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June 2007

## Remedying Trade Remedies

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# Remedying Trade Remedies

*“The heart of our national economic policy long has been faith in the value of competition.”\**

Sungjoon Cho<sup>^</sup>

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

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## Remedying Trade Remedies

### Introduction

Ever since the birth of the Union, competition has been an ideological beacon of its economic governance. Both the people and the government of the United States have believed that “the unrestrained interaction of competitive forces” will bring them prosperity and progress.<sup>1</sup> Based on this belief, the United States enacted the Sherman Act,<sup>2</sup> established the Federal Trade Commission (FTC),<sup>3</sup> split Standard Oil<sup>4</sup> and AT&T,<sup>5</sup> and more recently challenged Microsoft’s abuse of its monopoly in the personal computer operating system market.<sup>6</sup>

Nonetheless, competition has mostly been an *internal* affair involving domestic economic players.<sup>7</sup> While internal competition is highly protected in the domestic market, *external* competition from foreign producers has largely been neglected and thus failed to be factored into antitrust scrutiny. On the contrary, the government, through its trade policies, has often hampered foreign competition to protect domestic producers at the expense of all the benefits that foreign competition might bring to the economy.<sup>8</sup> In particular, the antidumping statute enables the government to impose additional tariffs on foreign imports to neutralize their price competitiveness under the disingenuous rationale of unfair trade.<sup>9</sup> In addition to its price-fixing nature, the antidumping regime further restrains trade when it is used to harass foreign rivals through a strategy labeled “non-price predation.” Non-price predation involves filing spurious petitions whose main purpose is to terrorize rivals regardless of the merit in initiating an antidumping proceeding.<sup>10</sup> In fact, nearly a half of all antidumping petitions turn out to be without merits.<sup>11</sup>

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<sup>1</sup> *Northern Pac. Ry. v. U. S.*, 356 U.S. 1, 4 (1958).

<sup>2</sup> The Sherman Antitrust Act, 15 U.S.C. § 1-7 (2004). (originally passed July 2, 1890, c. 647, § 1, 26 Stat. 209)

<sup>3</sup> Federal Trade Commission Act, 15 U.S.C. §41 (1914)

<sup>4</sup> *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911)

<sup>5</sup> *U.S. v. Amer. Tel. and Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982)

<sup>6</sup> *U.S. v. Microsoft Corp.* 253 F.3d 34 (D.C. Cir. 2000)

<sup>7</sup> Regarding a notable exception, see *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (ruling that foreign companies operating in foreign countries might still be found to violate the Sherman Act if they attempted to restrain trade within the United States).

<sup>8</sup> See EINAR HOPE, *COMPETITION AND TRADE POLICIES: COHERENCE OR CONFLICT* 3 (1998) (observing that a captured, protectionist policy undermines competition policy, and hence market inefficiency as well as deteriorated consumers’ welfare).

<sup>9</sup> Bernard M. Hoekman & Michael P. Leidy, *Antidumping and Market Disruption: The Incentive Effects of Antidumping Laws*, in *THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE* [hereinafter *THE MULTILATERAL TRADING SYSTEM*] 155, 164 (Robert M. Stern ed., 1993) (viewing the fair trade rationale as “red herring”). See also JAMES BOVARD, *THE FAIR TRADE FRAUD* (1991).

<sup>10</sup> See generally Pierre F. De Ravel Esclapon, *Non-Price Predation and the Improper Use of U.S. Unfair Trade Laws*, 56 *ANTITRUST L.J.* 543, 549 (1987).

<sup>11</sup> Elizabeth L. Gunn, *Eliminating the Protectionist Free Ride: The Need for Cost Redistribution in Antidumping Cases*, 28 *B.C. INT’L & COMP. L. REV.*, 165, 177 (2005).

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When confronted by the disturbing anticompetitive effects that these trade remedies tend to create, one may argue that antitrust authorities, in particular the FTC, should expand their hitherto largely domestic jurisdiction to international trade, thereby subjecting trade remedies to antitrust scrutiny. In doing so, the FTC can protect *competition* itself, not *competitors*.<sup>12</sup> However, the FTC's potential antitrust mission over trade remedies is severely obstructed by a judicially created antitrust immunity labeled the "Noerr-Pennington doctrine."<sup>13</sup> As a legal reincarnation of political pluralism under the Warren court, this doctrine expansively immunizes antidumping petitioners from any antitrust investigations over their potentially trade-restraining behaviors. Although the doctrine does have its own limitation, "the sham exception," courts have interpreted the exception in an extremely narrow fashion to the extent that it nearly marginalizes its purposefulness in the antidumping context.

This gap in enforcement of antitrust disciplines with regards to trade remedies is highly troubling. Foremost among concerns are the notoriously loose standards in determining dumping and injury, the central parameters of antidumping remedies. The present antidumping proceedings are vulnerable to manipulation by petitioners who are tempted to inflate, exaggerate and even misrepresent facts and data to prevail in dumping and injury determinations. The lack of antitrust enforcement as a backstop to trade remedies based on these misrepresentations tends to pass restraints on competition into the marketplace. Furthermore, while the demand for protectionism at home rises, globalization increasingly exposes the domestic economy to import penetration. A series of global trade talks has led to the replacement of conventional barriers, such as tariffs, by more esoteric administrative barriers, such as antidumping remedies. Consequently, if left unchecked, the frequent abuse of trade remedies is likely to multiply damages to the economy resulting from the stifling of competition in the marketplace.

Against this backdrop, I argue in this Article that the failure to allow antitrust oversight when implementing trade remedies should be rectified by means of judicial and administrative intervention. I do not propose herein a repealing of the current antidumping statute: such a drastic measure would be politically infeasible in the current protectionist atmosphere of Congress.<sup>14</sup> Instead, I take a more modest yet realistic stance: sanitizing antidumping remedies by bringing certain abusive behaviors in the antidumping proceeding, such as deliberate misrepresentations of facts and data, under antitrust

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<sup>12</sup> A. Paul Victor, *Task Force Report on the Interface between International Trade Law and Policy and Competition Law and Policy: Introduction*, 56 ANTITRUST L. J. 463, 464 (1987).

<sup>13</sup> *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464; *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626. For a case employing the doctrine, see *City of Columbia v. Omini Outdoor Advertising, Inc.*, 499 U.S. 365, 379-380 (holding that federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government because while appropriate in a business context, it is not appropriate in the political arena).

<sup>14</sup> See RAINER M. BIERWAGEN, *GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTIDUMPING LAWS* 158 (1990)

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disciplines.<sup>15</sup> In order to prevent such abuse of antidumping remedies by rent-seekers, courts should interpret the currently narrow definition of the sham exception broadly enough to effectively foreclose non-price predation. At the same time, the FTC, under its vested antitrust authority, should reinforce its surveillance and enforcement activities to guard against the abuse of trade remedies by domestic producers. In the long-term, these targeted judicial and administrative interventions will eventually lead the public, and legislators alike, to rethink the antidumping statute itself.

My thesis of remedying trade remedies via enhanced antitrust disciplines develops in the following sequence. Part I divulges the flawed rhetoric of fair trade behind the antidumping regime. It first traces the historical path of the antidumping statute to highlight its ironic transformation from an antitrust statute to a mercantilist law. Then the antidumping remedies' façade legitimization under the fair trade mantra is exposed, from both an economic and legal perspective. The article illustrates how antidumping remedies lack economic sense because they neglect or misinterpret firms' cost structure. Also illustrated is the lack of legal sense because the ultimate normativity hinges not purely on the merit of an underlying transaction, i.e., dumping, but cumulatively on its commercial effect and injuries. Part I concludes with an analysis of the antidumping remedies' protectionist *modus operandi*, as evidenced by elusive concepts of prices and injuries as well as procedural injustice.

In the absence of a genuine fair trade justification, antidumping measures remedy nothing while creating distortions in market economies. Part II first defines antidumping remedies as a Madisonian failure in that they only serve the special interests of a handful of domestic producers, i.e., economic factions, at the expense of the entire economy. Part II then explains a more serious antitrust failure in which antidumping remedies tend to fix prices and restrain trade through a petitioner's harassing behavior falling under the rubric of non-price predation. This process of harassment and intimidation eventually leads to cartelization of an industry.

Part III attempts to remedy the flaws of trade remedies by suggesting a course of action. Radical measures, such as repealing the antidumping statute, are politically infeasible. Therefore, this Part suggests that the FTC expand its statutory authority into the area of international trade. At the same time, however, the Part also points out potential obstruction of the FTC's oversight of antidumping remedies by the *Noerr-Pennington* doctrine.

Taking note of potential obstructions to FTC oversight of antidumping remedies, Part IV argues that the courts should adopt a broader interpretation of the sham

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<sup>15</sup> My proposal in the Article is basically in sync with other scholars who argue for some kind of antitrust checks against trade policies. See e.g., Konstantinos Adamantopoulos & Diego De Notaris, *The Future of the WTO and the Reform of the Anti-dumping Agreement: A Legal Perspective*, 24 *FORDHAM INT'L L.J.* 30, 54-55 (2000) (proposing involvement by a domestic antitrust agency in an injury determinations to ensure "competition principles"); Hoekman & Leidy, *supra* note \_\_, at 170 (emphasizing cooperation between domestic antitrust agencies and trade authorities).

exception to the *Noerr-Pennington* doctrine to facilitate the application of antitrust disciplines to trade remedies. It is also argued that the FTC should target certain abusive behaviors by antidumping petitioners, such as deliberate misrepresentations and repetitive petitioning, because the current *Noerr-Pennington* jurisprudence certainly reserves room for antitrust liability as to these unethical behaviors. The FTC can also monitor petitioners' behaviors by requiring them to register before they file antidumping complaints in tandem with a similar requirement under the Webb-Pomerene Act. Part IV concludes by raising the possibility of disapplying the *Noerr-Pennington* doctrine to private rights of action based on abusive behavior which may constitute a tortious interference with business.

The Article concludes that a political marketplace ideal under the First Amendment should not unduly absolve patent antitrust violations in apolitical areas such as antidumping proceedings.

## **I. Demystifying Trade Remedies: A Fair Trade Rhetoric with Protectionist Substances**

### *A. Outlining the U.S. Antidumping Regime*

#### 1. Origin and Evolution

The historical developments of the antidumping regime in the U.S. offer a powerful elucidation of its protectionist nature. The genesis of the U.S. antidumping regulation derived from antitrust concerns, rather than from the protection of domestic industries. Influenced by the antitrust sentiments in the late nineteenth century, which led to the enactment of the Sherman Act in 1890, the first U.S. antidumping statute, the Antidumping Act of 1916, required the existence of "predatory intent" to punish foreign dumping, and also imposed criminal liability for violations.<sup>16</sup>

The Antidumping Act of 1921 superseded the 1916 Act and provided a prototype for the current antidumping statute.<sup>17</sup> To protect infant U.S. industries from powerful European "cartels,"<sup>18</sup> the 1921 Act only required that there be "injuries" to domestic

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<sup>16</sup> J. Michael Finger, *The Origins and Evolution of Antidumping Regulation*, WORLD BANK PAPER 783 (1991), available at <http://ideas.repec.org/p/wbk/wbrwps/783.html#provider>; Douglas A. Irwin, *Explaining the Rise in U.S. Antidumping Activity, A Centennial of Antidumping Legislation and Implementation 2-5* (held at University of Michigan, Mar. 12, 2004), available at <http://www.fordschool.umich.edu/rsie/Conferences/ADSym/Irwin.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> Roy L. Prosterman, *Withholding of Appraisement Under the United States Antidumping Act: Protectionism or Unfair-Competition Law?*, 41 WASH. L. REV. 315, 316 (1966).

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industries allegedly caused by foreign dumping *without* a separate requirement of predatory intent. The only remedy of this new law was the imposition of duties equivalent to the magnitude of dumping. It was this softened standard under the 1921 Act that ushered in the administrative flexibility which enabled the government to manage trade policies in the interests of domestic industries and in tune with protectionist political climates.<sup>19</sup> The 1921 Act also provided a basis for Article VI of the General Agreement on Tariffs and Trade (GATT) which authorizes domestic antidumping measures.<sup>20</sup>

Nonetheless, the protectionist enlistment of antidumping measures had not fully materialized until the 1970's. Tariff barriers still provided effective import relief in the 1950's and 1960's before the average tariffs began to significantly fall under the Kennedy Round of trade talks in the late 1960's.<sup>21</sup> Despite the relatively steady number of antidumping cases filed in the 1950s and 1960s, actual determinations of injuries were rare during this period.<sup>22</sup> This phenomenon may be explained by the lingering effects of the 1916 Act which required the existence of a predatory intent. Although the text of the 1921 Act did not require the existence of predatory intent, only injury, the legislative intent of the 1921 Act was still to address "commercial warfare," i.e., potentially aggressive (predatory) exporting by foreign producers. The 1921 Act was to prevent a situation where "while temporarily cheaper prices are had our industries are destroyed after which we more than repay in the exaction of higher prices."<sup>23</sup> This antitrust relic of the antidumping statute maintained *de facto* the predatory intent requirement. Until the 1960's, the Tariff Commission (the ITC's predecessor) often based its injury determination on the existence of predatory intent.<sup>24</sup> The absence of predatory intent frequently led the Tariff Commission to a negative finding of injury.<sup>25</sup>

Yet, the 1921 Act had begun to be stretched to serve a protectionist purpose as the level of import penetration in the U.S. market (the import/GDP rate) increased from 3% in the 1950's and 1960's to 8% in the 1980's.<sup>26</sup> "New protectionism"<sup>27</sup> or "administered protection"<sup>28</sup> with a litany of non-traditional trade barriers (NTBs), such as antidumping measures, emerged in the 1970's and 1980's as traditional protectionist devices, such as tariffs, waned through trade rounds. In 1980, the veering of U.S. trade policy toward protectionism transferred the task of dumping determinations from the

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<sup>19</sup> Finger, *supra* note \_\_, at 24.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Irwin, *supra* note \_\_, at 9.

<sup>23</sup> H.R. Rep. No. 1-67, at 23-24 (1921).

<sup>24</sup> See e.g., Bicycles from Czech, 25 Fed. Reg. 9782 (1960); Carbon Steel Bars & Shapes from Can., 29 Fed. Reg. 12599 (1964).

<sup>25</sup> See e.g., Portland Cement from Dom. Rep., 27 Fed. Reg. 3872 (1962); Portland Cement from Can., 25 Fed. Reg. 2191 (1960); Rayon Staple Fiber from Fr., 24 Fed. Reg. 10092 (1959).

<sup>26</sup> Irwin, *supra* note \_\_, at 11

<sup>27</sup> See Dominick Salvatore, *Import Penetration, Exchange Rates, and Protectionism in the United States*, 8 J. POLY MODELING 125 (1987).

<sup>28</sup> Krueger, *supra* note \_\_, at 33-50.

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Department of Treasury to the Department of Commerce (DOC).<sup>29</sup> Before 1980, dumping determinations were conducted by the Treasury Department, which seldom delivered affirmative findings of injury. Frustrated by the Treasury Department's lukewarm posture toward a protectionist use of the antidumping statute, Congress took away the Treasury Department's authority over antidumping proceedings and accorded it to the DOC whose major constituency is domestic producers.<sup>30</sup>

Moreover, in the 1970's Congress expanded the scope of an antidumping investigation from conventional price discrimination to sales below cost. U.S. domestic firms often price their products below full costs to be more competitive. Yet, the Treasury Department, then the antidumping agency, revised its administrative interpretation to exclude sales below cost by foreign producers from the calculation of normal value on the ground that these sales are not made "in the ordinary course of trade"<sup>31</sup> This exclusion naturally led to a higher probability of finding positive dumping margins. Originally, the Treasury Department had wished to limit use of this expansive definition of dumping under its reserved discretion. However, Congress led by the powerful Senator Russell Long, then chairman of the Senate Finance Committee, codified the expansive definition in the 1974 Trade Act.<sup>32</sup> The protectionist impact of this change can be attested by the fact that more than half of the U.S. antidumping cases that followed concerned sales below cost.<sup>33</sup>

In sum, as J. Michael Finger trenchantly observed, the very history of antidumping reveals that the major purpose of the antidumping statute is sheer protectionism, although this purpose is camouflaged by a "good public relations program."<sup>34</sup> Finger noted that:

Adding this or that technical amendment – tailor-made to fit the situation of a particular and powerful constituent – soon became another vehicle for constituent service, the lifeblood of congressional politics.<sup>35</sup>

## 2. The Current System

The current U.S. antidumping statute<sup>36</sup> is designed to protect domestic producers from imports occurring at "less than fair value," i.e., dumping.<sup>37</sup> The antidumping statute allows domestic producers to petition relevant government agencies to investigate alleged

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<sup>29</sup> *Id.* at 11-12.

<sup>30</sup> *Id.* at 6-7.

<sup>31</sup> Finger, *supra* note \_\_, at 28-29.

<sup>32</sup> *Id.* at 29.

<sup>33</sup> *Id.* at 28.

<sup>34</sup> *Id.* at 13.

<sup>35</sup> *Id.* at 26-27.

<sup>36</sup> Tariff Act of 1930 as amended, 19 U.S.C. §§ 1637-1673h, §§ 1675-1675b, §§ 1677-1677n.

<sup>37</sup> 19 U.S.C. § 1677(34) (stating that imports at less than fair value constitute dumping).

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dumping practices by foreign producers (dumpers).<sup>38</sup> If these agencies determine that dumping is occurring and that it inflicts substantial, i.e., “material,” injury (or a threat thereof)<sup>39</sup> to the petitioner, the government executes a remedial action by imposing antidumping duties on a foreign producer’s imports to cancel out such injurious effect.

In most cases, except for a self-initiation by the DOC,<sup>40</sup> individual producers file an antidumping complaint on behalf of a specific industry<sup>41</sup> which produces a specific product which is like or competitive with an alleged dumped product.<sup>42</sup> Two different government agencies, the International Trade Administration (ITA) under the DOC and the International Trade Commission (ITC), are involved in the investigative process.<sup>43</sup> Upon the initiation of an investigation, the ITC preliminarily decides whether the alleged dumped import has caused material injury or a threat of injury to the petitioner.<sup>44</sup> If the ITC’s preliminary injury determination is affirmative, the ITA in turn decides on a preliminary basis whether there is dumping, a sale in the U.S. at less than fair value.<sup>45</sup>

The ITA also calculates the degree of dumping, referred to as the “dumping margin,”<sup>46</sup> which determines the amount of antidumping duties. The dumping margin<sup>47</sup> is the difference between an imported goods’ home market price (normal value)<sup>48</sup> and its price in the U.S. market (export price).<sup>49</sup> When the imported product is not consumed in the exporting country’s home market, the ITA will substitute the product’s price in a third market in which it is sold to arrive at normal value.<sup>50</sup> If the ITA considers home market prices unreliable for certain reasons,<sup>51</sup> the ITA will construct normal values by adding production costs and profits of its own reckoning.<sup>52</sup> In calculating export price, the ITA makes certain adjustments to ensure that the export price is “ex factory,” which does

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<sup>38</sup> 19 U.S.C. § 1673a(b)(1) (permitting domestic producers to petition an investigation).

<sup>39</sup> 19 U.S.C. § 1673(2)(A); § 1677(7)(A) (concerning material injury or threat thereof).

<sup>40</sup> 19 U.S.C. § 1673a(a)(1) (authorizing the Commerce Department to self-initiate investigations).

<sup>41</sup> 19 U.S.C. § 1677(9)(C),(D),(E),(F) (defining interested parties as those manufacturing a domestic like product); § 1677(4) (defining industry and related parties).

<sup>42</sup> 19 U.S.C. § 1677(10) (defining domestic like product).

<sup>43</sup> 19 U.S.C. § 1673 (referring to the “administrative authority” and the “commission” as determining facts about dumping); § 1677(1) (defining the “administering authority” as the Secretary of Commerce); § 1677(2) (defining the “commission” as the International Trade Commission (ITC)).

<sup>44</sup> 19 U.S.C. § 1673b(a) (requiring the ITC to make a preliminary determination of reasonable indication of injury).

<sup>45</sup> 19 U.S.C. § 1673b(b) (requiring a preliminary determination by the administering authority).

<sup>46</sup> 19 U.S.C. § 1677(b) (explaining the calculation of the dumping margins).

<sup>47</sup> 19 U.S.C. § 1677(35) (defining dumping margins).

<sup>48</sup> 19 U.S.C. § 1677b(a)(1) (explaining the calculation of normal value).

<sup>49</sup> 19 U.S.C. § 1677a(a) (defining export price); § 1677a(c) (calculating export price).

<sup>50</sup> 19 U.S.C. § 1677b(a)(1)(C) (allowing the ITA to use a third market to determine normal value); 19 C.F.R. § 351.404 (deciding which third market to use).

<sup>51</sup> 19 U.S.C. § 1677b(b) (concerning below cost sales); 19 U.S.C. § 1677b(c) (concerning non-market economies).

<sup>52</sup> *Id.* Constructive normal value calculations are carried out by the ITA taking into account general factors in the statutes. 19 C.F.R. § 351.405.

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not include post factory expenses, such as transportation costs.<sup>53</sup> The ITA's preliminary determination on dumping and dumping margins is followed by a final determination.<sup>54</sup> If after the ITA's final determination the ITC also issues a final determination finding a material injury or a threat thereof,<sup>55</sup> an order imposing antidumping duties (tariffs) equivalent to the ITA's final dumping margin<sup>56</sup> will be collected at the border by the Customs Office.<sup>57</sup>

Antidumping orders remain in effect unless they are revoked pursuant to a review of the order.<sup>58</sup> A foreign producer may request a review to revoke a final determination resulting in an antidumping order by the ITA and ITC no earlier than two years after the issuance of the order absent a showing of good cause.<sup>59</sup> However, an interested party,<sup>60</sup> including foreign and domestic producers, may request the ITA to conduct an annual administrative review to recalculate the exact amount of antidumping duties.<sup>61</sup> Five years after an antidumping order is issued, the ITA and the ITC will initiate a mandatory review of the order.<sup>62</sup> In the meantime, foreign producers may challenge both the ITC and the ITA's final determinations before the Court of International Trade and subsequently appeal to the Court of Appeals at the Federal Circuit and eventually to the Supreme Court.<sup>63</sup> However, the U.S. courts accord both the ITC and the ITA determinations great deference under the *Chevron* doctrine.<sup>64</sup>

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<sup>53</sup> 19 U.S.C. § 1677a(c)(2)(A) (concerning costs that are deducted to arrive at export price); 19 C.F.R. § 351.402.

<sup>54</sup> 19 U.S.C. § 1673d(a) (concerning a final determination by the International Trade Administration (ITA), i.e., the Commerce Department).

<sup>55</sup> 19 U.S.C. § 1673d(b) (concerning the ITC final determination).

<sup>56</sup> 19 U.S.C. § 1673e(a) (concerning the issuance of the antidumping order by the ITA).

<sup>57</sup> 19 U.S.C. § 1673e(a)(1) (concerning the assessment and the collection of antidumping duties by the Customs Office).

<sup>58</sup> 19 U.S.C. § 1675(d) (explaining the process and ability for revocation of an antidumping order subject to a review under § 1675(b) or the revocation of a final determination of the amount of duties under § 1675(a).)

<sup>59</sup> 19 U.S.C. § 1675(b)(4) (limiting review of the ITA and the ITC's final determinations resulting in an antidumping order).

<sup>60</sup> 19 U.S.C. § 1677(9) (defining an "interested party").

<sup>61</sup> 19 U.S.C. § 1675(a) (periodically reviewing the amount of the antidumping duty).

<sup>62</sup> 19 U.S.C. § 1675(c) (obligating the ITA and the ITC to review an antidumping order five years after issuance).

<sup>63</sup> The Court of International Trade has jurisdiction pursuant to 28 U.S.C. § 1581(c), and the U.S. Court of Appeals for the Federal Circuit has jurisdiction pursuant to 28 U.S.C. § 1295(a)(5). The Supreme Court has jurisdiction pursuant to the U.S. Const. art. III, § 2, cl. 2, and reviews cases by granting a writ of certiorari.

<sup>64</sup> *Chevron U.S.A., Inc. v. Nat. Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984). For an example as applied in the antidumping context see *Daewoo Elecs. Co. v. Int'l Union of Elec. v. Zenith v. U.S.*, 6 F.3d 1511, 1516 (Fed. Cir. 1993). See also *Smith-Corona v. U.S.*, 713 F.2d 1568, 1582 (Fed. Cir. 1983) (accorded "tremendous deference to the expertise of the Secretary of Commerce in administering the antidumping law").

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

1. An Economic Analysis

Advocates for the antidumping regime, including the U.S. government, attempt to cloak its protectionist nature in the unfair trade mantra. The alleged rationale of antidumping remedies is based on a self-righteous notion of “fairness” which proponents believe is achieved through a “level playing field” of their own reckoning.<sup>65</sup> In other words, these remedies are imposed on the assumption that foreign producers have engaged in certain unfair practices without which they could not have produced such cheap products. It is argued, therefore, that antidumping remedies should neutralize this unfair price advantage by imposing duties at the border. The corollary of this position is that producers who compete in the market, global or local, should be given *identical* conditions for production, including socio-economic arrangements influenced by labor-management and government-business relations. In this regard, the U.S. government contends that:

“A government’s industrial policies or key aspects of the economic system supported by government inaction can enable injurious dumping to take place. Although these policies take on many different forms, they can provide similar artificial advantages to producers. For instance, these policies may allow producers to earn high profits in a home “sanctuary market,” which may in turn allow them to sell abroad at an artificially low price. Such practices can result in injury in the importing country since domestic firms may not be able to match the artificially low prices from producers in the sanctuary market.”<sup>66</sup>

Although this ostensibly clear-cut argument may appeal to ordinary people in its most abstract terms, it is seriously flawed. First of all, one must not forget that the benefit of trade stems from the fact that trading partners are *different*, not identical, in many ways, such as their levels of development and natural endowment. This difference brings to certain producers price competitiveness because they are capable of producing their products more cheaply than their rivals. These superior conditions, collectively labeled as “comparative advantage,” are the very engine of trade.<sup>67</sup> Therefore, those conditions must

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<sup>65</sup> See BRINK LINDSEY & DANIEL J. IKENSON, *ANTIDUMPING EXPOSED THE DEVILISH DETAILS OF UNFAIR TRADE LAW*, xi (2003).

<sup>66</sup> WTO, Negotiating Group on Rules, *Communication from the United States: Basic Concepts and Principles of the Trade Remedy Rules*, TN/RL/W/27, Oct. 22, 2002, at 4. The Commerce Department’s website, instructs how to file antidumping claims against imports in the name of “Ensuring a Level Playing Field.” See The United States Department of Commerce, *Ensuring a Level Playing Field*, available at <http://www.commerce.gov/field.html> (last visited on Jun. 14, 2004). See also Jeffrey E. Garten, *Is America Abandoning Multilateral Trade?*, 74 *FOREIGN AFF.* No. 6, 50, 57 (1995) (submitting that “our standards of openness are higher than others’ because our market is more open. We want foreign countries to come up to our level, not to settle for the lowest common denominator.”).

<sup>67</sup> See WTO, *Understanding the WTO: Basics, The Case for Open Trade*, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact3\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm).

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not be leveled and those cheap prices must not be neutralized or countervailed, if we truly mean to engage in trade.<sup>68</sup> In a broader sense, market economy forces dictate that domestic industries losing their competitive edges should give their places in the market to more efficient and innovative rivals, be they foreign or domestic. This is a fundamental rule of market economy and should not be breached. And, perhaps more importantly, it is fair. According to this rule, countless firms disappear and at the same time newly emerge in this country. Consumers and the U.S. economy as a whole incessantly benefit from this seemingly simple yet powerful process.

In addition, the “sanctuary market” argument employed by the U.S. government is nothing but a façade legitimatization of the antidumping regime. The antidumping advocates view is that dumpers can set lower prices in the exporting market than they do in the domestic market only because they can assign lower cost, in a manipulative manner, to export prices than they do to domestic prices.<sup>69</sup> The antidumping advocates contend that this manipulative allocation of cost is possible thanks to dumpers’ monopoly profits in the sanctuary (home) market. Therefore, such cost structure is an outcome of “subsidization” which is unjustified and thus should be countervailed by imposing antidumping duties.<sup>70</sup> However, this is a “fallacy of cost-plus pricing,” as John Barceló aptly posited. If one duly takes into account the “demand” side in this picture, he or she will soon realize that this cost allocation is nothing but a legitimate business practice.<sup>71</sup> In other words, to maximize his or her profits, a dumper must charge a lower price in the more elastic foreign market and a higher price in the less elastic home market.<sup>72</sup> There is nothing unusual in this business practice.

In fact, those transactions described as dumping are occurring in the domestic arena all the time.<sup>73</sup> For instance, airplane companies routinely engage in price differentiation through various discounts over the same quality of seats. A shirt’s price can vary from points of sale, for example, from an outlet store to a department store. Many stores undersell their rivals even below the cost level to secure certain market share. Yet, these practices are all deemed legitimate as a profit-maximization strategy in the U.S. in the absence of “predatory intention” as is stipulated in domestic statutes such as the Robinson-Patman Act.<sup>74</sup> In other words, domestic dumping practices are perfectly legal unless dumpers intend to eventually drive out their rivals. Yet, a double-standard is evident in cases where those rivals are *foreign*. Imported products which enjoy price competitiveness, namely cheap goods, are often accused of being “dumped.”

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<sup>68</sup> Hoekman & Leidy, *supra* note \_\_, at 164.

<sup>69</sup> John J. Barceló III, *A Comment: Judicial Review and Causation in Unfair Trade Remedy Law*, in *FAIR EXCHANGE: REFORMING TRADE REMEDY LAWS 503-06* (Michael J. Trebilcock & Robert C. York eds. 1990).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Richard J. Pierce, Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 *ANTITRUST L.J.* 725, 731 (2000).

<sup>74</sup> 15 U.S.C. §13a (2007) (requiring that the purposes behind underselling be to destroy competition or eliminate competitors).

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Without economic support for the “unfair trade” rationale, the motivation for antidumping measures is left to protectionism. The unfair trade mantra, in fact, comes from those interest groups seeking protection from foreign rivals.<sup>75</sup> As Kenneth Dam observed over three decades ago, “the concern with dumping is... a concern with the protection of domestic industry from international competition.”<sup>76</sup> More often than not, such protectionist rationale is associated with a deprecatory image that the term “dump” carries with it and even serves as xenophobic propaganda.<sup>77</sup> By framing cheap imports as fruits of illicit activities through complex arbitrary regulations, antidumping measures give legal cover to the institutionalization of protectionism.<sup>78</sup> Likewise, a bellicose myopia of “us versus them,” as seen in the Cold War mentality, blinds both policy-makers and the public from the important benefits of trade, including consumers’ welfare and efficient allocation of resources rendered by cheap imports.<sup>79</sup>

Unsurprisingly, most mainstream economists and policymakers, including the former Federal Reserve Board Chairman Alan Greenspan, recognize in unison that antidumping measures are nothing but protectionism.<sup>80</sup> Alan Deardorff observes that ever since the classical study by Jacob Viner in the Twenties, economists have viewed dumping as harmless without predatory, i.e., monopolistic, intent.<sup>81</sup> A close scrutiny of a foreign producers’ cost structure soon reveals that dumping, whether by price discrimination or sales below cost, is in fact normal business behavior in the absence of any predatory intent.<sup>82</sup> In the case of price discrimination, if extra transaction costs accompanied by

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<sup>75</sup> Diane P. Wood, “Unfair” Trade Injury: A Competition-Based Approach, 41 STAN. L. REV. 1153, 1171 (1989). See also CANDIDO TOMAS GARCIA MOLYNEUX, DOMESTIC STRUCTURES AND INTERNATIONAL TRADE: THE UNFAIR TRADE INSTRUMENTS OF THE UNITED STATES AND THE EUROPEAN UNION 39 (2001) (observing that the US trade policies based on fairness in fact impose “standards embedding implicit parochial views on the behavior of political institutions and market actors”).

<sup>76</sup> KENNETH DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970).

<sup>77</sup> Bovard, *supra* note \_\_; See also Michael S. Knoll, Dump Our Anti-Dumping Law, Foreign Policy Briefing No. 11, Cato Institute, Jul. 25, 1991; Pierce, *supra* note \_\_, at 735. See also Frederick Davis, *The Regulation and Control of Foreign Trade*, 66 COLUM. L. REV. 1428, 1439 (1966) (observing that the antidumping remedy is based on the “tortious or quasi-criminal quality” of dumping and thus insinuates the “official moral sense” in its allegation).

<sup>78</sup> Lindsey & Ikenson, *supra* note \_\_, at ix.

<sup>79</sup> Mark Philip Bradley, *Narrow Idealism*, CHI. TRIB., June 6, 2004, Sec. 2, at 2-3.

<sup>80</sup> Alan Greenspan testifying before the U.S. Senate Committee on Finance on July 4, 2001, stated “These forms of protection have often been imposed under the label of promoting “fair trade,” but oftentimes they are just simple guises for inhibiting competition.” Available at: <http://www.federalreserve.gov/boarddocs/testimony/2001/200104042/default.htm>.

<sup>81</sup> Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, in THE MULTILATERAL TRADING SYSTEM, *supra* note \_\_ at 135; JACOB VINER, *STUDIES IN THE THEORY OF INTERNATIONAL TRADE*, 145-47 (1955). This predatory dumping is a kind of “intermittent” dumping which Jacob Viner viewed as harmful because it last long enough to injure other producers (unlike “sporadic” dumping) yet not long enough for consumers’ welfare to materialize (unlike “continuous” dumping). See also Barceló, *supra* note \_\_, at 508-09.

<sup>82</sup> “As long as the exporter’s marginal revenue from sales in the importing country exceeds its marginal cost of production, the exporter is behaving in an economically rational fashion.” (emphasis added) Raj Bhala, *Rethinking Antidumping Law* 29 GEO. WASH. J. INT’L L. & ECON. 1, 14 (1995). See also William J. Davey,

foreign sales are not too high, the actual sale price in the foreign market may be lower than in the home market.<sup>83</sup> Also, firms often respond to market depression or pursue sale maximization despite short-term loss of profits through sales below average or marginal cost.<sup>84</sup> As for predation, a foreign producers' potential predatory intent to drive out domestic rivals by underselling them, it is often inconceivable, perhaps "laughable," considering a foreign product's share of the importing market is often insignificant.<sup>85</sup> As a matter of fact, even in the domestic setting "predatory pricing schemes are rarely tried, and even more rarely successful."<sup>86</sup> In conclusion, the economic rationale for antidumping remedies rings false while the economic disincentives of protectionism, inefficiency and costs to consumers ring clear.<sup>87</sup>

## 2. A Legal Analysis

Admittedly, low-priced foreign products are not, and should not be, always immune from government restrictions or countermeasures even without predatory behaviors. If an underlying production process at home involves any illicit or illegitimate activities according to international trade law, or sometimes importing countries' local statutes, imports may be halted. If an import's low prices are attributable to government subsidies they may be banned or subjected to countervailing duties.<sup>88</sup> Likewise, if low prices are attributable to prison labor or piracy, the imports may be prohibited.<sup>89</sup> If low prices are the result of predation, i.e., deliberately aimed at driving out rivals in a given market to enjoy a monopolistic position afterward, domestic antitrust statutes may provide punitive measures.<sup>90</sup> If low prices on imports are otherwise legal, but nevertheless cause serious injury to domestic industries, an importing country's government may still rely on safeguard measures under certain conditions.<sup>91</sup>

However, the above-mentioned scenarios, apart from safeguards, are all tuned in to the "legality" underlying production activities, not the impact imports have on rival domestic producers. If these underlying production activities are illegal in the importing country, for example production by prison labor, the importation of such products can be banned regardless of their injurious effect to rival domestic industries. It is an established jurisprudence that any violation of international trade rules *ipso facto* nullifies or impairs

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*Antidumping Laws in the GATT and the EC*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* 296 (John H. Jackson & Edwin A. Vermulst eds., 1989).

<sup>83</sup> Deardorff, *supra* note \_\_, at 139.

<sup>84</sup> *Id.* at 144-48.

<sup>85</sup> Patrick Messerlin, *The EC Antidumping Regulations: A First Economic Appraisal*, 1980-85, *Weltwirtschaftliches Archiv* 125, 563-87 (1989); Pierce, *supra* note \_\_, at 733 (observing that in most successful antidumping cases "none of the foreign producers accounts for a dominant share of the market").

<sup>86</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 589 (1986).

<sup>87</sup> *Id.* at 154.

<sup>88</sup> Lindsey & Ikenson, *supra* note \_\_, at 42-43

<sup>89</sup> GATT Art. XX (e), (d) (general exception allowed for products of prison labor and piracy, respectively).

<sup>90</sup> See *supra* notes 2 and 76.

<sup>91</sup> GATT Art. XIX(1)(b) (allowing emergency action on imports of particular products).

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the benefits of other trading partners.<sup>92</sup> In other words, complaining parties need not demonstrate injuries that violations under international trade law may have caused them or their domestic industries. As a corollary, defending parties cannot escape their legal responsibilities from those violations even if they generate no damages to other trading partners. However, very few allegations of unfair or illegal practices leading to dumping have ever been brought before the WTO dispute settlement mechanism or under the U.S. domestic trade act, such as Section 301. These underlying practices are seldom mentioned even in the USTR's annual report on foreign trade barriers, the "National Trade Estimates (NTE)."<sup>93</sup>

In stark contrast, antidumping laws predicate their foundation on the very existence of "injuries." If certain imports, no matter how unfair they may be, do not cause injury or the threat of injury to domestic rivals the petition fails. In other words, the existence of injuries is a litmus test for affording domestic producers protection. Only after a preliminary injury determination does the DOC begin examining whether dumping has really occurred and if so to what extent (the dumping margin).<sup>94</sup> In nearly all cases, antidumping investigations are initiated by petitions from domestic industries which allege injury by unfair foreign imports.<sup>95</sup>

The protectionist attributes of the antidumping law can also be discovered in the very structure of its process, which tends to burden and disadvantage the respondents. The ITC's affirmative preliminary injury determination triggers an issuance of long and complicated questionnaires by the DOC to the "mandatory respondents," who are major foreign producers and at the same time market competitors of domestic producers.<sup>96</sup> The questionnaires are not voluntary surveys. Any omissions and insufficiencies will work against the interests of foreign respondents because the DOC habitually relies on adverse information provided by the petitioners, i.e., domestic producers, to fill in gaps. Such information is euphemistically referred to as "facts available."<sup>97</sup> Therefore, foreign respondents are forced to spend tremendous time, energy and money coping with this trying bureaucratic burden from a foreign government.<sup>98</sup>

In sum, an antidumping regime is a legalistic reincarnation of protectionism. It stigmatizes otherwise legitimate business practices under the label of "unfair trade," and based on such label it imposes penalties resembling the remedies available for the torts of deceptive conduct or patent violations.<sup>99</sup> Fair trade rhetoric serves as a façade

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<sup>92</sup> See Tarcisio Gazzini, *The Legal Nature of the WTO Obligations and Consequences of their Violations*, 17 EUR. J. INT'L L. 723, 731-732 (2006).

<sup>93</sup> Lindsey & Ikenson, *supra* note \_\_, at 33

<sup>94</sup> 19 U.S.C. § 1673b(b).

<sup>95</sup> 19 U.S.C. § 1673a(b)(1).

<sup>96</sup> Gunn, *supra* note \_\_, at 175.

<sup>97</sup> Determinations on the basis of Facts Available, 19 U.S.C. § 1677e(b).

<sup>98</sup> Gunn, *supra* note \_\_, at 175.

<sup>99</sup> Barceló, *supra* note \_\_, at 502

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legitimization which conceals the protectionist nature of antidumping duties.<sup>100</sup> Once a group of domestic producers feel threatened by cheap foreign imports they accuse foreign producers of dumping and the ITC, in about 80% of all cases, issues an affirmative preliminary ruling that dumped imports have caused or threaten to cause injury to the petitioner.<sup>101</sup>

### *C. Detailing Protectionism: A Flawed Modus Operandi and Its Devilish Details*

The nuts and bolts of the antidumping statute are numerous technicalities in both calculating dumping margins and finding injuries. Although these mechanics, including various means of analysis and computation, may appear at first glance methodical or even scientific, they are so Byzantine and labyrinthine that they tend to repel any attempt to comprehend them. Therefore, they constitute nearly a self-justifying system which is vested with vast administrative discretion and immune to routine challenges from outside.<sup>102</sup> J. Michael Finger aptly observed that:

The mind's eye can see a computer, programmed to run through the various iterations of the ways in which *dumping, injury, industry*, and other technicalities of a case might be specified. Having multiple ways to specify the technicalities mean that there is always another combination to try each time the computer receives a "No" response from the government; it just ticks over to the next iteration.<sup>103</sup>

Ironically, however, by scrutinizing these technicalities, which have been dubbed the "devilish details,"<sup>104</sup> one may unveil the antidumping regime's deceitful fair trade rhetoric and expose its substantive and procedural protectionism.<sup>105</sup> If the "false veil of unfairness loses its power to confuse or mislead," the merits of antidumping remedies

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<sup>100</sup> David Palmetier has eloquently demonstrated how antidumping laws masquerade as anti-unfair competition laws. See David Palmetier, *Competition Policy and Unfair Trade: First Do No Harm*, 49 *AUSSENWIRTSCHAFT* 417, 418 (1994); David Palmetier, *The Antidumping Law: A Legal and Administrative Non-Tariff Barriers*, in *DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS* (Boltuck & Litan eds.) (1991); David Palmetier, *The Rhetoric and Reality of the United States Antidumping Law*, 14 *WORLD ECON.* 19 (1991); David Palmetier, *The Antidumping Emperor*, 22 *J. WORLD TRADE* 5 (1988). In fact, proponents of antidumping remedies deny that these remedies serve a protectionist purpose. See e.g., S. Rep. No. 1298, 93<sup>rd</sup> Cong., 2d. Sess. (1974) at 179 ("This Act is not a 'protectionist' statute designed to bar or restrict U.S. imports; rather, it is a statute designed to free U.S. imports from unfair price discrimination practices").

<sup>101</sup> Lindsey & Ikenson, *supra* note \_\_, at 2.

<sup>102</sup> Bierwagen, *supra* note \_\_, at 158 (legislation and jurisprudence of antidumping may generate a misleading impression that sophisticated rules would lead to rule-oriented and fair outcome when those rules are subject to wide discretion and thus vulnerable to abuse).

<sup>103</sup> Finger, *supra* note \_\_, at 3.

<sup>104</sup> Lindsey & Ikenson, *supra* note \_\_.

<sup>105</sup> Barceló, *supra* note \_\_, at 520-22.

might be rethought.<sup>106</sup> This will lead people to realize Mr. Hyde's monstrosity hidden behind Dr. Jekyll's gentle face.<sup>107</sup>

## 1. Phantom Injuries

As discussed above, injuries caused by dumped imports are an essential element of antidumping remedies. No matter how unfair or illegal a foreign import may be, it is off the antidumping radar as long as it causes no injury to rival domestic industries. The injury requirement is a logical corollary of the antidumping remedies' rationale, i.e., to protect "competitors" rather than "competition" itself.<sup>108</sup> Therefore, antidumping remedies focus not on objective injuries to competition, such as those from predatory pricing, but on subjective injuries to domestic producers. The problem, however, is that such subjective injuries may also come from normal (fair) competition, not necessarily from the alleged unfair trade.<sup>109</sup> Nonetheless, the competitor-oriented antidumping statutes make it easier for the domestic antidumping authority, such as the ITC, to find injuries even when such injuries are unreal because they are not directly connected to the alleged dumping.<sup>110</sup>

Two conditions should be met to locate an injury under a given situation: scope (injury to *whom*) and extent (*how much* injury). The U.S. antidumping statute stipulates that an injury caused by dumped imports should be attributed to those domestic industries which produce "like products" of the dumped imports.<sup>111</sup> Therefore, a domestic salt producer may not claim injury caused by an allegedly dumped sugar import. In addition, such injury should be more than *de minimis*, i.e., "material," which is consequential and important.<sup>112</sup> However, these two parameters are inherently ambiguous, leaving the ITC enormous discretion which may be hijacked for protectionist purposes.<sup>113</sup> Below is an illustrative list of phantom injuries.

First, no standardized test exists to determine whether foreign imports, which are a target of an antidumping investigation, and domestic products whose producers launch an antidumping petition against those imports, are like products. Petitioners can freely square the circle of such likeness in a way which best serves their protectionist purpose. Likewise, there is no objective likeness test, which makes the ITC's injury test inevitably

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<sup>106</sup> *Id.* at 102.

<sup>107</sup> BRIAN HINDLEY & PATRICK A. MESSERLIN, *ANTIDUMPING INDUSTRIAL POLICY: LEGALIZED PROTECTIONISM IN THE WTO AND WHAT TO DO ABOUT IT* 28 (1996).

<sup>108</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (delivering the same observation from the antitrust perspective).

<sup>109</sup> Wood, *supra* note \_\_, at 1153

<sup>110</sup> Barceló, *supra* note \_\_, at 514-16

<sup>111</sup> 19 U.S.C. § 1677 (10).

<sup>112</sup> 19 U.S.C. § 1677 (7) (A).

<sup>113</sup> Bhala, *supra* note \_\_, at 47-48. Even an ardent advocate of antidumping regime admits that an injury determination by the ITC is unpredictable. Terence P. Stewart, *U.S. – Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 ARIZ. J. INT'L & COMP. L. 689, 726 (1999).

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arbitrary and leads to incongruous results. For example, although galvanized carbon steel sheeting is *not* like ungalvanized carbon steel sheeting, galvanized carbon steel wire nails *are* like ungalvanized carbon steel wire nails.<sup>114</sup> In addition, petitioners tend to narrowly define the affected market, and thus industry, to aggrandize the injuries.<sup>115</sup> For example, when the same imported goods are both marketed as a final product in the merchant market and used to produce other downstream products (captive production), petitioners will only focus on the merchant market sales in the antidumping petition to raise their odds for success.<sup>116</sup>

Second, a more serious problem lies in the lax, or often lacking, analysis on “causation” between dumping and alleged injury.<sup>117</sup> Astoundingly, the injury need not be actually “caused” by dumping: it only needs to be “by reason of” dumping.<sup>118</sup> This nearly non-existent causation requirement is a true blessing to petitioners, which need not demonstrate that dumping is the “sole or even primary” cause of injury.<sup>119</sup> Therefore, even if a domestic industry’s injury or loss of profit result mainly from consumers’ changed habits or severe competition among domestic producers,<sup>120</sup> the industry can easily raise its fingers to foreign producers and associate its injury with their alleged dumping.<sup>121</sup> Under this lax causation standard, the majority of ITC commissioners does not use any economic analysis, but instead rely on a gut test in determining the existence of injury in specific cases.<sup>122</sup> For example, an increase of imports for three years in a row will be viewed by commissioners as an evidence of a causal relation between imports and injuries.<sup>123</sup>

Third, even in the absence of actual material injury petitioners can initiate an antidumping investigation and obtain a protective action by demonstrating a mere “threat” of injury.<sup>124</sup> This inherently inferential concept requires the ITC’s “prognostication” and thus attracts protectionist abuse by petitioners.<sup>125</sup> Under this threat of injury, any foreign imports can be subject to a potential trade restriction even before

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<sup>114</sup> Wood, *supra* note \_\_, at 1153

<sup>115</sup> Bhala *supra* note \_\_, at 107

<sup>116</sup> *Id.* See also 19 U.S.C. § 1677(7)(C)(iv) (1994)

<sup>117</sup> See Wood, *supra* note \_\_, at 1161 (1989) (observing the disagreement even among the Commissioners of the International Trade Commission over the causation issue).

<sup>118</sup> 19 U.S.C. §. 1673 (2).

<sup>119</sup> Bhala, *supra* note \_\_, at 51-52; Powell, Goldstein, Frazer & Murphy, Background Materials on GATT Antidumping Issues, tab A, at 5 (June 1994) (on file with The George Washington Journal of International Law and Economics).

<sup>120</sup> “It is to be expected that when an industry expands from three to nine producers within a short period of time, severe price competition will be experienced as the new producers strive to obtain a share of the existing market.” Pressure Sensitive Plastic Tapes from Italy, Determination of Injury or Likelihood Thereof, 42 Fed. Reg. 44, 854-55 (1977) (Investigation No. AA1921-167, USITC Pub. No. 830).

<sup>121</sup> Bhala, *supra* note \_\_, at 52-53

<sup>122</sup> Wesley J. Liebel, *Import Relief on Imports from the People’s Republic of China*, 12 LOY.L.A.INT’L & COMP.L.J. 14 (1989)

<sup>123</sup> *Id.*

<sup>124</sup> WTO AD Code, art. 3.7; 19 U.S.C. § 1677(7)(F)(i).

<sup>125</sup> Bhala, *supra* note \_\_, at 104-06

they are shipped to the U.S. market. Understandably, petitioners usually, almost in a default fashion, include this threat claim in their petitions.

Fourth, injuries can be accumulated from multiple sources (countries) in order to bestow on domestic industries a maximum level of protection. As a result, even small-scale exporters can be determined to dump after their products are lumped together with those of other producers in the dumping investigation.<sup>126</sup> This cumulation practice seems to be unfair to these small-scale producers in that they are penalized as dumpers even if their exports alone would not cause any damages to domestic rivals.

Fifth, a “regrettable change” has been made during the Uruguay Round negotiation and enshrined as Article 3.4 of the WTO AD Agreement. The Article mandates the ITC to consider the “magnitude of the margin of dumping” in its injury determination, which makes the ITC more likely to find injuries when the Commerce Department has come up with a large dumping margin.<sup>127</sup>

In sum, these lax injury standards offer the ITC various routes to locate phantom injuries. Unsurprisingly, most domestic industries competing with alleged dumped imports are not truly injured by unfair imports. The Federal Trade Commission (FTC) economists Morris E. Morkre and Kenneth H. Kelly demonstrated that out of 179 cases decided by the ITC from 1980 through 1988 only 21 cases involved revenue losses greater than 10 percent.<sup>128</sup>

## 2. Phantom Prices

In addition to injury, an importing government should find the existence of dumping before imposing antidumping duties on imported products. While the ITC determines the existence of injury, the ITA within the DOC investigates and decides whether foreign producers sold their products in the U.S. market at less than fair value (LTFV), i.e., dumped, in the U.S. market and if so, to what extent.<sup>129</sup> To determine the existence of dumping and its magnitude logically requires two “prices” to be compared. The first price, which is labeled “normal value (NV),” is a normative, fair price which should have been set in the home (exporting) market without any alleged unfair governmental intervention or other such practices.<sup>130</sup> The other price, which is labeled

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<sup>126</sup> 19 U.S.C. §1677(7)(C)(iv). See also *Fundicao Tupy S.A. v. United States*, 859 F.2d 915 (1988).

<sup>127</sup> Christopher M. Dumler, *Anti-dumping Laws Trash Supercomputer Competition*, CATO INSTITUTE BRIEFING PAPERS, No. 32, Oct. 17, 1997; Bhala, *supra* note \_\_.

<sup>128</sup> Morris E. Morkre & Kenneth H. Kelly, Federal Trade Commission, *Effects of Unfair Imports on Domestic Industries: U.S. Antidumping and Countervailing Duty Cases, 1980 to 1988*, 69 (1994). See also *FTC Staff Study Estimates That Dumped, Subsidized Imports Do Not Cause Severe Injury in Most U.S. Industries*, FTC Press Release, Feb. 18, 1994.

<sup>129</sup> 19 U.S.C. § 1673 (1994)

<sup>130</sup> The U.S. Commerce Department (Import Administration), *Antidumping Manual*, Chapter VI, available at [http://ia.ita.doc.gov/admanual/admanual\\_ch06.pdf](http://ia.ita.doc.gov/admanual/admanual_ch06.pdf)

“export price” (EP), is the actual price offered in the importing country’s domestic market, which is the U.S.<sup>131</sup> The difference between these two prices constitutes the dumping margin.

The problem is that prices are always fluctuating, which complicates the determination on price discrimination, i.e., dumping. The concept of normal value itself sounds somewhat oxymoronic in the free market system because prices constantly rise and fall according to the force of supply and demand. This situation makes it hard to fix a price for a *normative* reason. Moreover, most antidumping cases, at least in the U.S., concern the situation in which the same products as imports are not sold in the exporting countries (developing countries).<sup>132</sup>

In other words, there exists no “sanctuary market” in the exporting country where government favoritism or intervention unduly creates price differences.<sup>133</sup> Accordingly, common sense dictates that there should be no “comparison” at all for the sake of determining the existence of dumping and its margin because one of two subjects for comparison does not exist. Nonetheless, the antidumping regime’s protectionist mission still forces the DOC to locate the “next most similar” products.<sup>134</sup> At this stage, the DOC’s *own* logic and philosophy replaces common sense. The DOC uses its self-designed product code, coined “CONNUM,” which categorizes distinctive characteristics or properties of each given product, such as rubber or plastic and small or big, and conducts the so-called “model matching”<sup>135</sup> to obtain two entities to be compared.

Even assuming, *arguendo*, that the DOC can come up with two matching models to be compared, obtaining their prices requires yet another layer of fiction. As discussed above, actual market prices are hard to fix. Prices can be individual, specific or averaged. Prices of today can be different from those of yesterday. You can pay lot less for the same product in an outlet mall compared to a department store. Products are often on sale for various reasons. Therefore, in order to obtain prices to determine the existence of dumping and the dumping margin, the DOC conducts a “dizzying variety of adjustments.”<sup>136</sup> The basic methodology is to strip final sale prices of all post-production expenses to acquire the so-called “ex-factory” prices. These post-production expenses include various discounts/rebates, transportation/advertisement cost and other direct/indirect selling expenses.<sup>137</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> Lindsey & Ikenson, *supra* note \_\_, at 6

<sup>133</sup> The sanctuary market is a “closed home market” where foreign producers earn profits only due to government subsidization or other intervention. *Id.* at 23; Stewart, *supra* note \_\_, at 699.

<sup>134</sup> Lindsey & Ikenson, *supra* note \_\_, at 6

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*, at 7, 21-24. In the same line, Bhala observes that no matter how identical imported products may be at the time when they enter into the U.S. market they are subsequently subject to totally different commercial trajectories which affect cost and prices. Bhala, *supra* note \_\_, at 38-45 (detailing various kinds of adjustments over both home market prices and U.S. prices).

<sup>137</sup> See e.g., 19 U.S.C. § 1677a(c)(1)(A) (1994); 19 C.F.R. s 353.41(d)(1)(i) (1995) (regarding the addition of pre-shipment expenses to the U.S. price); 19 U.S.C. § 1677a(c)(1)(B) (1994); 19 C.F.R. §

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Although the use of these ex-factory prices aims for an equi-dimensional, i.e., “apples-to-apples” comparison, a combination of factors, including the above-mentioned fictitious “model matching” practice, the inherent multiplicity of prices, and finally the DOC’s unrestricted discretion in the price adjustment process, tend to entail preposterous “apples-to-oranges” comparisons.<sup>138</sup> For example, when the DOC compares the U.S. sale prices with third-country sale prices when an investigated product is not sold in the home market, a dumping margin may easily be found solely on the ground that the third-country prices become higher due to the third country’s invisible trade barriers, which has nothing to do unfair practices by the accused dumper.<sup>139</sup>

This arbitrariness in legislating prices culminates in the situation where the DOC “constructs” prices.<sup>140</sup> Under certain circumstances in which either the model matching or third-party product comparison does not work and the DOC designates an exporting country as a non-market economy (NME), the DOC itself computes, but more accurately legislates, archetypal prices to be used in determining the existence of dumping and the dumping margin.<sup>141</sup> Here, the DOC wields enormous discretion in assigning all relevant costs for production, ranging from raw material, labor and capital, as well as producers’ profits.<sup>142</sup> No doubt, such construction is biased towards findings of dumping. In many situations the DOC relies on information and data provided by no one but petitioners in the name of “facts available.”<sup>143</sup> In addition, the profit rates that the DOC adopts in the construction of prices are often higher than in reality.<sup>144</sup>

In sum, even if one supposes *arguendo* that dumping in the form of price discrimination is a condemnable practice, the euphemistic process of “fair market comparison” to determine the existence of such dumping is not in fact fair at all. Both foreign and domestic prices in the comparison are unobtainable, and are either manipulated or constructed. Lindsey and Ikenson observed that:

In the typical antidumping investigation, the DOC compares home-market and U.S. prices of physically *different* goods, in *different* kinds of packaging, sold at

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353.41(d)(1)(iii) (1995) (regarding the addition of sales taxes to the U.S. price); 19 U.S.C. § 1677a(c)(2)(A) (1994); 19 C.F.R. § 353.41(d)(2)(i) (1995) (regarding the addition of export costs such as freight charges, insurance premiums, import duties, and warehouse expenses to the U.S. price); 19 C.F.R. § 353.57(a) (1995) (regarding the difference in merchandise (DIFMER) adjustment over the home market price); 19 C.F.R. § 353.58 (1995) (regarding the level of trade (LOT) adjustment over the home market price); 19 C.F.R. § 353.56(a) (1995) (regarding the circumstances of sale (COS) adjustment over the home market price).

<sup>138</sup> Lindsey & Ikenson, *supra* note \_\_, at 8, 22

<sup>139</sup> *Id.*

<sup>140</sup> 19 U.S.C. § 1677b(e) (1994).

<sup>141</sup> 19 U.S.C. § 1677b(b) (concerning below cost sales); 19 U.S.C. § 1677b(c) (concerning non-market economies).

<sup>142</sup> 19 C.F.R. s 353.50(a) (1995).

<sup>143</sup> 19 U.S.C. § 1677e(a) (1994); Lindsey & Ikenson, *supra* note \_\_, at 20.

<sup>144</sup> *Id.* at 29

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*different* times, in *different* and fluctuating currencies, to *different* customers at *different* levels of trade, in *different* quantities, with *different* freight and other movement costs, *different* credit terms, and other *differences* in directly associated selling experiences (e.g., commissions, warranties, royalties, and advertising). Is it any wonder that the prices aren't identical?<sup>145</sup>

On top of these structural problems, numerous bureaucratic technicalities employed by the DOC contribute to an affirmative finding of dumping by making home market value (normal value) higher and/or the U.S. market value (export price) lower. First of all, the DOC excludes most sales by domestic producers made at prices below the production cost ("below-cost" sales) in calculating normal value.<sup>146</sup> Such practice makes it easier to find dumping by ultimately exaggerating normal value, especially considering the fact that below-cost sales are not subtracted in calculating the U.S. home price unless such sales constitute at least 20 percent of total sales.<sup>147</sup>

However, this special treatment of "below-cost" sales as something in the extraordinary course of trade is without any economic rationale because, as discussed above,<sup>148</sup> firms often engage in sales at a loss for a variety of legitimate reasons, such as launching their products in a new market. This below-cost production makes perfect economic sense if one takes a closer look at firms' cost structure, especially the fact that what often matters in a firm's decision-making is "variable," not "total" cost of production.<sup>149</sup> In the absence of evidence that these firms aim for predatory pricing, the practice of below-cost sales must be allowed in the same fashion that airplane companies often undersell each other. Even more problematic is that the power to decide whether to disregard below-cost sales in calculating normal value is at the total discretion of the DOC.<sup>150</sup>

Second, because the antidumping remedy is based on an aggregate, collective notion of injuries to domestic industries fair market comparison requires summing up each dumping margin separately calculated from sales in each different category (model or type) of the same product. Therefore, if such comparison is really fair, any possible *negative* dumping margins in some categories, which indicates that the U.S. market price is *higher* than the home market price, should be allowed to offset other positive dumping margins from other categories. However, under a well-established and even judicially endorsed practice<sup>151</sup> labeled "zeroing," the DOC disallows such offsetting by zeroing any

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<sup>145</sup> *Id.* at 21 (emphasis added).

<sup>146</sup> 19 U.S.C. § 1677 b (b) (1).

<sup>147</sup> Lindsey & Ikenson, *supra* note \_\_, at 23

<sup>148</sup> *Id.*

<sup>149</sup> Bhala, *supra* note \_\_, at 72-75

<sup>150</sup> 19 U.S.C. § 1677 b (b) (2), (3)

<sup>151</sup> *Corus Staal BV v. Dep't of Commerce* 395 F.3d 1343, 1349 (C.A.Fed.,2005) (affirming the deference given to the DOC in calculating dumping margins and declining to be influenced by WTO decisions).

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negative dumping margins.<sup>152</sup> The zeroing practice tends to inflate the actual impact of dumping. Likewise, non-dumped sales in the U.S. market do not offset dumped ones, thereby increasing the possibility of the DOC's finding dumping.<sup>153</sup>

Third, any *fair* market comparison should maintain methodological coherence in calculations between the home market and the U.S. price. Therefore, "average" home market prices should be compared with "average" U.S. prices, and "individual" home market prices "individual" U.S. prices. However, the DOC often makes another deviation from this normative track and compares "average" home market prices with "individual" U.S. prices. Therefore, even if "average" U.S. prices exceed "average" home market prices and no dumping exists, the DOC still creates dumping margins by selecting a couple of low-priced anecdotal transactions in the U.S.<sup>154</sup> This scenario is most likely under an administrative review in which the DOC determines whether it maintains or terminates its pre-existing antidumping order because averaging is not adopted in the administrative review.<sup>155</sup> The bottom line is that the DOC can, and will, arrive at a finding that dumping has occurred one way or another, if it so desires.

All in all, the classic theory of justice, articulated by Aristotle, dictates that equals should be treated equally and unequals unequally.<sup>156</sup> Yet, a premise logically superseding this heuristic is that one should be able to determine whether the two subjects in question are equal or unequal before conferring on them equal or unequal treatment. If one attempts to square an unequal to an equal, any subsequent treatment based on this flawed designation is pre-ordained to be unjust. In other words, certain situations do not even warrant a comparison between what is to be compared. The fundamental defect of the antidumping regime originates from its brazen comparison of what should not be compared. This flaw, or bias, explains an astonishingly high affirmative determination rate against foreign producers by the DOC over alleged foreign dumping practices.<sup>157</sup>

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<sup>152</sup> The WTO has recently struck down the zeroing practice by the Commerce Department. See United States – Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”), WT/DS294/AB/R, Apr. 18, 2006. The Commerce Department has vowed to discontinue the practice. See Agreement on Procedures between Ecuador and the United States, in United States - Anti-Dumping Measure on Shrimp from Ecuador, WT/DS335/8 (Panel Report circulated on Jan. 30, 2007). However, it remains to be seen whether the courts and the Congress will follow the suit. See Daniel Ikenson, *Antidumping Reformers Rejoice*, Cato Institute, (Dec. 18, 2006), available at <http://www.cato-at-liberty.org/2006/12/18/antidumping-reformers-rejoice/>

<sup>153</sup> See William J. Davey, *Antidumping Laws in the GATT and the EC*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* 298-99 (John H. Jackson & Edwin A. Vermulst eds., 1989); Robin Lanier (Executive Director, Consumers for World Trade), “Zeroing of Duties,” A Letter to the Secretary of Commerce Donald Evans, Jan. 6, 2005.

<sup>154</sup> See Richard Boltuck & Robert E. Litan, *America's “Unfair” Trade Laws*, in *DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS* 1, 14 (Richard Boltuck & Robert E. Litan eds., 1991).

<sup>155</sup> Bhala, *supra* note \_\_, at 69

<sup>156</sup> ARISTOTLE, *NICOMACHEAN ETHICS*, 67-84 (Terence Irwin trans., Hackett Publishing Co. 2d ed. 1999)

<sup>157</sup> Dumler, *supra* note \_\_ (observing that the DOC rendered dumping determinations over ninety six percent of cases (804 out of 837 petitions) filed from 1980 to 1997).

### 3. Procedural Burdens and Injustice

The investigatory process of antidumping is inherently biased against respondents (foreign producers) in the sense that petitioners (domestic producers) are teamed up with the antidumping authorities (DOC and ITC) throughout the investigatory process. Therefore, impartiality or other due process values, which are the backbone of any quasi-adjudicatory or adjudicatory proceeding, cannot be anticipated from the antidumping authorities. For example, unlike in a normal litigation setting, petitioners in an antidumping proceeding are free from heavy burdens of discovery since the antidumping authorities perform an investigation by themselves.<sup>158</sup> Antidumping authorities even work with petitioners before they initiate their petition to ensure that the petition is “legally sufficient.”<sup>159</sup>

In addition, due process and other procedural safeguards cannot be fully implemented in an antidumping proceeding. The Administrative Procedural Act (APA) does not apply to an antidumping suit.<sup>160</sup> Also, the whole investigatory process is subject to a strict timetable,<sup>161</sup> which tends to militate against the interests of foreign respondents because tight deadlines deprive them of adequate time to defend their cases. For example, foreign respondents have only 45 days to respond to the DOC’s questionnaire.<sup>162</sup> In order to fully respond to such questionnaire foreign respondents need lawyers, economists, accountants, and translators.<sup>163</sup>

Therefore, the responding process costs respondents a vast amount of time, money and energy. If the respondent ever lapses on the aforementioned deadline, the DOC will use data provided by petitioners, which is predictably self-serving and adverse to the interests of foreign producers. This petitioner produced data is labeled “best information available.”<sup>164</sup> Even if domestic industries fail to prevail in the first round of an antidumping complaint, they can re-try with new filings over the same subject-matter because the doctrine of *res judicata* and collateral estoppel does not apply to the antidumping proceeding unlike other civil procedures.<sup>165</sup>

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<sup>158</sup> See Theodore W. Kassinger, *Antidumping Duty Investigations*, in LAW AND PRACTICE OF UNITED STATES REGULATION OF INTERNATIONAL TRADE 1, 2 (Charles R. Johnston, Jr. ed., 1989); Hilary K. Josephs, *The Multinational Corporation, Integrated International Production, and the United States Antidumping Laws*, 5 TUL. J. INT’L & COMP. L. 51, 65-66 (1997).

<sup>159</sup> Kassinger, *supra* note \_\_, at 16; Josephs, *supra* note \_\_, at 66.

<sup>160</sup> Kassinger, *supra* note \_\_, at 16-20; Josephs, *supra* note \_\_, at 66. See *Elof Hansson, Inc. v. United States*, 41 Cust. Ct. 519, 528 (1958) (ruling that the APA was not applicable to dumping investigations).

<sup>161</sup> 19 U.S.C. § 1673b(b) (requiring the preliminary determination be made 45 days from the date of filing); 19 U.S.C. § 1673d(a)(1) (setting the general rule that final determinations by the DOC are to be made 75 days after the preliminary determination).

<sup>162</sup> 19 U.S.C. § 1671b(a).

<sup>163</sup> Gunn, *supra* note \_\_, at 175.

<sup>164</sup> 19 U.S.C. § 1677e(b). See Wesley K. Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 L. & Pol’y Int’l Bus. 681, 698 (1981).

<sup>165</sup> 19 U.S.C. §§ 1671a(a) & 1673a(a); Josephs, *supra* note \_\_, at 66.

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This “procedural protectionism”<sup>166</sup> results from a *captured* trade policy under which domestic interest groups persuade the U.S. Congress to change various procedures, such as time limits or deadlines, to the detriment of foreign rivals.<sup>167</sup> Capitalizing on these time limits, antidumping petitioners often “overload” the system by filing loads of cases beyond the government’s capacity in a hope that the government is forced to broker settlements, such as Voluntary Export Restraints (VERs), between petitioners and foreign producers, rather than determining on the merits of the cases.<sup>168</sup>

This procedural injustice, which is potential harassment to foreign producers, severely distorts trade flows and often forces them to raise export prices to avoid antidumping investigations. In other words, a mere threat of filing antidumping petitions or initiating antidumping investigations may suffice to chill foreign producers’ entry or force cooperation with domestic producers on pricing, even in the absence actually imposed antidumping duties. In fact, this threat is very effective in forming a cartel: while petitioners can abuse the antidumping proceeding with very little cost, the anticompetitive damages to consumers and the entire economy are “significant and durable.”<sup>169</sup>

Robert Staiger and Frank Wolak empirically proved the occurrence of these trade distortions before the final determination of dumping and injury via the presence of pending investigations ( the “investigation effect”) and the suspension of investigations in exchange for foreign producers’ commitment to raise export prices (the “suspension effect”).<sup>170</sup> Therefore, by filing antidumping petitions domestic producers may attempt to merely harass foreign producers with a view to wringing cooperation from the latter (“process filers”), rather than targeting for the imposition of final duties (“outcome filers”).<sup>171</sup>

Shi Young Lee and Sung Hee Jun also demonstrated this investigation effect, yet in a more dynamic fashion. First, they show that a petitioner’s mere initiation of an antidumping complaint can increase the uncertainty for the “trade prospects” as to targeted products since an importer might be forced to pay antidumping duties in the future.<sup>172</sup> These additional transaction costs created by uncertainty tend to drive the export production to other non-petitioned foreign producers (“first order investigation

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<sup>166</sup> Barceló, *supra* note \_\_; Joe Simslawm & Edith E. Scott, *Antitrust Consequences to Private Parties of Participation in and Settlement of Selected Trade Actions*, 56 ANTITRUST L.J. 561, 575 (1987).

<sup>167</sup> O’Halloran, *supra* note \_\_, at 181.

<sup>168</sup> Finger, *supra* note \_\_, at 5.

<sup>169</sup> FEDERAL TRADE COMMISSION, ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE, AN STAFF REPORT 3 (2006) [hereinafter FTC STAFF REPORT]. See also Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L. J. 975, 977-87, 990-92 (2005).

<sup>170</sup> Robert W. Staiger & Frank A. Wolak, *Differences in the Uses and Effects of Antidumping Law across Import Sources*, NBER Paper, 1996, 385, 386-87

<sup>171</sup> *Id.*

<sup>172</sup> Shi Young Lee & Sung Hee Jun, *On the Investigation Effects of United States Antidumping Petitions*, 38 J. WORLD TRADE, 425, 433 (2004).

effect”).<sup>173</sup> Yet, news of the petition will soon reach non-petitioned foreign producers who export competitive or substitutable products. Even though these non-targeted foreign producers are not directly affected by the petition, they nonetheless tend to fear any possible future petitions toward themselves.<sup>174</sup> Their fear may be explained by a social psychology phenomenon called “priming effects” under which the salience of the previous event (the original initiation) influences, i.e., *primes*, the perception of risks by non-targeted foreign producers.<sup>175</sup> Therefore, even non-targeted firms tend to reduce their exports or raise their prices to avoid any possible antidumping attacks in the future. This is called the “second order investigation effect”.<sup>176</sup>

In sum, the antidumping mechanism inflicts high costs, and in particular uncertainty, on foreign exporters throughout its investigatory process.<sup>177</sup> It also tends to convert the U.S. adversarial system of justice into an inquisitorial one which is biased against respondents (foreign producers).<sup>178</sup> As Frederick Davis avowed forty years ago, this area of law in many aspects contravenes basic tenets of law, such as due process and equal protection, which are so assiduously respected in other areas of public law.<sup>179</sup> Without a political check on this administrative abuse, the antidumping remedy cannot be but yet another maltreatment of foreign producers.<sup>180</sup>

## II. Two Failures of the Antidumping Regime

### A. *Economic Factionism: A Madisonian Failure*

James Madison began the Federalist Paper No. 10 by submitting that

“[A]mong the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”<sup>181</sup>

Antidumping remedies are the very evil that Madison so passionately preached against. Without any true foundation for their ostensible “fair trade” rationale, as discussed above, antidumping remedies have become “little more than an excuse for

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 436.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Finger, *supra* note \_ at 248.

<sup>178</sup> Gunn, *supra* note \_, at 176.

<sup>179</sup> Davis, *supra* note \_, at 1440; James A. Kohn, *The Antidumping Act: Its Administration and Place in American Trade Policy*, 60 MICH. L. REV. 407, 421-27 (1962).

<sup>180</sup> See Davis, *supra* note \_, at 1460.

<sup>181</sup> JAMES MADISON, THE FEDERALIST No. 10, 77 (Clinton Rossiter ed., 1961).

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special interests to shield themselves from competition at the expense of both American consumers and other American companies.”<sup>182</sup> Through antidumping measures, federal economic welfare is hijacked by a handful of special interests, which can be depicted as economic “factions.”<sup>183</sup> Therefore, antidumping remedies precipitate a Madisonian failure by the government.<sup>184</sup>

Unbeknownst, American consumers are forced to pay higher prices for their everyday purchases, including candles, shrimp and computers, due to additional antidumping duties, while such overpayment enriches only a small group of producers which are losing competitive edges but are nonetheless protected by these trade remedies. This “protection tax”<sup>185</sup> has inflicted upon the U.S. economy massive economic damages. Raj Bhala pointed to the ITC’s candid analysis on the antidumping regime’s negative effect on the welfare of the U.S. economy.<sup>186</sup> The ITC estimated that outstanding antidumping and countervailing duty orders as of 1991 deprived the U.S. economy of about \$ 1.6 billion. Furthermore, the burden falls disproportionately onto the poor because targeted consumer goods are often necessities which tend to constitute a bigger portion of their spending than the rich.<sup>187</sup>

Economic harms inflicted by antidumping remedies are also felt by American companies as well as their workers. Because most antidumping tariffs are imposed on parts and intermediary goods which are used to produce other goods, producers of these final goods (the so-called “downstream” firms), such as automobile companies, face steeper costs.<sup>188</sup> For example, even if automakers no longer use imported steel, they still have to pay higher steel prices because domestic steel prices have soared as a result of antidumping measures.<sup>189</sup> As a result, each steel job saved by these antidumping tariffs costs an estimated three jobs in steel-consuming industries.<sup>190</sup> For the same reason, in the early 1990’s Toshiba closed its California laptop factories and moved to Japan after the 62.7% antidumping tariffs were imposed on flat-panel displays.<sup>191</sup> All in all, the

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<sup>182</sup> N. Gregory Mankiw & Philip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, 84 FOREIGN AFF. 107, 107 (2005).

<sup>183</sup> N. David Palmeter, *The Capture of the Antidumping Law*, 14 YALE J. INT’L L. 182, 190 n.44 (1989); Inge Nora Neufeld, *Antidumping and Countervailing Procedures – Use or Abuse?: Implications for Developing Countries* iii (2001), Policy Issues in International Trade and Commodities Study Series No. 9, UNCTAD/ITCD/TAB/10.

<sup>184</sup> See FTC Press Release, FTC Chairman Oliver Says Protectionism Not Justified, Does Not Save Jobs, Actually Hurts Economy, April 24, 1987 (observing that “the special interests ... have invented a national problem in order to advance their own interests.”).

<sup>185</sup> See Consumers for World Trade, *Protectionism in America: Watch Your Wallet* (Nov. 1, 2003), available at <http://www.cwt.org/learn/CWT%20Protection%20Tax%Study.pdf>

<sup>186</sup> Bhala, *supra* note \_\_, at 11-12; *The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements*, USITC Pub. 2900, Inv. No. 332-344, at ix (June 1995).

<sup>187</sup> Mankiw & Swagel, *supra* note \_\_, at 108.

<sup>188</sup> *Id.* at 113.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

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antidumping remedy “imposes disparate transaction costs” on parties concerned, resulting in a failure to achieve an optimal level of resource allocation in the national economy.<sup>192</sup>

Furthermore, the remedial (protectionist) effect of antidumping measures may be questionable even to their ostensible beneficiaries. While antidumping measures may allow inefficient firms to sustain themselves temporarily, they tend to eventually harm those firms in the long run.<sup>193</sup> Antidumping measures send the wrong signals to the firms’ shareholders and employees, depriving them of any entrepreneurial efforts such as restructuring. Moreover, protectionism sustained by antidumping remedies appears quite addictive.<sup>194</sup> Once in place, antidumping measures are hard to revoke, despite statutory possibilities under a “sunset review” conducted every five years.<sup>195</sup> The DOC repealed antidumping tariffs in only two of the 314 cases which it examined under the sunset review between 1998 and 2000.<sup>196</sup> Therefore, as of December 1999 Chinese “cotton shop towels” and Japanese “television receivers” had continuously been subject to an antidumping order ever since October 1983 and March 1971, respectively.<sup>197</sup> The U.S. trade law was amended during the 1970s and 1980s to make it easier to find dumping by adding special rules such as the exclusion of below-cost sales and the use of constructed value, etc.<sup>198</sup>

The foregoing self-reinforcing propensity of antidumping remedies has recently culminated in the “United States Continued Dumping and Subsidy Offset Act (CDSOA) of 2000,”<sup>199</sup> which is often referred to as the “Byrd Amendment” after its chief architect, Senator Robert Byrd. The Byrd Amendment mandates the U.S. government to disperse antidumping duties to none but antidumping petitioners on an annual basis.<sup>200</sup> Unsurprisingly, this extraordinary financial incentive has dramatically boosted antidumping petitions ever since its enactment.<sup>201</sup> Even some government agencies have warned against the devastating economic effects that the Byrd Amendment has caused to the U.S. economy. The Congressional Budget Office (CBO) has recently stated that:

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<sup>192</sup> See KEVIN SCOTT MARSHALL, ADMINISTERED PROTECTION: THE POLITICAL ECONOMY OF U.S. COUNTERVAILING DUTY AND ANTIDUMPING REGULATION 174 (1993).

<sup>193</sup> THOMAS BODDEZ & MICHAEL J. TREBILCOCK, UNFINISHED BUSINESS: REFORMING TRADE REMEDY LAWS IN NORTH AMERICA 169 (1993).

<sup>194</sup> *Id.*

<sup>195</sup> Bhala, *supra* note \_\_, at 115-16; Barbara R. Stafford & Linda S. Chang, The Sunset Provisions, Mortality and the Uruguay Round, in *The Commerce Department Speaks on International Trade and Investment* 1994, 721, 727 n.12 (PLI 1994); Bovard, *supra* note \_\_ at 140; Mankiw & Swagel, *supra* note \_\_, at 112.

<sup>196</sup> Mankiw & Swagel, *supra* note \_\_, at 112.

<sup>197</sup> Neufeld, *supra* note \_\_, at 8

<sup>198</sup> Lindsay & Ikenson, *supra* note \_\_, at 104

<sup>199</sup> The United States Continued Dumping and Subsidy Offset Act (Byrd Amendment), Pub. L. 106-387, 19 U.S.C. § 1675(c) (2000).

<sup>200</sup> *Id.*

<sup>201</sup> Kenneth J. Pierce & Matthew R. Nicely, Case Studies: Catfish and Shrimp Antidumping Cases, Conference Paper presented at the NCIEC WTO Conference, at 1-5 (Georgetown University Law Center, Mar. 11, 2004). Import Injury Investigations Case Statistics (FY 1980-2005) [http://www.usitc.gov/trade\\_remedy/Report-10-06-PUB.pdf](http://www.usitc.gov/trade_remedy/Report-10-06-PUB.pdf) (showing an increase in antidumping cases filed from 35 in 2000 to 92 in 2001) [hereafter referred to as “Injury Statistics”].

The law subsidizes the output of some firms at the expense of others, leading to inefficient use of capital, labor, and other resources of the economy. It discourages settlement of cases by U.S. firms and will lead to increased expenditure of economic resources on administration, legal representation of parties, and various other costs associated with the operation of the antidumping and countervailing-duty laws.<sup>202</sup>

Although this law has already been struck down as an illegal extension of antidumping measures by the WTO,<sup>203</sup> it is not likely to be repealed in the near future considering its unusual popularity in Capitol Hill.<sup>204</sup> It is reported that seven of the nine newly elected senators officially supported the Byrd Amendment in February 2005.<sup>205</sup> The U.S. economy will soon suffer further if U.S. trading partners decide to retaliate against U.S. exports because of the U.S.'s non-compliance with the WTO decision.<sup>206</sup> This reciprocation reveals another, much broader, negative ramification of antidumping remedies to the U.S. economy. As long as the U.S. uses antidumping remedies as its protectionist weapon, its trading partners will follow suit and plague U.S. exporters with their own antidumping investigations and duties.<sup>207</sup> In sum, antidumping remedies leave the U.S. with many self-inflicted wounds.

#### *B. Cartelization: An Antitrust Failure*

In addition to the foregoing parochialistic consequences, antidumping remedies tend to cause an antitrust breakdown by creating oligopolistic pricing patterns. The purpose of the antidumping regime is to discourage imports from being priced lower than their rival domestic products. Hence, pro-competitive pricing strategies by importers, such as "low introductory prices" or "experimental prices," are deterred.<sup>208</sup> Without this price competition, domestic prices remain stable, i.e., fixed, to the detriment of consumers and consuming industries, while such fixed prices serve the narrow interests of a handful of oligopolistic domestic producers.<sup>209</sup>

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<sup>202</sup> CBO Letter, *supra* note \_\_, at 1.

<sup>203</sup> Appellate Body Report, United States - Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

<sup>204</sup> See *Byrd-Brained*, THE ECONOMIST, Sep. 4, 2004, at 69; Dan Ikenson, "Byrdening" Relations: U.S. Trade Policies Continue to Flout the Rules, FREE TRADE BULLETIN No. 5 (Jan. 13, 2004), available at <http://www.freetrade.org/pubs/FTBs/FTB-005.html> (depicting trade remedy laws, such as the Byrd Amendment, as the "sacred cow" of the U.S. trade policy).

<sup>205</sup> Mankiw & Swagel, *supra* note \_\_, at 107.

<sup>206</sup> WTO, Arbitrator Issues Awards on "Byrd Amendment," Aug. 31, 2004, available at [http://www.wto.org/english/news\\_e/news04\\_e/news04\\_e.htm](http://www.wto.org/english/news_e/news04_e/news04_e.htm).

<sup>207</sup> Lindsay & Ikenson, *supra* note \_\_, at 122-23; Mankiw & Swagel, *supra* note \_\_, at 115 (citing research by Thomas Prusa and Susan Skeath).

<sup>208</sup> See Barceló, *supra* note \_\_, at 510-11

<sup>209</sup> *Id.* at 512; Davis, *supra* note \_\_, at 1444 (observing the potential clash between antidumping and antitrust policies). See also Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of*

## *Remedying Trade Remedies*

This anti-competitive effect, i.e., price-fixing, of antidumping remedies, can be easily located in the very concept of “dumping margins” which as a remedial criterion eventually determine the amount of duties foreign producers are forced to pay for their alleged dumping. These extra duties tend to increase domestic sale prices which would have otherwise been low. In addition, if those foreign producers decide to leave the domestic market as a result of such penalizing antidumping duties, petitioners, i.e., domestic competitors, can enjoy their pre-existing price levels which are higher than what they would have been without the existence of antidumping duties.

Therefore, the antidumping statute promotes a “legal cartel” in which the government itself monitors and enforces a price-fixing scheme for the benefit of domestic industries and to the detriment of domestic consumers.<sup>210</sup> Under this legal cartel, the mere act of filing an antidumping petition may induce effective cooperation in price-fixing among domestic and foreign producers.<sup>211</sup> Antidumping petitions targeting imported products are usually filed jointly by a certain critical mass of domestic producers producing similar goods.<sup>212</sup> In this joint effort to launch an antidumping complaint, domestic producers naturally exchange information on prices and output levels of their products. Such communication may be the onset of a price-fixing conspiracy. Recent oligopolistic behaviors, such as “price leadership” by big companies and “open pricing” through trade associations,<sup>213</sup> also facilitate such collusive communication. Under these circumstances, domestic producers can comfortably engage in the so-called “conscious parallelism” in which they can effectively coordinate their price and output decisions even in the absence of overt illegal collusion.<sup>214</sup>

However, cartelization through an antidumping petition does not remain purely a domestic phenomenon. The prototypical collusion toward a price-fixing cartel among antidumping petitioners may soon expand to foreign producers who produce identical or similar products. The message is blunt: If you raise your prices to a level with which we feel comfortable, we will withdraw the antidumping petition.<sup>215</sup> Economists have long

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*Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 24 (1995) (observing that antidumping law tends to generate tensions with antitrust authorities in that it chills low pricing in order to protect domestic industries).

<sup>210</sup> Pierce, *supra* note \_\_, at 741-42

<sup>211</sup> This “threat” effect may explain why there are so many frivolous antidumping petitions which eventually result in a *de minimis* or zero dumping margin. See Gunn, *supra* note \_\_, at 165 (arguing that petitioners should bear the costs of discovery and investigation to eliminate “frivolous and protectionist” antidumping filings).

<sup>212</sup> Petitioners may file jointly as an industry under 19 U.S.C. § 1673a(b)(1).

<sup>213</sup> See FREDERIC M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE*, 153-56, 160, 248-61, 347-59 (3d. ed. 1990).

<sup>214</sup> *Id.* at 742. See also Donald Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

<sup>215</sup> See M. Herander & J.B. Schwartz, *An Empirical Test of the Impact of the Threat of U.S. Trade Policy: The Case of Antidumping Duties*, *Southern Economic Journal*, 51, 59-79 (1984); Christopher T. Taylor, *The Economic Effects of Withdrawn Antidumping Investigations: Is There Evidence of Collusive Settlements?*, FTC

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suspected collusions among domestic and foreign producers when the former withdraw their antidumping petitions after out-of-court settlements with the latter.<sup>216</sup> Likewise, to terminate antidumping investigations against them, foreign producers are often forced to conclude “price undertaking” or “suspension agreements,” the economic effect of which is price-fixing.

Why do foreign producers feel powerless when domestic producers file antidumping petitions and why are they willing to settle rather than respond to dumping allegations and comply with the ensuing investigations? An answer to this question may be found in the U.S. District Court’s opinion in *Music Center*:

These proceedings may pose a substantial burden on their target. The foreign companies who are the subject of an antidumping investigation are presented with questionnaires seeking information about their selling practices, and, in many cases, their cost of production as well. After submission of questionnaire responses, these responses are verified by Commerce officials. The verification process sometimes involves up to five investigators reviewing source documents at the respondents’ corporate offices and factories for periods ranging between three days and three weeks.<sup>217</sup>

In particular, small foreign companies as respondents often cannot afford lawyers, accountants and economists which are necessary to fully respond to the DOC’s investigation, while the well-monied petitioners can.<sup>218</sup> The obverse side of this story is that domestic industries may be willing to spend a handsome amount of money in an antidumping suit against small foreign producers in order to harass these foreign producers out of the domestic market. This behavior, which is called a “non-price predation,” aims to raise competitors’ cost through specious litigations.<sup>219</sup>

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Working Paper, Aug. 23, 2001, available at <http://www.ftc.gov/be/workpapers/wp240.pdf>, at 8; Harrison, A., 1991, *The New Trade Protection: Price Effects of Antidumping and Countervailing Measures in the United States*, World Bank Policy Research Working Paper 808.

<sup>216</sup> See T. J. Prusa, *Why Are So Many Antidumping Petitions Withdrawn?*, 33 J. INT’L ECON. 1-20 (1992); T. Calvani & R.W. Tritell, *Invocation of United States Import Relief Laws as an Antitrust Violation*, Antitrust Bulletin 31, 527-50 (1986); P.B. Rosendorf, *Voluntary Export Restraints, Antidumping Procedure, and Domestic Politics*, AM. ECON. REV., 86, 544-561 (1996); M. Zanardi, *Antidumping Law as a Collusive Device*, B.C. WORKING PAPER No. 487 (2000); Taylor, *supra* note \_\_, at 2-3. See also Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: What Are So Few Challenged?*, 34 J. LEGAL STUD. 515, 525 (2005).

<sup>217</sup> *Music Center*, at 547 (citing Pierre F. De Ravel Esclapon, *Non-Price Predation and the Improper Use of U.S. Unfair Trade Laws*, 56 ANTITRUST L.J. 543, 549 (1987)). See also Dumler, *supra* note \_\_ (observing that lengthy questionnaires (100-200 pages), translation problems, American accounting standard, and a tight deadline for response (two-four weeks) bring great pains to foreign respondents who would be penalized, if not cooperating, by the DOC using information provided by petitioners).

<sup>218</sup> See Marshall, *supra* note \_\_, at 174 (arguing that the disparate transaction costs that the antidumping measure imposes tend to favor the interests of “highly concentrated” industries to the detriment of “highly competitive” small producers).

<sup>219</sup> See Terry Calvani & Randolph W. Tritell, *Invocation of United States Import Relief Laws as an Antitrust Violation*, 31 ANTITRUST BULLETIN 527, 529, n. 5 (1986); J. Hurwitz, *Abuse of Government Processes, the*

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Non-price predation may be a superior alternative to price predation for big domestic producers in many aspects. For example, the former is less expensive than the latter since joint petitioners can share the legal cost among themselves. In addition, price predation, while its costs are certain, cannot guarantee recoupment of these costs despite a monopoly because there is always the possibility of new entries to the market.<sup>220</sup> Moreover, in the antidumping context, petitioners can rely on the government to absorb most costs through statutory proceedings.<sup>221</sup> The DOC's own practice of not screening spurious petitions in the filing stage contributes to the potential proliferation of non-price predation in antidumping proceedings.<sup>222</sup> "[V]ery little (if any) predation is accomplished through pricing, while a good deal is achieved through litigation."<sup>223</sup>

The pain inflicted by this non-price predation on foreign producers is so grave that they tend to react even to a mere "threat" of an antidumping suit.<sup>224</sup> In other words, even without actual antidumping petitions a mere prospect, or threat thereof, sensitizes foreign producers in their pricing behaviors, forcing these producers to put higher price tags on their exports to avoid any potential antidumping attacks. This *tacit* communication can lead to an effective price-fixing.<sup>225</sup> Moreover, domestic industries lobby the government to establish the euphemistically labeled VERs, which are nothing but cartels,<sup>226</sup> with foreign countries participating under the implied threat of antidumping remedies.<sup>227</sup>

Some of the most pre-eminent antitrust scholars in the nation have illustrated the foregoing forced participation in the cartelization by foreign producers under the government fiat or under the shadow of antidumping threat by domestic producers. Frederick Scherer highlighted how the government contributed to a cartelization through antidumping proceedings.<sup>228</sup> Two New Mexico potash (potassium) producers filed an antidumping suit against Canadian potash producers, in particular the Potash

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*First Amendment, and the Boundaries of Noerr*, 74 GEORGETOWN L. J. 601 (1985). The Department of Justice also acknowledged these anti-competitive effects resulting from antidumping procedures. ("It is often not the actual imposition of antidumping duties that inhibits foreign competition so much as the indeterminate liability that arises from the filing of a dumping complaint.") Administration of the Antidumping Act of 1921: *Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means Comm. on Assessment and Collection of Duties under the Antidumping Act of 1921*, 95<sup>th</sup> Cong., 2d Sess. (1978) at 243-44.

<sup>220</sup> Calvani & Tritell, *supra* note \_\_, at 529, n.5.

<sup>221</sup> *Id.*

<sup>222</sup> See Pierre F. De Ravel Esclapon, *supra* note \_\_, at 548. See also *United States v. Roses, Inc.*, 706 F.2d 1563 (Fed. Cir. 1983).

<sup>223</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX* 357 (1978) (quoted in FTC Staff Report, *supra* note \_\_, at 38).

<sup>224</sup> James T. Hendrik, *The United States Antidumping Act*, 58 AM. J. INT'L L. 914, 927 (1964) (arguing that the mere initiation of a dumping investigation may lead foreign producers to change their prices).

<sup>225</sup> Ulrich Immenga, *Export Cartels and Voluntary Export Restraints between Trade and Competition Policy*, 4 PAC. RIM L. & POL'Y J. 93, 132-33 (1995).

<sup>226</sup> *Id.* at 114.

<sup>227</sup> Hoekman & Leidy, *supra* note \_\_, at 156.

<sup>228</sup> See FREDERIC M. SCHERER, *COMPETITION POLICY, DOMESTIC AND INTERNATIONAL* 20-22 (2000); Frederic M. Scherer, *Some Principles for Post-Chicago Antitrust Analysis*, 52 CASE W. RES. L. REV. 5, 9 (2001).

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Corporation of Saskatchewan (PCS), on February 10, 1987. Followed by the ITC's preliminary injury determination on March 23, 1987, the DOC announced preliminary dumping margins of 52% against the PCS.

The PCS was then required to post huge bonds on future exports covering duties tantamount to these preliminary dumping margins. The PCS was soon forced to increase its export price on potash in an attempt to reduce final dumping margins and to pay the bonds to be posted. Other Canadian producers followed suit, and potash prices spiked. Finally, Canadian potash producers concluded a "suspension agreement" with the U.S. government under which they agreed to fix their export prices to the titular "fair market value" for the next five years. Yet, this price hike (nearly 100%) precipitated by an antidumping suit continued throughout the 1990's, demonstrating the classic phenomenon of cartel-driven price-fixing. The government's enforcement of price-fixing through the antidumping process made this cartel legal.

Richard Pierce introduced a case in point which vividly demonstrated how the "threat" of an antidumping suit may be used to compel foreign producers to join a pre-existing price-fixing cartel.<sup>229</sup> In 1989, the U.S. ferrosilicon producers, who tried to form a price-fixing cartel, faced an obstacle from cheap imports by foreign producers from China, Kazakhstan, Russia, Ukraine, and Venezuela. In an attempt to eliminate those five non-cartel members from the U.S. market, the U.S. producers filed antidumping complaints against them and soon succeeded in preventing foreign producers from those five countries from competing with the U.S. cartel members. Yet, their cartelization soon faced another obstacle. In the early 1990's, Brazilian producers of ferrosilicon began to approach the U.S. market. This time, the U.S. producers invited Brazilian producers to join the cartel under the threat of another antidumping suit.

However, Brazilian producers declined this offer, and the U.S. cartel members executed their threat by successfully filing antidumping complaints against Brazilian ferrosilicon producers. These wrongly imposed antidumping remedies were revoked only after this cartel was revealed by a whistleblower. This case eloquently describes how effortlessly domestic producers may abuse the antidumping proceeding for anticompetitive purposes and how greatly the antidumping remedies may contribute to the solidification of a pre-existing cartel. Perhaps this may explain why big steel companies such as Bethlehem Steel and LTV Steel dominate antidumping petitions in the U.S. concerning steel.<sup>230</sup> Considering a high success ratio of antidumping suit,<sup>231</sup> such dominance by big corporations in antidumping petitions tends to oust relatively small foreign rivals.

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<sup>229</sup> Pierce, *supra* note \_\_, at 726-28

<sup>230</sup> Neufeld, *supra* note \_\_, at 12

<sup>231</sup> *Id.* at 6-7; Bhala, *supra* note \_\_.

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In sum, antidumping actions facilitate cartelization. Without antidumping actions, “it is difficult to create, maintain, and enforce a price-fixing cartel.”<sup>232</sup> Thanks to a statutorily stipulated antidumping proceeding, which creates a legal cartel, domestic industries can either deter non-cartel members from advancing on the cartelized market or force them to join the cartel.<sup>233</sup> Since a petition for an antidumping investigation should be filed by a representative number of companies producing like products, these companies tend to discuss among themselves the prices and costs of foreign competitors whose low prices threaten their own market shares.

### III. Remedying Trade Remedies: Options and Obstacles

#### *A. Repealing or Revising the Antidumping Statute?*

Confronting the aforementioned flaws and damages, a camp of scholars, lawyers and economists argue that the current antidumping statute should be repealed<sup>234</sup> and/or replaced other by antitrust regulations.<sup>235</sup> Yet, these options tend to suffer from either political infeasibility or lack reform value. First, if the antidumping statute is truly to protect domestic industries from any *unfair* foreign trade practices involving a restraint on trade or other monopolistic behaviors, antitrust statutes, such as the Robinson-Patman Act,<sup>236</sup> should apply to discipline anticompetitive behavior. Under these circumstances, however, domestic petitioners have to prove foreign dumpers’ “predatory intent,” which is a tremendously burdensome process, and they would certainly disfavor such an option as sharply decreasing their chances for legal protection against foreign competition.<sup>237</sup> Domestic industries, which are accustomed to a nearly automatic protection under antidumping remedies without the burden of proving predatory intent, would not support a legislative change fatal to their interests.

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<sup>232</sup> Pierce, *supra* note \_\_, at 731

<sup>233</sup> *Id.* at 739-41

<sup>234</sup> Raj Bhala extensively documents scholars who favor the repeal, or at least phase-out, of the antidumping regime. Bhala, *supra* note \_\_, at 14, n. 56. Wesley K. Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 LAW & POLY INT'L BUS. 681 (1981); Rowley et al., *supra* note \_\_, at 268. Tomer Broude labeled these scholars who call for the abolition of antidumping remedies as “abolitionists.” Tomer Broude, *An Anti-Dumping “To Be or Not To Be” in Five Acts: A New Agenda for Research and Reform*, 37 J. WORLD TRADE, 305, 310 (2003).

<sup>235</sup> See P.A. Messerlin, *Should Antidumping Rules be Replaced by National or International Competition Rules?*, 18 J. WORLD TRADE 37 (1995); Bernard M. Hoekman & Petros C. Mavroidis, *Competition, Competition Policy, and the GATT*, 17 WORLD ECON. 1035 (1990); Bernard M. Hoekman & Petros C. Mavroidis, *Dumping, Antidumping and Antitrust*, 30 J. WORLD TRADE 27 (1996).

<sup>236</sup> Robinson-Patman Act § 2, 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13 (Supp. V, 1964) (formerly Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914)).

<sup>237</sup> See Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust Laws*, 6 GEO. MASON L. REV. 479, 490-91 (1998).

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Others argue that the antidumping statute should be replaced by the current safeguard measures under Section 201. However, Section 201, as an exceptional trade remedy, requires a higher threshold in demonstrating injuries to domestic producers, *serious* injuries, as opposed to the antidumping measures' *material* injuries.<sup>238</sup> This more cumbersome injury standard tends to make legislators shun the proposal. Some observers suggest using the material injury standard found in the antidumping statute for safeguard measures.<sup>239</sup> However, this would be tantamount to merely changing the name of antidumping remedies to safeguard measures without a substantial redress of the antidumping remedies' negative effects.

A more modest option may be to insert the "public interest" clause in the current antidumping statute, as is the case in Australia and the European Community (EC).<sup>240</sup> The main idea behind the clause is to take into account negative economic consequences of antidumping duties to consumers and consuming industries vis-à-vis remedial effects to petitioners based on their injuries.<sup>241</sup> However, this clause seems to have exerted little impact in practice both in Australia and the EC. Antidumping authorities have seldom revoked their final dumping or injury determinations in the name of public interest once they discovered the existence of dumping and injury.<sup>242</sup>

This refusal to revoke determinations may be attributed to two factors. First, unlike antitrust authorities, antidumping authorities are not well positioned to weigh in the negative effects of antidumping remedies to consumers and consuming industries, which is a critical component of the public interest test.<sup>243</sup> Second, those negatively affected parties, such as consumers, often lack significant access to the investigatory process: they often have no legal standing in the process.<sup>244</sup> In addition, to introduce the public interest clause in the current U.S. antidumping statute appears politically infeasible considering the protectionist bias in Congress which has reinforced, through a series of amendments, the antidumping statutes and regulations.<sup>245</sup> Even if such clause is established, its practical value may be questionable without additional procedural arrangements being contemplated to ensure its effectiveness.

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

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<sup>238</sup> Trade Act of 1974 as amended, 19 U.S.C. § 2251(a)(1988) (allowing action by the executive if foreign imports invade the market in such increased quantities as to be a substantial cause of serious injury).

<sup>239</sup> Barfield, *supra* note \_\_, at 31.

<sup>240</sup> Broude labeled this camp as "reformists." Broude, *supra* note \_\_, at 311.

<sup>241</sup> Barfield, *supra* note \_\_, at 24-26

<sup>242</sup> Hoekman & Mavroidis, *supra* note \_\_, at 45-46 .

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* In the EC, the public interest (Community-interest) clause was reinforced in 1994 by according consumers legal standing. *Id.*

<sup>245</sup> Barfield, *supra* note \_\_, at 24-26; Finger, *Reform*, *supra* note \_\_, at 57. *See also* Bierwagen, *supra* note \_\_, at 157 (observing that a proposal for unilateral repeal of antidumping legislation would be the "object of derision in the prevailing political climate").

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

1. A Case for the FTC's Intervention

If the case of repealing or revising the antidumping statute is politically or practically infeasible, one reasonable alternative may be to check and discipline the antidumping proceeding under antitrust rules. In particular, the FTC, with its unique constitutional stature as the *fourth* branch guardian of competition, can play a vital role in cabinining anti-competitive aspects of the antidumping proceeding. As the Former FTC Chairman Daniel Oliver noted, Congress certainly gave the FTC responsibilities relating to international trade in addition to domestic commerce when it created the Commission in 1914.<sup>246</sup>

As discussed above, the anticompetitive nature of the antidumping statute is revealed by its lack of consideration of consumers' welfare. Captured by domestic producers' protectionist aspirations, the antidumping statute disregards consumers' injuries (high prices) while sympathizing with injuries to domestic industries. High domestic prices are the consequence of the price-fixing mechanism which is the gestalt of the antidumping regime. A mere threat of an antidumping suit by big domestic producers is enough to chill small foreign producers and force them to raise export prices.<sup>247</sup> In the end, antidumping duties imposed by the Customs Office on imports are often transferred to consumers in the form of increased retail prices.

Unfortunately, however, the three traditional branches of the government seem to have been largely ineffective in tackling the anticompetitive effects of the antidumping statute mainly because these branches themselves are involved in creating and preserving price-fixing cartels. The legislature passed the antidumping statute and has reinforced it through a series of amendments,<sup>248</sup> while the executive branch through the DOC has implemented the statute in a way which represents the interests of domestic producers.<sup>249</sup> Furthermore, the role of the Judiciary in sustaining legal cartels has been most conspicuous.

The Judiciary protects antidumping petitions and remedies by according a broad amount of deference over issues of fact and law to antidumping authorities, such as the DOC and the ITC, under the *Chevron* doctrine.<sup>250</sup> It seems nearly paradoxical that the

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<sup>246</sup> FTC Press Release, Federal Trade Commission's Role in International Trade is to Protect Consumers through Competition, FTC Chairman Oliver Says, Oct. 16, 1986.

<sup>247</sup> Hendrick, *supra* note \_\_.

<sup>248</sup> Ikenson, *supra* note \_\_.

<sup>249</sup> Lindsey & Ikenson, *supra* note \_\_, at 21

<sup>250</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Thanks to the profuse discretion enjoyed by antidumping agencies such as the DOC, not a single antidumping dispute has been adjudicated in the Supreme Court. See *e.g.*, *Allied-Signal Aerospace Co. v. United States*, 28 F.3d 1188 (1994) (viewing that the DOC's certain calculation methodology is not a change of course mandating

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court gives a free hand to those agencies which are in fact vulnerable to capture by special interest groups.<sup>251</sup> For example, the DOC's calculations and determinations on dumping margins are highly motivated by the inputs of domestic industries which the DOC exists to serve. Under these circumstances, it is not surprising that the DOC tends to find dumping margins in most cases.<sup>252</sup>

Even if the ITC were to come up with certain innovative pro-competitive interpretations of the law, the courts are unlikely to subscribe to them because it has no option but to follow the protectionist legislative intent of antidumping statutes. For example, in *Certain Red Raspberries from Canada*, one Commissioner proposed to limit the injury determinations to predatory pricing type dumping cases, i.e., below-cost foreign sales.<sup>253</sup> This proposal featured a five-factor test which focused on the "intent and cost structure" of foreign producers to evaluate the degree of their anti-competitive behaviors in the domestic market.<sup>254</sup> However, in *USX Corp. v. United States*, the court rejected this narrow interpretation in that this approach was inconsistent with the antidumping statute which permits a broader range of dumping.<sup>255</sup> After all, the court should conduct the injury test "from the standpoint of U.S. producers."<sup>256</sup>

Facing these protectionist biases manifested in the three branches' dealings with the antidumping remedies, an innovative response must be contemplated beyond conventional institutional parameters. It is at this juncture that the distinctive function of the FTC should be spotlighted. As the titular *fourth* branch, the FTC should counteract the three branches' troubling trade-restraining practices which are to the detriment of consumers and competition.<sup>257</sup> In particular, the very existence of these "public restraints" and their "long-lasting public harms," which are created and maintained by legal cartels under the antidumping regime, not only justifies but also requires the FTC's intervention

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an agency explanation under the Administrative Procedure Act), cert denied by 513 U.S. 1077 (1995); *Smith-Corona v. United States*, 713 F.2d 1568 (1983) (acknowledging huge discretion of the DOC in administering antidumping investigations), cert denied by 465 U.S. 1022 (1984); *Algoma Steel Co. v. United States*, 865 F.2d 240 (1988) (upholding the ITC's injury determination even if it is inconsistent with GATT), cert denied by 492 US 919 (1989); *Ta Chen Stainless Steel Pipe Inc. v. United States*, 298 F.3d 1330 (refusing to second-guess the DOC's use of best-information-available methodology), cert denied 538 U.S. 1031, 123 S.Ct. 2073; *Timken v.* , 354 F.3d 1334 (upholding the DOC's controversial methodology of "zeroing" in its dumping margin calculation) (2004) , cert denied by 125 S.Ct. 412 (2004); *Daewoo v. Zenith v. United States*, 6 F.3d 1511 (holding that the DOC's long-standing practice in the calculation of U.S. price (ex factory prices) is based on a reasonable interpretation of the Antidumping Act) (1993), cert denied by 114 S.Ct. 2672, 512 U.S. 1204 (1994).

<sup>251</sup> See John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV.L.REV. 713, 724-26 (1986).

<sup>252</sup> Injury Statistics, *supra* note \_\_, at 3 (stating that from 1980 to 2005, 82percent of cases resulted in affirmative preliminary determinations by the ITC).

<sup>253</sup> Wood, *supra* note \_\_, at 1162; *Certain Red Raspberries from Canada*, 7 I.T.R.D. at 1973.

<sup>254</sup> Wood, *supra* note \_\_, at 1162-63.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Pierce, *supra* note \_\_, at 743

in the antidumping matter as a guardian of market competition.<sup>258</sup> It is well known that the public restraints imposed by a legal cartel tend to be more fatal to competition than private cartels since they block a competitor's new entry to the market more effectively.<sup>259</sup>

Admittedly, the FTC alone could not invalidate the whole antidumping regime despite its anti-competitive attributes as long as a cartel remains *legal*. Nonetheless, the FTC can still expose the trade-restraining nature in procedural aspects of the antidumping regime and limit abuses by domestic producers in a way which minimizes potential harms to the market competition.<sup>260</sup>

## 2. Modalities of FTC Intervention

### *a. Administrative Adjudication*

The FTC can initiate an administrative proceeding against domestic companies or associations, if it has reason to believe that those entities, through antidumping procedures, engage in unfair or deceptive practices affecting commerce, and if it views such administrative adjudication serves public interests, i.e., consumers' welfare. Although the Commission cannot review each and every antidumping litigation, it should commence a proceeding if it has "reason to believe" that unfair practices have motivated antidumping litigation.

Several occasions may satisfy this threshold test and function as *triggers* initiating the Commission's adjudication over certain antidumping petitions. First, if the respondents of an antidumping action, i.e., foreign producers, argue that the complainants, i.e., domestic producers, deliberately manipulate or misrepresent facts and data to prevail in the antidumping proceeding, the Commission may take a close look at such allegation to decide whether there is any suspicion or reason to believe that unfair practices have been conducted on the side of domestic industries. Here, the Commission need not rely necessarily on hard and direct evidence of bad faith in the petitioners: Even certain "circumstantial evidence" may be adequate to justify initiation of an antitrust investigation.<sup>261</sup>

Second, if the DOC or the ITC in their preliminary determination rules that no dumping or injury has occurred, these negative findings may provide the FTC with grounds for suspicion that domestic producers have engaged in anticompetitive behavior.

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<sup>258</sup> *Id.* at 170, 173.

<sup>259</sup> Timothy J. Muris, *Principles for a Successful Competition Policy*, 72 U. CHI. L. REV. 165, 170 (2005).

<sup>260</sup> See Patrick A. Messerlin, *Should Antidumping Rules be Replaced by National or International Competition Rules?*, 49 *AUSSENWIRTSCHAFT* 351, 368 (1994) (viewing that competition authorities can effectively divulge the real faces of the fair trade argument since they have no vested interests in antidumping remedies).

<sup>261</sup> Calvini & Tritell, *supra* note \_\_, at 539.

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Although the FTC should conduct a preliminary investigation on its own before it concludes that an aborted antidumping petition involves certain wrongdoing and thus justifies an independent administrative adjudication, negative determinations by the DOC or the ITC might at least serve as a trigger for such a preliminary investigation by the FTC.<sup>262</sup>

Third, the FTC may want to probe withdrawn antidumping petitions as a result of settlement deals between complainants and respondents. Economists often point out that these deals are a product of a cartelizing collusion among domestic and international producers, and that they effectively fix domestic prices.<sup>263</sup> This practice of withdrawal after private deals has a certain demonstration effect on other foreign producers and effectively conveys a price-raising signal to other respondents in similar antidumping proceedings or to potential exporters.<sup>264</sup> Therefore, these de facto price-fixing deals in the form of private “price undertaking” tend to accord the FTC “reasons to believe” that certain anticompetitive conducts may be involved.<sup>265</sup> In constructing these reasons, the FTC should take into account any trade-restraining effects which the aforementioned private settlements may cause, even though these settlements are technically within the parameters of the antidumping statute and trade policies.<sup>266</sup>

If the FTC’s preliminary investigation raises a prima facie case of anticompetitive behavior by antidumping petitioners, it should issue and serve a complaint explaining the charges and including a notice of a hearing.<sup>267</sup> If the Commission is not convinced by the antidumping petitioner’s defense at the hearing, it may require withdrawal of the petition or cancel price-fixing deals through a cease and desist order.

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<sup>262</sup> D’Esclapon, *supra* note \_\_, at 551 (observing that an antitrust action for baseless petitions would have the greatest chances when an antidumping petition is dismissed before being commenced either in the DOC or in the ITC).

<sup>263</sup> Rebecca Kanter, *United States v. Nippon Paper Industries: Price-Fixing Conspiracy or Trade Remedy?*, 8 UCLA J. INT’L L. & FOREIGN AFF. 165, 173 (2003) (relating an interesting case in which the FTC found grounds of intent to price-fix when a Japanese company attempted to negotiate with an antidumping petitioner).

<sup>264</sup> See Donald S. Clark, *Price-Fixing without Collusion: An Antitrust Analysis of Facilitating Practices after Ethyl Corp.*, 1983 WIS. L. REV. 887, 889 (1983) (citing the FTC’s 1983 decision implying that certain “facilitating practices” even without an explicit agreement among producers may constitute a violation of the Sherman Act).

<sup>265</sup> 15 U.S.C. Sec. 45(b). The Department of Justice did prosecute successfully such a private agreement to raise domestic prices under the Sherman Act in a similar case involving quotas. *United States v. National Board of Fur Farms Organizations.*, 395 F. Supp. 56 (E.D. Wis. 1975) (concerning a price-fixing agreement between domestic mink farmers and foreign producers in exchange for the former’s discontinuation of lobbying to the Congress for quota legislation); Simslewn & Scott, *supra* note \_\_, at 597-99. See also, Taylor, *supra* note \_\_, at 6-7

<sup>266</sup> Simslewn & Scott, *supra* note \_\_, at 587

<sup>267</sup> *Id.*

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### *b. Amicus Briefs*

The FTC may offer their antitrust expertise to the ITC by submitting amicus briefs and assisting the ITC in its injury determination. Considering its vast ability for collecting economic data about U.S. industries and their market performance,<sup>268</sup> the ITC, upon red flags raised by FTC, can effectively take into account domestic industries' market control in deciding whether their alleged injuries from foreign dumping are justifiable. As Diane Wood insightfully contended, the ITC may conclude, after reviewing data such as the number of domestic firms and sales figures,<sup>269</sup> that their alleged injuries either result from more efficient foreign producers or purport to maintain economic rents flowing from their monopolistic or oligopolistic position in a non-contestable domestic market.<sup>270</sup> Under these circumstances, the ITC should decline to find injuries for domestic industries because doing so tends to maintain or solidify an anti-competitive market situation.<sup>271</sup>

In fact, one can find a premonition of this approach in the ITC's past practices. The ITC has often refused to find injuries when petitioners are found to be involved in anti-competitive behaviors such as price-fixing. For example, in the early 1990's when the ferrosilicon price-fixing cartels were exposed and their members prosecuted, the ITC revoked its previous injury determination prompted by these industries' use of antidumping petitions to harass foreign competitors.<sup>272</sup> Therefore, if the ITC's position is to deny an antidumping shelter to domestic industries which desire to create or maintain their anti-competitive position, it can do so by actively scanning antidumping petitions through the an antitrust lens provided by the FTC in its amicus brief. The FTC is capable of assisting the ITC in this competition-based scanning by means of its expertise in the market/competition analysis. The FTC's involvement in the ITC's injury determination can be a powerful tool preventing antidumping remedies from unduly overprotecting domestic industries and thus unnecessarily impeding competition.<sup>273</sup>

### *c. Litigation*

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<sup>268</sup> Wood, *supra* note \_\_, at 1193

<sup>269</sup> *Id.* at 1182.

<sup>270</sup> *Id.* at 1183-92.

<sup>271</sup> Finger, Reform, *supra* note \_\_, at 71 (submitting that the injury investigation should be replaced by a "national economic interest" investigation, which can take into account consumers' welfare and other competition-related consequences of antidumping measures).

<sup>272</sup> Pierce, *supra* note \_\_, at 726-28

<sup>273</sup> For example, in the 64K/256K DRAMs case, the FTC argued before the ITC that the price of Japanese DRAMs had declined not because of dumping but because of Japan's comparative advantage in producing them. See FTC, Prehearing Brief, 64K Dynamic Random Access Memory Components from Japan, No. 731-TA-270 (final), and Dynamic Random Access Memory Semiconductors of 256 Kilobits and above from Japan, No. 731-TA-300 (final), April 25, 1986, at 9. Yet, the FTC's intervention was not always well received by the Commissioners. See Harvey M. Applebaum & David R. Grace, *U.S. Antitrust Law and Antidumping Actions Under Title VII of the Trade Agreements Act of 1979*, 56 ANTITRUST L. J. 497, 516-17 (1987).

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The FTC can also make use of the federal courts in remedying antitrust violations which may be committed by domestic industries engaging in antidumping actions. The FTC has litigation authority in antitrust cases concurrently with the Attorney General<sup>274</sup> but can independently represent itself in cases where the Attorney General declines to act.<sup>275</sup> Moreover, the FTC is *exclusively* authorized to represent itself “in its own name by any of its attorneys” before the federal court under certain circumstances,<sup>276</sup> such as when it seeks injunctive relief under Section 13 of the FTC Act<sup>277</sup> or consumer redress under Section 19 of the FTC Act.<sup>278</sup> Therefore, the FTC can sue domestic producers before a federal court when they commit certain egregious anticompetitive behaviors, such as conspiring to price-fix through threats of antidumping litigation.

As a guardian of public interest, the FTC should seek “preliminary or permanent injunctive relief” against certain government actions related to antidumping remedies when the proceedings were initiated by domestic producers to achieve anticompetitive goals.<sup>279</sup> For example, if domestic producers deliberately provide manipulated facts to the DOC, which in reliance on such facts as “facts available” makes a preliminary dumping determination and subsequently imposes bonds for future antidumping duties, the FTC may obtain preliminary injunctive relief against such a bond requirement to prevent any injury to consumers.

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

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

As discussed above, antidumping remedies are to protect domestic industries from foreign competition, and naturally involve a restraint on trade through severe interference with prices and output of foreign rivals. These aspects directly concern the very rationale of antitrust statutes such as the Sherman Act. Therefore, antidumping remedies can be tamed through the FTC’s antitrust scrutiny.<sup>280</sup> Unfortunately, however, the applicability of antitrust statutes is prohibitively conditioned by a judicially crafted antitrust exemption, the *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine gives antitrust immunity to domestic producers who cooperate and exchange information among themselves in order to file antidumping

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<sup>274</sup> 15 U.S.C. § 56(a)(1)(A)

<sup>275</sup> 15 U.S.C. § 56(a)(1)(B)

<sup>276</sup> 15 U.S.C. § 56(a)(2)

<sup>277</sup> 15 U.S.C. § 53

<sup>278</sup> 15 U.S.C. § 57b

<sup>279</sup> 15 U.S.C. § 53(b).

<sup>280</sup> See Calvani & Tritell, *supra* note \_\_, at 528-29 (observing that various officials from antitrust authorities, i.e., the Department of Justice and the Federal Trade Commission have raised the question of disciplining anticompetitive aspects of antidumping proceedings or determinations).

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suits against foreign producers. The brainchild of the Warren Court, the *Noerr* decision predicated its rationale on the political freedom reified in the Bill of Rights, in particular the freedom of expression under the First Amendment. In *Noerr*, railroad industries lobbied and petitioned Congress to pass anti-truck legislation amid intense competition with truckers.<sup>281</sup> Justice Black viewed that the Sherman Act should not be employed to bar those railroad industries from exercising their political rights of lobbying and petitioning to pursue their interests.<sup>282</sup>

In *Pennington*, the Supreme Court further expanded the doctrinal reach of *Noerr*.<sup>283</sup> First, the *Pennington* Court also applied the *Noerr* immunity to lobbies directed to the Executive branch, while the *Noerr* decision concerned lobbies to the Congress. Second, Justice White, writing for the majority, further ruled that the union's effort to lobby and petition the Secretary of Labor should be given an antitrust immunity *even if* its intention was to eliminate competition.<sup>284</sup> Therefore, the Court immunized the miners' union from antitrust scrutiny over their role in creating an agreement which eventually led to a cartelization of coal industries in exchange for increased wages to union members.<sup>285</sup>

The *Noerr-Pennington* doctrine is premised on a staunch belief in the political freedom embedded in the First Amendment. The doctrine, finding its theoretical underpinnings in political pluralism and the "marketplace of ideas," takes an optimistic view of political competition among various interest groups which it believes will lead to a rational outcome as "invisible hands" determine right prices in the market.<sup>286</sup> Therefore, in order for this political market to operate well, the autonomy of those interest groups should be preserved and their privilege to pursue self-interests fully guaranteed without restraints imposed by the government.<sup>287</sup> In this very context, Justice Black's opinion in *Noerr* feared that an application of antitrust law under the Sherman Act would "disqualify people from taking a public position on matters in which they are financially interested" and would thus "deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."<sup>288</sup>

However, this sanguine perspective on interest group politics has been heavily criticized by pluralists themselves who have raised various empirical protests. For example, Robert Dahl, *qua* a pluralist himself, admitted the so-called "dilemmas of the pluralist Democracy" in which powerful interest groups may "stabiliz[e] inequalities, deform civic

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<sup>281</sup> *Noerr Motor Freight v. Eastern R.R. Presidents Conference*, 155 F.Supp. 768, 775-78 (E.D.Pa.1957)

<sup>282</sup> *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 138 (1961).

<sup>283</sup> Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L. J. 905, 924-925 (1990).

<sup>284</sup> *Id.*

<sup>285</sup> *United Mine Workers of America v. Pennington*, 381 U.S. 670 (1965).

<sup>286</sup> Minda, *supra* note \_\_, at 938-42

<sup>287</sup> *Id.* See also Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 34 (1985); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542 (1988).

<sup>288</sup> *Noerr*, 365 U.S. at 139.40.

consciousness, and distort the public agenda.”<sup>289</sup> Dahl warned against an anachronistically naïve preposition to which classical pluralism clings. Modern private actors are no longer atomistic players defined and controlled by mechanisms of the political marketplace. With more power and efficient organization, private actors are now capable of controlling and manipulating the political marketplace to their benefit.<sup>290</sup> Therefore, Dahl’s insightful observation is correct that without a radical restructuring of the borders of the private and public spheres of the government, the democratic aspiration of “egalitarian pluralism” cannot be fulfilled.<sup>291</sup>

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

As discussed above, the political liberalism that served as the rationale for the *Noerr-Pennington* doctrine is prone to criticism. Forebodings over the doctrine’s broad exemption led the Supreme Court to declare that doctrine would not be unqualified. Justice Black himself came up with an exception to the doctrine in *Noerr* labeled “the sham exception.” Under the sham exception, a domestic industry’s lobbying or petition is a “mere sham [when used] to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”<sup>292</sup>

Critically, however, the sham exception has largely been fossilized without much use on account of the court’s extremely narrow interpretation in subsequent cases. For example, the *Pennington* Court refused to apply the sham exception even to those situations in which parties explicitly revealed an antitrust intention, i.e., to eliminate competition. Justice White wrote that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition” so long as “[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.”<sup>293</sup>

The subsequent court decisions further consolidated antitrust immunity under the *Noerr-Pennington* doctrine by narrowing the operational scope of the sham exception. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc (PRE)*, the Court outlined a two-pronged definition of sham litigation.<sup>294</sup> First, the complaint should be “objectively baseless” in the sense that no reasonable litigant would expect success on the merits.<sup>295</sup> Second, only if the first prong is met, then the court will address the subjective motivation for the litigation. The question is whether the litigant has attempted to

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<sup>289</sup> Minda, *supra* note \_\_, at 943; ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY V. CONTROL 166 (1982).

<sup>290</sup> Minda, *supra* note \_\_, at 944

<sup>291</sup> *Id.*; Dahl, *supra* note \_\_, at 166-205.

<sup>292</sup> *Noerr*, 365 U.S. at 144.

<sup>293</sup> *Pennington*, 381 U.S. at 670.

<sup>294</sup> *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993).

<sup>295</sup> *Id.* at 60.

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directly interfere with the business relationship of a competitor through the use of government *process* itself regardless of its outcome.<sup>296</sup> The upshot is that the existence of any “probable cause” to institute legal proceedings precludes the sham exception.<sup>297</sup>

Under the sham test, as watered down by the *PRE* decision, it appears practically impossible to subject any antidumping petitions launched by domestic producers to an antitrust scrutiny despite their oligopolistic intention as well as price-fixing effects of their petitions. For example, even inaccurate petitions rife with “deliberate misstatements” might not be objectively baseless if such petitions eventually prevail because “a winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.”<sup>298</sup> Even a malicious antidumping suit, which is “intended solely to injure plaintiffs competitively in a trade war that defendants appear to be losing, and not to secure the trade relief for which such petitions were created by Congress,” would escape antitrust scrutiny, if the petitioner could reasonably expect to win the case.<sup>299</sup> Moreover, if a government’s determination is not influenced by the misrepresentations, such misrepresentations are not regarded as “material,” and thus do not bar the application of the *Noerr-Pennington* exemption.<sup>300</sup>

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

Moreover, this pro-petitioner bias in the antidumping proceeding tends to bolster the case for antitrust immunity by increasing the potential merits of any antidumping complaint. Antidumping authorities’ generous stance toward imprecise information

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<sup>296</sup> *Id.* at 60-61 (observing that the inquiry “should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon”) (emphasis in original).

<sup>297</sup> *Profl Real Estate Investors, Inc.* 508 U.S. 62 (1993).

<sup>298</sup> *Music Centers S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp.*, 874 F.Supp. 543, 549 (1995) [hereinafter *Music Centers*]; *PRE*, 508 U.S. at 61 n. 5. See also *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999) (ruling that antidumping petitions involving alleged misrepresentation are still under the protection of the *Noerr-Pennington* immunity).

<sup>299</sup> See *Music Center*, 874 F.Supp. at 554-55.

<sup>300</sup> *Ethyl Corp.*, 168 F.3d 119, 124 (1999).

provided by petitioners boosts their chances to win the proceeding, especially when the DOC may rely on such information as “facts available.”<sup>301</sup> These elevated chances of winning tend to clear the petitioner from the objective baselessness test under the sham exception. Even if the ITC finds no injury to the petitioner and thus the original petition can no longer stand on the merits, the petition may still not be objectively baseless if the DOC still finds some dumping margins.<sup>302</sup> Under these circumstances in which all the government agencies or branches involved in antidumping proceedings, such as the DOC, the ITC and the Court of International Trade, unabashedly favor the petitioners, a reasonable petitioner would not in fact expect that they would ever lose.

In sum, this blanket antitrust immunity under the broadest construction of the *Noerr-Pennington* doctrine and the narrowest interpretation of the sham exception results from the Warren Court’s internalization of a naively optimistic and thus flawed understanding of interest group politics.<sup>303</sup> This misunderstanding tends to sanction spurious filings of antidumping petitions whose sole purpose is to harass competitive foreign rivals and thus to block their access to domestic market. Moreover, this overreaching antitrust immunity tends to put domestic industries in a more advantageous position to force their foreign competitors to join a price-fixing cartel under the threat of antidumping suits.<sup>304</sup> Consequently, market competition comes to its demise in the name of First Amendment rights.<sup>305</sup>

#### IV. Revitalizing Antitrust Options Applied to Trade Remedies

##### A. Judicial Reconstruction of the Sham Exception

Reconstructing the *Noerr-Pennington* doctrine is inextricably linked to rethinking the sham exception. Some lower court opinions inspiringly illustrate such potential. In *Ethyl*, Judge Sloviter, in his dissenting opinion, criticized the majority which blindly followed the *PRE* court’s obsession with the “objective baselessness” test. Highlighting the Supreme Court’s solemn declaration in *California Motor Transport* as to the limitation of

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<sup>301</sup> 19 U.S.C. § 1677e(b)

<sup>302</sup> *Music Centers*, 874 F.Supp. at 554

<sup>303</sup> *Minda*, *supra* note \_\_, at 933-34

<sup>304</sup> In *Music Centers*, plaintiffs (a foreign producer and an importer) argued that the defendant (a domestic producer) filed an antidumping suit after the plaintiffs refused an offer from the defendant to join the price-fixing cartel. 874 F.Supp. at 548.

<sup>305</sup> *But cf.* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1782 (2004) (viewing that despite the constitutionalization of commercial speech antitrust law continues to generate tensions with the First Amendment in areas of exchange of market information).

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the *Noerr-Pennington* doctrine over fraudulent and unethical misrepresentations by petitioners,<sup>306</sup> Judge Solviter aptly observed in his dissent that:

[T]he majority ignores the risk that a party will *intentionally* use fraud and misrepresentation to transform a claim that is otherwise weak and unlikely to prevail, although not “objectively baseless,” into one that succeeds.<sup>307</sup>

Then, Judge Solviter prioritized the “fraud” over “objective baselessness” in an effort to reconstruct the sham exception, citing some of the Court of Appeals decisions in that direction. In *Whelan*, the Court of Appeals for the District of Columbia struck down a district court’s application of antitrust immunity on the ground that such immunity should not be available when petitioners presented “deliberately false and material representation” even if the litigation itself was not baseless.<sup>308</sup> Likewise, in *Kottle*, the Ninth Circuit held that a litigation may be a sham if a party’s “intentional misrepresentations” to the court rid the litigation of its “legitimacy.”<sup>309</sup>

In a similar context, Judge Posner in the Seventh Circuit potentially increased the possibilities of subjecting antidumping petitions to antitrust scrutiny by broadening the operational scope of the sham exception.<sup>310</sup> In a likely departure from the strictures of political expression under *PRE*, Judge Posner in *Grip-Pak, Inc. v. Illinois Tool Works* revived the critical importance of harassing intents of litigants in determining whether filing a lawsuit is a sham.<sup>311</sup> Employing the common law tort of abusive process, Judge Posner held that a litigant crossed the line and thus was subject to antitrust scrutiny via the sham exception, even if he or she presents a probable cause or colorful claim, so long as his or her sole purpose is not to win the case but to harass competitors regardless of the outcome of the case.<sup>312</sup>

In a subsequent case, Judge Easterbrook, based on Judge Posner’s analysis in *Grip-Pak*, held that cost-justification in a lawsuit should determine sham liability.<sup>313</sup> If a litigant’s litigation cost is well beyond a prospective benefit from the merits of the case, no rational person would engage in such litigation because there is no cost-justification. The only foreseeable benefit would be from an upsurge of litigation costs to a rival to the extent that the current market price is sustained.<sup>314</sup> If such a foreseeable benefit exists, such cases would fall under the rubric of sham litigation.

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<sup>306</sup> *Ethyl Corp.*, 168 F.3d at 131-32

<sup>307</sup> *Ethyl Corp.*, 168 F.3d at 131 (emphasis added).

<sup>308</sup> *Whelan v. Abell*, 48 F.3d 1247, 1254-55 (D.C.Cir.1995).

<sup>309</sup> *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir.1998), cert. denied, 525 U.S. 1140, 119 S.Ct. 1031, 143 L.Ed.2d 40 (1999).

<sup>310</sup> Minda, *supra* note \_\_, at 966-67

<sup>311</sup> *Grip-Pak, Inc. v. Illinois Tool Works*, 694 F.2d 466 (7th Cir.1982), cert. denied, 461 U.S. 958 (1983).

<sup>312</sup> *Id.* at 470-72.

<sup>313</sup> Minda, *supra* note \_\_, at 968-69

<sup>314</sup> *Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n*, 814 F.2d 358, 372 (7th Cir.1987).

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The *Grip-Pak* case law tends to furnish courts with critical avenues allowing antitrust scrutiny of possible anticompetitive behaviors by antidumping petitioners. More often than not, a powerful association of domestic producers files antidumping suits against small foreign producers in an attempt to thwart their entries to the U.S. market. In this adversarial proceeding, foreign respondents, which are often small companies, are highly disadvantaged vis-à-vis big domestic petitioners who are armed with big law firms and accountants. As stated before, the mere filing of an antidumping petition, regardless of its merit, can financially burden foreign producers, and thus be an effective harassment technique.<sup>315</sup> The antidumping authorities' heavy reliance on facts and data provided by petitioners further disadvantages respondents.<sup>316</sup> Therefore, one can easily locate a petitioner's intent to harass when he or she deliberately exaggerates or manipulates price and output data in their antidumping petitions.

Considering the foregoing predatory nature of antidumping procedures, the court should rationalize an operational scope for the *Noerr-Pennington* doctrine through a more proactive use of the sham exception in line with the *Grip-Pak* decision. One possible way of doing so is to introduce a presumption of a "sham's" existence whenever a deliberate misrepresentation is detected. A deliberate misrepresentation in an antidumping proceeding is a grave non-price predation which should raise a red flag despite the First Amendment considerations. Thus, those petitioners who deliberately misrepresent critical facts in order to prevail in an antidumping proceeding should be deprived of antitrust immunity, at least provisionally. Unless petitioners can rebut the presumption by proving that their misrepresentations have not been material, i.e., have not controlled determinations by antidumping authorities, they should be subject to an antitrust scrutiny. This way, the court can restore a balance between political freedom and market competition which has been skewed toward the former under the hitherto operation of the *Noerr-Pennington* doctrine.

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

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

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

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<sup>315</sup> Gunn, *supra* note \_\_, at 175.

<sup>316</sup> 19 U.S.C. § 1677e(b).

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As discussed above, the FTC, as an enforcer of the Sherman Act, bears the principal responsibility for monitoring whether sham litigations are launched in violation of the Sherman Act, i.e., by using the antidumping mechanism as a sheer instrumentality of restricting market competition. In its recent *Unocal* decision, the Commission emphasized that:

Whether we view misrepresentation as a distinct variant of sham petitioning or as a separate exception to Noerr-Pennington, the fabric of existing law is rich enough to extend antitrust coverage, in appropriate circumstances, to anticompetitive conduct flowing from deliberate misrepresentations that undermine the legitimacy of government proceedings.<sup>317</sup>

A mere commencement of antitrust investigation should not be automatically translated into any affirmative determination of antitrust liability. The FTC will still be subject to the *Noerr-Pennington* doctrine and the Commission's findings are judicially reviewable. Nonetheless, the FTC's active review of antidumping proceeding would convey a powerful warning to domestic producers who might be tempted to abuse the antidumping remedies and thus would deter, to a considerable extent, spurious or harassing petitions based on manipulated or false information. This kind of FTC oversight could help to remedy the current situation in which nearly a half of all antidumping petitions turn out to be without merits (no dumping margins).<sup>318</sup>

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

[W]ere the parties directly to exchange extensive information relating to their costs, the prices each has charged for the product, pricing trends, and profitability, including information about specific transactions that went beyond the scope of those facts required for the adjudication, such conduct would go beyond the contemplated protection of Noerr immunity.<sup>319</sup>

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<sup>317</sup> *In the Matter of Union Oil Co of California*, No 9305 (July 6, 2004) (Opinion of the Commission), <http://www.ftc.gov/os/adjpro/d9305/04070stigationopinion.pdf> (visited Nov 26, 2004), at 30.

<sup>318</sup> Gunn, *supra* note \_\_, at 177.

<sup>319</sup> The U.S. Department of Justice & The Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations*, Illustrative Example L, available at <http://www.usdoj.gov/atr/public/guidelines/internat.htm> (last visited on Mar. 29, 2006) [hereinafter *Antitrust Enforcement Guidelines*]. See also William T. Lifland, *Monopolies and Joint Ventures*, 813 PLI/CORP 107, 448 (1993) (observing that the Noerr-Pennington doctrine would not shield the exchange of information among antidumping petitioners designed to implement a "naked" price-fixing agreement). Cf. *United States v. Container Corp. of America*, 393 U.S. 333 (1969) (holding that "agreement between the relatively few dominant sellers of corrugated containers, a fungible product for which demand was inelastic, to give to each other on request information as to most recent price charged or quoted, resulting in stabilization of prices, violated Sherman Act").

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Second, the FTC should actively employ a new doctrinal test introduced in the recent *Unocal* decision for deliberate misrepresentation.<sup>320</sup> In *Unocal*, the Commission spelled out a two-tiered test in which a petition with misrepresentations would lose the *Noerr-Pennington* protection in non-political contexts such as an antidumping proceeding: first, the misrepresentation or omission must be “deliberate, factually verifiable, and central to the outcome of the proceeding or case”; second, “it [must be] possible to demonstrate and remedy this effect without undermining the integrity of the deceived governmental entity.”<sup>321</sup> The *Unocal* test is supported by a number of lower court decisions rejecting the application of the *Noerr-Pennington* doctrine with regards to cases involving deliberate misrepresentations.<sup>322</sup> Therefore, the *Unocal* test could provide effective regulation in the typical misrepresentation situation in the antidumping proceeding.

Critically, the *Unocal* test follows a different jurisprudential path from the *PRE* Court and thus is doctrinally distinguishable from the *PRE* sham exception. The *Unocal* test derives from *Allied Tube* in which the Supreme Court explicitly distinguished conduct that “genuinely seeks to achieve [a] governmental result, but does so *through improper means*” from a traditional meritless sham situation which the *PRE* case targeted.<sup>323</sup> Therefore, the *Unocal* test can overcome an extremely narrow scope of the sham exception defined by the first prong (“objective baselessness” test) in *PRE* because the test concerns those misrepresentations which *do* seek favorable government actions, such as affirmative dumping/injury determinations, not just meritless (sham) petitions. As a result, the *Unocal* test provides a powerful check against these “unethical and deceptive practices,”<sup>324</sup> such as data manipulation or other misrepresentation by petitioners in the antidumping proceeding. Accordingly, the *Unocal* test is preferable in deterring anticompetitive behavior damaging to the economy while posing no threats to political freedom.

Last but not least, the FTC should carve out an exception to the *Noerr* protection with regards to repetitively filed antidumping petitions through which the petitions are aimed at harassing foreign competitors regardless of the outcome.<sup>325</sup> Due to the lack of *res judicata* and collateral estoppel in antidumping proceedings, domestic producers can file new petitions on the same subject-matter even if they fail to succeed in the first round.<sup>326</sup>

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<sup>320</sup> See FTC STAFF REPORT, *supra* note \_\_, at 37-38.

<sup>321</sup> *Unocal*, *supra* note \_\_, at 48 (opinion of the Commission). See also FTC STAFF REPORT, *supra* note \_\_, at 25.

<sup>322</sup> See FTC STAFF REPORT, *supra* note \_\_, at 25-26.

<sup>323</sup> *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 n. 10 (1988) (emphasis in original). See also *F.T.C. v. Superior Court Trial Lawyers Ass’n (SCTLA)*, 493 U.S. 425 (1990) (refusing to apply *Noerr* when the restraint was “the *means* by which respondents sought to obtain favorable legislation,” not “the *consequences* of public action”) (emphases in original).

<sup>324</sup> *California Motor Transport*, 500. See also *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F. 2d 1240, 1261 (9<sup>th</sup> Cir. 1982) (ruling that “there is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicative body.”).

<sup>325</sup> See FTC Staff Report, *supra* note \_\_, at 38.

<sup>326</sup> 19 U.S.C. §§ 1671a(a) & 1673a(a); Josephs, *supra* note \_\_, at 66.

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The *PRE* test would not apply to repetitive antidumping petitions because that case involved a single petition.<sup>327</sup> Even though some of individual filings in the repetitive continuum may be successful and thus would not fail under the sham test in *PRE*, repetitive filing as a whole should still be subject to antitrust scrutiny if they are a part of a strategy to harass competitors regardless of the merit.<sup>328</sup> In other words, “[r]epetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused.”<sup>329</sup>

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

In addition to the aforementioned *ex post* monitoring, the Commission can also employ a more preemptive, *ex ante* monitoring scheme. Under its administrative rulemaking authority,<sup>330</sup> the FTC may require domestic industries to register with the Commission before they benefit from the *Noerr-Pennington* exemption in jointly launching antidumping petitions against foreign producers. This requirement serves two main purposes. First, it puts the Commission in a better position to monitor possible anticompetitive behaviors which may fall within the rubric of “sham” litigation. It is crucial for the Commission to get information as to which companies or associations file antidumping petitions because it can detect oligopolistic behavior or cartelizing more effectively than the courts. Second, such a requirement tends to exert psychological pressure under the shadow of the Commission’s potential Sherman Act investigation of antidumping complainants and thus deters abusive behavior, such as deliberate misrepresentation of facts.

This rulemaking proposal is not unprecedented: it has already been adopted and implemented in a parallel area. The Webb-Pomerene Act<sup>331</sup> provides a case in point. The Act, legislated in 1918, is to permit U.S. exporters to collude among themselves in foreign markets under the exemption of the Sherman Act. This Act purports to prevent U.S. small and medium exporters from being disadvantaged in foreign markets from its own domestic law vis-à-vis foreign rivals who were seldom subject to the rigorous antitrust disciplines.<sup>332</sup> Nonetheless, the Webb-Pomerene Act does not tolerate any antitrust consequences *within* the U.S. For example, if those exporters attempt to “artificially or

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<sup>327</sup> See FTC Staff Report, *supra* note \_\_, at 33.

<sup>328</sup> *Id.* at 31.

<sup>329</sup> *California Motor Transport*, 73 (concurring opinion). See also *USS-POSCO*, 31 F. 3d, at 811 (inquiring whether legal filings were made “not out of a genuine interest in redressing grievances, but as a part of a pattern or practice of successive filings undertaken essentially for purposes of harassment”).

<sup>330</sup> 15 U.S.C. § 18a (d) (stipulating that the FTC may “prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section”); 15 U.S.C. § 46 (g) (providing that the FTC may “make rules and regulations for the purpose of carrying out the provisions of this Act”).

<sup>331</sup> 15 U.S.C. §§ 61-66.

<sup>332</sup> Elaine Metlin et al., *The Webb-Pomerene Act: A Relic That Has Outlived Its Usefulness*, *The Antitrust Rev. Am.* (2006), available at [http://www.dicksteinshapiro.com/files/Publication/518eafb1-5df5-4b8f-bc7b-013f07753df3/Presentation/PublicationAttachment/8c563117-3d1f-4cf4-833f-0737df6d6b19/DSMDB-%231987778-v1-Global\\_Compensation\\_Review.pdf](http://www.dicksteinshapiro.com/files/Publication/518eafb1-5df5-4b8f-bc7b-013f07753df3/Presentation/PublicationAttachment/8c563117-3d1f-4cf4-833f-0737df6d6b19/DSMDB-%231987778-v1-Global_Compensation_Review.pdf).

intentionally enhance or depress” U.S. prices on similar products that they trade or “substantially lessen competition” within the U.S., such behaviors are not immune from the Sherman Act.<sup>333</sup> Highlighting these exceptions, the FTC, by promulgating its own rules, reiterated a limited antitrust exemption under the Webb-Pomerene Act and declared its potential antitrust jurisdiction in those situations falling under the exceptions.<sup>334</sup>

The FTC’s rule-making experience under the Webb-Pomerene Act sheds light on its similar responsibilities over the *Noerr-Pennington* doctrine. Both the Webb-Pomerene Act and the *Noerr-Pennington* doctrine concern an antitrust immunity rendered to protect U.S. industries from foreign competition arising under international trade. Yet, an antitrust immunity under both situations is not unlimited and conditioned by certain exceptions. Therefore, the FTC, as it does under the Webb-Pomerene Act, should set an internal rule by which to check and monitor whether these exceptions to antitrust exception are triggered by domestic industries’ possible abusive use of antidumping petitions. Under the proposed registration or notification rule, the Commission, while it still accommodates the judge-made *Noerr-Pennington* exemption, can extend its potential jurisdiction to any abusive antitrust behaviors, such as sham petitions, which cannot be protected even under the exemption.<sup>335</sup> If the Commission has “reason to believe” that those abusive behaviors occur in violation of the Sherman Act, it may initiate an investigation.<sup>336</sup> If the Commission concludes after the investigation that the Act is violated, it may recommend domestic companies or association to withdraw their antidumping petitions.<sup>337</sup>

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

In an attempt to narrow the scope of antitrust immunity, Gary Minda linked common law remedies (e.g., the tort of abusive litigation) to antitrust challenges against predatory behaviors or other anticompetitive actions to restrain trade.<sup>338</sup> First, he finds a possibility to “disapply” the *Noerr-Pennington* doctrine under certain circumstances in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*<sup>339</sup> which justified the introduction of common law remedies in the area of antitrust disciplines.<sup>340</sup> In *Walker Process*, the Supreme Court held that the enforcement of a patent earned by fraud in order to restrain trade may violate Section 2 of the Sherman Act.<sup>341</sup> By focusing on the

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<sup>333</sup> 15 U.S.C. § 62

<sup>334</sup> FTC, Webb-Pomerene Act Filing, available at <http://www.ftc.gov/os/statutes/webbpomerene/> (Subpart E – Export Trade Associations).

<sup>335</sup> Cf. *Id.* at § 1.41, 1.42.

<sup>336</sup> Cf. *Id.* at § 1.43.

<sup>337</sup> Cf. *Id.*

<sup>338</sup> Minda, *supra* note \_\_, at 1022-23

<sup>339</sup> *Walker Process Equip., Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965)

<sup>340</sup> Minda, *supra* note \_\_, at 1023

<sup>341</sup> *Walker Process Equip., Inc.*, 382 U.S. 172 (1965)

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fraudulent behaviors and anticompetitive motivations of the petitioner, the Court paved the way for disciplining abusive petitioning without engaging in the *Noerr-Pennington* doctrine.<sup>342</sup> When applied to antidumping complaints, the *Walker Process* case law can be adopted by a court, at least by analogy, to subject domestic industries' predatory antidumping petitions based on deliberate misrepresentations on facts and data, to the Sherman Act disciplines, without any need to engage the doctrine of *Noerr-Pennington* immunity.

This approach of stripping antidumping petitioners of the *Noerr-Pennington* privilege via tort doctrines, like tortious interference, hinges on basic values which the general tort system aims to protect, such as fairness and business ethics.<sup>343</sup> If domestic producers abuse the import relief, such as the antidumping mechanism, through an intentional, deliberate use of false information and misstatements, they fail to comply with the "rules of the game," and the value of competition is compromised beyond the permissible exception.<sup>344</sup> Under these circumstances, antitrust immunity which is reserved for normal joint petitioning under the *Noerr-Pennington* doctrine is no longer applied.

Nonetheless, it remains uncertain whether the court subscribes to this tort-based disapplication of the *Noerr-Pennington* doctrine. In fact, the Third Circuit in *Ethyl* extended the *Noerr-Pennington* doctrine even to common law tort claims. In this case, an Indian ibuprofen manufacture, Cheminor, sued an American ibuprofen manufacturer, Ethyl, on the grounds of antitrust violation and common law torts, of unfair competition and tortious interference. Ethyl was the only bulk ibuprofen producer in the U.S. before Cheminor started to export bulk ibuprofen to the U.S. After failing to lobby the USTR to block the Cheminor's market access, Ethyl filed an antidumping and countervailing duty suit against Cheminor and succeeded to obtain a decision ordering Cheminor to pay 43.71 % duties on their export amounts.<sup>345</sup> This additional cost forced Cheminor to retreat from the U.S. market, which was followed by Ethyl's withdrawal of its petition.<sup>346</sup> Cheminor then sued Ethyl on both grounds of antitrust and common law tort.

The district court dismissed the antitrust claim under the *Noerr-Pennington* doctrine and rejected jurisdiction over the common law tort on procedural grounds.<sup>347</sup> The Third Circuit also dismissed the antitrust claim by applying the *Noerr-Pennington*

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<sup>342</sup> Minda, *supra* note \_\_, at 971, n. 232

<sup>343</sup> Cf. Marina Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 73-74 (1997).

<sup>344</sup> *Id.* Regarding tortious interference in general, see Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudent Response*, 38 ARIZ. L. REV. 1175 (1996); Orrin K. Ames III, *Tortious Interference with Business Relationships: The Changing Contours of the Commercial Tort*, 35 CUMB. L. REV. 317 (2005).

<sup>345</sup> *Ethyl Corp.*, 168 F.3d at 130

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

doctrine. At the same time, it extended the same doctrine to the tort claims and thus rejected them.<sup>348</sup> The court held that:

[We] have been presented with no persuasive reason why these state tort claims, based on the same petitioning activity as the federal claims, would not be barred by the *Noerr-Pennington* doctrine.<sup>349</sup>

The court basically viewed that the First Amendment principles should apply to the New Jersey tort claims, based on *Brownsville* which held that the *Noerr-Pennington* doctrine immunizes tort liability for the failure of reporting nursing home violations to regulatory authorities.<sup>350</sup>

However, the dissenting judge in *Ethyl*, Judge Sloviter who was the very author of the *Brownsville* opinion, argued that the majority's interpretation of the sham exception was flawed and thus unduly narrowed the operational scope of the Sherman Act.<sup>351</sup> He also contended that *Brownsville* should not be read to warrant the majority's broad application of antitrust immunity to common law tort claims because the decision simply dismissed a damage action against a legitimate reporting activity and should thus be distinguished from the current case which elicited government actions via alleged fraudulent misrepresentations.<sup>352</sup>

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

## Conclusion

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

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<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir.1988) (Sloviter, J.).

<sup>351</sup> *Ethyl Corp.*, 168 F.3d at 134

<sup>352</sup> *Id.*

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While “the first amendment has not been interpreted to preclude liability for false statements,”<sup>353</sup> the courts have failed to provide clear guidance as to the scope of the *Noerr-Pennington* doctrine.<sup>354</sup> This Article locates room for the FTC to make use of its statutory jurisdiction over trade remedies and calls for a proactive stance by the FTC on this issue. In doing so, the FTC can achieve the same goal shared by trade and antitrust policies, “to remove barriers to the competitive process.”<sup>355</sup> Administrative protections, such as antidumping measures, not only impede international commerce but also cause market distortions, which prevents growth and job creation both domestically and internationally.<sup>356</sup> Antitrust oversight of trade remedies will eventually bring forth the salutary effect of forcing domestic producers to become more innovative and competitive in the global market.<sup>357</sup>

J. Michael Finger once portrayed the antidumping regime as a “witches’ brew of the worst of policy-making: power politics, bad economics, and shameful public administration.”<sup>358</sup> Now, it is time to break the spell cast by this protectionist brew using an antitrust antidote.

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<sup>353</sup> *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F. 2d 1240, 1261 (9<sup>th</sup> Cir. 1982).

<sup>354</sup> FTC STAFF REPORT, *supra* note \_\_, at 16.

<sup>355</sup> OECD, COMPETITION AND TRADE POLICIES: THEIR INTERACTION 74 (1984).

<sup>356</sup> *Id.* at 73-74.

<sup>357</sup> Joseph Stiglitz, *Hearings on Global and Innovation-Based Competition*, Federal Trade Commission, Washington D.C., Oct. 12, 1995 (Docket No.:P951201).

<sup>358</sup> Finger, *supra* note \_\_, at 57.