# ANTIDUMPING:

# TIME TO: (1) GO BACK TO BASICS; AND (2) POLITICIZE THE FINAL OUTCOME; OR (3) SUBSTITUTE SAFEGUARDS FOR ANTIDUMPING ACTIONS

Claude Barfield
American Enterprise Institute

Paper Prepared for the Centennial of Anti-Dumping Legislation and Implementation Symposium

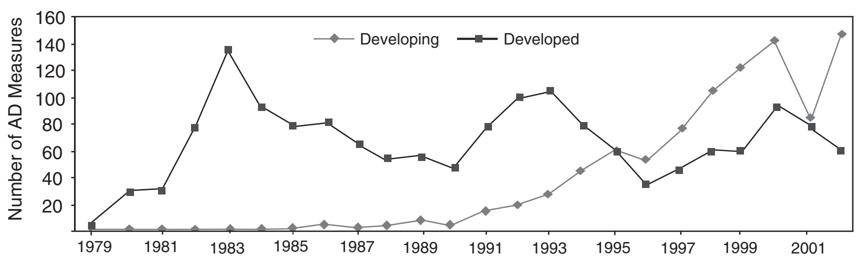
March 12, 2004
University of Michigan, Ann Arbor

This paper is a distillation of, and expansion upon, the analysis and policy recommendations the author presented in a recently published study: *High-Tech Protectionism: The Irrationality of Antidumping Laws* (AEI Press, 2003). The book traced the attempts by succeeding U.S. administrations over the past several decades to use antidumping actions as industrial policy tools to foster and protect four industries: semiconductors, flat-panel displays, supercomputers—and steel (steel was added on the premise that those elements of the steel industry that will survive in the United States will incorporate new technologies and processes into their production cycle). Based on the lessons gleaned from these sectors, the study made a series of recommendations for reform of U.S. (and other national) antidumping laws and regimes.

The hallmarks of these proposals are attempts to go back to the basics of competition policy and to introduce frankly political judgments at the end of the process leading to the imposition of antidumping duties or price undertakings.

Two facts about the recent history of antidumping actions should be underscored: First, there has been a great proliferation in the use of antidumping cases among WTO members (particularly by developing countries), combined with a rising number of cases targeting the United States. Second, the current Doha Round of WTO negotiations could be jeopardized by a backlash against the antidumping rules and by threats to block trade liberalization in other areas unless the antidumping rules are reformed. Figure 1 shows the trend in new antidumping measures for both developed and developing countries from 1979 to 2002. For the past decade (1990–2002), developed country new antidumping measures have fluctuated from a low of 33 to a high of 105. But the striking change has come in the numbers for developing countries, which have risen almost steadily each year from 3 in 1990 to a high of 146 in 2002. By mid-2002, India (150 measures in place), South Africa (98), Mexico (61), and Argentina (58) were moving up the ranks to join the United States (264), the European Union (219), Canada (90), and Australia (56) as the most frequent antidumping users (WTO 2002a). In 2000, more than seventy countries had antidumping laws on the books.

FIGURE 1
ANTIDUMPING MEASURES BY IMPORTING COUNTRIES:
DEVELOPING VS. DEVELOPED COUNTRIES, 1979–2002




| | | | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Developed | 4 | 29 | 31 | 77 | 135 | 93 | 78 | 82 | 65 | 53 | 55 | 46 | 76 | 98 | 105 | 78 | 59 | 33 | 46 | 59 | 58 | 93 | 77 | 59 |
| Developing | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 4 | 1 | 3 | 7 | 3 | 14 | 18 | 26 | 44 | 59 | 51 | 73 | 103 | 124 | 142 | 82 | 146 |

Source: WTO 2002a.
Note: All of the high-income OECD members (23 countries in total) are counted as "developing" countries.

Both developed and developing countries have been targeting more countries. At the end of 2002, the United States led the brigade, with actions in place against 48 countries; but developing countries were also expanding their antidumping targets: between 1995 and 2002, India jumped from 7 to 39 countries; Brazil from 12 to 24; and Mexico from 13 to 17 targeted countries. The European Union maintained measures in place against 34 countries at the end of 2002 (WTO 2003a). And finally, the United States stood third behind China and South Korea as the most popular target of antidumping investigations. From January 1995 through December 2002, the United States was the subject of 115 investigations initiated by 18 different countries. During the same time interval, 67 definitive measures were imposed against U.S. exports (WTO 2003f).

## Antidumping: A Threat to the Doha Round Negotiations

Though developing countries, defensively, have become keen students of the protectionist antidumping game, they are still novices, far behind the United States and the European Union in the exploitation of antidumping actions to stifle international competition. The United States, with over 250 measures in place, and the EU, with more than 200, still far outdistances even the most eager learners among the developing countries.

It should come as no surprise, then, that reform of the WTO antidumping rules has become a hotly debated topic in the new Doha Round of multilateral trade negotiations. Leading developing countries such as Brazil, Chile, Korea, Colombia, Hong Kong, Turkey, Mexico, Costa Rica, Singapore and others have threatened to hold all other negotiating issues hostage to changes in this protectionist vestige from the past. They have been joined by several developed countries, including, Norway, Switzerland, Israel, and Japan (no doubt as a result of its long history as the chief target of antidumping actions by the United States and European countries) (International Trade Reporter [ITR] November 1, 2001; May 2, 2002).

In a series of joint papers in 2001 and 2002, these oddly named “Friends of Antidumping” set forth a number highly technical reforms for WTO antidumping procedures and methodologies, including, among others, “zeroing,” constructed values, cumulative assessment of injury, the “de minimus” rule, the causal relationship between dumping and injury, sunset reviews and the use of “facts available.” (ITR, May 2, May 9, July 18, 2002).

Demands for fundamental changes in WTO trade remedy rules will present the Bush administration with one of its most difficult challenges in the Doha Round negotiations. In the run-up to the launching of the round in November 2001, while the administration beat back attempts in Congress to tie its hands completely, both houses of Congress passed strongly worded resolutions advising the president not to agree to major revisions in the current regime. The House of Representatives resolution passed 410 to 4 (its also included a sop to foes of antidumping with a mandate to take steps to stop other countries from hurting U.S. exporters through misuse of trade laws) just one week before the Doha meeting (ITR November 15, 2001). Defenders of U.S. trade laws wanted the administration to veto any discussion of these issues in the upcoming negotiations. In order to break a deadlock that would have prevented the launch of the new round, however, U.S. Trade Representative Robert Zoellick agreed to language that placed trade remedies laws on the table—but, at least in the American view, under tightly restricted conditions and terms. The Doha Declaration allows negotiations “aimed at clarifying and improving disciplines" under the WTO's existing antidumping and subsidies agreements, but the mandate also states that such negotiations will preserve the "basic concepts, principles and effectiveness of these Agreements, their objectives and instruments" (ITR November 15, 2001; February 14, 2002).

In a message to Congress and in a submission to the WTO, the United States has directly challenged both the legal and the methodological bases for key proposals presented by the "Friends of Antidumping." Beyond the individual technical arguments, the United States holds that as a group these proposals violate the Doha Declaration's mandate that negotiations preserve the "basic concepts, principles, and effectiveness" of existing antidumping national regimes (ITR, October 17, 2002; October 24, 2002).

Clearly, the Bush administration's strategy is to wait until the very end of the Doha Round negotiations before dealing with proposed antidumping reforms. What defenders of the current system fear—and opponents hope for—is that in order to seal a "grand bargain" in the closing hours of negotiations, U.S. Trade Representative Zoellick will be forced (or will claim to be forced) to accept at least some of the major demands that have been put forward by developing countries. The problem with this approach is that developing countries thus far have been adamant in opposing any interim agreements absent movement on antidumping issues. Thus, the outcome of antidumping negotiations—and the endgame for the Doha Round itself—remains doubtful.[1]

[1] Antidumping issues played no part in the disastrous outcome of the ministerial meeting in Cancun. The reason is probably twofold: one, even with already conflicting interpretations, the wording of the Doha Declaration fixed the parameters of the negotiations; and two, with all of the acrimony over agriculture, the development agenda, and TRIPS, all sides seem to have decided to hold off and fight it out another day (for details on Cancun negotiations, see ITR, September 4,11, 18, 2003.)

**International High-Tech Competition and Antidumping Laws**

National dumping laws (and WTO rules) define dumping as exporting (or “dumping”) products into a foreign market at prices below the cost of production, or below the prices charged in the domestic market, or third markets (Jackson, 1997). Economists have identified a number of different categories of “dumping” actions, related to the underlying motivations of the exporting company (Willig 1998). Market-expansion dumping takes place when there are differences in demand between two discrete and separable markets. Cyclical dumping occurs when a sudden downturn in demands creates a situation of oversupply. State-trading dumping occurs when a non-market economy wants to get hard currency or creates an oversupply in an industry due to poor planning. None of these types of dumping is meant to create monopoly conditions. Under most circumstances, economists believe these are relatively benign forms of dumping, unless accompanied by other private market or government practices.

The actions that should most concern proponents of antidumping laws occur when companies engage in dumping in order to increase market power to such a high degree that they will be able to charge monopoly prices later. Broadly speaking, economists identify two categories of actions that could constitute anticompetitive dumping onto a market.

The first type of market-power dumping is known as “predatory dumping.” This occurs when companies export at low prices to drive rivals out of business and obtain monopoly power. Four basic prerequisites are necessary for predatory dumping to take place successfully. First, a country must possess a large market share at home that is protected or serves as a “sanctuary market.” Second, there must be an opportunity to invade another market to obtain larger market shares. Third, if there are several producers in the domestic market, they must collude in order to maintain the long-term price hike that is possible after the foreign market firms have been driven out of business. Finally, significant barriers to entry must exist in the industry. If not, the price hike would create strong incentives for competitors to enter the market and undermine the monopolistic position (Schone, 1996;Willig 1998).

The second form of dumping relates to the expansion of market power and is referred to as “strategic dumping.” Strategic dumping combines low export prices with a protected home market to give exporters an advantage in industries with static (fixed R&D and capital expenses) or dynamic (learning by doing) economies of scale. With access to both home and foreign markets, foreign firms gain a cost advantage over domestic firms that are unable to compete abroad. This advantage allegedly eventually gives the exporting firms market power (Hindley and Messerlin 1996: Schone, 1996; Deardorff, 1989).

Assigning motivations to a particular firm’s reasons for dumping is difficult at best. Antidumping laws do not require a country to investigate behavior that is consistent or inconsistent with normal competition. All that petitioners must show is that dumping and “unfair” pricing is taking place and that they have been “materially injured” somehow. A brief review of the process illustrates these flaws.

Dumping cases are handled by two U.S. government agencies. The Department of Commerce establishes whether or not dumping is taking place and to what degree. This process is essentially pro forma: Between 1980 and 1997, the department ruled that dumping was taking place in 96 percent of the cases it reviewed (804 of 837 petitions). The case then proceeds to the U.S. International Trade Commission (USITC), which decides whether the U.S. industry in question is suffering injury. If the USITC finds injury is occurring, the dumping companies are required to place a cash deposit or bond with U.S. Customs equal to the dumping margin determined by the Commerce Department. Provisions are in place to review these findings, and vary by circumstance.

The methodologies, though, upon which these two agencies rely are arbitrary at best and based on faulty methodologies at worst (Ikenson 2001; Lindsey and Ikenson 2002a). First, comparing prices between markets is difficult. In addition to variations on the demand side due to consumer preferences, on the supply side there is tremendous variation in costs of different factors of production, whether it is the cost of inputs or the cost of labor. All of these factors exert great influence on the price of a product in a given market.

Second, there are considerable asymmetries in the methodology used to calculate price differences between markets. Economists have long established that under typical competitive conditions, firms will sell products at marginal, not average, costs. The U.S. antidumping law equates fair value with average costs plus an allowance for profit. It is thus possible for a firm to be selling at exactly the same price as the U.S. firm and be found guilty of dumping.

Third, even if one accepts the methodology used by U.S. government agencies, it is difficult to discern whether or not dumping is taking place at all since the law does not require evidence of the one variable that transcends all forms of market-expanding dumping—a “sanctuary” or protected home market. It seems reasonable to conclude that if dumping can only take place in the context of governments abroad enacting regulations to protect their home market, then these practices should at least be investigated (Hindley and Messerlin 1996).

## Alleged Dumping in High-Tech Industries

While the application of antidumping laws is problematic in any sector, it is particularly foolish and/or futile in high-technology sectors for three primary reasons. First, given the inherently dynamic nature of high-technology competition, the specific products which have duties imposed upon them are often obsolete by the time the inevitably contentious antidumping case is resolved. The famous Moore's Law (Gordon Moore was a cofounder and later chairman of Intel) which posits that the capacity of semiconductor chips doubles every eighteen months still holds and symbolizes the difficulty of using antidumping actions against such rapidly moving targets. Under such conditions, the petitioners in the domestic market rarely achieve meaningful relief. Second, the high degree of multisourcing from different countries in the chain of production results in situations where antidumping duties against foreign component producers often undercut the competitiveness of other domestic producers. Third, identifying so-called strategic industries is usually a fool's errand; in many cases what is labeled "strategic" in one year quickly becomes merely a commodity over the next few years.

In the case studies in the aforemention *High-Tech Protectionism*, the following results generalized across several sectors: (1) negative consequences for other industries, U.S. consumers and workers far outweighed the purported protectionist benefits (DRAMs, flat-panel displays, and steel); (2) dumping actions that were based upon the historically erroneous prediction that U.S. competitiveness was inextricably bound to the protection of a particular "strategic" sector (DRAMs, supercomputers, flat-panel displays, and steel); (3) political interventions traduced the integrity of the administrative and legal process (supercomputers and flat-panel displays); and (4) the serendipitous appearance of new technologies that rendered irrelevent the original antidumping actions (DRAMs and supercomputers). Regarding individual industries, the results were equally baleful: in DRAMS, antidumping actions transferred $4-5 billion from U.S. computer companies and consumers to Japanese semiconductor companies; for flat-panel displays, antidumping actions drove U.S. and foreign computer manufacturers offshore, displacing thousands of American workers; and in the case of steel—the longest and most costly government intervention—it has been estimated that the price to American taxpayers was between $46 and $74 billion.

**Recommendations**

A word about the priorities given to the recommendations: Clearly, the more sweeping the proposed reform, the more difficult it will be to accomplish. Given the overwhelming political power domestic producers have demonstrated over the years, a number of policymakers and policy analysts have drawn back and concentrated on highly technical changes to redress the bias against importers in the extraordinarily complex national and WTO antidumping regimes. The proposals advanced by the "Friends of Antidumping" in the current Doha Round represent this incremental approach to reform.

But it is contended here that there are two reasons priority should first be assigned to pressing for more fundamental changes: one, it is important to iterate and reiterate for politicians and the voting public the basic truth that current antidumping regimes are intellectually without foundation and that even on their own terms (and even with the technical reforms put forward by the "Friends of Antidumping) they cannot accomplish intended goals; and two, while many of the technical proposals have real merit, the history of antidumping rules since 1945 demonstrates the ability of domestic producers and their legislative allies quickly to revise and twist proposed technical legislative changes back in a protectionist direction (Finger 1993). Proponents of reform are thus likely to be playing "catch-up" continually.

**Repeal Antidumping Laws and Substitute Antitrust Actions**

Clearly, if political considerations were not present, the most economically sensible (and equitable) course would be to treat allegations of price discrimination and below-cost pricing as potential infractions against a country's competition policy regime. Under this scenario, domestic antidumping laws would be repealed, and countries would substitute actions against alleged abuses of competition policy or law. Such a course would entail smashing through the rhetorical interpretations of certain historical developments and focusing relentlessly on the underlying economic fundamentals. It would directly challenge arguments made in recent years by both the Clinton and the Bush administrations, which aligned themselves with the flawed and deceptive arguments of academic and legal defenders of antidumping actions.

A prime argument advanced by both the Clinton and Bush administrations is historically accurate but masks an underlying economic falsity: antidumping laws cannot be judged by the same standards as competition policy laws and regulations because they have evolved with different goals in mind and serve different constituencies. As a statement of historical fact, this political divergence is accurate. Taking note of the original common antimonopoly rhetoric of both antitrust and antidumping adherents, Alan Sykes of the University of Chicago has described the evolved and different attributes of the two systems, as follows:

> Antitrust and antidumping law come from the same family tree, but the two branches have diverged widely. . . . [I]n the modern era, antitrust concentrated on the pursuit of economic efficiency . . . address[ing] problems associated with concentrated economic power, primarily through a common law process that left to the courts much of the task of delineating the practices that violate antitrust law. . . . By contrast, antidumping law was intended to create a politically popular form of contingent protection that bears little, if any connection to the prevention of monopoly. . . . Likewise, the political constituency for antidumping law is not an antimonopoly constituency, but one for the protection of industries facing weak markets or long-term decline. (Sykes 1998, 1–2)

Seizing upon this historical divergence, both the Clinton and the Bush administrations have argued that competition policy laws cannot substitute for antidumping laws. As the Clinton administration stated in a brief to a WTO trade and competition policy working group, “If the antidumping laws were eliminated in favor of competition laws or modified to be consistent with competition policy principles, the problems which the antidumping rules seek to remedy would go unaddressed" (WTO 1998, 1).

The fallacy behind this assertion is that all of the antidumping "problems" identified as distinct from competition policy concerns are based upon rationales that cannot stand scrutiny on grounds of either efficiency or equity. Regarding efficiency, Sykes has accurately stated, "Although economic theory identifies a few plausible scenarios in which antidumping measures might enhance economic efficiency, the law remains altogether untailored to identifying them or limiting the use of antidumping measures to plausible cases of efficiency gain" (Sykes 1998, 2). On equity grounds, antidumping actions repeatedly flout a fundamental principle of "fairness" in the multilateral trading system—that is, the principle of national treatment, or that corporations and citizens of foreign countries will receive the same treatment under law that is accorded domestic citizens and corporations. Under antidumping rules, many actions that are clearly legal under U.S. domestic law are deemed "unfair" competition when taken by foreign corporations.

## The Underlying Efficiency Principles

As described above, economists have identified a number of circumstances in which dumping, as defined by U.S. and WTO rules (sales below the fully allocated cost of production or international price discrimination) is likely to have no adverse economic consequences. These include "market expansion" dumping, in which a company exports goods at a lower price than it charges in the home market in order to increase worldwide market share; "cyclical dumping," or exporting during periods of low demand and excess production capacity in the home market; "state-trading dumping," in which state-owned entities export at low prices, usually in order to gain hard currency; and "life cycle pricing" in high-tech industries, in which prices are initially set below fully allocated costs in order to generate sales, and over the short life-cycle of the product, "learning by doing" will drastically reduce production costs. As economist Robert Willig has argued, all of these forms of "non-monopolizing dumping" are "entirely consistent with robustly competitive conditions in the importing nation's market" (Willig 1998, 66).

Predatory ("monopolizing") dumping, however, could very well hurt consumers and producers of the importing nation. Predatory dumping occurs when an exporter has the ability to lower prices for an extended period of time in order to drive companies in the importing country out of business and achieve a monopoly. As we have noted earlier, for predation to be successful, certain market characteristics must apply: a large home market for the exporter; substantial entry and reentry barriers in the exporter's home market and market of the importing nation; relative concentration in the importing market so that monopoly power is readily achieved when a few companies leave the industry; and, if there are several predators, the ability to collude in keeping prices excessively low. Antitrust authorities, in evaluating anticompetitive effects from alleged predation, could readily contrive a series of rather straightforward questions, such as:

- Is the alleged dumping likely to reduce the number of rivals (both domestic and foreign) in the importing country's market?

- What share of the market would the dumpers have if the complainants left the market?
- Is the market share of the dumpers growing rapidly?
- If there are two or more alleged dumpers, could they plausibly be colluding?
- Are there significant entry and reentry barriers, and concomitantly, does entry require significant capital requirements and sunk costs? (Shin 1998; Willig 1998)

Antitrust authorities in many countries have substantial experience in dealing with just these questions, and there is no reason that such analysis could not be applied in cases of alleged dumping.

**Response to "Sanctuary Market" and "Strategic Dumping" Allegations: Target Offending Policies Directly, after Proving That They Exist**

If for political reasons, it proves impossible to do away with national antidumping laws entirely, fundamental reforms should be introduced into national antidumping regimes, the aim of which would be to force those systems to address directly and systematically allegations that government policies or market characteristics of the exporting country result in "injurious" dumping into the importing country. (For an analysis with conclusions similar to those set forth here, see Finger and Zlate 2003.)

In recent years, proponents of antidumping actions have advanced a much more sweeping rationale based upon the supposed advantages of firms exporting from so-called "sanctuary markets," or markets that as a result of government policies or private sector practice are closed to outside competitors. This situation need not involve a goal of predation, but it theoretically allows exporters to earn high profits at home and sell abroad at "artificially" low prices. In October 2002, the Bush administration, in a document submitted to the WTO defending current antidumping rules, framed the potential danger this way:

> A government's industrial policies or key aspects of the economic system supported by government inaction can enable injurious dumping to take place. . . . 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. (WTO 2002b, 4)

The Bush administration's submission is quite brief and a bit sheepish ("antidumping measures should be seen not as an ultimate solution to trade-distorting practices abroad…"). In 1998, however, the Clinton administration had presented a much longer, unabashed defense of the system and a comprehensive review of domestic policies and practices that might trigger antidumping actions. For its candor, chutzpah, and the sweeping expansion of the sources of "injurious" dumping, the document deserves careful scrutiny—and rebuttal.

The Clinton administration began by describing a pristine world of "fair" competition based upon "natural" comparative advantage: "In other words, 'fair' trade envisions that producers will use only natural comparative advantages, such as natural resources, a favorable climate, advanced technology, skilled workers, greater efficiency or lower labor costs, and not any artificial advantage." "Injurious" dumping, according to the

Clinton submission, results from artificial advantages stemming from two situations: "market-distorting industrial policies and/or differences in national economic systems" (WTO 1998, 7). Antidumping policies, then, constitute a means of achieving a "level playing field."

For the balance of the document, the Clinton administration assembled a veritable farrago of government policies and "differences in national economic systems" that, in its view, lead to injurious dumping. Included in this list is an extraordinarily diverse set of examples, including: high tariffs; government subsidies; price controls; government limitations on investment; limitations on the number of producers in a particular sector; anticompetitive sanitary and phytosanitary standards; a range of services barriers, including restrictions of provision of financial services, regulation of international data flows and data processing; misuse of standards, testing and certification procedures; permissive policies toward vertical and horizontal restraints of competition; cross-subsidization in multi-product firms; employment and social policies that result in "artificial" advantages for domestic firms; and contrasting business practices that give rise to differing debt/equity structures between domestic and foreign firms.

The above list is not complete, but the inescapable conclusion is that virtually every area of domestic public policy can be a cause of antidumping action under this expansive interpretation of artificial advantages. This paper will comment on only a selected few of the examples advanced in the submission.

**Market-Distorting Industrial Policies.** It should be noted that the line between public policies and differences in economic systems is blurred, and so the following designations are somewhat arbitrary. High tariffs and subsidies are two of the simplest government (industrial) policies to describe and rebut as necessitating the use of antidumping actions. The tariff rates have been set as a result of negotiations by individual nations in the Uruguay Trade Round. If a nation has negotiated high tariffs, so be it; if it breaks the agreement and raises its rates, it must renegotiate rates with all other members of the WTO or face retaliation. Industrial subsidies lead to a similar situation: the WTO has set rules for illegal and legal subsidies, and if a nation believes these rules have been violated, it will bring a case to the WTO—thus obviating (indeed precluding) the use of national trade remedy systems.

The submission also mentions government policies to limit the number of producers in a sector or limitations on foreign equity participation or ownership in a sector. Two points are relevant in this case: First, like other nations, the United States has long limited investment in certain quite important sectors, such as airlines and telecommunications. It thus comes with ill grace for the U.S. government to take unilateral action against other governments for the same practice. Second, GATT and WTO rules, except in unusual circumstances generally in the services area, do not cover investment issues; thus, there are no legal impediments to governments' applying certain restrictions (as the United States has done).

The examples cited relating to rules for competition are also of questionable validity, particularly with regard to cross-subsidization and relaxed limitations on vertical restraints.

In the United States and numerous other countries, many firms have multiple product lines, and there is no restriction on cross-subsidization per se, absent some other anticompetitive practice by the firms. Thus, companies such as IBM and Texas Instruments for many years produced computers and computer components such as chips, with chips being priced to increase the competitiveness of the final product. In no case did the U.S. government object—nor should it have. Similarly, while U.S. competition policy has changed greatly over the past half-century, current thinking holds that under most conditions vertical restraints of trade are not anticompetitive. To lump these industry practices as evidence of an "artificial" advantage is hypocritical and deceptive.

**Differences in National Economies.** Several of the above citations could also be counted as the result of "differences in national economies." But the most significant example given by the Clinton administration is the potential for "injurious dumping . . . when social and legal arrangements for employment and under-employment differ between countries. . . ." The Clinton submission (odd for an administration with at least vaguely social democratic aspirations) in effect charges that industries in nations with greater protection of labor and employment will unfairly reduce prices while forced to hold onto existing employees during economic downturns. Under this proposed reading of antidumping laws, most nations of the European Union, whose domestic laws contain many such protections for labor organizations and employment, would seem to face the prospect of endless antidumping actions.

With the introduction of potential injurious dumping from national labor practices or social welfare systems, the questions raised by the current rationale for dumping actions have moved far from border prices and deep into the social and economic fabric of individual nations. Under current antidumping regimes in any country, judgments cannot be established about whether a nation's labor practices, allegedly lax rules on vertical integration, subsidies to key industries, or health and safety regulations create artificial advantages or are merely evidence of "robustly competitive" conditions in importing markets.

**Reform of U.S. (and WTO) Antidumping Rules**

By broadening the alleged goals of antidumping laws to include a defense against all "artificial" or "unnatural" advantages, defenders of the current system have opened a Pandora's box for themselves. Even the most ardent proponents admit that the mere existence of price discrimination or below-cost sales does not "prove" market distortions in the exporting economy are the causal factor. Many perfectly natural competitive conditions can cause variations in price. To be credible and fair, therefore, U.S. rules and the WTO Antidumping Agreement should mandate that the petitioning industry and the domestic antidumping authority identify the purported market distortion and establish a causal connection between this alleged distortion and injurious dumping, as evidence by either below-cost sales or price discrimination. If, for instance, government limitation on the number of producers in a sector results in a closed sanctuary market that allows below-cost pricing in foreign markets, that competitive impediment should be identified and the injurious connection established. Similarly, if cross-subsidization in multi-product companies results in component prices that have no relation to costs of production, this subsidization should be pointed out and made part of any antidumping allegation. The respondents should be given the opportunity to rebut, with evidence to the contrary, all allegations regarding market-distorting government policies or "differences in economic systems" that result in "unnatural" advantages.

As envisioned here, the presentations of the petitioner and the respondent would largely establish the facts and economic evidence in a case, though the government agency should be allowed limited investigatory power to clear up conflicting claims by the two private parties. This compromise—regarding the roles of the private parties and the government agency in the importing country—attempts to balance a concern that national antidumping authorities will create huge new factual burdens on the foreign respondents against the reality that, given the expanded causal connections that must be established, these antidumping authorities may need some independent analysis and counsel.

**Competition Policy Analysis.** In addition, certain elements of the antitrust economic analysis should be introduced into antidumping proceedings. First, a clear distinction should be drawn between industries with a large number of producers worldwide and those with relatively few producers. By and large, the presumption would be that dumping cannot occur when many firms are competing against one another in numerous markets. (An exception would be if the importing country could demonstrate the existence of a cartel fixing domestic prices in the exporting country, or the existence of an international cartel.) Under this scenario, a high legal threshold would exist for proof of dumping in the steel industry as it has evolved worldwide.

In industries where there are only a few producers and the possibility of sanctuary markets exists, the priority of the WTO should be opening the sanctuary market of the exporting country, not creating another sanctuary market in the importing country. Antidumping authorities that claim sustained differential-price dumping should be required to produce an explanation of how a higher price is maintained in the home market, either through private action or with some government support. Once they satisfactorily provide this explanation, negotiations would first be conducted between the exporting-country and importing-country governments, aimed at dismantling the barriers to entry into the sanctuary market. Should these fail, antidumping penalties could be imposed immediately. Evidence from these negotiations could also be grounds for antidumping actions by other WTO members (Hindley and Messerlin 1996).

**The National Interest.** A third reform is the expansion of antidumping economic analysis to include an assessment of the costs and benefits of individual actions across the entire economy. Presently, only the costs to the petitioning industry are examined by the USITC. A broader analysis, as suggested here, would include the costs and benefits to corporate users of the dumped products, as well as the overall costs to final consumers of the product. As noted above, consumer groups and downstream corporate industries should have standing to appear before antidumping authorities to present evidence and their viewpoints into the proceedings. In the current Doha Round, the European Union, as well as a group of nations pushing for substantial reforms in the WTO antidumping regime, have endorsed the idea of a "public interest test" to measure the effects of antidumping orders on the whole national economy, not just on the fortunes of the petitioning industry (ITR May 2, 2002; July 11, 2002).

In the longer term, policymakers should give serious consideration to a more fundamental structural change in the U.S. antidumping regime: providing that in certain circumstances, the president can intervene at the end of the process, invoke a national interest clause, and craft a solution that is based upon economic considerations in combination with other U.S. national political goals and imperatives. The original reason behind granting authority to an independent commission (USITC) on antidumping cases was to ensure a nonpolitical, "scientific" decision. However, the history of the current process for deciding antidumping cases renders laughable the idea that science or fundamental economic theory plays any significant part in the final antidumping determinations. There are two reasons for this: one, over the past four decades, Congress has continuously legislated rules and instructions to the USITC which overwhelmingly tilt the criteria for "injurious" dumping in favor of the domestic petitioners; and two, with some outstanding exceptions, members of the commission have been political hacks, with neither interest in nor competence for economic analysis. More often than not, they are congressional staffers who use the position as a stepping-stone to lucrative private sector jobs or more prestigious executive branch appointments.

More broadly, a body of literature and analysis now exists that questions independent commissions in general (see Wallison 2003). Those who argue against allowing the president or his direct appointees to have a say in the final determination claim the process would be subject to great political influence and lobbying. The argument on the other side—particularly given the evolution of the antidumping regime—is that capture of an independent commission by the regulated industry, either through legislative fiat or control of appointments, means that the public interest has already been subverted, and in this circumstance would be better served by a direct and transparent judgment by a political officer. Also, in the trade remedy area, safeguard actions end with a final political decision by the president, as discussed below. With all the political pressures that have come to bear on this process over the years, the outcomes on safeguards dictated by the White House have generally served the national interest well.

**Substitute Safeguard Actions for Antidumping**

The final broad, longer-range recommendation is to shift national trade remedy actions away from antidumping toward the greater use of safeguard actions (much of this section is based upon Barfield, 1999 [updated]) Under U.S. law (Section 201 of the basic trade law), as sanctioned by WTO rules, the government may intervene to ameliorate the negative effect of import surges on industries and workers. As Section 201 operates—upon petition by an industry or union, the House and Senate trade committees, or the president—the USITC may determine an industry is threatened by "serious" injury caused by a sudden increase in imports and recommend remedies to the president, who then makes the final decision. Under current WTO rules, the relief can be granted for up to four years, with the possibility of an extension for another four years. (If the relief is granted for less than three years, other countries cannot demand compensation for tariff increases or quantitative restrictions that are part of the remedy.)

**"Interface Mechanisms": The Merits of Safeguards over Antidumping Actions.** Before describing proposed reforms in the current U.S. safeguards system, both safeguards and antidumping measures should be placed in the larger framework of what John Jackson has called the necessity for "interface mechanisms" as national economies become more interdependent and trade rules delve more deeply into domestic economic, social and political systems. He writes:

> "As world economic interdependence has increased, it has become more difficult to manage relationships among various economies. This problem is analogous to the difficulties involved in trying to get two computers of different designs to work together. To do so, one needs an 'interface' mechanism to mediate between the two computers. Likewise in international economic relations, particularly in trade, some 'interface mechanism' may be necessary to allow different economic systems to trade together harmoniously."(Jackson, 1997, 248)

The world trading system has provided for two such broad "interface" mechanisms: antidumping actions, which entail allegations of "unfair" trade; and safeguards actions, which allege no unfairness but merely posit that a nation needs time to adjust to rapidly changing competitive conditions (In addition, for the more narrowly based allegation of unfair subsidy, countervailing duties are also allowed). As Jackson points out, in recent years the distinctions between fair and unfair trade has become increasingly blurred "because of some fundamental disagreement about what should be called 'unfair'." (Jackson, 1997, 247).

Many trade policy specialists—particularly political scientists—agree with Jackson and have argued that on pragmatic, political grounds, the trading system must contain practical and usable "safety valves" that allow nations to adjust over time and manage a fractious domestic trade policy climate in which producers clamoring for protection will always trump consumers and free trade theorists. Granting this reality, from both an economic and a political perspective, safeguards actions are the better course.

There are four strong advantages for substituting safeguard actions for antidumping actions (Barfield 1999). First, safeguard actions are much more flexible in both substance and duration; the president, who has final authority to put the trade remedy package together, can tailor such a package to match individual situations. As we have seen, antidumping duties, once levied, remain in place for at least five years—and thus can continue long after the alleged dumping has ended.

Second, in determining a safeguard action, the president can take into account the overall national welfare (including consumer and corporate users' interests) and other political and diplomatic factors—which cannot be done with antidumping. For example, in the semiconductor and flat-panel displays situations of the late 1980s, use of safeguards would have allowed the Reagan and Bush administrations to assess the overall impact of trade actions on the U.S. computer industry.

Third, safeguard actions require that the petitioning industry, as a condition of receiving temporary protection, put together a plan to increase its competitiveness. Thus, unlike antidumping actions, safeguards introduce pressure for action-forcing results and do not allow industries to drift supinely for years under the cover of government protection (though in many cases a successful recovery strategy may not be possible).

Finally, increased use of safeguard actions would reduce the inflammatory and often-spurious comparisons made between “fair” and “unfair” trade practices. With more naked honesty, the government would temporarily decrease imports in order to allow a U.S. industry to put together and execute a plan for recovery. Certainly there would be pressure to extend these bailouts to the fullest allowable time, but at least consumers and U.S. industries whose interests would be damaged by the protective package could have their voices heard in opposition up front and on a continuing basis.

**Reforming the Safeguards System**. One major problem in attempting to shift trade remedy (“interface”) actions from antidumping to safeguards is the relative paucity of use by complainants both in the United States and in other WTO countries. From 1975 to 1996, only 65 petitions were received by the USITC for the escape clause. Of these, the USITC turned down thirty; and of the thirty-four cases sent to the President, only eleven resulted in some sort of import restraining measures (Jackson, 1997). During roughly that same time period (1979-1995), seven hundred and fifty antidumping petitions were filed in the United States. Similarly, according to GATT/WTO records, from 1947-1994 only 150 safeguards actions were notified to Geneva—while thousands of antidumping actions were put in place by GATT/WTO members (Jackson, 1997).

In explaining this difference, many commentators point to the difference in legal standards for imposing the two types of actions. For antidumping cases, the petitioner must only show "material injury," or the threat thereof; and Congress has lowered the bar further by defining this as "harm which is not inconsequential, immaterial, or unimportant." (Jackson, 1997, 268). In contrast, under current U.S. safeguards law, increased imports must be a "substantial cause of serious injury," or threat thereof, for the USITC to find injury. This goes beyond the less stringent requirements of the WTO, where the relevant rule does not include the "substantial cause" phrase. It has been suggested that the United States amend its own escape clause language to drop this more restrictive phrase as a possible inducement to increased use of safeguards. If one desired to bring about an even more truly level playing field, consideration should also be given to changing the WTO trade remedy standards so that safeguards, like antidumping actions, would only have to meet the lesser "material injury" standard (Barfield, 1999).

These recommendations are all defensible and plausible, but the experience over the past several years with legislative tinkering with the escape clause in the United States also points up the dangers inherent in reopening this section of trade remedies law. In 1999—and in subsequent sessions of Congress--Rep. Sander Levin (D-Mich.), the leading Democratic spokesman for trade on the House Ways and Means Committee, has introduced legislation to ease the escape clause standard (he has had various Democrat and Republic co-sponsors during this period: in the current Congress, the bill is H.R. 2365).

Unfortunately, Levin and his allies have added quite mischievous articles to the legislation—articles that would undo all of the good embodied in the relaxed standard. First, the legislation overreaches with regards to the standard itself. It greatly weakens the criteria by adding the provision that, for the USITC to make a finding of injury, imports "need not be equal to or greater than any other cause." Opponents of the bill correctly charge that this last phrase would lead to injury determinations even in cases where imports were only a very minor cause of the domestic industry's competitive problems.

Further, other provisions of H.R. 2365 constitute very bad policy choices. For instance one of the best features of the safeguards process is that the president is granted the widest possible leeway in deciding whether safeguards relief is warranted. He can, and does, consider whether the economic and social costs of relief outweigh the benefits and whether national political and security interests are served by such relief. Levin's bill attempts to curb presidential discretion by requiring that the president grant relief unless doing so would have an adverse effect on the United States "substantially out of proportion" to the benefits of such action.

Finally, H.R. 22365 adds new list of criteria that must bind the president in deciding upon relief—including rate and amount of increased imports, employment effects, foreign production capacity, changes in domestic sales—and it mandates that these new criteria take priority over more general factors. In sum, as observed above, as presently written, H.R.2365 does not represent a balanced "interface" approach.

**Forcing a Choice.** There is one further change that should be introduced into the U.S. trade remedy regime. If and when it becomes possible to lower the standard of injury for safeguards and push the system in that direction, Congress should condition that reform on changes in current U.S. antidumping laws and procedures. Specifically, Congress should provide that, if protection is granted under the safeguards clauses of U.S. trade law, antidumping actions currently in place would be voided and no new antidumping actions could be initiated for those products for the duration of the protection.

Logically, with protection under a WTO-legal safeguards program, there is no reason for a second layer of protection with dumping actions; clearly, the crucial showing of injury in antidumping cases would no longer be possible while a product was protected under a safeguards agreement. Further, if the safeguards agreement applies for a period of less than three years, WTO rules provide that other WTO members can take no action in retaliation, which adds to the benefits of the safeguards approach.

## APPENDICS

### Important Technical Changes to Antidumping Rules

As noted in the text, over the past several years, a group of WTO members—the "Friends of Antidumping"—opposed to current WTO rules governing antidumping actions put forward several sets of proposals for major technical changes relating to procedures, methods of calculation for antidumping duties, and the means of determining injury to a domestic industry. In addition, scholars at the Cato Institute have published several excellent studies detailing the flaws in the current rules and offering analytically strong analysis and twenty-one recommendations for reform (Lindsey and Ikenson 2002a, 2002b). In December 2002, the United States signaled its strong opposition to many of the proposals of the "Friends of Antidumping." The EU, in typical fashion, is trying to have it both ways—on the one hand courting proponents of reform by backing a few of their recommendations, while on the other hand opposing key elements of the reform package, which would force substantial changes in the current EU antidumping regime.

Full details of all of the proposed technical reforms are available in the Lindsey and Ikenson trade policy papers and on the WTO website. What follows are brief descriptions of the four most significant of these proposals, in the opinion of the author.

**Revise Existing Rules for Cost Comparisons between Home and Foreign Market Sales**. Under current WTO rules (Article 2.2.1 of the Antidumping Agreement), dumping margins are determined by a comparison of export prices to “normal” prices in the exporter’s home market. The problem lies in the determination of which prices are “normal” and stem from the “ordinary course of trade.” Under the cost test now allowed, antidumping authorities may exclude home market prices that are found to be below the cost of production. This produces comparisons of all export prices with prices in the home market that are above the cost of production (that is, with the highest prices). Such an asymmetric method of calculation and comparison inevitably skews the result toward a finding of dumping, and Lindsey and Ikenson call it the “most egregious methodological distortion in contemporary antidumping practice.” They go on to point out, “The existence of below-cost sales in the home market is actually affirmative evidence of the absence of a sanctuary market. A sanctuary market, after all, is supposed to be an island of artificially high prices and profits. If home-market sales at a loss are found in significant quantities, isn’t that a fairly compelling indication that there is no sanctuary market?” (Lindsey and Ikenson 2002b, 15).

Reformers call for Article 2.2.1 to be rewritten to clarify that under most circumstances, sales below the cost of production should not be excluded automatically. Only under specific circumstances—for example, sales of damaged goods—should these exclusions be allowed.

**Zeroing.** Under this practice, in determining dumping margins, national authorities use different methodologies to compare export producer prices with the "normal value" of prices in the importing country (usually determined by the average price of like products in the home market). When the export price is lower than the normal value in the importing market, the difference becomes the basis for the amount of dumping for that sale. However, when the export price is lower than the normal value in the importing market, the difference becomes the basis for the amount of dumping for that sale. However, when the export price is higher than the normal value in the importing market, the dumping amount is calculated as zero. The results are then averaged to arrive at a dumping margin, which is then assessed as the final dumping duty. Obviously, zeroing out lower-than-average prices for exporters skews the result toward a conclusion that dumping has occurred, even when it clearly has not.

In March 2001, the WTO's Appellate Body ruled that the EU's application of "zeroing" violated WTO rules, concluding that it did not meet the standards of articles 2.4 and 2.4.2 of the Antidumping Agreement, which required a "fair comparison" between export price and normal values. Without taking into account the prices of all comparable export transactions, the EU's application could not provide a "fair comparison" (WTO 2001a). However, the extent to which this ruling will force widespread changes in price comparisons remains uncertain. On technical grounds not dealt with here, the EU has only partially complied, and the U.S. Department of Commerce has not changed its zeroing practices, even though they would seem clearly to go against the Appellate Body's decision.

In order to give full force to the sensible and equitable conclusion of the Appellate Body, current Doha Round antidumping negotiations should amend Article 2 of the WTO Antidumping Agreement to prohibit zeroing at any point in antidumping proceedings. Thus, in the determination of antidumping margins, when export prices are higher than normal value they should be given their exact value when averaged in with other export prices.

**"Lesser Duty" Application.** Article 9.1 of the Antidumping Agreement encourages WTO members to establish dumping duties only to the level that will remove the injury to the domestic industry: specifically, it states it is "desirable" that antidumping duties "be less than the [dumping] margin if such lesser duty would be adequate to remove the injury to the domestic industry." The EU and some other WTO members follow this practice and apply a "lesser duty rule" when determining dumping duties. Research has shown a substantial difference in some cases between the final dumping margins and the actual rate that would be noninjurious. Since the avowed aim of the antidumping action is to remove injury, the Article 9.1 provision should be amended to require that antidumping duties be less than the dumping margin, if the lesser duty is sufficient to remove the injury.

**Causation of Injury.** The current system of rules for determining whether foreign dumping has injured a domestic industry is flawed and unworkable. In addition to establishing that dumping has occurred, the WTO Antidumping Agreement requires a finding that dumped imports are causing or threatening to cause "material injury" to the affected industry, before dumping remedies can be applied. Unfortunately, the agreement does not provide standards or a methodology for determining a causal connection between dumping and material injury of the domestic industry.

In the United States and a number of other WTO member countries, the standard used by the antidumping authorities merely seeks to establish dumping as "a cause" of the injury. This allows the U.S. Department of Commerce to ignore the impact of overall economic conditions, the competitive condition of the industry, and a host of other factors that could be the real cause of lower export prices and increased imports.

The Uruguay Round made an attempt to tighten up the criteria for finding "material injury" as a result of dumping. Specifically, Article 3.5 of the Antidumping Agreement provides that dumping authorities are required "to examine any known factors other than dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports" (WTO 1995). In a 2001 case, the Appellate Body of the WTO, in interpreting the new mandate, muddied the water by introducing what even opponents of antidumping regimes admit is probably an impossible standard for determining injury. The Appellate Body ruled that antidumping authorities identify all the factors that could be causing injury, disentangle them from the effects of alleged dumping, and calculate the injurious impacts separately, though it admitted that, as a practical matter, it might not be easy to distinguish the specific effects of different causal factors (WTO 2001b). Defenders of antidumping regimes argue that if this ruling becomes the new standard, demonstrating injury will be virtually impossible. Even opponents of most antidumping practices and rules fear a backlash that could result in much laxer injury standards.

In order to avoid this result, the Doha Round antidumping negotiations should take up the issue and reach agreement on a new standard. The focus should be to isolate the effects of alleged dumping and draw back from the enormously complicated and analytically difficult goal of evaluating and putting a number on all possible causes of injury to the domestic industry. If dumping alone is found to be a substantial cause, or even a threat, of material injury, then injury is established and duties can be levied.

## BIBLIOGRAPHY


Barfield, Claude, 2003, *High-Tech Protectionism: The Irrationality of Antidumping Laws*, AEI Press, Washington, D.C.

Barfield, Claude. 1999. *Safeguards vs. Antidumping Protection: Lessons from the Steel "Crisis."* On the Issues. Washington, D.C.: American Enterprise Institute, June.

Deardorff, Alan. V., 1989,"Economic Perspectives on Antidumping Law," in John H. Jackson and Edwin A. Vermulst, *Antidumping Law and Practice: A Comparative Study*, University of Michigan Press, Ann Arbor, Mich.

Finger, J. Michael. 1993. *Antidumping: How It Works and Who Gets Hurt*. Ann Arbor: University of Michigan Press.

Finger, J. Michael and Andrei Zlate. 2003. *WTO Rules Allow New Trade Restrictions: The Public Interest is a Bastard Child*. Paper Prepared for the U.N. Millennium Project Task Force on Trade. Washington, D.C.: April.

Hindley, Brian and Patrick A. Messerlin. 1996. *Antidumping Industrial Policy*. Washington, D.C.: American Enterprise Institute.

Ikenson, Dan. 2001. *Antidumping Laws Hurt American Consumers*. CTPS Articles. March 7.

International Trade Reporter[ITR]. November 1, 15, 2001; February 14, 2002; May 2,9, 2002; July 18; October 17,24, 2002; September 4,11,18, 2003.

Jackson, John, 1997, *The World Trading System: Law and Policy of International Economic Relations*, MIT Press, Cambridge, Mass.

Lindsey, Brink and Dan Ikenson. 2002a. *Antidumping 101: The Devilish Details of "Unfair Trade" Law*. Briefing Paper No. 20. Washington, D.C.: The Cato Institute, November 26.

Lindsey, Brink and Dan Ikenson. 2002b. *Reforming the Antidumping Agreement: A Road*

*Map for WTO Negotiations*. Briefing Paper No. 21. Washington, D.C.: The Cato Institute, December 11.

Schone, Rainer, 1996,"Alternatives to Antidumping from an Antitrust Perspectiv," Dissertation, University of St. Gallen (Nr. 1830), Difo-Druck GmbH, Bamberg, Germany.

Shin, Hyun Ja. 1998. *Possible Instances of Predatory Pricing in Recent U.S. Antidumping Cases*. In Robert Z. Lawrence, ed. Brookings Trade Forum: 1998. Washington, D.C.: The Brookings Institution.

Sykes, Alan O. 1998. *Antidumping and Antitrust: What Problems Does Each Address?* In Robert Z. Lawrence, ed. Brookings Trade Forum: 1998. Washington, D.C.: The Brookings Institution.

Wallison, Peter J. 2003. *A Power Shift Nobody Noticed*. Washington Post. January 12.

Willig, Robert D. 1998. *Economic Effects of Antidumping Policy*. In Robert Z. Lawrence, ed. Brookings Trade Forum: Part One, Antidumping. Washington, D.C.: The Brookings Institution.

World Trade Organization. 1995. *The Results of the Uruguay Round of Multilateral Trade Negotiations*. The Legal Texts. Geneva, Switzerland.

———. 1998. Communication from the United States to the Working Group on the Interaction between Trade and Competition. WT/WGTCP/W/88. Geneva, Switzerland. August 28.

———. 2001a. Appellate Body Report: European Communities—Antidumping Duties o Imports of Cotton-Type Bed Linens from India. WT/DS141/AB/R. Geneva, Switzerland. March 1.

———. 2001b. Appellate Body Report: United States—Antidumping Measures on Certain Ho Rolled Steel Products from Japan. WT/DS174/AB/R. Geneva, Switzerland. July 24.

———. 2002a. Antidumping Legislation Notifications. Report of the Committee of Antidumping Practices. G/L/581. Geneva, Switzerland. October 29.

———. 2002b. Basic Concepts and Principles of the Trade Remedy Rules. Communication from the United States to the WTO Negotiating Group on Rules. TN/RL/W/27. Geneva, Switzerland. October 22.

———. 2003a. Semi-Annual Report under Article 16.4 of the Agreement. United States. G/ADP/N/98/USA. March 10.

———. 2003f. Antidumping Initiations/Measures: Reporting Member vs. Affected Country—01/01/95 to 03/12/03. http://www.wto.org/english/ ratop_e/adp_e/ adp_e.htm. Website accessed on July 25, 2003.