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Using Antitrust Principles to Reform Antidumping Law

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For more than 70 years, the United States has had two standards for dealing with international predatory pricing. The first, the Antidumping Act of 1916, addressed what competition policy normally conceives of as predation. The latter, the Antidumping Act of 1921, came to be the international version of price discrimination policy.[1] These statutes may thus be thought of as the international counterparts to section 2 of the Sherman Act and section 2(a) of the Robinson-Patman Act, which prohibit, respectively, predatory pricing and price discrimination within the domestic market.[2] However, the jurisprudence under these four statutes, particularly since the Antidumping Act of 1921 was superseded by the Trade Agreements Act of 1979, has shown a remarkable and even alarming degree of divergence.

True predatory pricing in its original sense remains difficult to prove in both the domestic and international contexts; domestic price discrimina-

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1. Antidumping Act of 1916, *US Code* 15 § 71 et seq. The Antidumping Act of 1921, codified at *US Code* 19 § 161 et seq., was repealed by the Trade Agreements Act of 1979. The current administrative antidumping law is found at 19 U.S.C. § 1673 et seq.

2. Sherman Act, § 2, *US Code* 15 § 2. Robinson-Patman Act, *US Code* 15 § 13. Similar concepts exist in many other countries that have well-developed antidumping and competition regimes. For Canada, see the 1986 Competition Act (competition policy—§ 45 prohibition on restraint of competition, § 50 price discrimination, § 79 predatory pricing), and the 1988 Special Import Measures Act (antidumping). For the European Union, see Articles 85-86 of the Treaty of Rome (EEC Treaty—competition policy) and Regulation 3283/94 (antidumping measures).

tion cases are relatively few, and plaintiffs rarely win them.[3] This is true whether the claim is one of predation by a horizontal competitor for a primary line injury under the Robinson-Patman Act, or whether the claim is for discrimination by a single seller between competing purchasers, which constitutes a claim of secondary line injury under Robinson-Patman.

Antidumping law unquestionably was aimed, at least in part, at price predation undertaken by companies with the intent to harm their competitors. Although there is no direct analogy to secondary line injury cases in the antidumping context, modern antidumping law notions of less-than-fair-value (LTFV) sales are more akin to the lower standards of proof found in secondary line cases. Antidumping law merely requires proof of crossborder discrimination in the form of a seller's lower return on US sales as compared with home-market sales. Antidumping law thus targets not *price discrimination* but *profit discrimination* and seeks to force foreign sellers to earn the same profit, or return, on export sales as on domestic sales. Despite this difference, antidumping law can be analyzed using tools developed in both primary- and secondary-line domestic price discrimination cases.

Contrary to the difficulties of private plaintiffs attempting to prove price discrimination by their domestic competitors, in the international context price discrimination has become relatively easy to establish, using rules that tilt heavily in favor of US Department of Commerce (or counterpart administering authority) findings of less-than-fair-value sales.[4] In this chapter, I will explore some of the "rules of the game," focusing on those applied by the US International Trade Commission (ITC) and the Commerce Department's International Trade Administration (ITA) in antidumping duty investigations and administrative reviews. I then suggest specific proposals to make an antidumping case more like price discrimination litigation under US competition law. While specific regimes from Canada, the European Union (EU), and similar developed-country jurisdictions are not discussed, I submit that a similar degree of divergence between antidumping and antitrust exists in all developed countries, and that similar reforms are also warranted there.

3. *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Orscheln Brothers Truck Lines, Inc. v. Zenith Electronics Corporation*, 498 U.S. 933 (1990); ABA Antitrust Section, *Antitrust Law Developments* (3d ed. 1992), 401–51.

4. Throughout this chapter, I use terminology established under the new US antidumping law. The Antidumping Agreement concluded as part of the GATT Uruguay Round was enacted into US domestic law by the Uruguay Round Agreements Act (URAA), P.L. 103-465, *Statutes at Large* 208, 4809 (8 December 1994). The GATT Agreement defines dumping as the sale of a product from one country into another at "less than its normal value." Such a sale occurs if the "export price of the product is less than the comparable price of the like product when sold in the exporting country" (Agreement on Implementation of Article VI of the GATT 1994, Article 2 [hereafter, cited only to the article number of the Agreement]).

I do not here debate the wisdom of defining price discrimination, or even predatory pricing, differently for international and domestic purposes. Rather, I assume that there is a political consensus, and perhaps even an economic justification, favoring some greater protection of domestic producers from international, as opposed to domestic, competition and, therefore, that there is a need for a different framework for addressing discriminatory pricing in the international context.[5] This chapter's more modest goal is to examine whether antidumping laws and their enforcement have so markedly tilted the playing field that dumping is being found, and duties are being imposed, for pricing or other behavior that is not only accepted in the purely domestic context but is even encouraged as being fair, aggressive competition.

The Divergence of Trade and Competition Policies

The degree of divergence between trade and competition approaches to price discrimination can best be demonstrated by the following hypothetical case.

A producer of stainless steel tubing located in the Northwest United States, by virtue of its longevity in the area and its relative geographic isolation from other producers of stainless tubing, has enjoyed substantial economic success and has developed solid and long-standing customer relationships. But because of the shutdown of a major customer, this producer decides that it must sell its product in Southern California, where it has not traditionally done business. To penetrate the Southern California market, the steel producer offers lower prices to new customers in Southern California than it offers to existing customers in the Northwest. Its policy of offering lower prices to California customers earns it a 10 percent share of the California stainless steel tubing market and angers Southern California producers of stainless steel tubing, which traditionally have not faced competition from the Northwest.

Since this hypothetical case involves purely domestic, localized price cutting, the legal remedy available to the Southern California producers is limited to domestic price discrimination laws, principally the Robinson-Patman Act. Under the facts presented, the Southern California producers would be unable to persuade any respectable antitrust lawyer even to bring a Robinson-Patman Act action against the Northwest competitor. A competitor would have to allege primary line injury in such a case, tantamount to an "attempt to monopolize" antitrust case against the Northwest producer for predatory pricing in violation of section 2 of the Sherman Act (*Brook Group Ltd.*, 509 U.S. 209). This would have no

5. An excellent and up-to-date discussion of the subject can be found in Hart (1997). For the view that antidumping law should be scrapped altogether, see Lipstein (1993, 43).

chance of succeeding under US competition law because of the Northwest producer's small market share, inability to recoup lost profits, and the absence of below-cost sales. Moreover, it could not be credibly argued that the Northwest producer would greatly expand its Southern California market share, as it enjoys much more profitable business closer to home.

Rather than resorting to a legal remedy at all, the California producers would most likely retaliate in kind by shipping their newfound excess capacity to the Northwest, thereby lowering prices in the Northwest and undermining the Northwest producer's ability to continue to charge lower prices in Southern California. Such arbitraging of price discrimination is quite common in the purely domestic setting. The Southern California steel producers most likely would elect to compete rather than seek legal protection because the competition law remedies available to them do not offer the option of protectionism.

Now assume the stainless steel tubing mill is located not in the Northwest United States but in Canada. Under the same facts, the Canadian steel producer is now selling at less than fair value in the United States. Whether the Canadian producer is dumping or not depends entirely on whether its less-than-fair-value sales are causing material injury, or threatening to cause material injury, to the domestic stainless steel tubing industry—here conceived as a regional industry comprising the Southern California producers. In arguing their case before the US International Trade Commission, the Southern California steel producers would point to their own lost sales in Southern California, price undercutting by the foreign supplier, and price suppression effects by the foreign supplier, where its lower bids have forced the California producers to lower their own prices to retain business. There will also be arguments about lost employment, reduction of profits, and a continuing threat of injury because, under the hypothetical case, the Canadian supplier's sales to the US market are driven by the permanent loss of a major Canadian customer, thereby creating long-term capacity for the US market.

Under US antidumping law, the Southern California producers would almost certainly obtain legal relief on the very same facts that would not support an antitrust *claim*, let alone antitrust relief. The dumping remedy, in the form of an antidumping duty order, would effectively raise prices to stainless steel tube consumers in the Southern California market. Note, too, that the imposition of antidumping duties would remove the incentive for US producers to arbitrage the higher prices in the Canadian market, thereby allowing higher prices to prevail in both the Southern California and Canadian markets.

At this point, it seems appropriate to ask the competition policy question: Why should there be different schemes for price discrimination *across* national boundaries than for price discrimination *within* national boundaries? Put differently, one could also ask the trade policy question: why should a country be permitted to deviate to such a significant extent from principles of national treatment in the enforcement of its price discrimination laws?[6] The principal answer is largely historic, and in many cases, no longer accurate.

Specifically, it was generally the case when the Antidumping Law of 1921 was enacted that the goods being targeted were fully manufactured, or almost fully manufactured, in the country of export. It was also true that one did not, or could not, arbitrage international price discrimination by exporting back to the dumping firm's home market, thereby bidding away his home-market profits and thus his ability to sustain discriminatory prices. As a result, there was a policy presumption implicit in antidumping law that the imposition of antidumping duties on the merchandise in question would not produce a dynamic response from other domestic industries.

Modern US experiences, however, such as the antidumping case against flat-panel displays, are reason enough to question the continuing validity of these assumptions ("High Information Content Flat Panel Displays and Display Glass," *Federal Register* 56: 32376, 16 July 1991; ITC 1991). As that case and others demonstrate, manufacturing today is a global business, and antidumping measures interfere with efficient structuring of global manufacturing.

Moreover, a US company can, in many instances, effectively arbitrage international price discrimination by taking business away in the dumping firm's home market, or in third-country markets in which both compete. The Canada-US Free Trade Agreement, for example, moved those two countries' markets to this standard of openness, thereby eliminating a fundamental original premise of antidumping law.[7]

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6. The concept of nondiscrimination in treatment of domestic and foreign companies underlies the General Agreement on Tariffs and Trade (GATT), and exceptions to national treatment, for example, for reasons of national security, are specifically enumerated in the GATT. The Antidumping Agreement, of course, is part of the GATT and therefore a permitted departure from the national-treatment principle. The question here is not why such a departure should be recognized, but rather, why the degree of departure should be tolerated.

7. For a scholarly analysis on the reasonableness of replacing antidumping law with competition law for US-Canada trade, see Feltham et al. (1991). The economic integration of Europe has resulted in the elimination of a cause of action for dumping among member states of the European Union, leaving dumping only as a border measure and competition principles as the measure for addressing intra-Union price discrimination. Australia and New Zealand have also eliminated the use of antidumping measures for trade between them, likewise relying on competition rules instead (see the 1988 Australia/New Zealand Closer Economic Relations Trade Agreement, described by Graeme Thompson in chapter 12). These examples, as well as the hypothetical case in the text, underscore the lack of relevance of antidumping measures for trade between economically integrated and open markets.

Where international arbitrage is not possible—that is, where the foreign market is "closed"—the increasingly frequent remedy has been more widespread use of antidumping or other trade measures. This likely explains why Japan and China have been the primary targets of US antidumping cases in recent years. But this approach has not solved the underlying problem—the closed foreign market remains closed. Indeed, as the hypothetical case suggested, the availability of an easy and effective dumping remedy dulls the incentive for private interests to pry open the closed market, again with the result that higher prices prevail all around.

The adoption of antidumping regimes has increased nontariff trade barriers and genuinely threatens to undo much of the benefit realized by decades of multilateral tariff reduction. When the United States enacted its first modern antidumping law, the Trade Agreements Act of 1979, there were less than 10 countries in the world that had antidumping laws in place. In 1990 there were 24 countries with such laws, and by 1996 nearly 60 countries had enacted antidumping laws.[8] US exporters—indeed, exporters from all countries—should be concerned that the seemingly arbitrary application of their own country's dumping laws will create new and higher barriers to trade, just when tariff barriers are being negotiated down to minimal or zero levels. The better approach is suggested by competition law and the use of public and private antitrust actions to open up markets to international trade.

If governments are to ease the trade-distortive effects of the ever-increasing number of antidumping regimes being created, it will be necessary for antidumping law to be less arbitrary and less tilted in favor of the domestic industry. This will require that the concepts of "unfair" trade practices in domestic and in international trade begin to converge, using competition law principles as the paradigm.

A Comparison of International and Domestic Price Discrimination Requirements

US Antidumping Law

The US antidumping law, Title VII of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (URAA), like its domestic counterpart, the Robinson-Patman Act, uses specialized terms of art to define

8. *1996 Trade Policy Agenda and 1995 Annual Report of the President of the United States on the Trade Agreements Program* (US Government Printing Office 1996, 39). See also, "Dumping Complaints Rapidly Rising," *Financial Times*, 28 April 1993, 5 (citing GATT figures showing the rapid growth of antidumping investigations worldwide); "Mexican Dumping Cases Unsettling US Businesses," *Journal of Commerce*, 14 May 1993, 1A (describing the surge in Mexican antidumping cases against US exports).

its primary findings: "less-than-fair-value sales" and "material injury." Each aspect of the antidumping law, however, is enforced by separate agencies, each of which employs its own terminology and its own standards to reach what are, in some areas, overlapping decisions.

Before antidumping duties can be imposed, the Commerce Department must determine that a class or kind of foreign merchandise is being or is likely to be sold in the United States at less than fair value, and the ITC must determine that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of the foreign merchandise. (The key terms will be defined below.) An antidumping investigation proceeds through four separate stages: preliminary determination of injury, preliminary determination of LTFV sales, final determination of LTFV sales, and final determination of injury (*US Code* 19 §§ 1673 and 1677).

Almost all antidumping investigations are initiated by the private filing of a petition, which is required by law to be on behalf of a domestic industry. While the Department of Commerce is considering the sufficiency of the petition, the ITC proceeds with its preliminary injury determination, which must be in the affirmative if the ITC finds that "there is a reasonable indication" that an industry in the United States is materially injured or threatened with material injury by reason of imports of the merchandise that is the subject of the investigation. An affirmative preliminary injury determination permits the investigation to continue; a negative preliminary determination terminates the proceeding.

The statute contains a number of defined terms:

Industry is defined as the producers as a whole of a "domestic like product," or those producers whose collective output of "a domestic like product" constitutes a major proportion of the total domestic production. If, however, some of the domestic producers are related to the exporters or importers, then the statute permits industry to be defined in certain circumstances to exclude those producers from the scope of the domestic industry.[9]

Material injury is defined simply as "harm which is not inconsequential, immaterial, or unimportant." As a result, virtually any injury will be deemed to be material under this definition.[10]

In determining whether material injury is *by reason of* the imports

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9. The 1994 GATT Antidumping Agreement, Article 4, defines domestic industry as "the domestic producers of the like products as a whole or those producers whose collective output constitutes a major proportion of the total domestic production of the like products." The Agreement also allows the domestic industry to be defined to exclude producers related to the exporters of the merchandise, or that are themselves importers of the merchandise. (US implementing legislation generally follows the language of the Agreement.)

10. The 1994 GATT Antidumping Agreement modified the injury test in several significant aspects (see, generally, footnotes 11-14 and accompanying text).

under investigation, the statute directs the ITC to consider the volume of imports, the effect of imports on prices in the United States for the domestic like product, and the impact of imports on producers of the domestic like product, with respect to their US operations.[11] The statute further elaborates on each of these factors. Critically, the statute requires the ITC to cumulate the volume and effect of imports from two or more countries subject to investigation if such imports compete with each other and with the domestic like products in the United States.[12]

Domestic like product is defined in circular terms as "a product which is like, or in the absence of like, most similar in characteristics and uses with," the merchandise that is subject to investigation. The 1994 GATT Antidumping Agreement defines *like product* to mean "a product that is identical to the product under investigation, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under investigation" (1994 GATT Antidumping Agreement, Article 2). While this would appear to be an improvement, there is still substantial discretion left to the agencies to define which characteristics "closely resemble" those of the product under investigation, and US implementing law made no substantive change.

The Department of Commerce is obliged to determine whether a class or kind of merchandise is being or is likely to be sold in the United States at *less than fair value*. Merchandise is sold at less than fair value if its export price or constructed export price (CEP) is less than its normal value.[13] Export price or CEP is, effectively, the selling price of the merchandise to the first unrelated party in the United States, less deductions for US Customs duties and brokerage charges, and all movement charges associated with delivering the merchandise from its point of production in the foreign country to the unrelated US customer, less expenses incurred in selling to the customer in the United States.

Normal value is, generally speaking, the price at which the foreign like product is sold in the home country, again adjusted for movement charges and selling expenses. Thus, both export price and normal value

11. Article 3.5 of the 1994 GATT Antidumping Agreement requires affirmative proof that the "dumped imports are, through the effect of dumping, causing injury within the meaning of this Agreement." The 1994 GATT Antidumping Agreement further requires that all factors contributing to the injury of the domestic industry, other than the dumped imports, be isolated and not considered in the causation analysis. US implementation of this requirement, however, has treated the 1994 GATT Antidumping Agreement as not requiring a substantive change in US law, a position that, to this author, is untenable.

12. Cumulation is expressly permitted, though not required, by Article 3 of the 1994 GATT Antidumping Agreement.

13. The new GATT terminology, which has been implemented into US law, substituted the concept of normal value for foreign market value, and export price, or constructed export price, for US price.

measure prices adjusted to an ex-factory basis; assuming the actual home-market price is above the cost of production, US sales are made at less than fair value when the manufacturer realizes a lower rate of return on export sales to the United States than on domestic sales. As noted earlier, this concept of profit discrimination, not price discrimination, is unique to trade law.

As in the case of domestic like products, the statute defines *foreign like product*, but it sets forth here a specific hierarchy: (1) subject merchandise that is identical in physical characteristics with and produced in the same country and by the same person as that merchandise; (2) merchandise produced in the same country and by the same person as the subject merchandise which is like the subject merchandise in component materials and in the purposes for which it is used, and is of approximately equal commercial value; (3) merchandise produced in the same country by the same person, of the same general class or kind as the subject merchandise, which is like that merchandise in the purposes for which it is used, and that the Department of Commerce may determine may be reasonably compared (*US Code* 19 § 1677, 16).

Further, normal value is to be based on sales for home consumption "in the usual commercial quantities" and "in the ordinary course of trade."[14] Finally, normal value is to be determined by prices prevailing, at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price. This introduces into the antidumping margin analysis a requirement that US sales be compared with home-market sales that are made reasonably contemporaneously to the US sale.

Where there are no home-market (or third-country) sales of the foreign like product, or such sales occur below the cost of production, then normal value may be based on "constructed value," which is the cost of all materials and labor used to produce the product exported to the United States, plus actual selling, general and administrative expenses (SG&A), plus profit.[15]

The foregoing is merely a review of the statutory framework. Examples of how the ITC and the Department of Commerce have implemented this framework in specific cases will follow. These will demonstrate the degree

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14. In implementing legislation, the United States has defined "ordinary course of trade" to be only those home-market sales that survive the "sales below cost" test. Further, since the GATT Agreement provides that the profit for calculating constructed value (normal value based on cost of production, plus expenses and profit) will be profit on sales in the ordinary course of trade, this US definition of ordinary course of trade will actually increase dumping margins based on constructed-value comparisons. This certainly was not the intent of GATT negotiators when they bargained for US elimination of its minimum 8 percent profit and the use instead of "actual profit" information.

15. See discussion in footnote 14 regarding the impact of the 1994 GATT Antidumping Agreement on this statutory provision.

to which the implementation of the antidumping law deviates from either predatory pricing or price discrimination standards under domestic antitrust law. Antitrust standards are discussed in the context of specific proposals for reform of antidumping law later in this chapter.

Requirement of Contemporaneous Sales

For antidumping investigations, the Department of Commerce generally examines a 12-month period of sales in the United States. Section 773(a)(1) of the Tariff Act provides that the Department use as the normal value the price "at a time reasonably corresponding to the time" of the US sale.[16]

As a result of changes made by the WTO Antidumping Agreement and the URAA, Commerce will normally calculate a single weighted average price for each "averaging group" covering the 12-month period of sales in both the United States and in the home market. Averages will be calculated based on groups of identical or virtually identical merchandise in each market and at the same level of trade.[17] Under this average-to-average methodology, US sales that occur toward one end of the period of investigation could, effectively, be compared to home-market sales made several months earlier or later than the "contemporaneous" home-market sale(s).[18]

In administrative reviews, Commerce normally will compare sales of identical merchandise in the home market in the same month as the US sales. If there are no sales of identical merchandise in the home market in the same month as each monthly average of US sales, Commerce will search for monthly weighted average sales values of identical merchandise in the home market up to three months, or 90 days prior to the month of the US sales. If there are no sales of identical merchandise in the home market up to 90 days prior to the month of the US sales, Commerce will search for monthly weighted average sales values of identical merchandise in the home market up to two months, or 60 days subsequent to the month of the US sales. If no home-market sales of identical merchandise are located, the 90-60 search is repeated for home-market sales of "similar" merchandise. If Commerce is *still* unable to find contemporaneous sales in the home market, Commerce will use constructed value as the basis for normal value.[19]

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16. For a comparison with pre-1995 law, see "Certain Forged Steel Crankshafts from the United Kingdom," *Federal Register* 56 (14 February 1991): 5975 and 5976.

17. 19 CFR § 351.414(d)

18. Note, however, that the use of averages on both sides does not give full credit for US sales made above normal value. See discussion of US sales below.

19. This matching process obviously introduces the possibility that margins will be created, exaggerated, or eliminated solely by virtue of movements in exchange rates. Dur-

In some annual reviews before 1995, Commerce had examined home-market transactions to determine whether prices on a part-by-part basis had been stable throughout the period of review. When prices were stable, Commerce used an average value of sales for the entire period of review, effectively treating all home-market sales as contemporaneous to each and every US sale.[20]

Contemporaneous is not defined by a US statute. However, the ITC follows a general practice of reviewing data for a full three-year period before the investigation as well as data for the current partial year and the corresponding data from the immediately preceding partial year.

Thus, ITC review of relevant economic factors covers the entire industry within a broad period. Findings of injury may, therefore, be based on conduct occurring well before Commerce's 12-month period of investigation. This bifurcated approach is unlike US domestic antitrust law, where the plaintiff is required to demonstrate that the very sales for which discriminatory prices were charged are the source of competitive harm.

Cumulation

In making its determination on material injury, the ITC must evaluate the volume, price effects, and impact on domestic producers of the subject imports, as well as any other economic factors deemed relevant. In conducting its evaluation, the ITC is required to:

> cumulatively assess the volume and effect of imports of the subject merchandise that compete with each other and with domestic like products in the United States market. *US Code* 19 § 1677(7)(G)(i)

Traditionally, the ITC has evaluated four factors in determining if products compete with one another and with domestic like products as

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ing 1994 and early 1995, for example, the Japanese yen strengthened considerably, and at times rapidly, against the US dollar. Because Commerce converts the price of a home-market sale using the exchange rate in effect on the date of the US sale, a comparison two or three months back would produce significantly higher margins, even if the exporter had raised US prices to offset the currency fluctuation. The 1994 GATT Antidumping Agreement, Article 2.4.1., provides that enforcement authorities must allow exporters 60 days to adjust to sustained currency movements and that temporary movements are to be disregarded in margin calculations. The new US antidumping law provides for a 60-day lag on currency conversions where there has been a sharp and unexpected movement in exchange rates. See section 773A of the Tariff Act of 1930, as amended by section 225(a) of the Uruguay Round Agreements Act. The United States has limited this change, however, to "investigations" and has not applied it to "annual reviews," where the actual margin of dumping for duty assessment purposes is calculated.

20. US implementation of the 1994 GATT Antidumping Agreement prevents such "annual averaging," limiting Commerce to monthly averages (section 777A[d][2] of the Tariff Act of 1930).

required under this cumulation provision: fungibility of imports with both other imports and the domestic product, sales or offers of sales in the same geographic markets, existing common or similar channels of distribution, and the simultaneous presence of imports in the market (ITC 1993c, 66). In evaluating these factors, the ITC only has to find a "reasonable overlap" of competition to mandate cumulation. The ITC asserts that it is its general practice to "cumulate imports even where there were alleged differences in quality between imports and domestic products, although considerations of quality differences are relevant to whether there is 'reasonable overlap' of competition" (ITC 1993b, 12). Imports already subject to trade relief were, under prior US law, eligible to be cumulated with imports under investigation if the antidumping order was "sufficiently recent such that those unfairly traded imports which resulted in the imposition of the order are continuing to have an effect on the domestic industry" (ITC 1993a, 12-13).[21]

As a result, injury can be established through the magic of cumulation even where the volume of imports from one country under investigation is small. In the *Flat-Rolled Carbon Steel Products* case (ITC 1993c), the ITC considered the issue of "reasonable overlap" of competition to mandate cumulation according to the market share of the countries in question.

The ITC rejected challenges that were based on claims that the imported merchandise did not compete with the products of the domestic industry. Thus, the ITC rejected arguments by French producers of hot-rolled sheet that a large percentage of French products did not compete with other subject imports and the domestic like product because they were of higher quality and because domestic manufacturers were unable to manufacture similar products. The ITC said it was sufficient that a significant minority of products did compete more directly. It reached a similar decision with respect to hot-rolled sheet from the Netherlands, stating:

> We also specifically reject the Dutch respondent's arguments that the Commission has the 'inherent authority' to exclude from its cumulation analysis a certain portion of a country's imports that are found to be noncompetitive with the domestic like product and other subject sources. We have consistently declined to exclude a portion of a country's imports which may be less than completely substitutable with domestic products and other imported sources and only analyze competition with respect to the remaining imports. (ITC 1993c, 56, note 202)

As noted, the injury portion of the antidumping statute permits an exception to mandatory cumulation for negligible imports. Import levels

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21. The 1994 GATT Antidumping Agreement, Article 3.3., limits cumulation authority to imports simultaneously subject to investigation. The United States implemented this requirement under the Uruguay Round Agreements Act.

Table 1 Imports by selected countries of hot-rolled sheet as a percentage of US apparent consumption, 1990-92
(percentages)

Country	1990	1991	1992
Non-negligible import levels subject to cumulation			
Canada	1.2	1.3	1.9
France	0.9	0.6	0.8
The Netherlands	0.4	0.5	0.6
Negligible import levels not subject to cumulation			
Germany	0.6	0.5	0.4
Japan	0.4	0.4	0.3
Brazil	0.3	0.2	0.3
Belgium	0.1	0.2	negl.[a]

a. Import levels of less than 0.1 percent.

were found *not* to be negligible in Canada, France, and the Netherlands. By contrast, imports from Belgium, Brazil, Germany, and Japan were found to be negligible and therefore escaped cumulation (table 1).

In the decision involving Germany, the ITC ruled: "We believe that the volume and market share of the imports alone, together with the fact that there was significant overselling of German products, indicates that German imports are negligible. . . ." (ITC 1993c, 66). Compared with the decision concerning the Netherlands, the crucial factor seems to be one of a very marginal trend line.

The new US antidumping law defines negligible imports as imports that account for less than 3 percent of all such imports by volume in the most recent 12-month period, unless the total of all negligible imports from all countries exceeds 7 percent of import volume (*US Code* 19 § 1677, 24).

Domestic and Foreign Like Products

Again, under the antidumping law, the determination of what merchandise is involved in an investigation is loosely defined by statute and requires separate analyses by both Commerce and the ITC. Commerce determines whether subject merchandise has been sold at less than fair value. In calculating antidumping margins, Commerce must go further than simply identifying the subject merchandise—it must identify merchandise sold in the home market or in third countries that is "such or similar" to the merchandise allegedly being dumped in the United States. For its part, the ITC determines "domestic like product" categories to determine whether injury, or threat of injury, to the domestic industry exists. These analyses are not uniform and allow for varying levels of discretion by each agency. Furthermore, Commerce and ITC may or may not come to similar conclusions, and often include products that do not truly compete with the allegedly injured producers of the domestic like products.

An example of the application of the statutory language governing Commerce's foreign like-product determination is the case of "Certain Cold-Rolled Carbon Steel Flat Products From Argentina, et al." (*Federal Register* 58: 37062, 9 July 1993, Notice of Final Determination). Here, Commerce determined that the products constituted four classes or kinds of merchandise, as well as four categories of "such or similar merchandise." This determination was reached despite claims by both respondents and interested parties that some of the merchandise should not be included because it was neither available domestically (at all or in the required quantities), nor were there any substitutable products (*Federal Register* 58: 37062 and 37075, 9 July 1993). Commerce rejected these arguments, noting that petitioners are not required to produce every product covered by the scope of the investigation, nor is Commerce required by law to consider such arguments as "available substitutes" when considering what products to include under a scope exclusion request.[22]

The antidumping statute requires the ITC to determine what constitutes domestic like-product categories for determining injury. To determine whether the petitioner in an antidumping case has been injured, the ITC examines the industry that produces the domestic product it has determined is "like" the merchandise under investigation. The petitioner, however, has the first opportunity to define this merchandise and therefore to influence the scope of the domestic like-product determination. The statute itself provides little guidance on how the ITC should determine when one product is "like" another.

ITC analysis of injury is producer based, not consumer based, as would occur under competition law principles. In the recent antidumping investigation of *Certain Steel Wire Rod from Brazil, Canada, Japan, and Trinidad and Tobago,* for example, the ITC preliminarily determined that all products under investigation constituted a single like product.[23] In the public hearing, suppliers of steel wire rod testified that only the high-quality, high-carbon content wire rod could be used for certain applications such as tire cord and bead; lower-grade rod could not be substituted. Furthermore, there was testimony that the domestic industry had neither the capacity nor the capability to produce acceptable tire

22. "Certain Cold-Rolled Carbon Steel Flat Products From Argentina et al., (Notice of Final LTFV Determination)," *Federal Register* 58: 37,076, 9 July 1993. In contrast, under price discrimination law, a key issue is product substitutability, discussed later in this chapter.

23. *Certain Steel Wire Rod From Brazil, Canada, Japan, and Trinidad and Tobago,* USITC Publication 2647 (June 1993, 9).

wire rod.[24] Thus, the effect of the ITC's one like-product determination was to allow injury to be found by reason of imports of all grades of wire rod, regardless of differences in market circumstances surrounding the different grades of steel wire rod covered under this investigation.[25]

The ITC's producer-oriented focus is further highlighted in the recent steel case decisions in which it determined that the products under investigation constituted four separate like products. Here, the ITC reiterated that its practice is not "to fragment like product definitions where a continuum of products exists" (ITC 1993c, 13). The ITC deviates from this practice only where *more than minor* differences exist to distinguish products. In the steel cases, however, even though the foreign producers alleged, and the ITC found, differences in price and customer and producer perceptions and a lack of interchangeability in end uses, the ITC determined that these differences were not significant enough to warrant additional separate like-product distinctions (ITC 1993c, 17-18).

The Robinson-Patman Act

The Robinson-Patman Act, passed in 1935 as an amendment to the Clayton Act, was expressly intended to protect competitors and is the only antitrust law that has that express purpose. It therefore provides a framework of analysis that should be acceptable to supporters of the antidumping law. To establish a prima facie case of price discrimination under the Robinson-Patman Act, the plaintiff must demonstrate:

- reasonably contemporaneous sales
- of commodities
- of like grade and quality
- at differential prices
- where the effect of such price differentials may be to lessen competition or tend to create a monopoly in any line of commerce.

Each of the above is a statutory element of the violation, and therefore the plaintiff bears the burden of proof as to all of them and must separately establish each element as to each defendant.

The statute provides for certain defenses from liability even where

24. USITC hearing, 14 May 1993, Steel Wire Rod case, Inv. no. 731-TA-646-649, pp. 161–69.

25. The ITC, in its final determination, found that there was no injury to the domestic industry, but retained its one like-product conclusion *(Certain Steel Wire Rod from Brazil and Japan*, Inv. Nos. 731-TA-646 and 648 [Final], USITC Pub. 2761, March 1994).

price differentials exist. Most significantly, the statute allows a price differential to be charged in good faith to meet a lower price offered by a competitor. Lower prices are also permitted where a price differential can be cost justified. Finally, the statute recognizes that certain inventory clearances or other unusual sales do not give rise to a lessening of competition.

Initial enforcement of the Robinson-Patman Act, particularly by the Federal Trade Commission (FTC), established some inflexible standards, the effect of which was to reduce merchants' abilities to compete with one another on price. As a result, the Robinson-Patman Act came under significant attack by antitrust commentators, and its enforcement, particularly by the FTC, virtually lapsed. In the last 15 years, however, there has been renewed litigation under Robinson-Patman, both by private parties and the FTC. Recent interpretations of the act have generally attempted—successfully, in my view—to harmonize enforcement of the act with the fundamental principle embodied in other US antitrust laws, namely, the protection of consumers through lower prices for goods. To that end, decisions under Robinson-Patman have eliminated the so-called "automatic damages" rule (*J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 US 557, 1981) and have expanded the "meeting competition" defense. Recent cases have confirmed that this defense is available so long as the seller acted in good faith, it is not lost if the seller ultimately proves to have beaten, rather than merely to have met, the competition (*Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 440 US 69, 1979), and they have allowed for areawide use of the defense based upon available information as to the competitor's marketing strategy (*Falls City Industries v. Vanco Beverage, Inc.*, 460 US 428, 1983).

While a showing of predatory pricing now requires an objective likelihood of recoupment, such requirement has not generally been imposed in secondary-line Robinson-Patman cases. Following on the thesis of this chapter that antidumping law is more like secondary-line injury cases than predatory pricing or primary line cases, the following reforms do not include a suggestion that possibility of recoupment be demonstrated before relief under antidumping laws can be obtained.

Specific Reforms of Antidumping Law

Changes in ITC Injury Determinations

Applying Antitrust Principles to Domestic Like Product Definition and Injury Analysis

As we have seen, the ITC conducts its injury analysis on the basis of data about the industries that produce domestic products that are "like" the merchandise under investigation. The domestic like-product concept, however, typically allows the petitioner to establish very broad product categories and to seek relief even for imports of individual products it does not produce. In the *Flat Rolled Steel* cases, for example, several foreign producers demonstrated that the specific products they sold to the United States were high-value, niche, or specialty products that did not compete with US production. In most instances, however, the ITC ignored such arguments, finding that it was sufficient that some portion of the foreign production competed with domestic production. In other words, the ITC would not segment the "domestic like product" into narrower groups of products.

Commerce's "class or kind" analysis is not much better. While Commerce often follows the ITC's preliminary like-product analysis, it is not bound to do so. In *Brass Nozzles* (*Federal Register* 50: 8354, 1 March 1985), for example, Commerce found five classes or kinds of merchandise, while the ITC found seven like products. As a result, Commerce had to recalculate its dumping margins to exclude the sales of the noninjurious products. Such differences are not only wasteful but downright silly. After all, the agencies are ultimately enforcing the same statute.

The contrast between the antitrust and trade law approaches to these issues could not be more stark. In antitrust cases, price discrimination is actionable only when the products involved are of "like grade and quality" (*US Code* 15 § 13[a]). Factors considered in determining whether products are of like grade or quality include cross-elasticity of demand, substitutability, physical appearance, and identity of performance (*Checker Motors Corp. v. Chrysler Corp.* 283 F. Supp. 876, 888-89, S.D.N.Y. 1968). True physical differences that affect either consumer use or the marketability of the product can be sufficient to make two products not of like grade and quality (*Quaker Oats Co.*, 66 F.T.C. 1131, 1964).

Like grade and quality can even be influenced by the relative time at which two sales occur. In *Lombino & Sons v. Standard Fruit & S.S. Co.*, bananas that were shipped in the same shipment but sold at different times were deemed to be *not* of like grade and quality due to their perishable nature (1975-2 Trade Cas. [CCH] ¶60,527, 67,329, S.D.N.Y. 1975). Thus, under the Robinson-Patman Act, the determination of like grade and quality is conducted under strict provisions that attempt to ensure that products are truly alike.

While the Robinson-Patman Act focuses on comparisons between individual products, the US government's Horizontal Merger Guidelines (US Department of Justice and Federal Trade Commission 1992) provide a framework for defining "relevant markets" within which to measure a variety of effects, including whether imported products compete sufficiently with domestic products to be a cause of material injury. Unlike the producer orientation of the ITC's injury analysis, the Merger Guidelines' analysis is based primarily on consumer substitution responses.

The Justice Department and the FTC "define a market in which firms could effectively exercise market power if they were able to coordinate their actions" (US Department of Justice and Federal Trade Commission 1992, 7). The core of this definitional process is the price increase test, which analyzes potential consumer response to a "small but significant and nontransitory" price increase. It is the consumer response that then defines the product market:

> A price increase could be made unprofitable by consumers either switching to other products or switching to the same product produced by firms at other locations. The nature and magnitude of these two types of demand responses respectively determine the scope of the product market and the geographic market. (US Department of Justice and Federal Trade Commission 1992, 8)

Thus, the Merger Guidelines define the product market, as described by a product or group of products, and a geographic market, based solely on demand substitution factors (US Department of Justice and Federal Trade Commission 1992, 8).

Proposal for Reform

The like grade and quality analysis of Robinson-Patman provides a single, workable framework for analyzing both margins and injury. Adopting a specific standard applicable to both determinations ought to be noncontroversial. Adopting a tighter standard, while most assuredly controversial, nonetheless makes sense. The current standards allow for import relief against whole groups of products that do not, in an antitrust sense, *compete* with the domestic products.[26] There is no trade policy rationale for such broad relief.

If, as we suspect will be argued, the like grade and quality standard is too narrow, then the product and geographic market analysis of the Merger Guidelines is an appropriate alternative. If the flow of imports of a specific product will not change in response to a higher US price for a second product, the two products are in different markets. The volume and value of imports of the one product cannot, by definition, injure producers of the second, and relief should not be allowed against both products merely because, in some vague sense, they are "like" each other.

By adopting a competition-based analysis of like product and injury, trade relief will be available only against truly competitive products.

26. The domestic industry retains a strong incentive to include such noncompeting products within the requested scope of relief because antidumping duties on such products raise rivals' costs and therefore enhance the effectiveness of any remedy obtained on directly competing products.

Emphasizing consumer substitution responses will eliminate from the scope of relief products that are not substitutes and that are not obtainable domestically. Such an analysis would limit remedies to competitive situations and would prevent injury both to downstream producers and consumers, who should not be forced to pay higher prices for imports when competitive domestic products are not available. This reform would return antidumping analysis to its roots and eliminate one of the more pernicious aspects of the current approach.

Requiring Proof of Injury

Nearly 10 years ago, Congress added a provision to Title 19 of the US Code that requires the ITC to cumulate the effects of imports from different countries if those imports compete with each other and with the like product; that provision, § 1677(7)(C)(iv), has a counterpart section in the Uruguay Round implementing legislation, *US Code* 19 § 1677(7)(G). As we have seen in the *Flat Rolled Steel Cases*, cumulation has permitted injury to be found from imports constituting as little as 0.5 percent of apparent consumption. Contrast this with the typical antitrust price discrimination case, where injury must be affirmatively demonstrated as to each defendant. Indeed, in such cases there is typically only one manufacturer as a defendant.

The concept of cumulation is nothing more than a petitioner's invention to broaden the reach of trade laws to remedy even the smallest perceived hurt. One cannot help but wonder how US domestic industries expect to be competitive in the rough-and-tumble of global competition when they enjoy such a protected home life.

Proposal for reform An antidumping petitioner should be required to prove his case element by element, exporter by exporter, or, at a minimum, country by country—bearing the burden of proof just as antitrust plaintiffs do. Of course, if an antidumping petitioner can establish the existence, or likelihood, of a cartel among two or more respondents, cumulation as to those respondents would be appropriate.[27]

One clear benefit of limiting or eliminating cumulation is that it makes the results of an antidumping case potentially destabilizing. While differing margins create winners and losers within a country under investigation, the prospect for a no-injury finding against some exporters but not others from the same country would be far more destabilizing. It may well improve the quality of information generated by the injury

27. The 1994 GATT Antidumping Agreement permits but does not require cumulation. Thus, it would be possible, consistent with the Agreement, to implement the proposed reform into domestic law.

investigation, as it could divide the foreign respondents, who now are virtually always united in opposing relief. By giving some respondents an incentive to lay the blame on others, a clearer picture of injury or threat of injury is likely to emerge.

Establishing a "Meeting Competition" Defense

Price discrimination under the Robinson-Patman Act is not actionable if the discriminatory price is offered in good faith to meet the lower price of a competitor. There is, however, no counterpart to the "meeting competition" defense under antidumping law. In part, this relates to the amorphous standard of "material injury" "by reason of" imports under the antidumping statute. The concept of meeting competition as a defense under the Robinson-Patman Act is that one supplier should not be prohibited from offering lower prices if a competitor is offering such prices. Under the antidumping law, however, if a domestic producer is the first to offer lower prices, the foreign producer is not permitted to meet those prices if, in doing so, it would be selling at less than fair value and such sales would be a cause of injury to the domestic industry. As we have seen, whether the domestic industry is presently suffering injury is oftentimes more a factor of general economic conditions, including global downturns in demand and global increases in capacities. Under such circumstances, it is quite easy to find LTFV imports to be a cause of that injury.[28]

Maintaining such disparate standards between domestic and international price discrimination has a wide variety of consequences. First, it most likely encourages a greater level of foreign direct investment than would otherwise be optimum. Domestically produced merchandise, even if produced by a foreign owner, will still enjoy the benefits of the Robinson-Patman Act's meeting-competition defense. Second, the disparities allow domestic petitioners who are suffering as a result of more efficient domestic competitors to obtain relief from import competition even though the import competition is not the most significant, or even a major, cause of the inefficient producers' problems. If imports are not the primary source of the domestic industry's problems, higher import duties will not be of much help to the petitioning domestic producers, as they must continue to face domestic competition that is already more efficient. For relief to be effective under such circumstances, an antidumping case would have to be coupled with a domestic cartel. That alone is reason enough to allow a meeting-competition defense in antidumping actions.

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28. Although the 1994 GATT Antidumping Agreement was intended to remedy, in part, the lack of clarity in injury standards, US implementing legislation left current US law unchanged.

Proposal for reform The burden should be on the exporter to show that its US prices, to the extent they were lower than its home-market prices, were offered to meet the competitive situation created by a US seller. This will assure that the ITC takes into account the prices of the most efficient US producer when it determines whether price underselling by imports has caused injury to the US industry. This would essentially allow a foreign seller to sell below its home-market price, as low as the price of the most efficient US seller.

Department of Commerce Procedural Changes

In addition to the changes described above to the ITC's standards for determining injury, there are a number of changes to Commerce's practices that would restore some semblance of balance between producers' and consumers' interest in antidumping enforcement. Some of these practices, in particular the procedures for identifying "such or similar" merchandise, have analogs to ITC determinations. Others, however, are issues unique to Commerce's LTFV calculation methodology.

Standing

The Department of Commerce alone determines whether an antidumping petitioner has the requisite standing. As noted above, a petitioner's action must be on behalf of the domestic industry that produces the product under investigation. Commerce has taken an expansive view of standing, so that a petitioner that makes some, but not all, of the products in the class or kind of merchandise under investigation will be presumed to have the requisite standing to maintain the action against the entire class of products. Further, opposing interests must challenge the petitioner's standing before Commerce will even survey the domestic industry to determine whether it supports the petition. Those opposed to a petitioner's claim of standing thus have the affirmative burden of persuading the Department of Commerce that a majority of producers in the industry are against the action.

Is it really necessary to change the standards for establishing standing? After all, one may reason that no antidumping measures will be imposed unless Commerce is satisfied that the imports under investigation are being sold at less than fair value and the ITC concludes that such LTFV imports are injuring the domestic industry.

Such a simplistic view, however, ignores the real-world consequences of an antidumping proceeding. One need look no further than the recent round of steel cases to appreciate the tremendous impact that the pendency of an antidumping case has on supply and pricing. Shortly after the steel cases were initiated, domestic steel producers increased prices on flat rolled products, even though the ITC eventually found imports of such products not to be causing material injury and did not impose duties. With each milestone in the case, the domestic industry hiked price again. After the preliminary LTFV determination, many foreign suppliers virtually abandoned the United States as a market, rather than risk millions of dollars in antidumping duty liability. Talk of shortages arose as the cases drew to a conclusion and, despite the negative injury determinations, price increases were not rolled back.

Merely the credible threat of an antidumping duty action can cause market impacts, even if a petition is not filed. In early 1993, the US auto industry was openly discussing commencing antidumping actions on virtually all automobile imports. Foreign producers scrambled to increase prices for automobiles sold in the United States in response. This allowed US producers to implement unheard-of midseason price increases, all of which occurred without any antidumping cases actually being filed. The results can be readily seen in the profits of Ford, Chrysler, and General Motors for the balance of 1993 and for 1994.

These examples demonstrate the enormous power of antidumping proceedings. Before 1 January 1995, access to such power was essentially not circumscribed. A single private party could bring to bear on its foreign competitors forces that closed the door to the United States as a viable market. The 1994 GATT Antidumping Agreement, Article 5.4, raised the threshold necessary to establish petitioner standing. The Agreement requires that a petition be supported by domestic producers representing a "major proportion" of domestic production, which means 50 percent of the output of those producers expressing views on the petition and at least 25 percent of total domestic production of the domestic like product; see *US Code* 19 § 1673a(c)(4)(A). Both the Agreement and the proposal for reform discussed below have the same objective: eliminating the presumption of standing.

Proposal for reform Once a petition is lodged, Commerce should be required to establish that the petitioner has the requisite standing *before* it begins an investigation. The burden should be on the petitioner to (1) identify each and every production source within the United States, whether US or foreign owned, that is engaged in the manufacture of the products under investigation, and (2) produce written evidence from those manufacturers supporting commencement of the proceeding.

For those production facilities located in the United States but owned by non-US companies, rules need to be established to determine *ex ante* whether such facilities will be considered part of the US industry. If the facility is owned by a parent company located in a country that is not the target of the petition, that facility should unequivocally be included in the concept of domestic industry. If the facility is owned ultimately by a company headquartered in a targeted country, then inclusion of the US production facility as part of the domestic industry should turn on the degree to which the US facility would be gaining a comparative advantage through the purchase of LTFV imports of components.

Two benchmarks would seem to be appropriate. First, there should be a minimum threshold of component cost as a percentage of total material costs of the US production facility. Second, total material cost should be measured against total US cost of manufacture: if imported components are a significant portion of total material costs but total material costs are only a fraction of the total cost of manufacture, then the "unfair advantage" conferred by the importation of LTFV price components is *de minimis*.[29]

Again, adopting this proposal would mean antidumping petitioners would have to meet standards more like those faced by a plaintiff in an antitrust action, who bears the burden of establishing certain jurisdictional prerequisites, including standing.

Foreign Like Product (Such or Similar Merchandise)

Under the antidumping law, Commerce calculates the US price for the merchandise under investigation and compares it to the normal value of the foreign like product.[30] The flexibility of the concept of foreign like product, or its predecessor, such or similar merchandise, often leads to comparisons that, under the Robinson-Patman Act, would never be allowed beyond a motion to dismiss.

Commerce, for example, has developed an elaborate methodology for

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29. The standard, as construed in the *Forklift* case, is that total US value added of more than 25 percent precludes circumvention. I therefore propose the obverse: Domestic production that is foreign owned is part of the domestic industry if imported components are less than 25 percent of material costs *or* total material costs are less than 25 percent of total cost of manufacture. For comparison, see "Internal Combustion Engines for Forklift Trucks from Japan, Negative Final Determination of Circumvention of Antidumping Duty Order" *(Federal Register* 55: 6028 and 6031, 21 February 1990):

> Value Calculation. Based upon our analysis of the comments received, we have amended our value calculation and determined that the difference in value between forklift trucks completed and sold in the United States and the value of the Japanese components used in the production of that merchandise ranged from 25 percent to 40 percent.

and

> . . . we determine that no circumvention of the anti-dumping duty order is occurring. This negative determination is in accordance with section 781(a) of the Tariff Act (*US Code* 19, section 1677j(a).

30. In accordance with language provided for in the 1994 GATT Antidumping Agreement, US law was amended to delete the "such or similar merchandise" language and to instead use "foreign like product." That change, however, had no substantive impact on the analysis.

identifying which tapered roller bearings (TRBs) sold in Japan are to be deemed identical or similar to tapered roller bearings sold in the United States. Commerce basically permits comparisons on a price-to-price basis of US TRBs to Japanese TRBs so long as the Japanese TRBs' variable cost of manufacture is no more than 20 percent of the total cost of manufacture of the US product. Within this basic parameter, Commerce will accept comparisons even if the Japanese TRB deviates from the US product in its size (outer diameter, inner diameter, or width), load rating, or precision rating by 100 percent or more. As far as Commerce is concerned, for example, a high-precision TRB sold in Japan is identical to a commodity-grade TRB sold in the United States, as long as it has the same dimensions and load rating. Even though the high-precision product will command a price premium as a result of extra steps in superfinishing that provide for closer tolerances, longer life, and quieter running, no adjustments are made for these differences, and dumping margins result not from price differentials for identical merchandise, but because a higher-value product is being treated as identical to a lower-value product.

Such flexible notions of foreign like product totally undermine the notion that the antidumping law addresses international price or profit discrimination. Domestic price discrimination law requires that the differential pricing involve sales of commodities of like grade and quality. As noted above, the concept of like grade and quality has been construed narrowly to prevent findings of price discrimination when, in the domestic context, the products cannot fairly be said to be comparable. In the international context, however, the United States has vested in an administrative agency virtually unfettered discretion to determine what can be considered comparable merchandise.

Proposal for reform In Robinson-Patman jurisprudence, there is a body of decisional law that fleshes out the concept of "like grade and quality." If Commerce were to apply the antitrust concept in the antidumping context, it would be forced to match US sales to a more limited home-market sales base or to compare US sales to a benchmark of cost-constructed value. This would have the salutary effect not only of eliminating margins derived solely from comparing prices of merchandise that shouldn't be compared, but also of substantially reducing the administrative burden imposed upon respondents who must participate in these proceedings.[31]

31. See, for example, "Comments of Assistant Secretary Garfinkel before the Practicing Law Institute," *International Trade Reporter* 6 (27 September 1989): 1222 and "Certain Small Business Telephone Systems and Subassemblies Thereof from Japan, Korea, and Taiwan," (Notice of Initiation of Investigation), *Federal Register* 54 (24 January 1989): 3516. The Department of Commerce data requests were so burdensome that the Japanese companies defaulted ("Certain Small Business Telephone Systems and Subassemblies Thereof from Japan" [Final LTFV Determination] *Federal Register* 54 [17 October 1989]: 42541).

Levels of Trade

The 1994 GATT Antidumping Agreement requires that "fair comparisons" of home market and export sales normally be partly based on comparisons made at the same level of trade. For matches made at different levels of trade, the US implementing legislation for the first time introduced into the antidumping statute a preference for matches at the same level of trade and adjustments based on the level of trade.

Commerce collects from respondents information on the selling functions performed in connection with the respondents' sales to home-market customers and sales to the export market. Based on an analysis of these selling functions and where in the chain of distribution each customer is located, Commerce will classify customers into different levels of trade. By law, export sales will be matched first to sales in the home market at the same level of trade, if such sales exist. If sales must be matched to a different level of trade in the home market, Commerce will grant an adjustment for the level of trade—but only if the need for such an adjustment is demonstrated and the amount of the adjustment can be quantified. In the case of CEP sales, if the amount of the adjustment for the level of trade cannot be quantified—as will often be the case—Commerce will grant a CEP offset equal to the lesser of the indirect selling expenses deducted in calculating CEP or the indirect selling expenses incurred on the home-market sales.

The new adjustment methodology based on the level of trade is a substantial improvement over prior law and, where it is used, will tend to eliminate the creation of artificial dumping margins arising from "cross-level of trade" matches. Under prior law, a high-volume, low-priced OEM sale in the United States often was compared to a low-volume, high-priced transaction to the aftermarket of the home country, without further adjustment. Thus, dumping was found not because the respondent was selling to similarly situated OEMs at different prices in the two markets, but because the prices being compared were prices to customers that were not, in fact, at the same level of trade with each other (i.e., they were not, functionally, in competition with one another). Although the adjustment for the level of trade substantially mitigates this problem, Commerce has acknowledged that, for CEP sales, there will rarely be an identical level of trade in the home market. As a result, in most CEP cases there will not be an adjustment for the level of trade, but there will be a CEP offset, assuming respondent can provide the necessary documentation and proofs. Because the indirect selling expenses associated with selling to different levels of trade may not, indeed likely will not, fully capture pricing and profit differences between levels of trade, the CEP offset will not remedy the creation of dumping margins from certain cross level of trade matches.

Under domestic price discrimination law, differential pricing to different levels of trade is not actionable, except in certain circumstances not applicable here. Whether expressed in terms of functional discounts, or simply that the less-favored customer does not compete with the favored customer, the result under Robinson-Patman case law is the same: differential pricing to different levels of trade is not actionable price discrimination.

Proposal for reform The Uruguay Round Agreements Act, and the manner in which Commerce has implemented the Act in its antidumping regulations on level of trade, represent substantial reforms over prior practice. Still, large volumes of products subject to antidumping duty orders are sold through affiliated US companies and are thus analyzed as CEP sales. As to those sales, Commerce has determined that it cannot calculate a level of trade adjustment and therefore will, at most, grant only a CEP offset.

Although Commerce has concluded that there is only one level of trade in the United States in CEP sales—the CEP level of trade—the CEP prices remain influenced by the original selling price which, in turn, is a function of the level of trade of the sale in the United States to the unaffiliated customer. Commerce recognizes this in selecting its home-market sales for comparison. It is Commerce's practice to compare a sale to a US unaffiliated OEM to the average normal value for OEM sales in the home market of the same product as a first choice, looking to home-market sales of the same product in the aftermarket as a second choice. In doing so, Commerce recognizes that there are differing price and profit levels associated with sales to different categories of customers in the home market. Commerce should therefore take the next step and calculate a level of trade adjustment applicable for CEP sales based on such differences. This could be accomplished by recognizing different CEP levels of trade, based on the category of the first sale in the United States to an unaffiliated customer, and then applying the level of trade adjustment as it normally would do so in the case of export price sales. This proposal is more in keeping with the Robinson-Patman model advocated here—price discrimination requires some evidence of price differentials that may tend to lessen competition. Where the customers whose prices are being compared do not compete with one another, an appropriate adjustment should be made in all cases, including CEP sales.

Averaging of US Sales

Under US law before 1 January 1995, Commerce examined each individual US sale against a weighted average of sales in the home market in its calculations of antidumping margins. In addition, sales in the United States that were above foreign market value (or, FMV, now normal value [NV]) were treated as having a zero dumping margin rather than a negative dumping margin. As a result, a respondent did not get full credit for having sold some products above fair value and others below fair value. Instead, the sales above fair value were treated as having been sold equal to fair value, with the result that dumping margins were still found even if there were only a handful of sales at less than fair value.

This can best be understood by specific example. Assume that the respondent engaged in five transactions in the United States during the investigation. These transactions were all at the same level of trade and all involved a single product, but they were in different quantities and hence at different unit prices: $4 per unit for 100 units, $3.50 for 200, $3 for 300 or 400, and $2 for 500. Assume further that the exporter engaged in the same five sales transactions in its home market involving the same quantities and the same prices of merchandise, and that these sales produced five FMVs equal to the per-unit US prices listed above. By weight averaging the home-market transactions to produce a single normal value, Commerce will calculate an NV equal to $2.80 for the home market. As a consequence, it would find dumping on one of the five transactions in the United States and calculate a 10.5 percent dumping margin.[32]

Proposal for reform If the purpose of antidumping law is to address price discrimination between markets, Commerce should calculate the measure of price in each market on the same basis. By failing to do so, the methodology is heavily tilted in favor of finding dumping margins even where price discrimination does not exist, as illustrated in the example above. The dumping margin should therefore be calculated in a manner that gives full credit for sales that are above fair value. This can be accomplished by weight averaging prices on the US side and comparing a single-weighted average export price or constructed export price for a specific period to a single-weighted average NV for a comparable period.

This is, in fact, the approach adopted in the 1994 GATT Antidumping Agreement, Article 2.4.2. US implementing legislation, however, limited such averaging to investigations. Commerce will continue to compare *individual* US sales to average home-market normal values in annual reviews—which is where the actual assessment rates are determined (but see 1994 GATT Antidumping Agreement, Article 18.3, which applies the

32. Dumping margins are calculated by the formula

S*PUDD*/S*USP*

where S*PUDD* (potential uncollected dumping duties) is the sum of all comparisons in which *NV* – *USP* > 0. Thus, the *PUDD* in the example equals ($2.80 – $2.00) × 500, or $400. The S*USP* (the sum of US prices) equals $400 + $700 + $900 + $1,200 + $1,000, or $4,200. By dividing $400 into $4,200, one can calculate a margin of approximately 10.5 percent.

agreement to both investigations and reviews). Alternatively, if Commerce continues to calculate margins on a sale-by-sale basis, as it will apparently do in reviews until reversed in a WTO challenge, it should give full credit for sales that occur above fair value. The calculation of the potential uncollected dumping duty (PUDD) would therefore equal the sum of the pluses and minuses that result from the margin calculation rather than just the sum of the pluses, as now occurs.

Such reform would put the antidumping duty calculation method through a "tightening" process similar to that experienced under the Robinson-Patman Act. Until the early 1980s, a successful plaintiff could collect "automatic" damages, equal to three times the amount of the price difference. However, the US Supreme Court in *J. Truett Payne Co. v. Chrysler Motors Corp.* (451 US 557, 562, 1981), eliminated the rule of automatic damages and firmly established the requirement that there be proof of a direct causal link between an alleged violation of the law and the amount of alleged injury. Further, a plaintiff must prove a direct link between a competitor's lower prices and plaintiff's loss of customers or profits. Mere assertions to that fact have been ruled insufficient for showing actual injury.[33]

Such a strict standard for the awarding of damages under antitrust law would be well applied to relief under antidumping law. Petitioners in dumping cases should be held to a much greater burden of proof to demonstrate that price discrimination by a foreign competitor has caused injury not only to themselves but also to competition. Furthermore, the proposed reform of the duty margin calculation would acknowledge and account for sales both above and below fair value, thereby giving credit for above-fair-value sales in determining the extent to which discrimination has actually occurred. In view of the express language of the GATT Antidumping Agreement and its limited US implementation for investigations only, there would seem to be no principled basis for not extending US price averaging to reviews as well.

Ordinary Course of Trade

Commerce has recognized that it may be inappropriate to include certain types of transactions occurring in the home market in the calculation of the weighted-average NV. Such sales are designated as sales "outside the ordinary course of trade." Typically, these are sales respondents have

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33. For example, in *Olympia Co. v. Celotex Corp.* (771 F.2d 888, 891-92, 5th Cir. 1985), the plaintiff made assertions regarding profits and sales it "would have made" had it received the same price reduction a competitor had received. That is, the plaintiff claimed that a 5 percent reduction in price (as given to a competitor) would have resulted in increased profits of $38,157.65 over four years, as well as a projected sales increase of 40 percent over a 10-year period. The courts ruled that these projections did not demonstrate injury but were merely unsupported hypotheses.

made at extraordinarily high prices under unusual circumstances—for example, prototype sales, where the product price includes special charges for design and/or tooling. Or, the product in question may be very unusual in the home market and therefore able to command a premium price (e.g., a product scaled in inches in a metric country).[34]

Before Commerce will exclude such sales from the home-market database, however, it requires respondents to produce significant amounts of evidence; mere abnormalities in price/quantity relationships have typically not been sufficient proof. Such a high standard of proof imposed upon respondents is probably defensible, however, given the strong desire of exporters to "cherry pick" the very high-priced home-market sales to eliminate them from the margin calculation. Indeed, we would have no objection with the standard at all if Commerce were to apply comparable standards to transactions in the US market.

In part because of differences in the statutory definitions of normal value and export price, however, Commerce maintains that it must calculate a margin for every sale in the United States during the period of review.[35] Thus, it has only excluded US "sales" where it has found that the transaction in question was in fact not a sale. While the standards for such a finding have varied, Commerce now appears to focus on whether title has passed to the customer, and if so, it deems the event a sale, for which a margin must be calculated.[36]

In determining what constitutes sales in the "ordinary course of trade" for the purpose of price comparisons, Commerce should follow principles analogous to those inherent in section 2(a) of Robinson-Patman, which allow for price differentials and variations resulting from factors that alter the market for, or marketability of, a product. Section 2(a) of Robinson-Patman allows for a "changing conditions defense." That is, in response to conditions such as seasonality or obsolescence of a product, temporary price reductions are not sufficient to sustain a finding of actionable price discrimination (ABA 1992, 426, notes 182, 183). The governing Robinson-Patman language reads:

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34. The United States has added to this category sales that are below cost within an extended period. This new measure is a significant move away from antitrust principles.

35. But see *Ipsco, Inc. v. United States*, 714 F. Supp. 1211, 1217 (Court of International Trade 1989), reversed on other grounds, 965 F.2d 1056 (Federal Circuit 1992), in which the court ruled that Commerce was not required to include every US sale in calculating margins in investigations.

36. The broad concept of what constitutes a sale conflicts with the narrower scope of generally accepted definitions, such as that found in the Uniform Commercial Code, § 2-106: "A 'sale' consists in the passing of title from the seller to the buyer for a price. . . ." The UCC definition thus excludes transfers in which the transferor receives no valuable consideration from the transferee, while Commerce considers such transfers, in the United States, to be sales.

> . . . nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. (*US Code* 15, § 13)

The inclusion of such language in the law reflects Congress's intent to allow for price adjustments that reflect changes in the "saleability of goods" (ABA 1992, 426). In its report, the House stated that:

> . . . while it is not believed that the principal prohibitions of Section 2(a) apply in any case to such price changes, nor has such construction ever been suggested or contended for under present Section 2, this specific exemption is included as an added precaution to safeguard the ready disposition of goods characterized by fluid market conditions. (H.R. Rep. No. 2287, 74th Cong., 2d Sess. 11, 1936)

In *Valley Plymouth v. Studebaker-Packard Corp.* and *Peter Satori, Inc. v. Studebaker-Packard Corp.,*[37] lower prices were deemed to be justified by reason of obsolescence and seasonality. In one case, lower-priced cars were found to be obsolete and therefore appropriately reduced in price from earlier sales. In the other case, cars had become less desirable due to the creation of improved models, thus permitting the lower prices. Under Robinson-Patman, the lower-priced sales (in the domestic context) were seen as justified by the market and consequently found to be an inappropriate basis for finding discrimination. In the international context, however, there is no similar acknowledgment of the real-world workings of the marketplace. Commerce continues to view each US transaction as a sale suitable for comparison, regardless of the market conditions or reasons behind the pricing.

Proposal for reform By incorporating Robinson-Patman provisions in its price comparison methods, Commerce would be forced to account for reasonable variations in price differentials rather than being allowed to compare, on a price-to-price basis, US sales which are *not* in the ordinary course of trade but merely priced in response to changing market conditions. Further, applying the same "ordinary course" concepts in both the home and US markets, Commerce ought not to calculate margins on "giveaways," which in commercial terms constitute merely promotional expenses, not sales.

Constructed Value Calculations

Commerce uses constructed value as a basis for NV when there is no foreign like product in the home market, or when identical merchandise

37. Found, respectively, in 219 F. Supp. 608 (S.D. Cal. 1963) and 1964 Trade Cas. (CCH) ¶ 71,309 (S.D. Cal. 1964).

is sold in the home market but all such sales are disregarded as being below the cost of production. This use of constructed value has been the target of extensive criticism of US antidumping law. Such criticisms once focused primarily on the fact that the constructed-value calculation before 1 January 1995 included a minimum 10 percent of cost of manufacture to be added for SG&A expenses, plus a minimum profit of 8 percent to be added to the combined cost of manufacture plus SG&A. Thus, dumping was found to have occurred in constructed-value matches whenever the foreign manufacturer elected not to earn on its US sales a profit of at least 8 percent above its fully allocated cost of production.

More recently, the constructed-value statute has been the source of substantial additional mischief. The antidumping law generally considers parties to be "affiliated" if there is a 5 percent or greater stock ownership interest in one party by another. Thus, the statute permits Commerce to reject the transfer prices of inputs manufactured by affiliated parties if it finds that such prices are not at arm's length, and to use "best evidence available" as a substitute for such transfer prices whenever it does reject them. In addition, if the input in question is a "major input," and if Commerce has reason to believe or suspect that the transfer price is below the cost of production, it may substitute the affiliated supplier's cost of production for the transfer price.

The difficulties in responding to Commerce requests for such information, however, are manifold. In many circumstances, the affiliated supplier is the sole source of the particular input, and thus there is no easy way to provide prices of the input purchased from unaffiliated suppliers as a benchmark to test the market values of the affiliated-party transfer price. An even greater problem is that, for suppliers that are only partially owned by the manufacturer, it is often impossible to obtain cost of production information, particularly where the degree of ownership is between 5 and 50 percent. Recently, Commerce applied its "best information available" (now "facts available") rule (which usually means adverse information, often data from the petition or prior reviews) to a respondent that, in its view, had not been able to meet these onerous standards. Moreover, this is an issue of increasing interest to Commerce, fueled in large part by the discovery in the *Minivans* case that certain affiliated suppliers were transferring parts at different prices depending upon the ultimate destination of the minivan.[38]

While we generally do not dispute the need for a cost-based measure of NV, the statutory framework should not be so rigid that it disregards basic commercial realities. The notion that a supplier owned 5 percent by

38. "Final Determination of Sales at Less Than Fair Value: New Minivans From Japan," *Federal Register* 57: 21937, 21942 (26 May 1992); James Bovard, "Minivan," *The New Republic*, 22 June 1992, 20.

its customer would offer preferential pricing and/or sell below cost to its minority shareholder lacks any basis in reality. Moreover, the measure of cost that is currently used deviates so far from antitrust norms that it must be rejected in favor of a more modern approach.

Proposal for reform The proposals for reform depend in part on the reason for constructed value being invoked in the first place. When constructed value is used because there is no comparable merchandise sold in the home market, we submit that dumping should not be found unless the US price is less than the variable cost of manufacture of the product in question. Absent unusually compelling circumstances, prices above variable cost of manufacture would not be found to be predatory under US antitrust concepts. Applying the same standard to dumping would help to restore the law to one of its original premises as a predatory price discrimination statute.

Even assuming, however, that a standard based on variable cost of manufacture will be rejected by US domestic interests as unacceptably low, we would suggest that constructed value be simply the manufacturer's total cost of manufacture or, at worst, total cost of production, including its actual SG&A and profit.

The 1994 GATT Antidumping Agreement in fact required the United States to eliminate its minimum additions for SG&A expenses, and for profit. US implementing legislation, however, does not merely require that the profit be that which is actually earned by the exporter on its domestic sales. Rather, the profit that is added for constructed value must be the profit earned on those sales that pass the law's below-cost test. Once below-cost sales are eliminated, an exporter's profit margin may be, indeed is likely to be, much higher than the prior minimum of 8 percent. Here, again, the current US approach takes antidumping law further away from antitrust principles.

If the reason for a constructed-value calculation arises from the existence of sales of comparable merchandise in the home market that have been rejected for being below cost, then our proposal for reform is to revert to price-to-price comparisons. The reason for this is simple: The primary rationale for continuing to have an antidumping law that uses standards different from pure antitrust law is the inability of the US industry to "arbitrage" price differences between the two markets because of private or governmental restrictions on access to the foreign country's market. Profits made through sales in the protected home market, it is argued, can be used to underwrite dumping in the United States because such profits are insulated from arbitrage by US producers. Where, however, the foreign producers are selling below cost in *both* markets, there obviously will not be home-market profits available to subsidize dumping in export markets. Under such circumstances, the proper comparison is price to price, not price to some measure of cost.

Conclusion

The above proposals for reform are not intended to be comprehensive. Rather, they include only the aspects of existing antidumping practice that appear to have diverged the most from existing antitrust practice and represent an attempt to introduce (or in some cases reintroduce) competition-based principles into the antidumping framework. An antidumping regime reformed along the lines suggested here would produce many positive results: Foreign manufacturers would have much greater freedom to compete with US manufacturers on the same terms that other US manufacturers can now compete, and those dumping remedies that are imposed would be limited to a narrower range of products. Moreover, margins would be more likely to reflect the actual degree of discrimination and injury through the use of averaging of US sales.

Some of the proposed reforms were in fact codified in the GATT Antidumping Agreement after the completion of the Uruguay Round. Further, most but not all of the GATT reforms were included in the US implementing legislation for the Uruguay Round agreement. The United States, however, balked at the averaging of prices in reviews and at applying reasonable currency conversion rules in reviews. In other areas, it declined to follow the intent of the GATT changes; for example, in defining the conditions under which injury could be found. Further, the use of only above-cost sales for calculating constructed-value profits, although permitted by the GATT Antidumping Agreement, is not required by it, and undoubtedly will increase margins based on constructed value.

Other reforms could readily be proposed, such as truly automatic sunset provisions on antidumping orders. It is quite clear, however, given the difficulties that plagued antidumping reform in the GATT negotiations, that achievement of even the modest and rational goals suggested here must be considered a long-term project at best. Nonetheless, the first steps of focusing the debate must be taken, and this chapter offers what I hope is a contribution to that process.

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