).

286. Robinson-Patman Act § 2, 29 Stat. 1526 (1936) (codified as amended at 15 U.S.C. § 13 (2006)).

287. *See* Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust Laws*, 6 GEO. MASON L. REV. 479, 490–91 (1998).

opposed to the antidumping measures' *material* injuries.[288] This more cumbersome standard tends to make legislators shun the proposal. Some observers suggest using the material injury standard found in the antidumping statute for safeguard measures.[289] However, this would be tantamount to merely changing the name of antidumping remedies to safeguard measures, without a substantial redress of the antidumping remedies' negative effects.

A more modest option may be to insert the "public interest" clause in the current antidumping statute, as do Australia and the European Community ("EC").[290] The main idea behind the clause is to take into account negative economic consequences of antidumping duties to consumers and consuming industries.[291] However, this clause seems to have exerted little impact in practice both in Australia and the EC. Antidumping authorities have seldom revoked their final dumping or injury determinations in the name of public interest once they discovered the existence of dumping and injury.[292] This refusal to revoke determinations may be attributed to two factors. First, unlike antitrust authorities, antidumping authorities are not well positioned to weigh in on the negative effects of antidumping remedies to consumers and consuming industries, which is a critical component of the public interest test.[293] Second, those negatively affected parties, such as consumers, often lack significant access to the investigatory process: they often have no legal standing in the process.[294] In addition, introducing the public interest clause into the current U.S. antidumping statute appears politically infeasible considering the protectionist bias in Congress, which has reinforced, through a series of amendments, the antidumping statutes and regulations.[295] Even if such a clause is established, its practical value

288. Trade Act of 1974 § 421, 19 U.S.C. § 2251(a)(2006) (allowing action by the executive if foreign imports invade the market in such increased quantities as to be a substantial cause of serious injury).

289. Claude Barfield, *Antidumping: Time to Go Back to Basics*, 18 WORLD ECON. 719, 732 (2005).

290. Broude labeled this camp as "reformists." Broude, *supra* note 284, at 311.

291. Barfield, *supra* note 289, at 729–31.

292. Hoekman & Mavroidis, *Dumping, Antidumping and Antitrust*, *supra* note 285, at 45–46.

293. *Id.*

294. *Id.* In the EC, the public interest ("community-interest") clause was reinforced in 1994 by according consumers legal standing. *Id.* at 46.

295. Barfield, *supra* note 289, at 729–31; Finger, *supra* note 29, at 57; *see also* BIERWAGEN, *supra* note 25, at 157 (observing that a proposal for unilateral repeal of antidumping legislation would be the "object of derision in the prevailing political climate").

may be questionable without contemplating additional procedural arrangements to ensure its effectiveness.

In sum, repealing or revising the current antidumping statute appears politically infeasible considering strong protectionist support within Congress.

B. *Antitrust Options: FTC's Intervention in the Antidumping Proceeding*

1. A Case for the FTC's Intervention

If the case of repealing or revising the antidumping statute is politically or practically infeasible, one reasonable alternative may be to check and discipline the antidumping proceeding under antitrust rules. In particular, the FTC, with its unique constitutional stature as a *fourth* branch guardian of competition, can play a vital role in cabining anticompetitive aspects of the antidumping proceeding. As former FTC Chairman Daniel Oliver noted, Congress certainly gave the FTC responsibilities relating to international trade, in addition to domestic commerce, when it created the Commission in 1914.[296]

As discussed above, the antidumping statute's lack of consideration for consumer welfare illustrates its anticompetitive nature. Captured by domestic producers' protectionist aspirations, the antidumping statute disregards consumers' injuries (high prices) while sympathizing with injuries to domestic industries. High domestic prices are the consequence of exclusion and/or *de facto* price fixing, which are the gestalt of the antidumping remedy. A mere threat of an antidumping suit by big domestic producers is enough to chill small foreign producers and force them to raise export prices.[297] In the end, antidumping duties imposed by the U.S. Customs and Border Protection office on imports are often transferred to consumers in the form of increased retail prices.

Unfortunately, however, the three traditional branches of the U.S. government seem to have been largely ineffective in tackling the anticompetitive effects of the antidumping statute, mainly because

296. Press Release, Fed. Trade Comm'n, Federal Trade Commission's Role in International Trade is to Protect Consumers Through Competition, FTC Chairman Oliver Says (Oct. 16, 1986) (on file with the North Carolina Law Review).

297. Wesley A. Cann, Jr., *Internationalizing Our Views Toward Recoupment and Market Power: Attacking the Antidumping/Antitrust Dichotomy Through WTO-Consistent Global Welfare Theory*, 17 U. PA. J. INT'L ECON. L. 69, 79 (1996); A. Paul Victor, *Antidumping and Antitrust: Can the Inconsistencies Be Resolved?*, 15 N.Y.U. J. INT'L L. & POL. 339, 346 (1983).

these branches themselves are involved in preserving the antidumping regime. Ever since it passed the statute, Congress has reinforced the protectionist nature of the antidumping statute through a series of amendments,[298] while the executive branch (the DOC) has implemented the statute in a way that represents the interests of domestic producers.[299] Furthermore, the role of the judiciary in sustaining legal cartels has been most conspicuous. Courts protect antidumping petitions and remedies by according a broad amount of deference over issues of fact and law to antidumping authorities, such as the DOC and the ITC, under the *Chevron* doctrine.[300] It seems nearly paradoxical that the courts give a free hand to those agencies, which are in fact vulnerable to capture by special interest groups.[301] For example, the DOC's calculations and determinations of dumping margins are highly motivated by the inputs of domestic industries that the DOC exists to serve. Under these circumstances, it is not surprising that the DOC tends to find dumping margins in most cases.[302]

Even if the ITC were to come up with certain innovative procompetitive interpretations of the law, the courts are unlikely to subscribe to them, because they have no option but to follow the protectionist legislative intent of antidumping statutes. For example,

298. LINDSEY & IKENSON, *supra* note 85, at 21.

299. *Id.*

300. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Thanks to the profuse discretion enjoyed by antidumping agencies such as the DOC, not a single antidumping dispute has been adjudicated in the Supreme Court. *See, e.g.*, Timken Co. v. United States, 354 F.3d 1334, 1337 (Fed. Cir. 2004) (upholding the DOC's controversial methodology of "zeroing" in its dumping margin calculation), *cert. denied*, 543 U.S. 976 (2004); Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1349–50 (Fed. Cir. 2002) (refusing to second-guess the DOC's use of best-information-available methodology), *cert. denied*, 538 U.S. 1031 (2003); Allied-Signal Aerospace Co. v. United States, 28 F.3d 1188, 1191 (Fed. Cir. 1994) (viewing that the DOC's certain calculation methodology is not a change of course mandating an agency explanation under the Administrative Procedure Act), *cert. denied*, 513 U.S. 1077 (1995); Daewoo Elecs. Co., Ltd. v. Int'l Union of Elec. Elec., Tech., Salaried, and Mach. Workers, 6 F.3d 1511, 1523 (Fed. Cir. 1993) (holding that the DOC's long-standing practice in the calculation of U.S. price (ex factory prices) is based on a reasonable interpretation of the Antidumping Act), *cert. denied*, 512 U.S. 1204 (1994); Algoma Steel Co. v. United States, 865 F.2d 240, 243 (Fed. Cir. 1988) (upholding the ITC's injury determination even if it is inconsistent with GATT), *cert. denied*, 492 U.S. 919 (1989); Smith-Corona Group v. United States, 713 F.2d 1568, 1581–82 (Fed. Cir. 1983) (acknowledging huge discretion of the DOC in administering antidumping investigations), *cert. denied*, 465 U.S. 1022 (1984).

301. *See* John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724–26 (1986).

302. INJURY STATISTICS, *supra* note 237, at 3 (stating that, from 1980 to 2005, eighty-two percent of cases resulted in affirmative preliminary determinations by the ITC).

in *Certain Red Raspberries from Canada*,[303] one commissioner proposed limiting the injury determinations to predatory pricing type dumping cases, such as below-cost foreign sales.[304] This proposal featured a five-factor test that focused on the "intent and cost structure" of foreign producers to evaluate the degree of their anticompetitive behaviors in the domestic market.[305] However, in *USX Corp. v. United States*,[306] the court rejected this narrow interpretation, because this approach was inconsistent with the antidumping statute, which permits a broader range of dumping.[307] After all, courts should conduct the injury test from the standpoint of U.S. producers.[308]

To face the protectionist biases in the three branches, one must contemplate an innovative response beyond conventional institutional parameters. It is at this juncture that the distinctive function of the FTC should be spotlighted. As the titular *fourth* branch, the FTC should counteract the three branches' troubling trade-restraining practices, which disfavor consumers and competition itself.[309] In particular, the very existence of these "public restraints" and their "long-lasting public harms," which are created and maintained by legal cartels under the antidumping regime, not only justifies the FTC's intervention in the antidumping matter as a guardian of market competition, but also requires it.[310] It is well known that the public restraints imposed by a legal cartel tend to be more fatal to competition than private cartels, as they block a competitor's new entry into the market more effectively.[311]

Admittedly, the FTC's intervention in the antidumping proceeding may appear to be ineffective at first blush. For example, the FTC alone could not invalidate the whole antidumping regime despite its anticompetitive attributes, so long as a cartel remains *legal*. Nonetheless, the FTC can still expose the trade-restraining nature in procedural aspects of the antidumping regime and limit abuses by domestic producers in a way that minimizes potential harms to the

303. USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985) (final decision).
304. *Id.*; Wood, *supra* note 107, at 1162.
305. Wood, *supra* note 107, at 1162–63.
306. 682 F. Supp. 60 (Ct. Int'l Trade 1988).
307. *Id.* at 66–67.
308. *Id.* at 68.
309. Pierce, *supra* note 2, at 743.
310. Timothy J. Muris, *Principles for a Successful Competition Policy*, 72 U. CHI. L. REV. 165, 170, 173 (2005).
311. *Id.* at 170.

market competition.[312] One might also speculate that the FTC's pro-competition decision would eventually be struck down by the pro-antidumping courts. Yet, courts, on the basis of the *Chevron* doctrine, should defer antitrust determinations to the FTC, as much as they defer antidumping determinations to the DOC and the ITC. Therefore, the FTC's professional intervention, even if it is challenged in court later, could add another layer of regulatory consideration for the court to take into account in the antidumping litigation.

2. Modalities of FTC Intervention

a. Administrative Adjudication

The FTC can initiate an administrative proceeding against domestic companies or associations if it has "reason to believe" that those entities, through antidumping procedures, engage in unfair or deceptive practices affecting commerce, and if it views such administrative adjudication as serving the public interest. Although the Commission cannot review each and every antidumping case, it should commence a proceeding if it reasonably suspects that certain unfair practices involved in antidumping litigation would fall within the rubric of exclusionary behaviors under section 1 (the restraint of trade) or section 2 (monopolization) of the Sherman Act.[313]

Several occasions may satisfy this threshold test and function as *triggers*, initiating the Commission's adjudication over certain antidumping petitions. If the foreign producer respondents to an antidumping action argue that the domestic producer petitioners deliberately manipulated or misrepresented facts and data to prevail in the antidumping proceeding, the Commission may take a close look at such allegations to decide whether there is any suspicion or reason to believe that unfair practices have been conducted on the side of domestic industries. Here, the Commission need not rely necessarily on hard and direct evidence of bad faith in the petitioners;

312. *See* Patrick A. Messerlin, *Should Antidumping Rules Be Replaced by National or International Competition Rules?*, 49 AUSSENWIRTSCHAFT 351, 368 (1994) (noting that competition authorities can effectively divulge the real faces of the fair trade argument, since they have no vested interests in antidumping remedies).

313. 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.").

even certain "circumstantial evidence" may be adequate to justify initiation of an antitrust investigation.[314]

Second, if either the DOC or the ITC in their preliminary determination rules that no dumping or injury has occurred, these negative findings may provide the FTC with grounds for suspicion that domestic producers have engaged in anticompetitive behavior. Although the FTC should conduct a preliminary investigation on its own before it concludes that an aborted antidumping petition involves certain wrongdoing and thus justifies an independent administrative adjudication, negative determinations by the DOC or the ITC might at least serve as a medium for such a preliminary investigation by the FTC.[315]

Third, the FTC may want to probe withdrawn antidumping petitions as a result of settlement deals between petitioners and respondents. Economists often point out that these deals are a product of a cartelizing collusion between domestic and international producers, and that they effectively fix domestic prices.[316] This practice of withdrawal after private deals has a certain demonstrative effect on other foreign producers and effectively conveys a price-raising signal to other respondents in similar antidumping proceedings or to potential exporters.[317] Therefore, these *de facto* price-fixing deals in the form of private price undertaking tend to give the FTC reason to believe that certain anticompetitive conduct may be involved.[318] In constructing these reasons, the FTC should take into account any trade-restraining consequences that the aforementioned private settlements may cause, even though these

---

314. Calvani & Tritell, *supra* note 253, at 539.

315. de Ravel d'Esclapon, *supra* note 16, at 551 (observing that an antitrust action for baseless petitions would have the greatest chances when an antidumping petition is dismissed before being commenced either in the DOC or in the ITC).

316. Rebecca Kanter, United States v. Nippon Paper Industries: *Price-Fixing Conspiracy or Trade Remedy?*, 8 UCLA J. INT'L L. & FOREIGN AFF. 165, 173 (2003) (relating an interesting case in which the FTC found grounds of intent to price-fix when a Japanese company attempted to negotiate with an antidumping petitioner).

317. *See* Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices after* Ethyl Corp., 1983 WIS. L. REV. 887, 889 (1983) (citing the FTC's 1983 decision implying that certain "facilitating practices," even without an explicit agreement among producers, may constitute a violation of the Sherman Act).

318. 15 U.S.C. § 45(b). The Department of Justice did successfully prosecute such a private agreement to raise domestic prices under the Sherman Act in a similar case involving quotas. United States v. Nat'l Bd. of Fur Farms Orgs., 395 F. Supp. 56, 57 (E.D. Wis. 1975) (concerning a price-fixing agreement between domestic mink farmers and foreign producers in exchange for the former's discontinuation of lobbying the Congress for quota legislation); Sims & Scott, *supra* note 198, at 597–99; *see also*, Taylor, *supra* note 252, at 6–7.

settlements are technically within the parameters of the antidumping statute and trade policies.[319]

If the FTC's preliminary investigation raises a *prima facie* case of anticompetitive behavior by antidumping petitioners, it should issue and serve a complaint explaining the charges and including a notice of a hearing.[320] If the Commission is not convinced by the antidumping petitioner's defense at the hearing, it may require withdrawal of the petition or cancel exclusionary or *de facto* price-fixing deals through a cease and desist order.[321]

b. Amicus Briefs

The FTC may offer its antitrust expertise to the ITC by submitting amicus briefs and assisting the ITC in its injury determination.[322] The FTC retains vast ability for collecting economic data about U.S. industries and their market performance.[323] The ITC can take into account various market- and industry-related information provided by the FTC when deciding whether the petitioner's alleged injuries from foreign dumping are justifiable. As Diane Wood insightfully observed, the ITC, after reviewing data such as the number of domestic firms and sales figures, may conclude that the petitioner's alleged injuries either result from more efficient foreign producers or from a desire to maintain economic rents flowing from its monopolistic or oligopolistic position in a non-contestable domestic market.[324] Under these circumstances, the ITC should decline to find injuries for domestic industries, because doing so tends to maintain or solidify an anticompetitive market situation.[325]

In fact, one can find a premonition of this approach in the ITC's past practices. The ITC has often refused to find injuries when petitioners are found to be involved in anti-competitive behaviors, such as price fixing. For example, in the early 1990s, when the ferrosilicon price-fixing cartels were exposed and their members prosecuted, the ITC revoked its previous injury determination

319. Sims & Scott, *supra* note 198, at 587.

320. *Id.* at 566.

321. *Id.* at 567

322. Press Release, Fed. Trade Comm'n, FTC Comments to ITC on Semiconductor Dumping (Apr. 28, 1986) (on file with the North Carolina Law Review).

323. Wood, *supra* note 107, at 1193.

324. *Id.* at 1182–92.

325. Finger, *supra* note 29, at 71 (submitting that the injury investigation should be replaced by a national economic interest investigation, which can take into account consumers' welfare and other competition-related consequences of antidumping measures).

prompted by these industries' use of antidumping petitions to harass foreign competitors.[326] Therefore, if the ITC's position is to deny an antidumping shelter to domestic industries that desire to create or maintain their anticompetitive position, it can do so by actively scanning antidumping petitions through the antitrust lens that the FTC provides in its amicus brief. The FTC is capable of assisting the ITC in this competition-based scanning by means of its expertise in the market/competition analysis. The FTC's involvement in the ITC's injury determination can be a powerful tool to prevent antidumping remedies from unduly overprotecting domestic industries and thus unnecessarily impeding competition.[327]

c. Litigation

The FTC can also make use of the federal courts in remedying antitrust violations that domestic industries engaging in antidumping actions may commit. The FTC has litigation authority in antitrust cases concurrently with the Attorney General,[328] but can independently represent itself in cases where the Attorney General declines to act.[329] Moreover, the FTC is *exclusively* authorized to represent itself "in its own name by any of its attorneys" before the federal court under certain circumstances,[330] such as when it seeks injunctive relief under section 13 of the FTC Act[331] or consumer redress under section 19 of the FTC Act.[332] Therefore, the FTC can sue domestic producers before a federal court under the Sherman Act when producers commit certain egregious anticompetitive behaviors, such as conspiring to monopolize the domestic market or exercising other kinds of exclusion through various non-price predation tactics,

326. Pierce, *supra* note 2, at 726–28.

327. For example, in the *64K/256K DRAMs* case, the FTC argued before the ITC that the price of Japanese DRAMs had declined not because of dumping, but because of Japan's comparative advantage in producing them. *See* 64K Dynamic Random Access Memory Components from Japan, USITC Pub. 1862, Inv. No. 731-TA-270 (June 1988) (final decision); Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan, USITC. Pub. 1803, Inv. No. 731-TA-300, at 24 (Jan. 1986) (prelim. determination). Yet, the FTC's intervention was not always well received by the Commissioners. *See* Harvey M. Applebaum & David R. Grace, *U.S. Antitrust Law and Antidumping Actions Under Title VII of the Trade Agreements Act of 1979*, 56 ANTITRUST L.J. 497, 516–17 (1987).

328. 15 U.S.C. § 56(a)(1)(A) (2006).

329. 15 U.S.C. § 56(a)(1)(B).

330. 15 U.S.C. § 56(a)(2).

331. 15 U.S.C. § 53.

332. 15 U.S.C. § 57b.

including deliberate misrepresentations in the antidumping proceeding.

As a guardian of public interest, the FTC should seek "preliminary or permanent injunctive relief" against certain government actions related to antidumping remedies when the proceedings are initiated by domestic producers to achieve anticompetitive goals.[333] For example, if domestic producers deliberately provide manipulated facts to the DOC, and the DOC makes a preliminary dumping determination and subsequently imposes bonds for future antidumping duties on the basis of such facts, the FTC may obtain preliminary injunctive relief against such a bond requirement to prevent any injury to consumers.

C. *The* Noerr-Pennington *Doctrine: A Formidable Obstacle to Antitrust Disciplines*

1. The *Noerr-Pennington* Exemption: Its Jurisprudence and Rationale

As discussed above, antidumping remedies are intended to protect domestic industries from foreign competition, and they naturally involve a restraint on trade through severe interference with prices and output of foreign rivals.[334] These aspects directly concern the very rationale of antitrust statutes, such as the Sherman Act.[335] Therefore, the FTC's antitrust scrutiny can tame antidumping remedies.[336] Unfortunately, however, a judicially crafted antitrust exemption, the *Noerr-Pennington* doctrine, restricts the applicability of antitrust statutes to antidumping remedies.

The *Noerr-Pennington* doctrine, which developed through two similar Supreme Court decisions (*Noerr* and *Pennington*) in the 1960s, gives antitrust immunity to domestic producers who cooperate and exchange information among themselves in order to file antidumping suits against foreign producers.[337] As a brainchild of the Warren

333. 15 U.S.C. § 53(b).

334. *See supra* Part I.

335. *See* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* among the several States, or *with foreign nations*, is declared to be illegal." (emphasis added)).

336. *See* Calvani & Tritell, *supra* note 253, at 528–29 (observing that various officials from antitrust authorities, i.e., the Department of Justice and the Federal Trade Commission, have raised the question of disciplining anticompetitive aspects of antidumping proceedings or determinations).

337. Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the* Noerr-Pennington *Doctrine*, 41 HASTINGS L.J. 905, 926–27 (1990).

Court, the *Noerr* decision predicated its rationale on the political freedom reified in the Bill of Rights—in particular, the freedom of expression under the First Amendment. In *Noerr*, railroad industries lobbied and petitioned Congress to pass antitruck legislation amid intense competition with truckers.[338] Justice Black held that the Sherman Act should not be employed to bar those railroad industries from exercising their political rights of lobbying and petitioning to pursue their interests.[339]

In *Pennington*, the Supreme Court further expanded the doctrinal reach of *Noerr*.[340] First, the *Pennington* Court extended the *Noerr* immunity to lobbies directed to the Executive branch, while the *Noerr* decision concerned lobbies to Congress. Second, Justice White, writing for the majority, further ruled that the union's effort to lobby and petition the Secretary of Labor should be given antitrust immunity *even if* its intention was to eliminate competition.[341] Therefore, the Court immunized the miners' union from antitrust scrutiny over its role in creating an agreement that eventually led to a cartelization of coal industries in exchange for increased wages to union members.[342]

The *Noerr-Pennington* doctrine is premised on a staunch belief in the political freedom embedded in the First Amendment. The doctrine, finding its theoretical underpinnings in political pluralism and the "marketplace of ideas," takes an optimistic view of political competition among various interest groups that it believes will lead to a rational outcome, as "invisible hands" determine right prices in the market.[343] Therefore, in order for this political market to operate well, the autonomy of those interest groups should be preserved, and their privilege to pursue self-interests fully guaranteed, without restraints imposed by the government.[344] In this very context, Justice

338. Noerr Motor Freight, Inc. v. E. R.R. Presidents Conf., 155 F. Supp. 768, 775–78 (E.D.Pa. 1957).

339. E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961).

340. Minda, *supra* note 337, at 927.

341. *Id.*

342. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965).

343. Minda, *supra* note 337, at 938–42.

344. *See id.*; *see also* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542 (1988) ("[P]olitics consists of a struggle among interest groups for scarce social resources. ... [T]hey exert pressure on political representatives, who respond, in a market-like manner, to the pressures thus exerted. The ultimate result is political equilibrium."); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 33–34 (1985) ("Political ordering is, in this view, assimilated to market ordering. ... This market-like mechanism would promote aggregate social welfare through an 'invisible hand' like that found in other markets.").

Black's opinion in *Noerr* feared that an application of antitrust law under the Sherman Act would "disqualify people from taking a public position on matters in which they are financially interested" and would thus "deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."[345]

However, this sanguine perspective on interest group politics has been heavily criticized by pluralists, who have raised various empirical protests. For example, Robert Dahl, *qua* a pluralist himself, admitted the so-called "dilemmas of the pluralist Democracy," in which powerful interest groups may "stabiliz[e] inequalities, deform[ ] civic consciousness, [and] distort[ ] the public agenda."[346] Dahl warned against an anachronistically naïve proposition to which classical pluralism clings. Modern private actors are no longer atomistic players defined and controlled by mechanisms of the political marketplace. With more power and efficient organization, private actors are now capable of controlling and manipulating the political marketplace to their own benefit.[347] Therefore, Dahl's insightful observation is correct; without a radical restructuring of the borders of the private and public spheres of the government, the democratic aspiration of "egalitarian pluralism" cannot be fulfilled.[348]

2. A Broad Antitrust Immunity for Antidumping Petitioners: The Sham Exception and Its Drawbacks

As discussed above, the political liberalism that served as the rationale for the *Noerr-Pennington* doctrine is prone to criticism. Forebodings over the doctrine's broad exemption led the Supreme Court to declare that the doctrine would not be unqualified. Justice Black himself came up with an exception to the doctrine in *Noerr*, labeled the "sham exception."[349] Under the sham exception, a domestic industry's lobbying or petition is a "mere sham [when used] to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[350]

345. E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 139–40 (1988).

346. Minda, *supra* note 337, at 943 (quoting ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY V. CONTROL 166 (1982)).

347. Minda, *supra* note 337, at 944.

348. *Id.*; *see* DAHL, *supra* note 346, at 166–205 (1982) (discussing possible reforms to correct the growing influence and power of private interests).

349. *See Noerr*, 365 U.S. at 144.

350. *Id.*

Critically, however, the sham exception has largely been fossilized without much use on account of the Court's extremely narrow interpretation in subsequent cases. For example, the *Pennington* Court refused to apply the sham exception even to those situations in which parties explicitly revealed an antitrust intention—to eliminate competition. Justice White wrote that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition," so long as "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[351]

The subsequent Supreme Court decisions further consolidated antitrust immunity under the *Noerr-Pennington* doctrine by narrowing the operational scope of the sham exception. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industry, Inc.* ("*PRE*"), the Court outlined a two-pronged definition of sham litigation.[352] First, the complaint should be "objectively baseless" in the sense that no reasonable litigant would expect success on the merits.[353] Second, if the first prong is met, the Court will then address the subjective motivation for the litigation. The question is whether the litigant has attempted to directly interfere with the business relationship of a competitor through the use of government *process* itself, regardless of its outcome.[354] The upshot is that the existence of any "probable cause" to institute legal proceedings precludes the sham exception.[355]

Under the sham test, as watered down by the *PRE* decision, it appears practically impossible to subject any antidumping petitions launched by domestic producers to an antitrust scrutiny, despite their oligopolistic intention and the exclusionary effects of their petitions. For example, even inaccurate petitions rife with "deliberate misstatements" might not be objectively baseless[356] if such petitions eventually prevail, because "a winning lawsuit is by definition a

351. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965).

352. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60–61 (1993).

353. *Id.* at 60.

354. *Id.* at 60–61 (observing that the inquiry "should focus on whether the baseless lawsuit conceals an 'attempt to interfere *directly* with the business relationships of a competitor' through the 'use of governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon' ") (emphasis in original) (internal citations omitted).

355. *Prof'l Real Estate Investors*, 508 U.S. at 62.

356. Music Ctr. S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp., 874 F. Supp. 543, 549 (E.D.N.Y. 1995).

reasonable effort at petitioning for redress and therefore not a sham."[357] Even a malicious antidumping suit, which is "intended solely to injure plaintiffs competitively in a trade war that defendants appear to be losing, and not to secure the trade relief for which such petitions were created by Congress," would escape antitrust scrutiny if the petitioner could reasonably expect to win the case.[358] Moreover, if a government's determination is not influenced by the misrepresentations, such misrepresentations are not regarded as "material" and thus do not bar the application of the *Noerr-Pennington* exception.[359]

The *PRE* case and subsequent lower court jurisprudence on the sham exception are overly lax and thus highly troubling. This result-oriented jurisprudence on the sham test tends to overprotect antidumping petitioners at the enormous expense of market competition. Under this jurisprudence, even severe misrepresentations, such as frauds, may be sheltered from antitrust scrutiny. This jurisprudence is a recipe for procedural abuse or irregularities. First of all, every petitioner who engages in misrepresentation entertains some expectation that he or she will win the case. Accordingly, every misrepresentation may be a reasonable effort toward trade remedies and therefore not a sham. Moreover, a judge may not be able to distinguish "material" misrepresentations from immaterial ones. In other words, it would be difficult, if not impossible, to establish causation between a certain misrepresentation and a favorable government action. All in all, misrepresentations made in antidumping proceedings are, in most cases, likely to pass the sham test in *PRE*.

Moreover, this pro-petitioner bias in antidumping proceeding tends to increase the potential merits of a complaint and bolster the case for antitrust immunity. Antidumping authorities' generous stance toward imprecise information provided by petitioners boosts the petitioning party's chances to win the proceeding, especially when the DOC may rely on such information as "facts available."[360] These elevated chances of winning tend to clear the petitioner from the objective baselessness test under the sham exception. Even if the ITC

357. *Prof'l Real Estate Investors*, 508 U.S. at 60 n.5; *see also* Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 123 (3d Cir. 1999) (ruling that antidumping petitions involving alleged misrepresentation are still under the protection of the *Noerr-Pennington* immunity).

358. *See Music Ctr.*, 874 F. Supp. at 554–55.

359. *Ethyl Corp.*, 168 F.3d at 124.

360. 19 U.S.C. § 1677e(b) (2006).

finds no injury to the petitioner, and, thus, the original petition can no longer stand on the merits, the petition may still not be objectively baseless if the DOC finds some dumping margins.[361] Under these circumstances, in which all the government agencies or branches involved in antidumping proceedings, such as the DOC, the ITC, and the Court of International Trade, unabashedly favor the petitioners, a reasonable petitioner would not in fact expect that it would ever lose.

In sum, this blanket antitrust immunity under the broadest construction of the *Noerr-Pennington* doctrine and the narrowest interpretation of the sham exception results from the Warren Court's internalization of a naïvely optimistic, and thus flawed, understanding of interest group politics.[362] This misunderstanding tends to sanction spurious filings of antidumping petitions whose sole purpose is to harass competitive foreign rivals by blocking their access to the domestic market. Moreover, this overreaching antitrust immunity tends to put domestic industries in a more advantageous position to force their foreign competitors to join a price-fixing cartel under the threat of antidumping suits.[363] Consequently, market competition comes to its demise in the name of First Amendment rights.[364]

IV. REVITALIZING ANTITRUST OPTIONS APPLIED TO TRADE REMEDIES

A. *An Intent-Oriented Test: Judicial Reconstruction of the Sham Exception*

The court's overly liberal interpretation of the *Noerr-Pennington* doctrine prohibitively hampers the FTC's potential antitrust scrutiny over antidumping remedies. Reconstructing the *Noerr-Pennington* doctrine is inextricably linked to rethinking the sham exception. Some lower court opinions inspiringly illustrate such potential. In *Cheminor Drugs, Ltd. v. Ethyl Corp.*,[365] Judge Sloviter's dissent criticized the majority for blindly following the *PRE* court's

361. *See Music Ctr.*, 874 F. Supp. at 554.

362. *See* Minda, *supra* note 337, at 933–34.

363. In *Music Center*, plaintiffs (a foreign producer and an importer) argued that the defendant (a domestic producer) filed an antidumping suit after the plaintiffs refused an offer from the defendant to join the price-fixing cartel. 874 F.Supp. at 548.

364. *But cf.* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1782 (2004) ("[D]espite the constitutionalization of commercial speech, antitrust law has proceeded unhindered—its constraints on speech, advocacy, and the exchange of accurate information remaining behind the First Amendment's reach.").

365. 168 F.3d 119 (3d Cir. 1999).

"objective baselessness" test,[366] highlighting the Supreme Court's declaration in *California Motor Transport v. Trucking Unltd.*[367] Limiting the application of the *Noerr-Pennington* doctrine over fraudulent and unethical misrepresentations by petitioners,[368] Judge Sloviter aptly observed in her dissent that "the majority ignores the risk that a party will *intentionally* use fraud and misrepresentation to transform a claim that is otherwise weak and unlikely to prevail, although not 'objectively baseless,' into one that succeeds."[369]

Then, Judge Sloviter prioritized the "fraud" over "objective baselessness" in an effort to reconstruct the sham exception, citing some courts of appeal decisions in that direction.[370] In *Whelan v. Abell*,[371] the Federal Circuit struck down a district court's application of antitrust immunity on the grounds that such immunity should not be available when petitioners present "deliberately false" material representations, even if the litigation itself was not baseless.[372] Likewise, in *Kottle v. Northwest Kidney Centers*,[373] the Ninth Circuit held that a litigation may be a sham if a party's "intentional misrepresentations" to the court rid the litigation of its "legitimacy."[374]

In a similar context, Judge Posner of the Seventh Circuit potentially increased the possibilities of subjecting antidumping petitions to antitrust scrutiny by broadening the operational scope of the sham exception.[375] In a likely departure from the strictures of political expression under *PRE*, Judge Posner, in *Grip-Pak, Inc. v. Illinois Tool Works*,[376] revived the critical importance of harassing intents of litigants in determining whether filing a lawsuit is a sham.[377] Employing the common law tort of abusive process, Judge Posner held that a litigant crossed the line and was subject to antitrust scrutiny via the sham exception. This scrutiny applies even if the litigant presents a probable cause or colorful claim, so long as his or her sole purpose is not to win the case but to harass competitors

366. *Id.* at 131–32 (Sloviter, J., dissenting).
367. 404 U.S. 508 (1971).
368. *Ethyl Corp.*, 168 F.3d at 131–32 (Sloviter, J., dissenting).
369. *Id.* at 131 (emphasis added).
370. *Id.*
371. 48 F.3d 1247 (Fed. Cir. 1995).
372. *Id.* at 1254–55.
373. 146 F.3d 1056 (9th Cir. 1998).
374. *Id.* at 1060.
375. *See* Minda, *supra* note 337, at 966–67.
376. 694 F.2d 466 (7th Cir. 1982).
377. *Id.* at 470–72.

regardless of the outcome of the case.[378] In a subsequent case, Judge Easterbrook, based on Judge Posner's analysis in *Grip-Pak*, held that cost justification in a lawsuit should determine sham liability.[379] If a litigant's litigation cost is well beyond a prospective benefit from the merits of the case, no rational person would engage in such litigation because there is no cost justification. The only foreseeable benefit would be from an upsurge of litigation costs to a rival to the extent that the current market price is sustained.[380] If such a foreseeable benefit exists, such cases would fall under the rubric of sham litigation.

The *Grip-Pak* case law tends to furnish courts with critical avenues that catalyze antitrust scrutiny of possible anticompetitive behaviors by antidumping petitioners. More often than not, a powerful association of domestic producers files antidumping suits against small foreign producers in an attempt to thwart their entries into the U.S. market.[381] In this adversarial proceeding, foreign respondents, who are often small companies, are highly disadvantaged vis-à-vis big domestic petitioners armed with big law firms and accountants.[382] As stated before, the mere filing of an antidumping petition, regardless of its merit, can financially burden foreign producers and be an effective harassment technique.[383] The antidumping authorities' heavy reliance on petitioners for facts and data further disadvantages respondents.[384] Therefore, one can easily locate a petitioner's intent to harass when he or she deliberately exaggerates or manipulates price and output data in his or her antidumping petitions.

Considering the foregoing predatory nature of antidumping procedures, the Supreme Court should rationalize an operational scope for the *Noerr-Pennington* doctrine through a more proactive use of the sham exception, in line with the *Grip-Pak* decision. One possible way of doing so is to introduce a presumption of the existence of a "sham" whenever a deliberate misrepresentation is detected. A deliberate misrepresentation in an antidumping proceeding is a grave non-price predation, which should raise a red flag despite the First Amendment consideration. Thus, those

---

378. *Id.*

379. Minda, *supra* note 337, at 968–69.

380. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 372 (7th Cir. 1987).

381. *See supra* Part II.B.

382. *See* MARSHALL, *supra* note 226, at 178–79.

383. *Id.* at 175–76.

384. *See* 19 U.S.C. § 1677e(b) (2006).

petitioners who deliberately misrepresent critical facts in order to prevail in an antidumping proceeding should be deprived of antitrust immunity, at least provisionally. Unless petitioners can rebut the presumption—for example, by proving that their misrepresentations have not been material—they should be subject to antitrust scrutiny. This way, the court can restore the balance between political freedom and market competition, which has been skewed toward the former under the hitherto operation of the *Noerr-Pennington* doctrine.

In sum, where a deliberate misrepresentation or fraud is perpetrated on antidumping authorities for predatory purposes, the courts should presumptively find the petition to be "objectively baseless" and thus constituting a "sham." Unless domestic petitioners can rebut the presumption, they should be stripped of *Noerr-Pennington* immunity and subject to antitrust scrutiny over their alleged predatory behavior under the Sherman Act.

B. FTC's Effective Surveillance over the Noerr-Pennington *Doctrine*

1. FTC Enforcement and the *Noerr-Pennington* Doctrine

As discussed above, the FTC, as an enforcer of the Sherman Act, bears the principal responsibility for monitoring whether sham litigation is launched in violation of the Sherman Act, thus using the antidumping mechanism as a sheer instrumentality of restricting market competition. In its recent *In the Matter of Union Oil Co. of California* ("*Unocal*") decision, the Commission emphasized that

> [w]hether we view misrepresentation as a distinct variant of sham petitioning or as a separate exception to *Noerr-Pennington*, the fabric of existing law is rich enough to extend antitrust coverage, in appropriate circumstances, to anticompetitive conduct flowing from deliberate misrepresentations that undermine the legitimacy of government proceedings.[385]

The mere commencement of an antitrust investigation should not be translated automatically into an affirmative determination of antitrust liability. The FTC will still be subject to the *Noerr-Pennington* doctrine, and the Commission's findings are judicially reviewable. Nonetheless, the FTC's active review of antidumping proceedings would convey a powerful warning to domestic producers

385. *In the matter of* Union Oil Co. of Cal., No. 9305, slip op. at 30 (Fed. Trade Comm'n. Jul. 7, 2004), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf [hereinafter "*Unocal*"].

who might be tempted to abuse the antidumping remedies and thus would deter, to a considerable extent, spurious or harassing petitions based on manipulated or false information. This kind of FTC oversight could help to remedy the current situation, in which nearly half of all antidumping petitions turn out to be without merit (no dumping margins).[386]

First, if the width and depth of cooperation among domestic industries in the petition stage goes beyond what is deemed necessary to launch an antidumping complaint, such conduct may not be protected by the *Noerr-Pennington* doctrine. Consequently, the FTC would subject such action to antitrust scrutiny doctrine and thus subject to antitrust scrutiny by the FTC. The FTC, along with the Department of Justice, states that:

> [W]ere the parties directly to exchange extensive information relating to their costs, the prices each has charged for the product, pricing trends, and profitability, including information about specific transactions that went beyond the scope of those facts required for the adjudication, such conduct would go beyond the contemplated protection of *Noerr* immunity.[387]

Second, the FTC should actively employ the new doctrinal test, introduced in the recent *Unocal* decision, for deliberate misrepresentation.[388] In *Unocal*, the Commission spelled out a two-tiered test in which a petition with misrepresentations would lose the *Noerr-Pennington* protection in nonpolitical contexts such as an antidumping proceeding: first, the misrepresentation or omission must be "deliberate, factually verifiable, and central to the outcome of the proceeding or case"; and second, "it [must be] possible to demonstrate and remedy this effect without undermining the integrity

386. *See* Gunn, *supra* note 17, at 177.

387. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INT'L OPERATIONS 28 ex.L (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm; *see also* William T. Lifland, *Monopolies and Joint Ventures*, *in* 1 34TH ANNUAL ANTITRUST LAW INSTITUTE 448 app. B (1993) (observing that the *Noerr-Pennington* doctrine would not shield the exchange of information among antidumping petitioners designed to implement a "naked" price-fixing agreement). *But cf.* United States v. Container Corp. of Am., 393 U.S. 333 (1969) (holding that "agreement between the relatively few dominant sellers of corrugated containers, a fungible product for which demand was inelastic, to give to each other on request information as to most recent price charged or quoted, resulting in stabilization of prices, violated Sherman Act").

388. *See* FTC STAFF REPORT, *supra* note 201, at 37–38 (addressing "deliberate and material misrepresentations that deprive governmental proceedings of their legitimacy in other nonpolitical contexts").

of the deceived governmental entity."[389] The *Unocal* test is consistent with a number of lower court decisions rejecting the application of the *Noerr-Pennington* doctrine with regard to cases involving deliberate misrepresentations.[390] Therefore, the *Unocal* test could provide effective regulation in the typical misrepresentation situation in the antidumping proceeding.

Critically, the *Unocal* test follows a different jurisprudential path from the *PRE* Court and thus is doctrinally distinguishable from the *PRE* sham exception. The *Unocal* test derives from *Allied Tube*, in which the Supreme Court explicitly distinguished a conduct that "genuinely seeks to achieve [a] governmental result, but does so *through improper means*," from a traditional meritless sham situation, which the *PRE* case targeted.[391] Therefore, the *Unocal* test can overcome an extremely narrow scope of the sham exception, defined by the first prong ("objective baselessness" test) in *PRE* because the test concerns those misrepresentations that *do* seek favorable government actions—such as affirmative dumping or injury determinations—not just meritless (sham) petitions. As a result, the *Unocal* test provides a powerful check against these "unethical and deceptive practices," like data manipulation or other misrepresentations by petitioners in the antidumping proceeding.[392] Accordingly, the *Unocal* test is preferable as a means of deterring anticompetitive behavior damaging to the economy while posing no threats to political freedom.

Finally, the FTC should carve out an exception to the *Noerr-Pennington* protection with regard to repetitively filed antidumping petitions aimed at harassing foreign competitors regardless of the outcome.[393] Due to the lack of *res judicata* and collateral estoppel in

389. *Unocal*, No. 9305, slip op. at 48 (arguing that fraud and misrepresentation are not protected by the First Amendment); *see also* FTC STAFF REPORT, *supra* note 201, at 25 (recognizing the two-tiered test).

390. *See* FTC STAFF REPORT, *supra* note 201, at 25–26.

391. Allied Tub & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 507 n.10 (1988) (citing Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 465 n.5 (9th Cir. 1987)); *see also* F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 425 (1990) (refusing to apply *Noerr* when the restraint was "the *means* by which respondents sought to obtain favorable legislation," not "the *consequence* of public action").

392. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512–13 (1972) (recognizing an antitrust cause of action against parties who employ federal and state petitions in order to monopolize an industry); *see also* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1261 (9th Cir. 1982) ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicative body.").

393. *See* FTC STAFF REPORT, *supra* note 201, at 38.

antidumping proceedings, domestic producers can file new petitions on the same subject matter, even if they fail to succeed in the first round.[394] The *PRE* test would not apply to repetitive antidumping petitions, because that case involved a single petition.[395] Even though some individual filings in the repetitive continuum may be successful, thus passing the sham test in *PRE*, repetitive filing as a whole should still be subject to antitrust scrutiny if it constitutes an essential part of a strategy to harass competitors regardless of the merit.[396] In other words, "a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."[397]

2. The FTC Registration of the *Noerr-Pennington* Exemption

In addition to the aforementioned *ex post* monitoring, the Commission can also employ a more preemptive, *ex ante* monitoring scheme. Under its administrative rulemaking authority, the FTC may require domestic industries to register with the Commission before they can benefit from the *Noerr-Pennington* exemption in jointly launching antidumping petitions against foreign producers.[398] This requirement serves two main purposes. First, it puts the Commission in a better position to monitor possible anticompetitive behaviors that may fall within the rubric of "sham" litigation. It is crucial for the Commission to get information as to which companies or associations file antidumping petitions, because it can detect oligopolistic behavior or cartelizing more effectively than the courts. Second, such a requirement tends to exert psychological pressure under the shadow of the Commission's potential Sherman Act investigation of antidumping complainants and thus deters abusive behavior, such as deliberate misrepresentation of facts.

---

394. *See* 19 U.S.C. §§ 1671a(a), 1673a(a) (2006); Josephs, *supra* note 189, at 66 ("[B]ecause the doctrines of res judicata and collateral estoppel do not apply in antidumping proceedings, unsuccessful petitioners may bring repeated actions until success is finally achieved.").

395. *See* FTC STAFF REPORT, *supra* note 201, at 33.

396. *Id.* at 31.

397. *Cal. Motor Transp.*, 404 U.S. at 513; *see also* USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO, 31 F.3d 800, 811 (9th Cir. 1994) (inquiring whether legal filings were made "not out of a genuine interest in redressing grievances, but as a part of a pattern or practice of successive filings undertaken essentially for purposes of harassment").

398. *See* 15 U.S.C. § 18a(d) (stipulating that the FTC may "prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section"); 15 U.S.C. § 46(g) (providing that the FTC may "make rules and regulations for the purpose of carrying out the provisions of this subchapter").

This rulemaking proposal is not unprecedented; it has already been adopted and implemented in a parallel area. The Webb-Pomerene Act[399] provides a case in point. The Act, legislated in 1918, permits U.S. exporters to collude among themselves in foreign markets under the exemption of the Sherman Act.[400] It purports to prevent U.S. small and medium exporters from being disadvantaged in foreign markets by their own domestic law vis-à-vis foreign rivals who were seldom subject to rigorous antitrust discipline.[401] Nonetheless, the Webb-Pomerene Act does not tolerate any antitrust consequences *within* the United States. For example, if those exporters attempt to "artificially or intentionally enhance[ ] or depress[ ]" U.S. prices on similar products that they trade, or they attempt to "substantially lessen[ ] competition" within the United States, such behaviors are not immune from the Sherman Act.[402] Highlighting these exceptions, the FTC, by promulgating its own rules, reiterated a limited antitrust exemption under the Webb-Pomerene Act and declared potential antitrust jurisdiction in those situations falling under the exceptions.[403]

The FTC's rule-making experience under the Webb-Pomerene Act sheds light on its similar responsibilities over the *Noerr-Pennington* doctrine. Both the Webb-Pomerene Act and the *Noerr-Pennington* doctrine concern antitrust immunity rendered to protect U.S. industries from foreign competition arising under international trade. Yet, antitrust immunity under both situations is not unlimited and is conditioned by certain exceptions. Therefore, the FTC, as it does under the Webb-Pomerene Act, should set an internal rule by which to check and monitor whether these exemptions to antitrust exception are triggered by domestic industries' possible abusive use of antidumping petitions. Under the proposed registration or notification rule, the Commission, while still accommodating the *Noerr-Pennington* exemption, can extend its potential jurisdiction to any abusive antitrust behaviors, such as sham petitions, which cannot be protected even under the exemption.[404] If the Commission has

399. Webb-Pomerene Act, 15 U.S.C. §§ 61-66.

400. *Id.*

401. *See* Elaine Metlin et al., *The Webb-Pomerene Act: A Relic That Has Outlived Its Usefulness*, THE ANTITRUST REV. OF THE AMERICAS 84–86 (2006), *available at* http://www.dicksteinshapiro.com/files/Publication/518eafb1-5df5-4b8f-bcfb-013f07753df3/Presentation/PublicationAttachment/8c563117-3d1f-4cf4-833f-0737df6d6b19/DSMDB-%23198 7778-v1-Global_Competition_Review.pdf.

402. 15 U.S.C. § 62.

403. *See* 16 C.F.R. §§ 1.41-1.43 (2008).

404. *See id.* §§ 1.41, 1.42.

"reason to believe" that those abusive behaviors occur in violation of the Sherman Act, it may initiate an investigation.[405] If the Commission concludes after the investigation that the Act has been violated, it may recommend that domestic companies or associations withdraw their antidumping petitions.[406]

Concededly, one might object to this registration proposal by arguing that it goes beyond the FTC's statutory mandate and violates the First Amendment rights embedded in the *Noerr-Pennington* doctrine. Truly, the Webb-Pomerene Act cannot serve as a First Amendment defense. Critically, however, the *Noerr-Pennington* doctrine, even as it stands now, only *limits*, not fully eradicates, the application of antitrust disciplines. The registration scheme proposed here would screen out certain egregious, fraudulent abuses of the doctrine without running afoul of the First Amendment principle. After all, these unethical and fraudulent behaviors do not further any values protected by the First Amendment, and "the First Amendment has not been interpreted to preclude liability for false statements."[407]

C. *Disapplying the* Noerr-Pennington *Doctrine Based on Tort Law*

In an attempt to narrow the scope of antitrust immunity, Gary Minda linked common law remedies (e.g., the tort of abusive litigation) to antitrust challenges against predatory behaviors or other anticompetitive actions to restrain trade.[408] First, he finds a possibility of disapplying the *Noerr-Pennington* doctrine under certain circumstances in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*,[409] which justified the introduction of common law remedies in the area of antitrust disciplines.[410] In *Walker Process*, the Supreme Court held that the enforcement of a patent earned by fraud in order to monopolize or attempt to monopolize a relevant market may violate section 2 of the Sherman Act.[411] By focusing on the fraudulent behaviors and anticompetitive motivations of the petitioner, the Court paved the way for disciplining abusive

405. *Id.* § 1.43.

406. *Id.*

407. Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1261 (9th Cir. 1982); *see also In the Matter of* Union Oil Co. of Cal., No. 9305, slip op. at 17–19 (Fed. Trade Comm'n Jul. 7, 2004), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf (arguing that knowing misrepresentations are not protected by the First Amendment).

408. Minda, *supra* note 337, at 1022–23.

409. 382 U.S. 172 (1965).

410. *See* Minda, *supra* note 337, at 1023.

411. *See Walker Process Equip., Inc.*, 382 U.S. at 175–76.

petitioning without engaging the *Noerr-Pennington* doctrine.[412] When applied to antidumping complaints, the *Walker Process* case law can be adopted by courts, at least by analogy, to subject domestic industries' predatory antidumping petitions based on deliberate misrepresentations on facts and data to the Sherman Act disciplines, without any need to engage the doctrine of *Noerr-Pennington* immunity.

This approach of stripping antidumping petitioners of the *Noerr-Pennington* privilege via tort doctrines, such as tortious interference, hinges on the basic values that the general tort system aims to protect, like fairness and business ethics.[413] If domestic producers abuse the import relief, such as the antidumping mechanism, through an intentional, deliberate use of false information and misstatements, they fail to comply with the "rules of the game," and the value of competition is compromised beyond the permissible exception.[414] Under these circumstances, antitrust immunity, which is reserved for normal joint petitioning under the *Noerr-Pennington* doctrine, is no longer applied.

Nonetheless, it remains uncertain whether the court subscribes to this tort-based disapplication of the *Noerr-Pennington* doctrine. In fact, the Third Circuit in *Ethyl* extended the *Noerr-Pennington* doctrine even to common law tort claims. In this case, an Indian ibuprofen manufacturer, Cheminor, sued an American ibuprofen manufacturer, Ethyl, on the grounds of antitrust violation and common law torts of unfair competition and tortious interference.[415] Ethyl was the only bulk ibuprofen producer in the United States before Cheminor started to export bulk ibuprofen to the United States.[416] After filing a petition with the USTR to block Cheminor's market access, Ethyl filed an antidumping and countervailing duty suit against Cheminor and obtained a decision ordering Cheminor to pay 43.71% duties on their export amounts.[417] This additional cost

412. *See* Minda, *supra* note 337, at 971 n.232.

413. *Cf.* Marina Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 73–74 (1997) (differentiating the social fundamentals of tort law from the economic fundamentals of antitrust law).

414. *See id.* Regarding tortious interference, see generally Orrin K. Ames III, *Tortious Interference with Business Relationships: The Changing Contours of the Commercial Tort*, 35 CUMB. L. REV. 317 (2005), and Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudent Response*, 38 ARIZ. L. REV. 1175 (1996).

415. Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 120 (3d Cir. 1999).

416. *Id.* at 129 (Sloviter, J., dissenting).

417. *Id.*

forced Cheminor to retreat from the U.S. market, which was followed by Ethyl withdrawing its petition.[418] Cheminor then sued Ethyl on grounds of both antitrust and common law tort.[419]

The district court dismissed the antitrust claim under the *Noerr-Pennington* doctrine and rejected jurisdiction over the common law torts on procedural grounds.[420] The Third Circuit also dismissed the antitrust claim by applying the *Noerr-Pennington* doctrine. At the same time, it extended the doctrine to the tort claims and thus rejected them.[421] The court held that:

> [W]e have been presented with no persuasive reason why these state tort claims, based on the same petitioning activity as the federal claims, would not be barred by the *Noerr-Pennington* doctrine.[422]

The court basically viewed First Amendment principles as applying to the New Jersey tort claims based on *Brownsville*, which held that the *Noerr-Pennington* doctrine immunizes tort liability for the failure of reporting nursing home violations to regulatory authorities.[423]

However, the dissenting judge in *Ethyl*, Judge Sloviter, who was the very author of the *Brownsville* opinion, argued that the majority's interpretation of the sham exception was flawed and thus unduly narrowed the operational scope of the Sherman Act.[424] She also contended that *Brownsville* should not be read to warrant the majority's broad application of antitrust immunity to common law tort claims, because the decision simply dismissed a damage action against a legitimate reporting activity and should thus be distinguished from the current case, which elicited government actions via alleged fraudulent misrepresentations.[425]

Therefore, one might reasonably conclude that deliberate and fraudulent misrepresentations in antidumping proceedings could still potentially be subject to common law tort claims and thus block the application of the *Noerr-Pennington* doctrine.

---

418. *Id.*
419. *Id.* at 120.
420. *Id.*
421. *Id.*
422. *Id.* at 128.
423. *See* Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 159–60 (3d Cir. 1988).
424. *Ethyl Corp.*, 168 F.3d at 134 (Sloviter, J., dissenting).
425. *Id.*

CONCLUSION

This Article has argued that antidumping remedies, while unsupported by the unfair trade justification, serve the special interests of certain domestic producers at the expense of consumers. It further contends that courts should clear antitrust disciplines of doctrinal obstructions, most notably the *Noerr-Pennington* doctrine, through a broader construction of the sham exception. In the same vein, antitrust authorities, in particular the FTC, should pursue enforcement efforts over certain abusive behaviors by antidumping petitioners and introduce a registration scheme in line with the Webb-Pomerene Act. Finally, the courts should decline to apply the *Noerr-Pennington* doctrine to cases based on common law tort principles, such as unfair interference with business.

While "the first amendment [sic] has not been interpreted to preclude liability for false statements,"[426] the courts have failed to provide clear guidance as to the scope of the *Noerr-Pennington* doctrine.[427] This Article recognizes the FTC's statutory jurisdiction over trade remedies and calls for a proactive stance by the FTC on this issue. In doing so, the FTC can achieve the same goal shared by trade and antitrust policies: "ensuring efficient functioning of markets by the removal or control of restrictive business practices."[428] Administrative protections, such as antidumping measures, not only impede international commerce but also cause market distortions, which prevent growth and job creation both domestically and internationally.[429] Antitrust oversight of trade remedies will eventually bring forth the salutary effect of forcing domestic producers to become more innovative and competitive in the global market.[430]

J. Michael Finger once portrayed the antidumping regime as a "witches' brew of the worst of policy making: power politics, bad economics, and shameful public administration."[431] Now, it is time to break this protectionist spell by applying an antitrust potion.

---

426. Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1261 (9th Cir. 1982).

427. *See* FTC STAFF REPORT, *supra* note 201, at 16.

428. OECD, COMPETITION AND TRADE POLICIES: THEIR INTERACTION 11 (1984).

429. *Id.* at 73–74.

430. *Hearings on Global and Innovation-Based Competition Before the Fed. Trade Comm'n*, 103rd Cong. 1304–1526 (1995) (statement of Joseph Stiglitz, Chairman, Council of Economic Advisors), *available at* http://www.ftc.gov/opp/global/GC101295.shtm.

431. Finger, *supra* note 29, at 57.