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Introduction

The Obama administration is proposing to amend certain aspects of the Commerce Department's oversight of the U.S. antidumping law. Revised methods for estimating major components of the dumping calculation, higher thresholds for foreign companies to exceed in order to demonstrate that they are not "dumping," tighter rules governing methods of paying estimated antidumping duties, and other changes have been put forward, ostensibly to give the law more teeth.

History suggests that if those proposals are implemented, a surge in antidumping actions—at great cost to the broader U.S. economy—is likely to follow. The evolution of antidumping is marked by distinct inflection points corresponding to legal and administrative changes implemented at the behest of certain import-competing industries and their political allies. As the utility of antidumping became evident to those industries, trade negotiators, and politicians in the decades following World War II, the law—and its regulatory apparatus—was gradually transformed from one predicated on protecting consumers from collusive or predatory foreign trade practices into a tool to suppress competition in the name of remedying "injury" experienced by domestic producers. The arcane mix of statutory rules and discretionary whimsy that emerged as contemporary antidumping policy is a far cry from the first antidumping law—in practice and intent. Today, antidumping is little more than an elaborate excuse for run-of-the-mill protectionism.

No longer are anti-competitive or predatory pricing practices the target of the antidumping law. Rather, its target is price discrimination—specifically, the act of a foreign firm charging lower prices in the United States than it charges in its home market for the same product. But there is nothing inherently wrong or predatory or unfair about such a pricing strategy. Even if there were, evidence of anti-competitive behavior is never required to initiate an antidumping case or to impose restrictions. Antidumping borrows its rhetoric from

the past, but it presently punishes normal, healthy competition that certain domestic producers find objectionable.

Honest debate about the law's purpose and consequences has been stifled by its complexity and by the persistence of highly inaccurate rhetoric about the propriety of strong antidumping rules to redress unfair foreign practices. Armed with the pretense of a noble purpose, representatives of labor unions and import-competing industries often cite the number of antidumping initiations as evidence of the need for an even more accessible and restrictive antidumping law to better protect "us" from "them." Granted, U.S. antidumping initiations have increased considerably over the decades, but not because of an increase in anti-competitive behavior among foreign producers.

Rather, antidumping use has increased because the law has been "strengthened" by expanding the definition of "unfair" and granting domestic industry too much access to the levers of antidumping administration. Meanwhile, collateral damage to innocent victims and the broader economy continues to mount.

This paper describes the evolution of U.S. antidumping policy from an obscure offshoot of competition law into the predominant instrument of contingent protection that it is today and provides an account of some of the crucial statutory and administrative changes that have occurred over the decades. Its purpose is to demonstrate that the increase in antidumping activity reflects several developments that have nothing to do with foreign behavior whatsoever, including a progressive expansion of the definition of dumping, relaxation of evidentiary standards, and a pro-domestic-industry bias in the law's administration at the U.S. Department of Commerce. Ultimately, the antidumping remedy is a much larger problem than the dumping it is presumed to address.

What Is Dumping?

In economics, dumping is defined as the act of a firm charging lower prices in an export market than in the domestic market for the

same product. Dumping is a fancy term for cross-border price discrimination, which itself carries a malevolent connotation.

But there is nothing sinister or even unusual about a firm engaging in price discrimination. Indeed, U.S. firms charge different prices in different regional markets for the same goods for a variety of legitimate reasons. For example, an incumbent firm that has operated in New England for many years and whose brand is well known and respected by consumers might be able to charge higher prices in that market than it can charge in California, where it is an unknown entity attempting to enter the market. In California, the firm might have to induce consumers to try its product by offering lower prices.

The same strategy can be employed without sinister motive if those markets happen to be in different countries. A foreign firm that sells its widgets in the United States at lower prices than it charges at home may be trying to reap the benefits of the brand it has cultivated and nurtured at home by charging higher prices, while simultaneously pursuing a common market-entry strategy of charging lower prices where its brand is relatively unknown. In that regard, price discrimination is not a problem in need of a remedy. There are perfectly rational, legitimate, profit-maximizing justifications for engaging in a strategy of price discrimination. Accordingly, dumping is not systemically predatory, anti-competitive, or unfair.

However, in some cases when certain conditions are present, dumping can be a cause for concern. A sustained strategy of cross-border price discrimination could prove to be anti-competitive and welfare-reducing if: (1) the foreign firm in question has market power (i.e., can set prices in one or both markets); (2) the markets are sufficiently segregated to foreclose the possibility of price arbitrage; and (3) demand for the product in the export market is more price elastic than demand in the home market. The presence of those conditions could enable the kind of predatory, anti-competitive practices that are commonly—although mistakenly—presumed to be the target of the U.S. antidumping law.

Without those conditions present, however, a dumping strategy would be unsustainable.

Without sufficient market power to set and maintain higher prices at home, the firm would have insufficient profits from which to cross-subsidize lower-priced sales abroad. Without high enough tariffs, transportation costs, or other market barriers to sufficiently segregate the home market, reimportation of the lower-priced imports into the home market would arbitrage away any dumping-enabling profits. And if the demand of customers in the export market is less price elastic than the demand of customers in the home market, the price of the good in the export market could equilibrate at a level higher than the price at home. In other words, the home-market profits needed to enable a dumping strategy might in fact require home-market prices that are lower than export-market prices, rendering such a strategy self-defeating or impossible.

Although economic theory provides for these conditions, one would be hard-pressed to find any real-world examples of dumping causing competitive markets to become monopolistic. Nevertheless, the U.S. antidumping law is ostensibly concerned with the kind of international price discrimination that stems from those conditions. To be more precise, the antidumping law, according to its defenders, exists to remedy or countervail the effects of those anti-competitive conditions, which are presumed to exist because of various foreign government policies. A 2002 Bush administration submission to the World Trade Organization Negotiating Group on Rules put it 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.¹

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Thus, antidumping is portrayed as a legitimate government response to anti-competitive foreign government policies. However, the first major shortcoming of that justification is that, under the law, no evidence is required to demonstrate that (nor does the administering authority investigate whether) any of those anti-competitive conditions exist—let alone that they are the product of some foreign government policies. The existence of price discrimination (i.e., some sales that are priced lower in the United States than in the home market) is simply assumed to be proof positive of the existence of those anti-competitive conditions, and those conditions are assumed to be the product of foreign government policies, even though there are plenty of legitimate reasons for a firm to price discriminate.

Under U.S. law, dumping is defined as the sale of a commodity in the U.S. market at a price that is less than “normal value.”² Normal value is derived either from the selling price of the same or a similar product in a comparison market (normally the home market of the foreign producer) or from the cost of producing the product in question, plus allowances for selling expenses, administrative expenses, and profit.³ The amount of dumping is calculated by subtracting the export price from the normal value, and the dumping margin, expressed as a percentage, is that difference divided by the export price. Thus, if a foreign producer sells a product for \$11 in his home market and for \$10 in the U.S. market, the amount of dumping is \$1 and the dumping margin is 10 percent.

For antidumping duties to be imposed, the administering authorities must also determine that the domestic industry is materially injured or threatened with material injury, or that the development of an industry is materially retarded by reason of the dumped imports in question.

Thus, *any* price discrimination that causes or threatens injury to a domestic industry is the trigger for imposing duties—and not just price discrimination that arises from anti-competitive conditions abroad. Under the law, there is simply no requirement or effort to distinguish

the causes of price discrimination and, as a result, perfectly unobjectionable business practices are routinely punished at great expense to innocent victims.

A law that once required close examination of underlying market conditions and the motives of foreign sellers now simply grants the worst assumptions without requiring any meaningful evidence of anti-competitive behavior or the underlying market distortions that are presumed to give it rise.⁴

The explosion of antidumping in recent decades is in no small part attributable to changes in U.S. law and administration that have expanded the definition of dumping to include routine and unobjectionable pricing practices and made antidumping protection increasingly easy to obtain. Over the course of about eight decades, antidumping evolved from an instrument of law aimed at preserving competition to a bureaucratic apparatus devoted to restricting it.

How did such an obscure policy instrument evolve into what some economists consider to be the most prevalent impediment to international trade today?⁵ What explains the continuous broadening of the scope of U.S. antidumping law? Why does a practice that is so antithetical to free trade have sanction within the rules of the World Trade Organization? What explains the near total disregard for the interests of consumers and consuming industries in the contemporary administration of the antidumping law? The complex history of U.S. trade politics sheds some light on these questions.

Antidumping's Original Charter

Prior to the signing of the General Agreement on Tariffs and Trade in 1947, antidumping laws of the United States were premised upon the logic of antitrust.⁶ Like antitrust, the purpose of the antidumping law was to prevent unfair competition, which could be the result of monopolies engaging in predatory pricing. For better or worse, governments seeking to curtail the exercise of market power by domestic firms could turn to their antitrust laws. But it was far

more complicated for governments to apply and enforce their antitrust laws against foreign firms. And since it was apparent that foreign governments might be less thorough in applying their antitrust rules to their own firms' behavior in the U.S. market, the U.S. government turned to antidumping.⁷

Prior to passage of the first U.S. antidumping law in 1916, unfairly traded imports were regulated under the Sherman Antitrust Act of 1890, which "declared illegal any effort to combine or conspire to monopolize a particular market," and the Wilson Tariff Act of 1894, which expanded the prohibitions of the Sherman Act to firms outside the United States. The Wilson Act made it "unlawful for foreign producers to combine or conspire to monopolize the U.S. market."⁸ By federal statute, violations of these laws mandated criminal prosecution. Anti-competitive practices concerning imports covered under the Sherman and Wilson Acts were punishable by substantial fines or imprisonment.⁹

In 1904, the Canadian government became the first to have an antidumping law, when the parliament enacted legislation authorizing the imposition of "a special duty of customs" equal to the difference between the "fair market value" and the "selling price," whenever "it appears to the satisfaction of the minister of customs . . . that the export price . . . is less than the fair market value thereof."¹⁰

The primary purpose of the Canadian law was to enable the government to respond to competing demands from two vital constituencies—agriculture and steel. Agricultural interests wanted a significant cut in tariffs across the board, while the Canadian steel industry wanted protection from its principal competitor, U.S. Steel.¹¹ The government worried that raising tariffs on steel would be too risky, as it would encourage every other interest to lobby for higher protection of their industries.

By establishing a "special duty" to be administered separate from the general tariff and at the discretion of customs authorities instead of the courts, the Canadian government produced an appealing solution to its dilemma—a mechanism to grant contingent protection without

need of revising the general tariff structure. That the first firm investigated for antidumping was U.S. Steel, a perennial target of U.S. antitrust authorities, helps explain the lack of indignation on the part of Canada's trading partners.¹² And the discovery of antidumping as a vehicle through which protection could be doled out conditionally and at the discretion of politicians proved internationally appealing. Rather than condemn the Canadian policy, Australia, New Zealand, the United Kingdom, and France adopted antidumping policies of their own.¹³

The United States joined the antidumping club in 1916, when the Wilson administration was under pressure from industry for an increase in U.S. tariffs on the grounds that Germany was engaged in economic warfare in the form of predatory dumping. Sympathetic to those claims but averse to antagonizing free traders in the Democratic Party, Wilson asked Congress to put antidumping provisions into the Revenue Act of 1916. Congress obliged, inserting language that criminalized the importation of merchandise at prices lower than "actual market value" when such practices are undertaken with "intent to injure, destroy, or prevent the establishment of an industry in the United States or to restrain competition."

Like the Sherman and Wilson Acts before it, the Antidumping Act of 1916 was a criminal statute. But unlike the Canadian law of 1904, the first U.S. antidumping law did not grant customs the authority to levy special duties on dumped imports. Rather, the U.S. law sought to remedy predatory dumping with severe penalties, including punitive fines (triple damages) and imprisonment.¹⁴ But demonstrating predatory intent under the 1916 Act proved difficult, and few cases were brought.¹⁵

In 1919, the U.S. Tariff Commission published the results of a study on foreign competition, which was informed largely by surveys of domestic manufacturing firms. The study recommended that the Antidumping Act of 1916

be revised and strengthened, and that some official body, moving along lines sanctioned by Congress in the Federal Trade Commission Act, may realisti-

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cally be specifically instructed to deal with dumping as a manifestation of unfair foreign competitive methods . . . that in the case of imports, bonds providing for the collection of dumping duties subsequently assessed may be useful, and that the President or the Secretary of the Treasury may be empowered to impose additional duties, or even to refuse entry when industrially destructive dumping is proven or impending.¹⁶

Congress adopted the recommendations of the Tariff Commission study in the Antidumping Act of 1921, which authorized the secretary of the Treasury to levy “a special dumping duty” equivalent to the difference between the “exporter’s sales price” and the “foreign market value (or, in the absence of such value . . . the cost of production)” whenever “an industry is likely to be injured, or is prevented from being established, by reason of the importation into the United States of foreign merchandise of such class or kind is being sold or is likely to be sold in the United States or elsewhere at less than its fair value.”¹⁷

With passage of the new act, responsibility for the enforcement of the antidumping law was shifted from the judiciary to the executive branch, while the object of regulation was transformed from predatory pricing to injurious price discrimination. Economist J. Michael Finger characterized the changes to U.S. law between 1890 and 1921: “Trust-busting remained the rallying cry, but the object of the regulation shifted from trusts to imports, the instrument from law to bureaucracy.”¹⁸

The impact of the Tariff Commission study was profound. By elevating injury to U.S. producers as the primary rationale for having an antidumping law—and in the process marginalizing concern about the impact of predatory pricing or the imposition of duties on U.S. consumers—the report was the catalyst that sparked a dramatic transformation of the antidumping regime. The welfare of consumers was no longer a concern of the antidumping law. As Finger puts it: “the ‘injury to competition’ standard

[was] replaced by a ‘diversion of business’ standard, the sort of diversion that is a normal part of the competitive process.”¹⁹

Despite the relative ease of obtaining contingent protection under the 1921 Antidumping Law, U.S. industry was largely shielded from foreign competition thanks to the high levels of tariff protection afforded by the Fordney-McCumber Act of 1922 and the Smoot-Hawley Tariff Act of 1930. Antidumping would begin to emerge as an attractive alternative after World War II, as the multilateral endeavor to liberalize world trade gained momentum.

Antidumping in the GATT

The U.S. government requested that language permitting the use of antidumping be included in the GATT. In fact, as noted by economic historian Douglas Irwin, the Antidumping Act of 1921 provided the “textual basis” for the initial GATT rules on antidumping.²⁰ Indeed, the WTO Antidumping Agreement in effect today authorizes member states to impose antidumping duties when administering authorities find that imports determined to be sold at less than normal value are causing or threatening injury to a domestic industry or materially retarding the establishment of an industry.²¹

The view widely held—or at least the excuse given—by U.S. negotiators during the early decades of GATT was that the existence of antidumping made greater trade liberalization possible because it assured Congress that certain fallback contingencies were available if general tariff cutting exposed domestic interests to too much competition. Without antidumping, the argument went, Congress might not have supported general tariff liberalization.²² That a distinctly protectionist policy should be considered an element of trade liberalization was a bit counterintuitive. However, that assertion was made at least partially credible by the fact that the U.S. government exercised considerable restraint in its administration of U.S. antidumping policy. Between 1921 and the end of 1967, over 89 percent (631 out of a total of 706) of all U.S.

antidumping investigations ended with negative determinations of injurious dumping.²³

The U.S. argument that instruments of contingent protection could facilitate trade liberalization was tested during the Kennedy Round of GATT negotiations (1964–1967), when American negotiators found themselves in the awkward position of advocating the expansion of GATT rules to other nontariff trade barriers, while simultaneously resisting the attempts of their counterparts to bring antidumping under stricter multilateral discipline. Those advocating stronger disciplines on antidumping prevailed in the Kennedy Round by agreeing to guidelines for injury determinations that were more rigid (gave less latitude to the administering authorities) than those applied by the U.S. Tariff Commission, which had taken over responsibility for injury determinations from the Treasury Department in 1954, under U.S. law.²⁴

Congress did not acquiesce to this encroachment on its jurisdiction, and made explicit in the legislation authorizing the Kennedy Round agreements that the United States would be bound only by those provisions of the antidumping code consistent with existing U.S. law.²⁵ It would not be the last time that Congress asserted its authority to shield the U.S. antidumping law from reform.

The launch of the Tokyo Round of GATT negotiations (1973–1979) provided U.S. lawmakers occasion to once again revisit—and expand—the definition of dumping under U.S. law. Until 1974, dumping was defined as the practice of a firm selling in an export market at prices lower than those it charged in its home market. Price discrimination—regardless of its cause or intent—was the target of the U.S. antidumping law. There was no requirement, nor were efforts undertaken, to ascertain whether the price discrimination in question had an innocent explanation. Accordingly, in 1974 the deck was already stacked in favor of domestic protection-seekers.

Measuring price discrimination usually entailed comparing the net prices of the same or similar merchandise sold by a given firm in both markets and calculating an average difference, or

averaging net prices of sales of the same or similar merchandise and comparing those averages between markets. Under either approach, though, all home-market sales “made in the ordinary course of trade” factored into the determination of the average home-market price. The idea was to make an apples-to-apples comparison. But at the behest of various domestic producer interests, who had been trying for some time to persuade the Treasury Department of the propriety of more aggressive dumping margin calculation techniques, Congress amended the law to include a provision for a “cost test” in the Trade Reform Act of 1974.²⁶

The purpose of the cost test was to eliminate from determination of the average home-market price those home-market sales made at prices below the full cost of production. Only those sales made at prices above the cost of production would now factor into the average home-market price, and if less than 10 percent of the sales of a given product “model” were made at those prices, then all sales of that model would be disregarded and the home-market comparison would be based on a “constructed value” that included approximations for the cost of production, selling, general and administrative expenses, and an amount for profit. By eliminating lower priced home-market sales, the effect of the cost test was to produce higher home-market average prices or to necessitate use of constructed values, both of which inflated dumping margins.

The fig leaf of a legal justification offered for the change was that sales made at prices below the full cost of production could not be considered sales “made in the ordinary course of trade.” If the ordinary course of trade is for a firm to be profitable, then sales below the full cost of production must be anathema to that objective, as they detract from profit. Why would a firm sell below cost if its objective is to make profits?

But basic microeconomic theory holds—and economists, cost accountants, and analysts have noted—that selling at prices below the full cost of production is often the profit-maximizing course of action for firms, and that selling below the full cost of production is clearly a practice

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that is “in the ordinary course of trade.” Many firms—particularly those operating in high fixed-cost industries—drop their prices below the full costs of production when facing reduced demand for seasonal or cyclical reasons. As long as the price charged is high enough to cover the firm’s variable costs, any price above variable cost contributes toward coverage of the firm’s fixed costs. If the alternative is to stick to a higher price and sell nothing, then there are no variable costs to cover, but there is no contribution to fixed costs either. Under those circumstances, the accounting losses would be higher for the firm.

Consider the production of hot-rolled carbon steel, which involves the use of iron ore, coke, and other minerals; electricity; water; and other variable inputs—inputs that are consumed in some proportion to output and consumption of which increases with output. But steel production also involves high fixed costs—costs that are incurred regardless of the amount of output—on account of the need for expensive production facilities and the high cost of purchasing and operating the necessary capital equipment. Regardless of whether the factory produces one million tons or nothing at all, the total fixed costs are the same. All of the fixed costs have to be incurred in order to produce the first ton of steel, which is also the total amount of the fixed cost necessary to produce one million tons of steel, or more.

If the per-ton total fixed cost is \$100 and the per-ton total variable cost is \$100, then ideally, the firm would be able to sell at a price above \$200 and make a profit. But if economic conditions are such that the market will bear a price of only \$150 per ton, it is still profit-maximizing for this firm to sell at that price, even though it is below the full cost of production and even though the firm will incur a loss. If the firm does not sell the steel, it incurs a loss of \$100 (the fixed cost). If it sells at \$150, the firm incurs a loss of only \$50. In this case, profit maximization means loss minimization. Selling below the full cost of production, as long as the price is above the average variable cost of production, is the rational course of action.

Prior to the 1974 act’s mandate of a cost test, the Treasury Department addressed the issue of sales below cost in two different cases. In both, Treasury acknowledged the fundamental economic principle that selling below the full cost of production was sometimes the optimal decision. Treasury also noted that sales were made at prices below the full cost of production in both the U.S. and home markets, which made for a fair comparison.²⁷

Ultimately, domestic industry prevailed upon Congress to adopt a below-cost provision in the 1974 Act, which mandated that sales below the full cost of production be disregarded in the calculation of average home-market prices (but, unsurprisingly, made no such requirement on the U.S. side of the calculation). In cases where all home-market sales were at prices below the cost of production (and, thus, evidence of a protected, sanctuary home market in which high profits could be used to cross-subsidize cheap export sales entirely absent), the foreign firm would be further penalized by basing the dumping calculation on a comparison of its U.S. prices to “constructed value,” which was to be the sum of the full cost of production plus the larger of actual or estimated amounts for selling, general, and administrative expenses, plus a minimum of 8 percent for profit.

The effect of the cost test on the dumping calculation can be profound. To demonstrate, in Table 1 there are five hypothetical sales of a particular type of widget in the U.S. market at prices ranging from \$1.00 to \$5.00. Likewise, there are five sales of identical products in the home market also ranging from \$1.00 to \$5.00. Assuming the volumes sold in each transaction are the same (to simplify the process of weight averaging the prices), the weighted-averaged price in both markets is \$3.00 and the dumping margin should be zero because there is no price discrimination at all.

But the cost test introduces another step to the calculation methodology, which produces a different end result. The cost test restricts the eligibility of home-market sales that can factor into the weighted-average price. Specifically, only sales at prices above the full cost of production factor into the average. Accordingly,

Table 1
Cost Test (U.S. Dollar)

	Net U.S. Price	Net Home-market Price	Unit Cost	Cost Test	Net Home-market Price (used)
	1.00	1.00	2.50	Fail	--
	2.00	2.00	2.50	Fail	--
	3.00	3.00	2.50	Pass	3.00
	4.00	4.00	2.50	Pass	4.00
	5.00	5.00	2.50	Pass	5.00
Average	3.00	3.00	2.50		4.00

Table 2
Cost Test (U.S. Dollar)

	Net U.S. Price	Net Home-market Price	Unit Cost	Cost Test	Net Home-market Price (used)	Net Cost	Seller's Expense	Profit	Constructed Value
	1.00	1.00	5.50	Fail	—	5.50	0.55	0.44	6.49
	2.00	2.00	5.50	Fail	—	5.50	0.55	0.44	6.49
	3.00	3.00	5.50	Fail	—	5.50	0.55	0.44	6.49
	4.00	4.00	5.50	Fail	—	5.50	0.55	0.44	6.49
	5.00	5.00	5.50	Fail	—	5.50	0.55	0.44	6.49
Average	3.00	3.00	5.50		—	5.50	0.55	0.44	6.49

the two home-market sales priced below the unit cost of production, which is \$2.50 in Table 1, are eliminated, causing the average home-market price to rise to \$4.00. This change generates a dumping margin of \$1, or 33 percent, despite the fact that there are no price differences between the markets.

If the cost of production were \$5.50 instead of \$2.50, then all sales in both markets would be at prices below the full cost of production. The average U.S. price would still be \$3.00, but since all home-market sales would be ineligible for calculation of the average home-market price, a “constructed value” would be calculated to serve as a surrogate for home-market price. The constructed value would be equal to the cost of production plus allowances for selling, general, and administrative expenses (a minimum of 10 percent under the statute after the

1974 Act) plus an allowance for profit (a minimum of 8 percent under the statute after the 1974 Act).

At a minimum, the constructed value in this example would be \$6.49 (\$5.50 for cost; \$0.55 for expenses; \$0.44 for profit) and the dumping margin would be \$3.49 (\$6.49 minus \$3.00), or 116 percent. That is a pretty substantial margin of dumping—particularly for a firm that is charging identical prices in both markets and is by definition not price discriminating.

A 2002 Cato study exposing the methodological distortions of the U.S. antidumping regime included a table of counterfactuals—results that would have been obtained in 18 real-life antidumping cases, had particular methodologies been changed or forgone altogether. In 17 of 18 cases, the cost test was employed. Had the cost test not been employed in

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those 17 cases, the average calculated dumping margin would have been 59.7 percent lower.²⁸

In 5 of the 18 cases, calculation and use of constructed value was necessary. Had the build-up of constructed value not included an element for profit, the margins would have been 11 percent lower.²⁹

By mandating a cost test under U.S. law, Congress ensured that dumping calculations would no longer be the product of pure price comparisons—a development that further divorced the legal definition of dumping from its economic meaning. And, as evidenced above, it served to inflate dumping margins and antidumping duty rates, and subsequently heightened the appeal of the antidumping remedy to importing-competing industries.

Regulatory Capture

In addition to the technical changes to antidumping calculation methodology, the Trade Reform Act of 1974 also provided business a formal channel of access to antidumping and other trade policymaking. The act mandated the establishment of a private sector advisory committee system to ensure the inclusion and incorporation of business viewpoints in the negotiation, monitoring, and implementation of GATT agreements and related policies. The private sector consultation system was divided into three vertically integrated components: the President's Advisory Committee for Trade Policy and Negotiations; four policy advisory committees; and 22 industry-trade advisory committees, jointly administered by the Department of Commerce and the Office of the United States Trade Representative.

As the 1974 Act included language authorizing U.S. participation in the Tokyo Round of GATT negotiations, the Trade Agreements Act of 1979 implemented U.S. obligations committed during the Round. And it made several important changes to U.S. antidumping administration, including transfer of jurisdiction for determining the existence and magnitude of dumping from the Department of Treasury to the Department of Commerce. This seemingly

innocuous change was enormously consequential.

While both agencies have been delegated roles in the administration of U.S. economic policy, the prevailing institutional objectives diverge in many respects. Whereas Treasury's mission is one of commitment to the broader macroeconomic well-being of the United States, the benchmarks of success at Commerce have been aligned historically with firm-specific outcomes. Whereas Treasury officials would be more inclined to regard import duties resulting in deadweight economic loss as anathema to their mission, Commerce officials are expected to promote the narrow interests of domestic producers. Indeed, the mission of Import Administration, the agency within the Department of Commerce tasked with antidumping oversight, is to "safeguard American industries and jobs against unfair trade practices."³⁰ Import Administration works to "enforce effectively the U.S. unfair trade laws (i.e., the antidumping and countervailing duty laws) and to develop and implement other policies and programs aimed at countering foreign unfair trade practices."³¹ In that description, one can detect that Import Administration fancies itself responsible for writing, adjudicating, and enforcing the antidumping rules, all of which should comport with a design to protect U.S. industry.

In the words of Ronald Cass, former vice chairman of the U.S. International Trade Commission, Commerce Department officials "see themselves as advocates for domestic business."³² And the advisory committee system established after the 1974 Act provided private-sector stakeholders with direct channels of access to staff-level decisionmakers throughout the Commerce Department's international trade bureaucracy.

A 1994 Congressional Budget Office study of GATT and U.S. trade policy included commentary on the shift of antidumping jurisdiction from Treasury to Commerce:

The move reflected a Congressional desire for more zealous enforcement of the AD/CVD [antidumping/counter-vailing duties] laws and for less concern about their being used in a protection-

ist manner. Its significance goes beyond the difference in the institutional sympathies. One of [Commerce]’s functions is to serve as an advocate for U.S. firms. Thus, the move placed responsibility for deciding AD/CVD cases in the hands of an advocate of U.S. parties to cases.³³

The methodologies and procedures adopted by the Commerce Department in administering antidumping have led many observers to question the agency’s impartiality. Some of the Commerce Department’s curious methodological techniques and their margin-inflating effects have been documented in previous Cato publications.

In addition to the cost test and the use of constructed value (discussed earlier), practices such as the arm’s-length test, zeroing, the asymmetric treatment of indirect selling expenses as a deduction from price, and the deduction of profit from U.S. prices in so-called constructed export-price transactions are some of the most obvious methodological distortions that produce egregiously skewed results.³⁴

The table of counterfactuals from the 2002 Cato study cited above demonstrates that those various methodological distortions significantly impact the bottom-line result. For example, had zeroing been precluded from the Commerce Department’s calculation methodology in the 18 actual cases reviewed, the dumping margins would have been 43.6 percent lower.³⁵ Had the asymmetric treatment of indirect selling expenses been disallowed, margins would have been 9.1 percent lower.³⁶

Of course, the standard methodological distortions employed as a matter of course in the calculation of antidumping margins at the Commerce Department do not cover all of the channels through which agency bias affects antidumping policy. The Commerce Department is granted enormous discretion in its administration of the law, and often its actions are deemed by the courts to run afoul of the law.

As presented in a 2005 Cato study about the exercise of discretion at the Commerce Department, “IA [Import Administration] rou-

tinely exploits gray areas in the law to favor the domestic interests that seek protection—and, according to the verdicts of U.S. courts, sometimes violates the law in the process. In the 18-month period ending in June 2005, IA published 19 antidumping redeterminations pursuant to court orders to revise its assumptions or calculations to become compliant with the law. In 14 of those redeterminations, the revised antidumping rates were lower than those originally calculated.”³⁷

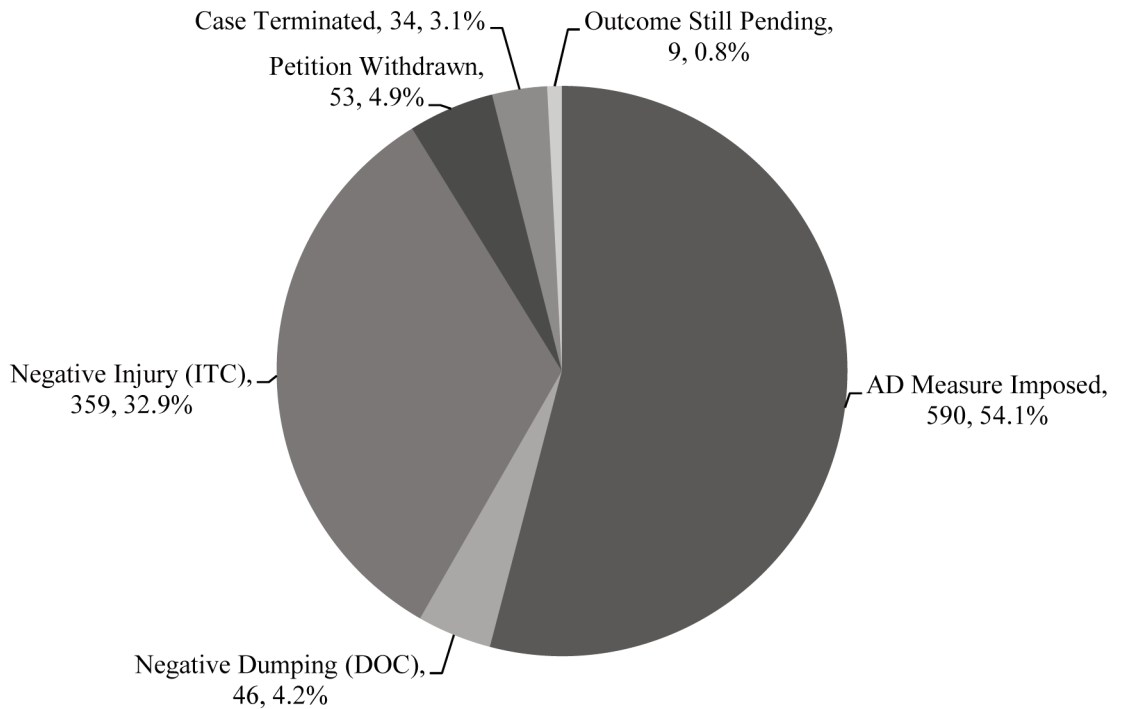
According to interviews with former congressional and Commerce Department staff conducted by the Office of the Inspector General:

This bias is illustrated by the actions of career Commerce Department officials through whom must pass all Department of Commerce [antidumping] determinations in steel cases. The members and staff of the congressional Steel Caucus meet with them regularly to discuss ongoing antidumping and countervailing duty proceedings pending before the Department of Commerce. At some of these meetings, these officials have shared advance draft investigation results with the congressional Steel Caucus well before they were announced in final form, allowing the Steel Caucus to “comment” on them. Time and again high level officials within the agency have exerted pressure on lower level Department of Commerce staff conducting investigations of foreign steel producers to rerun calculations and alter methodologies, resulting in increased AD/CVD tariffs.³⁸

Commerce investigators endeavor to substantiate allegations of dumping and measure its extent through lengthy, English-language questionnaires consisting of five sections and seven appendices, which are mailed to selected foreign companies and their embassies in Washington. These voluminous questionnaires seek full descriptions of virtually every aspect of the com-

The Commerce Department is granted enormous discretion in its administration of the law, and often its actions are deemed by the courts to run afoul of the law.

Figure 1
Disposition of 1,091 Antidumping Initiations, 1980–2009



Petitioners have had a 96 percent success rate at the Commerce Department since that agency took over antidumping administration from Treasury.

panies’ immediate and related business activities, supplemented with databases containing records of the costs of producing and selling all subject merchandise in the United States, the home market, and various third-country markets. The process almost always requires that the foreign respondents enlist the services of law and economics firms with expertise in the law’s administration. Agency guidelines stipulate that foreign firms under investigation must respond within 37 days (and that Section A of the questionnaire is due within 21 days).³⁹ If responses to the questionnaire are late, incomplete, or otherwise deemed unsatisfactory, Commerce investigators are authorized by Congress to utilize the “best information available” in determining whether dumping has taken place. Since the best information available to the Commerce Department is often culled from the allegations put forth by domestic competitors in their petitions for antidumping measures, this procedure is often punitive and unfair. In an opinion addressed to the Court of International Trade (the appellate court for U.S. antidumping cases),

Judge R. Kenton Musgrave labeled the practice a “predatory ‘gotcha’ policy.”⁴⁰

The data do little to dispel perceptions of bias. Between 1980 (when Commerce took over the administration of antidumping from Treasury) and the end of 2009, a total of 1,091 antidumping cases were initiated in the United States.⁴¹ Antidumping orders were imposed in 590 of those cases.⁴² Figure 1 (above) accounts for the dispositions of those 1,091 cases.

What stands out is that in only 46 of those 1,091 cases did the Commerce Department render a negative finding of dumping at the preliminary or final stage of the investigation. In other words, petitioners have had a 96 percent success rate at the Commerce Department since that agency took over antidumping administration from Treasury. What prevented more of those initiations from resulting in antidumping orders was the International Trade Commission, which issued negative injury determinations in 359 cases.

By contrast, during its oversight of the dumping determination, the Treasury Depart-

ment was far less likely to render affirmative findings. Between 1934 and 1954, a total of 146 U.S. antidumping cases were initiated and Treasury rendered negative dumping findings in at least 90 of those 146.⁴³

The Commerce Department's standing as an impartial arbiter is further undermined by a well-documented tendency to calculate excessive dumping margins. Foreign producers are routinely found to be selling at prices so far below fair value as to raise serious doubt about the accuracy and fairness of the Department's methodology. As noted by Bruce Blonigen and Thomas Prusa, the Commerce Department

not only finds dumping, they almost always find unbelievably large dumping margins. Any argument that [anti-dumping] law is designed to ensure "fair trade" looks ridiculous when confronted with [the Commerce Department's] margins. According to the statute, the dumping duties are designed to make the dumped imports "fairly traded" imports. Yet, the average dumping margin over the past decade is about 60 percent.⁴⁴

Even under the most extreme market conditions (i.e., perfect monopoly in the exporting country, perfect competition in the U.S. domestic market), price undercutting of 60 percent would be overkill for all but the most aggressive of predators. But that is often the outcome of a process in which dozens of decisions are made by bureaucrats exercising judgment and discretion that may be influenced by the underlying agency mission.

As noted in a 2005 Cato study:

When IA [Import Administration] publishes its final determinations, it often includes a list of the issues raised by the parties concerning methodologies employed, calculations made, and decisions rendered, along with a summary of each party's arguments and an explanation for its ultimate judgment on each decision. In the 18-month

period ending in June 2005, IA issued 38 final determinations in original antidumping investigations, finding dumping in 36 of those 38 determinations. In 11 of those final determinations, there were 5 or fewer issues raised by the parties; in 13 of those determinations, there were 10 to 20 issues raised; and in 14 of those cases there were 21 or more issues that IA was required to adjudicate. A total of 650 issues—an average of more than 17 per case—were presented and required adjudication by IA in those 38 final determinations. Thus, dumping calculation involves more than simply plugging objective numbers into a computer program. In many cases, IA's judgment calls determine the numbers themselves.⁴⁵

Relaxing "Material Injury" Standards

With an affirmative finding of sales at less than fair value by the Commerce Department all but assured after 1980, the last best hope for foreign firms (and U.S. importers) facing the specter of antidumping restrictions was to prevail on the "injury side" of the investigation. If there was no reasonable indication that the domestic industry was "materially injured or threatened with material injury," or that "the establishment of an industry was materially retarded" by reason of less than fair value imports, then an antidumping order could not be imposed, regardless of what the Commerce Department decided with respect to its dumping determination.

During its 25-year oversight of the injury determination function (from 1954 through 1979), the Tariff Commission rarely found material injury to have been caused by dumping. Out of 641 antidumping case initiations during this period, the Tariff Commission rendered affirmative injury findings in 97 cases—15 percent of the time.⁴⁶ Of those 97 affirmative findings, though, 73 occurred after 1970, a year in

The Commerce Department's standing as an impartial arbiter is further undermined by a well-documented tendency to calculate excessive dumping margins.

U.S. antidumping policy evolved in such a way as to become more accessible and more rewarding to U.S. import-competing industries.

which the Tariff Commission rendered a precedent decision to consider imports from more than one country—instead of imports from a single country, as had been previous practice—when determining whether less than fair value imports caused or threatened material injury.

That decision seems to have sparked an increase in the number of subsequent antidumping filings, as well as the number of affirmative rulings, because domestic industry petitioners learned quickly that if exporters of the same or similar products from multiple countries were simultaneously the subject of antidumping investigations, the chances of obtaining an affirmative injury finding were improved. Through the analytical practice now known as “cumulation,” if multiple countries are subject to an antidumping investigation of the same subject merchandise, and if exports from any one of those countries, or all in combination, are found to be a cause of material injury, then all must be considered injurious and subject to an antidumping order.

Though the practice of cumulation had been discretionary in the years after the 1970 Tariff Commission decision, the Trade and Tariff Act of 1984 codified the practice as a requirement of the ITC’s injury analysis. It became a matter of law that imports from countries that alone could not be demonstrated to be a cause of material injury could be subjected to antidumping duties.

This analytical approach would seem to fly in the face of any legitimate rationale for applying antidumping measures. Dumping is a firm- and country-specific phenomenon. The artificial, unfair advantages that antidumping measures are presumed to offset are supposed to be market-specific and the product of particular foreign government policies. If exports from a particular country are found to have no competitive advantage in the U.S. market, then there are no advantages to offset with antidumping duties.

But after 1984, the rules changed in a way that created incentives for bringing more cases against more countries. Countries from which imports of subject merchandise accounted for less than 3 percent of total imports of subject merchandise were considered negligible and immune from antidumping duties unless all of

the countries that fell under the 3 percent threshold “cumulatively” accounted for more than 7 percent of total imports of subject merchandise.

As was to be expected, the number of antidumping initiations increased dramatically, as the number of targeted products held steady, suggesting that petitioners were aware of the benefits of the cumulation requirements. The “clarifications” of the 1984 Act moved antidumping administration even further away from its theoretical underpinnings and signaled to U.S. industry and its trade lawyers that the rules of the game had once again changed in their favor.

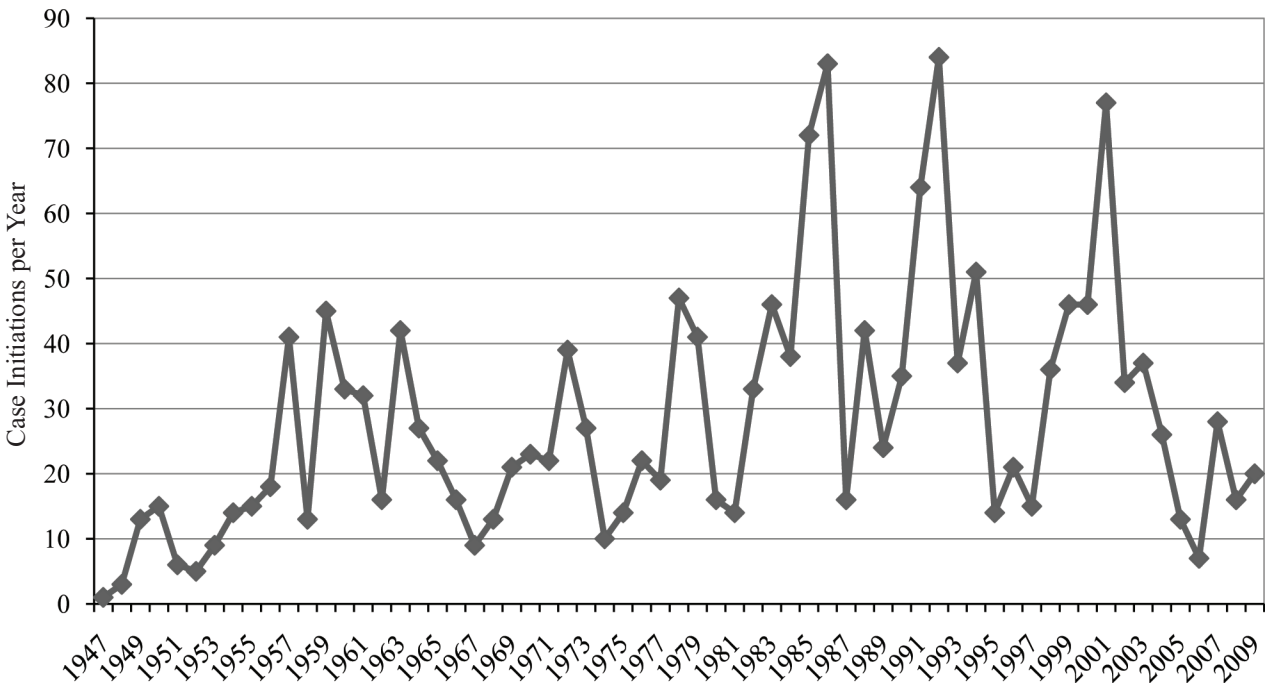
Antidumping was born nearly a century earlier as a mechanism to preserve and defend competitive markets and ultimately to protect consumers. The 1984 Act completely transformed antidumping into a tool to suppress competition in the name of protecting domestic producers from injury regardless of whether foreign producers benefited from any unfair advantages in their home markets.

Identifying the Determinants of Antidumping Use

As the foregoing history suggests, U.S. antidumping policy evolved in such a way as to become more accessible and more rewarding to U.S. import-competing industries. That the volume of antidumping filings and the frequency of affirmative rulings underwent a dramatic and sustained increase in the 1980s suggests that domestic industry was responsive to those changes.

The definition of dumping had been expanded, domestic industry had been invited to play a greater role in antidumping policy formulation and oversight (through the advisory committee system), and the U.S. government agency most closely aligned with domestic producer interests was made responsible for investigating dumping allegations. With the legislative changes of 1984, U.S. firms seeking protection were given strong incentives to file even more antidumping petitions to increase their odds of

Figure 2
Number of U.S. Antidumping Initiations, 1947–2009



obtaining affirmative injury findings at the ITC.

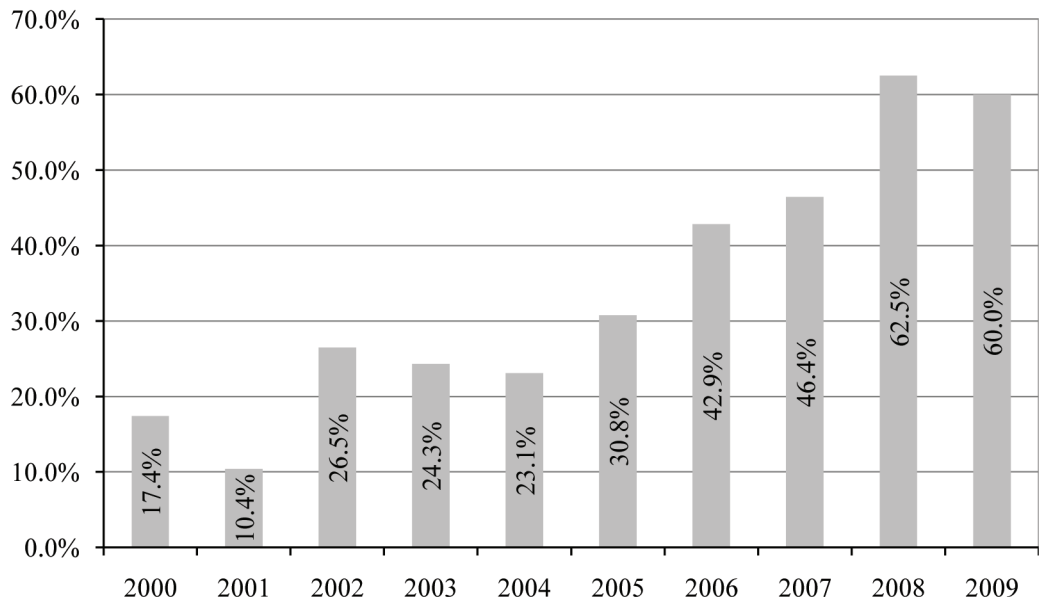
Figure 2 shows upticks in usage in years following changes to the law, which would seem to confirm those characterizations. But there are probably other reasons for the increase in antidumping use over time. For example, it is reasonable to assume that the demand for antidumping protection would be inversely related to the level of general tariff protection afforded. In other words, firms in import-competing industries might be more inclined to seek antidumping protection in response to reductions in general tariffs.

Indeed, with the exception of a trend reversal in the 1920s and 1930s, declining tariff rates have been evident throughout the history of the antidumping law. The average tariff from 1890 to 1894 was 48.4 percent; from 1894 to 1897, it was 41.3 percent; and when America’s first antidumping law entered into force in 1916, the average tariff had fallen to 30.7 percent.⁴⁷ The Fordney–McCumber Law of 1922 and Smoot–Hawley Tariff Act of 1930 reversed that downward trend, pushing the average up to as high as

59.1 percent in 1932. On the eve of U.S. entry into GATT in 1947 the average tariff stood at 20.1 percent and has fallen substantially in the years since. The average collected rate in 1974—when the “cost test” was introduced into the antidumping regime—was 7.8 percent. When antidumping oversight was shifted from Treasury to Commerce in 1980, the average tariff on dutiable imports was 5.6 percent. The rate had fallen to 5.5 percent in 1984, when cumulation was made a statutory requirement. And it stood at 4 percent in 2008.⁴⁸

The figure reveals an upward trend in the overall number of U.S. antidumping initiations. Given the administrative changes that took place between 1974, 1980, and 1984, it is not surprising that the number of initiations increased substantially during that period, or that the number of affirmative injury findings increased. Another interesting feature of the data is that the number of products subject to antidumping investigations has, to a far greater degree than either the overall number of initiations or the number of affirmative findings,

Figure 3
U.S. Antidumping Initiations against China (% of Total AD Initiations), 2000–2009



remained fairly consistent over time. That is suggestive of an increasing propensity of particular subsets of U.S. producers to bring more cases. In fact, more than half of all currently outstanding U.S. antidumping and countervailing duty orders (156 of 303) are against imported chemicals and steel products.⁴⁹ The concentration of protection in these few industries is likely a product of the ITC cumulation rules giving incentive to petitioners to name more target countries, as well as evidence that these industries have learned the ropes of antidumping administration and are no longer deterred by uncertainty about the process.

In 2004 Douglas Irwin published an analysis of the various determinants of increased antidumping use. Using data gathered from U.S. government sources, Irwin conducted a series of regression analyses seeking to disentangle and measure the impact of independent variables, including GDP growth rate, the unemployment rate, the exchange rate, tariff rate changes, and legal and administrative changes to the antidumping law on the number of antidumping cases filed per year between 1947 and 2002—the dependent variable.⁵⁰

Irwin's analysis found that unemployment and exchange-rate appreciations were significant and positively related to the number of antidumping case filings. That would seem to make sense, since material injury is more easily demonstrated when workers are let go and when there is evidence of sales lost to imports (which has been historically more likely when the U.S. dollar is appreciating). Irwin found the average rate of tariff protection to be significant and negatively related to the number of filings (i.e., falling Most Favored Nation tariffs lead to increased petitions), which is intuitive considering that import competition tends to increase in sectors where protection has been reduced. And, Irwin found the legal and administrative changes to have had a significant positive impact on dumping filings after 1984—a trend likely attributable to mandatory cumulation, but also suggestive of a lagged impact of the Commerce Department's takeover of dumping investigations.⁵¹

Irwin's analysis considered antidumping initiations through 2002. Since then, the predominant targets of U.S. antidumping activity have been exporters in China. Nearly 39 percent of all

Since 2002 the predominant targets of U.S. antidumping activity have been exporters in China.

antidumping initiations since 2003 have targeted China, and that rate has been increasing on an annual basis, as Figure 3 indicates.⁵²

Certainly, imports from China increased substantially between 2003 and 2009—which might explain some of the increase, as Irwin found the average rate of tariff protection to be inversely related to the number of petitions.

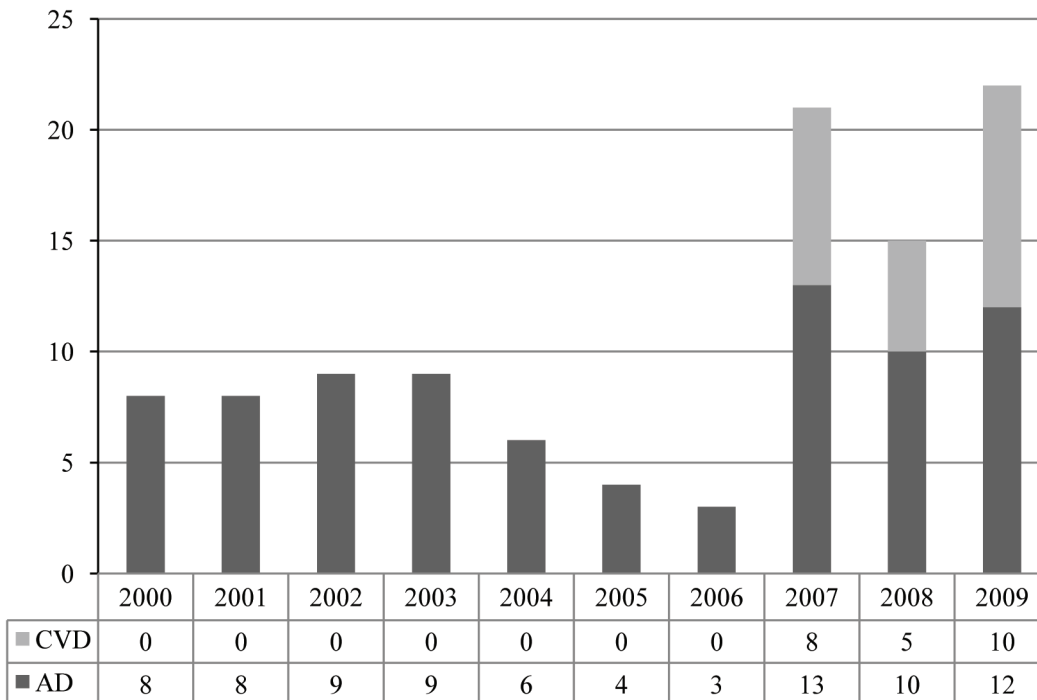
But are Chinese exporters more likely to benefit from unfair competitive advantages at home than exporters in other countries, or could it be that the increase in the number of cases against China is driven by the fact that the special nonmarket economy (NME) methodology reserved for China and just a few other countries is fertile ground for the exercise of discretion and the escalation of dumping margins?⁵³ Nonmarket economy methodology is probably an important determinant of the rising number of antidumping initiations against Chinese exporters because affirmative and high dumping margins are more likely to be calculated under this approach.⁵⁴

Likewise, the change in practice, announced

by the Commerce Department in 2007, to start applying the countervailing duty law to Chinese exporters is also a likely factor in the rise in cases against China over the past couple of years. Since material injury (or the threat of material injury) is a necessary condition of both antidumping and countervailing duties, there is little to lose and a lot to gain for U.S. industries by filing both kinds of petitions simultaneously. The added incentive for doing so in Chinese cases (as opposed to cases where the traditional market economy methodology is employed) is that the combined duties can be especially punitive. Under NME methodology, home-market prices are disregarded entirely and “normal value” is determined by estimating all of the inputs necessary to produce the good (labor, material, energy, overhead, etc.) and then assigning an estimated value to those inputs based on their prices in another, similarly sized, similarly developed economy—usually India, in Chinese cases. The dumping margin is then calculated as the average difference between the surrogates created and the U.S. prices.

The application of the countervailing duty law to Chinese exporters is also a likely factor in the rise in cases against China over the past couple of years.

Figure 4
U.S. Antidumping and Countervailing Duty Initiations against China, 2000–2009



It is reasonable to conclude that the law need not be made more user friendly.

As woefully inaccurate as the surrogate may be at approximating the Chinese home-market price, it is in fact a subsidy-free price. The cost build-up is based on market-oriented prices, and any subsidized prices or factors are eliminated from consideration. In other words, if one accepts the NME methodology as valid, then the margin calculated is sufficient to remedy the dumping margin and the subsidy margin. The difference between the two captures the full distortion. Nevertheless, the Commerce Department still separately calculates the benefit of the alleged subsidy and applies a separate countervailing duty on top of the antidumping duty, resulting in a double counting of the subsidy, thereby creating an extra incentive for domestic industry to file an antidumping petition to supplement its countervailing duty petition.

As Figure 4 demonstrates, there has been an increase in antidumping initiations against China since the Commerce Department changed its countervailing duty policy in 2007. Indeed, for 22 of the 23 countervailing duty cases initiated against China between 2007 and 2009, a companion antidumping case was initiated simultaneously.

Congress's Turf

Irwin's statistical findings confirm what is apparent to the naked eye from Figure 1 and Figure 2: legal and administrative changes affecting the antidumping law have been significant determinants of subsequent antidumping use. That finding is important for several reasons.

First, it provides a powerful rejoinder to assertions that the antidumping law needs to be made more accessible and trade restrictive so as to close loopholes in the battle against unfair trade. When the law's ease of use and its effectiveness at producing protection are more significant determinants of antidumping use than any other factor, it is reasonable to conclude that the law need not be made more user friendly. Second, Congress should seriously consider reform of the antidumping law to rein in the

abuse that its permissive rules and Commerce's fox-guarding-the-henhouse oversight have engendered. No longer can the global economy be characterized as a competition between "our" producers and "their" producers. Numerous U.S. interests—retailers, manufacturers, consumers, logistics providers, financial service providers, and more—are adversely affected when antidumping measures are imposed. Yet, under the law, the costs imposed on these groups are not even permitted to be considered by the administering authorities when rendering decisions about the propriety of antidumping measures.

So far Congress has been loath to acknowledge this reality. Instead, Congress considers any presentation of the economywide costs of antidumping, any discussion of antidumping reform, or any indictment of U.S. antidumping practices from the WTO or other trade dispute settlement bodies to be an affront to its authority and an encroachment on its jurisdiction.

Efforts in 2002 by then-U.S. trade representative Robert Zoellick to get antidumping rules on the agenda of the Doha Round of multilateral trade negotiations (an absolute condition of getting the Round launched) were made notoriously difficult by a Congress that insisted on language that committed the USTR to "not weaken" the antidumping law. When Zoellick returned from the meeting that ultimately produced the Doha Declaration, he was summoned to Congress to explain why he had agreed to include negotiations on antidumping on the agenda, even though the language did not commit anybody to any reform.

In the debate over fast-track trade negotiating authority in 2002, Congress strongly considered unbundling negotiations over antidumping from that authority, as proposed in the so-called Dayton-Craig Amendment. That rule would have given the president the authority to bring back trade agreements for an up- or down-vote without amendments, but with the exception that those same fast-track rules would not apply to any changes to antidumping rules, which would require the full congressional treatment.

And to this day, there is continued resistance in Congress to implementing the findings of the WTO dispute settlement body over

the issue of zeroing—the controversial method for calculating antidumping duties.⁵⁵

One cannot help but acquire the impression that Congress and the Department of Commerce are unwilling to relinquish what they consider a back channel for special favors to constituent interests that may find themselves in need of assistance.

Emboldened by this institutional resistance to curbing antidumping abuse, import-competing interests have taken the initiative to push for some new reforms of their own. However, those reforms would make antidumping measures easier to obtain and more difficult for foreign exporters and their U.S. customers to escape.

Based on a solicitation of comments from “the public,” the Commerce Department recently announced its intention to strengthen the enforcement of U.S. trade remedies laws.⁵⁶ Among the various reforms under consideration is one that would make it impossible for individual companies to get themselves out from under a dumping order even when they demonstrate that they are not dumping. Currently, individual companies from a foreign country can be excused from an antidumping order by demonstrating that they are not dumping for a certain period of time (usually three consecutive years). The new proposal would eliminate that channel and force all exporters from a given country to remain subject to the antidumping order for as long as it exists.

Another facially innocuous proposal that experts see as a cunning effort to make antidumping regulations even more restrictive would change the process by which the Commerce Department selects foreign respondents in antidumping investigations and reviews. Usually, Commerce chooses to investigate or review the producers accounting for the largest volume of exports to the United States. But the proposal on the table would require Commerce to use random sampling in selecting the respondents, which would increase the resource burdens on smaller firms that might be unable to afford the legal and economic representation that antidumping proceedings entail. Accordingly, Commerce would likely see less compliance with the arduous requirements of

the proceedings and would likely find itself resorting to “Facts Available” findings with greater frequency. Facts Available findings, which usually substitute figures alleged in the domestic industry’s petition for the exporter’s actual data, almost always produce higher dumping margins for the company in question—and for all the other companies that were not individually investigated—because their exports are subject to the average duty calculated for all investigated companies.

Economists Michael Moore of George Washington University and Thomas Prusa of Rutgers University summarized the problem with this recent example:

Suppose three large firms account for 90 percent of the subject imports while 20 others account for the remaining 10 percent. Under current rules the Department of Commerce samples the big three firms. Under the proposed rules, it can instead sample the pricing by firms with, say, 1 percent of the imports. What is the logic of focusing on such small firms? The reason is that small firms may not have the resources to spend the \$2 million (or more) required to participate in a proceeding. Failure to respond to all questions allows the Department of Commerce to use “facts available” (i.e., domestic firms’ allegations) when computing margins. Blonigen (2006) finds that using “facts available” increases the average computed margin by 30 percentage points.⁵⁷

If these kinds of changes are implemented, there should be little doubt of the impact on the number of case initiations. As has been demonstrated, episodes of relaxation of standards and rules over the years have been followed by increased usage. And with any causal link between a foreign firm’s prices in the United States and anti-competitive practices in the home market entirely severed by the progressive lowering of evidentiary standards and the expansion of the definition of dumping,

Episodes of relaxation of standards and rules over the years have been followed by increased usage of the antidumping law.

Although the real-world economic rationale for the antidumping status quo is virtually extinct, political support for this favor-doling machine remains strong and bipartisan.

antidumping measures will be even more disruptive of trade and progress, benefiting only a select few politicians and well-connected firms.

Conclusion

U.S. antidumping law no longer seeks to advance the pro-competition objectives of its original charter. What began as an outgrowth of antitrust intended to discipline predatory pricing—and, therefore, to safeguard competition—was gradually transformed into a mishmash of rules and discretion that enables inefficient, uncompetitive behavior on the part of domestic firms at great cost to other domestic entities.

Antidumping has done little, if anything, to focus the spotlight on the alleged sources of unfairness that presumably give rise to cross-border price discrimination. By systemically disregarding that kind of inquiry, antidumping's overseers have blurred any distinctions between possibly objectionable price discrimination and the kind that is the product of profit-maximizing decisionmaking. Furthermore, market access barriers and transportation costs have fallen precipitously since the establishment of antidumping policy, removing the impediments to arbitrage necessary for cross-border price discrimination to occur without undermining the market power of the foreign producer.

Although the real-world economic rationale for the antidumping status quo is virtually extinct, political support for this favor-doling machine remains strong and bipartisan. That antidumping did a lousy job living up to its rhetoric did not stop policymakers from expanding the definition of dumping and lowering the evidentiary requirements necessary for industry to obtain antidumping protection. The numerous legal and administrative changes, such as enabling the attribution of material injury to competitors in multiple countries, and disregarding home-market sales at prices below the full cost of production, further undermined the rationale for antidumping and blurred its distinction from run-of-the-mill, everyday protectionism.

This paper has presented a historical account of the events punctuating antidumping's metamorphosis and provided some numbers explaining the increasing resort to antidumping. The data seem to support the hypothesis that increasing demand for antidumping protection corresponds not with increased dumping, as defined by economists, but rather with the increased flexibility of antidumping, as defined by politicians. And ongoing efforts to make antidumping even more flexible are likely to induce more abuse—at great expense to the U.S. and global economies.

Notes

The author owes a debt of gratitude to Todd Fox, whose excellent December 2009 graduate paper, "Changing the Definition of Fair: The Economic History of Antidumping in the United States," submitted to Johns Hopkins School of Advanced International Studies, was the inspiration for this paper and, indeed, the model for its structure.

1. "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, October 22, 2002.

2. The antidumping statute is codified at 19 U.S.C. §§ 1673-1677n. The DOC's antidumping regulations may be found at 19 C.F.R. § 351.

3. In cases involving so-called nonmarket economies, the DOC calculates constructed value, not with the foreign producer's own cost data, but with data from "surrogate" market economies. For a comprehensive treatment of nonmarket economy methodology, see Daniel J. Ikenson, "Nonmarket Nonsense: U.S. Antidumping Policy toward China," Cato Trade Briefing Paper no. 22, March 7, 2005.

4. The antidumping regime's failure to discern the causes of price discrimination represents a fatal blow to its legitimacy. But beyond that, the methodologies employed to determine and calculate the extent of price discrimination (i.e., "dumping margins") are egregiously tilted in favor of finding larger margins. For a comprehensive critique of those methodologies, see Brink Lindsey and Dan Ikenson, "Antidumping 101: The Devilish Details of 'Unfair Trade' Law," Cato Trade Policy Analysis no. 20, November 21, 2002.

5. Michael P. Galloway, Bruce A. Blonigen, and

- Joseph E. Flynn, "Welfare Costs of the U.S. Antidumping and Countervailing Duty Laws," *Journal of International Economics* 49 (1999): 236.
6. Douglas Irwin, "The Rise of U.S. Antidumping Actions in Historical Perspective," NBER Working Paper 10582, June 2004, p. 4.
7. Ian Wooton and Maurizio Zanardi, "Trade and Competition Policy: Anti-Dumping Versus Anti-Trust," Department of Economics, University of Glasgow, Working Papers 2002_6, October 2002, p. 2.
8. Irwin, p. 3.
9. J. Michael Finger, *Antidumping: How It Works and Who Gets Hurt* (Ann Arbor: University of Michigan Press, 1993), p. 21.
10. *Ibid.*, p. 21.
11. *Ibid.*, p. 14.
12. Ironically, U.S. Steel would emerge in subsequent decades as one of the prime users of antidumping.
13. Finger, p. 16.
14. *Ibid.*, p. 19.
15. Irwin, p. 4.
16. Joshua Bernhardt, quoting the *United States Tariff Commission Report of 1919*, in *The Tariff Commission, Its History, Activities and Organization* (New York: D. Appleton and Company, 1922), p. 35, http://books.google.com/books?id=M-9AAA-AAIAAJ&printsec=frontcover&dq=Joshua+Bernhardt+The+Tariff+Commission,+Its+History,+Activities+and+Organization+1922&source=bl&ots=_XlB-PzaK0&sig=1d6792tLq4y4_46gLCSx81KLWGY&hl=en&ei=ZQn9TJP8L8H7lweNpLyMBQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBgQ6AEwAA#v=onepage&q&f=false.
17. Congressional Budget Office, *The Evolution of U.S. Laws: An Economic Perspective*, 1994, p. 21.
18. Finger, p. 21.
19. *Ibid.*, p. 22.
20. Irwin, p. 6.
21. World Trade Organization, Article VI, GATT 1994.
22. Finger, p. 26.
23. *Ibid.*
24. Per the Final Act of the 1964-1967 Trade Conference Section B, Article 3: "In order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined, for example: the volume and prices of undumped imports of the product in question, competition between the domestic producers themselves, contraction in demand due to substitution of other products or to changes in consumer tastes."
25. Irwin, p. 7.
26. For a more detailed accounting of domestic industry's lobbying of Congress on this issue, see William H. Barringer and Kenneth J. Pierce, *Paying the Price for Big Steel* (Washington: American Institute for International Steel, 2000), p. 75.
27. Barringer and Pierce, 75n93.
28. Brink Lindsey and Dan Ikenson, "Antidumping 101: The Devilish Details of 'Unfair Trade' Law," *Cato Trade Policy Analysis* no. 20, November 21, 2002, p. 14.
29. *Ibid.*
30. Import Administration website, <http://trade.gov/ia/>.
31. *Ibid.*
32. Michael Anthony Lawrence, "Bias in the International Trade Administration: The Need for Impartial Decisionmakers in United States Antidumping Proceedings," *Case Western Reserve Journal of International Law*, Winter 1994, p. 3.
33. Congressional Budget Office, "How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy," September 1994.
34. For a detailed discussion of several of these methodological distortions and their impact, see Daniel J. Ikenson, "Abuse of Discretion: Time to Fix the Administration of the U.S. Antidumping Law," *Cato Trade Policy Analysis* no. 31, October 6, 2005; and Brink Lindsey and Dan Ikenson, "Antidumping 101: The Devilish Details of 'Unfair Trade' Law," *Cato Trade Policy Analysis* no. 20, November 21, 2002.
35. Lindsey and Ikenson, p. 14.
36. *Ibid.*
37. Daniel J. Ikenson, "Abuse of Discretion: Time to Fix the Administration of the U.S. Antidumping Law," *Trade Policy Analysis* no. 31, October 6, 2005, p. 1.
38. Barringer and Pierce, p. 81.

39. U.S. Department of Commerce, Office of AD/CVD Enforcement. f5a6c0c5290985256a0a004dee7d/\$FILE/orders%20August%2012%202010.xls.
40. Lawrence, p. 3.
41. Compiled from databases available on the Import Administration website at <http://ia.ita.doc.gov/stats/iastats1.html>.
42. The 599 antidumping measures include 25 suspension agreements that are effectively settlements involving the agreement of the foreign exporters to sell above a certain price in the United States.
43. Cited in Irwin at p. 24, U.S. House of Representatives, Committee on Ways and Means, "Hearings on Amendments to the Antidumping Act of 1921, as Amended," 85th Congress, 1st Sess., 1957, p. 15. "At least" 90, and probably more, negative determinations were rendered because the data included in the cited report aggregate "de minimis" findings of dumping with "complaints withdrawn" and other reasons for non-affirmative findings. But de minimis findings are akin to negative finding of dumping and should have been counted as negatives.
44. Bruce A. Blonigen and Thomas A. Prusa, "Antidumping," in E. K. Choi and J. Harrigan, *Handbook of International Trade* (Oxford, UK and Cambridge, MA: Blackwell Publishers, 2003), p. 267.
45. Ikenson, October 2005, p. 3.
46. Tallied from Irwin, Appendix, p. 22.
47. Calculated as the ratio of duties collected over the value of imports for consumption.
48. United States International Trade Commission, *Value of U.S. Imports for Consumption, Duties Collected, and Ratio of Duties to Values 1891–2008*, ITC Statistical Services Division, April 2009.
49. Compiled from AD/CVD statistics available on the website of the U.S. International Trade Commission, [http://info.usitc.gov/oinv/sunset.nsf/0a915ada53e192cd8525661a0073de7d/96da5a6c0c5290985256a0a004dee7d/\\$FILE/orders%20August%2012%202010.xls](http://info.usitc.gov/oinv/sunset.nsf/0a915ada53e192cd8525661a0073de7d/96da5a6c0c5290985256a0a004dee7d/$FILE/orders%20August%2012%202010.xls).
50. The legal and administrative changes tested were those made pursuant to the Trade Reform Act of 1974 (the inclusion of the "cost test"), the 1980 shift of oversight from Treasury to Commerce, and the codification of "cumulation" pursuant to the Trade Agreements Act of 1984. Irwin used dummy variables corresponding to the first full years of the new policies: 1975, 1980, and 1985, respectively.
51. Irwin, p. 25.
52. Compiled from AD/CVD statistics available on the website of the U.S. International Trade Commission, [http://info.usitc.gov/oinv/sunset.nsf/0a915ada53e192cd8525661a0073de7d/96daf5a6c0c5290985256a0a004dee7d/\\$FILE/orders%20August%2012%202010.xls](http://info.usitc.gov/oinv/sunset.nsf/0a915ada53e192cd8525661a0073de7d/96daf5a6c0c5290985256a0a004dee7d/$FILE/orders%20August%2012%202010.xls).
53. For a detailed discussion of non-market economy methodology, see Daniel J. Ikenson, "Nonmarket Nonsense: U.S. Antidumping Policy toward China," Cato Trade Briefing Paper no. 22, March 7, 2005.
54. *Ibid.*, p. 6.
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